NO.

In the
Supreme Court of the United States

CHATTANOOGA-HAMILTON
COUNTY HOSPITAL AUTHORITY,
PETITIONER,

v.

UNITED STATES OF AMERICA
EX REL. ROBERT WHIPPLE,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act's public-disclosure bar removes jurisdiction over a *qui tam* action that is "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Account[ability] Office report, hearing, audit, or investigation, or from the news media . . . ." 31 U.S.C. § 3730(e)(4)(A) (1986).

The question presented is whether the public-disclosure bar applies to an action that is based upon the disclosure of allegations in an administrative audit or investigation if the disclosures were made to individuals with no involvement in the alleged fraud (as the Second Circuit has held) or an appropriate government official (as the Seventh Circuit has held) or, rather, whether a disclosure qualifies as "public" only if it is made to "outsiders" to the audit or investigation (as the Ninth Circuit has held and as the Sixth Circuit held below).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Chattanooga-Hamilton County Hospital Authority, dba Erlanger Medical Center, dba Erlanger Health System ("Erlanger"), was defendant-appellee below. Respondent Robert Whipple was relator-appellant below.

The United States declined to intervene in support of respondent's *qui tam* claims under the federal False Claims Act and thus is not a party, but it remains a real party in interest. Georgia, North Carolina, and Tennessee also declined to intervene in support of respondent's claims under those States' statutes, and respondent abandoned those state-law claims in the court below. *See* App. 22a.

Erlanger has no parent company and has no outstanding stock.

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PETITION FOR A WRIT OF CERTIORARI

Erlanger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–20a) is reported at 782 F.3d 260. The district court's opinion holding the public-disclosure bar applicable (App. 21a–41a) is not officially published but is available at 2013 WL 4510801 (M.D. Tenn. Aug. 26, 2013).

JURISDICTION

The Sixth Circuit entered its judgment on February 25, 2015. Erlanger filed a timely petition for rehearing, which was denied on April 20, 2015. App. 45a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The False Claims Act's public-disclosure bar, as amended in 1986, provides:

> 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 Account[ability] 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.

31 U.S.C. § 3730(e)(4)(A) (reproduced at App. 46a).

STATEMENT

Spurred by an anonymous tip by someone who is not respondent Robert Whipple, the federal government conducted a fraud investigation of certain Medicare claims submitted by petitioner Erlanger Medical Center. It is undisputed that during the government's administrative audit and investigation allegations of fraudulent billing were disclosed to numerous individuals outside the government—including numerous individuals who were not involved in the alleged fraud—as well as to responsible government officials. After a lengthy and thorough investigation, the government exercised the enforcement discretion the Constitution confers upon it to decline to pursue the matter criminally or civilly under the False Claims Act and instead opted for an administrative resolution in which Erlanger made a voluntary refund.

A year after the government resolved its investigation, respondent filed a *qui tam* action under the False Claims Act making the same allegations of fraudulent billing that the government had investigated and resolved. In the Second Circuit, the public-disclosure bar would apply because the allegations underlying respondent's claims were disclosed to innocent employees of Erlanger during the government's investigation. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992). The bar would also apply in the Seventh

Circuit because the allegations were disclosed to responsible public officials in the U.S. Attorney's Office and in the Office of Inspector General of the Department of Health and Human Services. *See, e.g.*, *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999), *overruled on other grounds by Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009).

The Sixth Circuit, however, rejected those Circuits' interpretations and held that the bar did not apply because the disclosures of the fraud allegations during the audit and investigation were not disseminated broadly enough to qualify as "public." Adopting the Ninth Circuit's approach, the court below held that the bar requires disclosure to "outsiders" to an audit or investigation. App. 18a; *see, e.g.*, *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1518–19 (9th Cir. 1995) (rejecting Second Circuit's *Doe* holding). That requirement appears nowhere in the text of the bar and contravenes its basic purpose—namely, to ensure that the government's recovery is not reduced by a relator's share where the government does not need the relator's help to uncover possible fraud.

This Court granted certiorari to resolve this conflict when the conflict was limited to the Ninth Circuit's rejection of the Second Circuit's *Doe* decision. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 519 U.S. 926 (1996). But the Court decided that case on other grounds, *see Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), and the conflict has only spread and deepened since then. The proper interpretation of the public-

disclosure bar is critical to the proper operation of the False Claims Act as Congress intended it. It is also extremely important in practice, as the scope of the bar is perhaps the most frequently litigated issue in *qui tam* suits. The Court should not allow this circuit conflict to persist further.

1. Petitioner is a governmental, not-for-profit health system that serves as the largest healthcare provider in Southeastern Tennessee and the seventh-largest public hospital in the United States. Petitioner operates five acute-care hospitals, a Level I trauma center, and other specialized facilities. Erlanger Medical Center is also the region's only teaching hospital, providing clinical education to physicians and students of the University of Tennessee College of Medicine.

The Office of Inspector General of the U.S. Department of Health and Human Services ("OIG") is responsible for combating waste, fraud, and abuse in government health programs. In April 2006, an anonymous caller (not respondent) to the OIG fraud hotline reported that Erlanger was improperly billing Medicare by admitting certain patients as "inpatients" rather than treating them as "outpatients" or on an "observation" basis. App. 3a, 10a. Medicare reimbursement for inpatient services is generally higher than that for outpatient services. The patient's treating physician determines a patient's status by predicting, in the exercise of medical judgment based on factors including the patient's medical history and current treatment needs, how long the patient is likely to need to stay in the hospital.

In response to the anonymous complaint, OIG referred the matter to AdvanceMed, a private company that served as a "program safeguard contractor" responsible for investigating potential Medicare fraud. App. 10a. AdvanceMed initially reviewed a sample of 90 inpatient admissions at Erlanger from July 2005 through May 2006 and determined that the allegations were supported. *Id.* AdvanceMed then sent a "Fraud Case Referral" to OIG but did not disclose its preliminary findings to Erlanger. App. 10a–11a.

Special Agents with OIG's Office of Investigations opened an investigation. App. 11a. The investigation was coordinated with the Office of Counsel to the Inspector General, which was monitoring Erlanger's compliance with a preexisting Corporate Integrity Agreement. *Id.* OIG Special Agents discussed the allegations with Erlanger's Chief Compliance Officer, who was not implicated in them. App. 11a–12a.

With OIG's permission, Erlanger retained Deloitte Financial Advisory Services, LLP to conduct an independent audit of the claims reviewed by AdvanceMed and a larger sample of claims from a longer time period, as well as a thorough review of Erlanger's billing practices. App. 12a. Deloitte's audit identified claims that Erlanger had erroneously billed. *Id.* Erlanger and Deloitte presented these findings to OIG in May 2008. *Id.*

During the government's investigation, the underlying fraud allegations were disclosed to (at least) the seven Deloitte consultants conducting the

audit and the ten Erlanger employees who were interviewed regarding the allegations. *See* App. 31a.

OIG informed the U.S. Attorney's Office for the Eastern District of Tennessee of the "Fraud Case Referral" and the ongoing investigation. App. 12a. In June 2008, both the Civil and Criminal Divisions of the U.S. Attorney's Office declined to pursue the matter. *Id.* The Office of Counsel to the Inspector General also concluded that Erlanger had not violated the Corporate Integrity Agreement and closed its investigation in February 2009. App. 12a–13a.

After the U.S. Attorney's Office declination, OIG's Office of Investigations closed its investigation and referred the matter back to AdvanceMed for administrative resolution. App. 13a. AdvanceMed formalized a report of its final audit findings and delivered it in March 2009 to Erlanger's Chief Financial Officer, who was not implicated in the allegations. Dkt. No. 107-9. AdvanceMed's audit report concluded that certain inpatient claims were erroneously billed to Medicare and a refund was owed. *See id.* Erlanger and Deloitte met with AdvanceMed and submitted Deloitte's audit findings and other relevant information. *See* Dkt. No. 107-23 (Erlanger letter to AdvanceMed). Based upon both audits and the additional materials, AdvanceMed directed Erlanger to submit a voluntary refund in the amount of $477,140.42, which Erlanger did in September 2009. App. 12a–13a.

After three years of intensive investigation of potential criminal or civil fraud violations, the government's investigation and audit were thus

resolved. *See* Dkt. No. 107-25 (AdvanceMed closing letter).

2. A year later, however, respondent tried to reopen the matter. Respondent was a revenue-cycle consultant with ACS Healthcare Solutions and was assigned to work at Erlanger during the first half of 2006. App. 3a–4a. Respondent had no further contact with Erlanger or its employees after his short stint at Erlanger ended in mid-2006.

Four years later, in October 2010, respondent approached the U.S. Attorney's Office for the Middle District of Tennessee with his allegations, and he filed his *qui tam* complaint in March 2011. App. 4a.

3. The False Claims Act imposes liability for, among other things, knowingly presenting a "false or fraudulent claim" to the government for payment. 31 U.S.C. § 3729(a)(1). While the Attorney General may bring a civil action if she believes that a person has violated the Act, *id.* § 3730(a), the Act's *qui tam* provisions also permit a private person (known as a relator) to bring his own action on behalf of the United States, *id.* § 3730(b). The relator is entitled to receive a portion of any funds recovered in a successful suit. *Id.* § 3730(d).

The FCA makes an "an effort to strike a *balance* between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1894 (2011) (internal quotation marks omitted). To further that purpose, Congress enacted a bar against *qui tam* actions "based upon the public disclosure of allegations or transactions in a criminal,

civil, or administrative hearing, in a congressional, administrative, or Government Account[ability] Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4).[1] This provision—known as the public-disclosure bar—divests courts of jurisdiction over actions that fall within its terms. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007).

Even where the public-disclosure bar applies, Congress thus preserved the ability of a subset of the most valuable relators—"original sources"—to proceed with *qui tam* actions. An original source "is 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." 31 U.S.C. § 3730(e)(4)(B). This exception to the bar reflects Congress's intent to incentivize relators who have valuable information while preventing the government's recovery from being reduced by a relator's share where the government

[1] Congress amended the public-disclosure bar in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901–02 (2010). The amendment narrowed the channels in which a covered public disclosure could occur and deleted the reference to jurisdiction but retained the basic rule that a *qui tam* action based upon a public disclosure is subject to dismissal. *See* 31 U.S.C. § 3730(e)(4) (2015) (reproduced at App. 47a). The amendment was not retroactive, *see Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010), and does not apply to this case, *see* App. 7a n.4. References in this petition, other than where noted, are to the applicable pre-2010 version of the bar.

does not need the relator's help. Because of the "direct and independent knowledge" requirement, original sources are "the most deserving *qui tam* plaintiffs." *Graham Cnty.*, 559 U.S. at 301.[2]

The statutory scheme thus provides for a public-disclosure bar with a "broad[] sweep," *id.* at 290, counterbalanced by a safety valve for deserving relators. But when a court finds that the bar does not apply in the first place, the original-source exception never comes into play—and the relator can proceed with a *qui tam* action and divert part of an award from the government even if he has no valuable information to contribute.

4. The government declined to intervene in respondent's *qui tam* action—not surprisingly, given that it had already investigated and resolved the allegations in his complaint. Indeed, it is undisputed that respondent's allegations raise the same issues the government investigated and resolved and thus meet the public-disclosure bar's "based upon" standard. *See, e.g.*, *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998) (action is "based upon" public disclosure if "substantial identity exists between the publicly disclosed allegations . . . and the *qui tam* complaint").

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[2] In the Affordable Care Act, Congress likewise amended the original-source exception but retained the basic premise that only an individual with information that is helpful to the government may overcome the bar and proceed with a *qui tam* action after a public disclosure. *See* 31 U.S.C. § 3730(e)(4)(B)(2) (2015) (if relator presents her information to government after public disclosure, relator's information must "materially add[]" to the publicly disclosed information).

Petitioner moved to dismiss respondent's *qui tam* action based on the public-disclosure bar under Fed. R. Civ. P. 12(b)(1). Following discovery, the district court found that respondent's allegations had been publicly disclosed in the government's audit and investigation and that respondent did not qualify as an "original source." App. 40a–41a.[3]

4. The Sixth Circuit reversed in a published opinion. It accepted the district court's factual findings that allegations substantially identical to respondent's were disclosed in connection with the government's investigation to and by OIG, AdvanceMed, Deloitte, and Erlanger employees, App. 4a–5a, 13a–14a; *see also* App. 30–31a, but reversed its holding that those disclosures qualified as "public disclosure." App. 20a.

With regard to the disclosures to OIG and the U.S. Attorney's Office, the court below explicitly rejected the Seventh Circuit's holding that disclosure to a responsible public official constitutes public disclosure. Instead, the Sixth Circuit held that there must be disclosure "to the public outside the government." App. 14a. The court likewise dismissed the disclosures to AdvanceMed, a private company, on the ground that it was engaged as a government contractor "for the purpose of acting on behalf of the government as part of the administrative audit and investigation." App. 17a.

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[3] As the Sixth Circuit noted, the district court labeled Erlanger's motion as one for summary judgment but evaluated it, and properly so, as a factual challenge to jurisdiction under Rule 12(b)(1). App. 7a–8a. In all events, the facts relevant to the question presented were not in genuine dispute.

Next, the Sixth Circuit held that the disclosures to Deloitte did not qualify either, because even though Deloitte's auditors "were not alleged to have participated in the fraudulent billing and were not potential witnesses," they were not "outsiders" to the investigation—a requirement the court adopted from the Ninth Circuit. App. 19a–20a. Finally, for the same reason, the court discounted the disclosures to several employees of petitioner who had no role in the alleged fraud, *see* App. 19a, in conflict with the Second Circuit's holding that the bar is triggered by disclosure to "strangers to the fraud" such as "innocent employees" of the defendant. *Doe*, 960 F.2d at 322–23.

REASONS FOR GRANTING THE PETITION

The circuits are deeply divided over the proper interpretation of the public-disclosure bar. The Second Circuit holds the bar triggered by disclosure to innocent employees of the defendant during an investigation; the Ninth Circuit, and now the Sixth Circuit, disagree and hold instead that disclosure to "outsiders" is required. Exacerbating the split, the Seventh Circuit holds that disclosure to a responsible government official satisfies the bar; several circuits, including now the Sixth Circuit, disagree and hold that "public" disclosure requires disclosure outside of the government.

This Court was correct to recognize the importance of this issue in 1996 and to grant certiorari in *Hughes Aircraft* to resolve it even when the split was limited to the Ninth Circuit's rejection of the Second Circuit's approach. In the intervening years, the divergence among the circuits has

broadened and deepened: the Seventh Circuit adopted its rule in 1999 and reaffirmed it as recently as 2007; the Ninth Circuit has reaffirmed its rejection of the Second Circuit's approach multiple times since this Court reversed its decision in *Hughes Aircraft* on other grounds, and the Sixth Circuit adopted the Ninth Circuit's approach in the decision below; and several circuits have rejected the Seventh Circuit's approach in recent years.

This division of authority is even more intolerable today than it was in 1996. False Claims Act litigation has exploded in recent years, and the scope of the public-disclosure bar has become perhaps the most heavily litigated issue in *qui tam* actions. Just as that intensive scrutiny by the lower courts has failed to resolve the split, legislative action has failed to reduce its practical importance. The existing split equally afflicts the current version of the bar, which still turns on the meaning of the word "public"—the very issue that has divided the circuits so intractably. And as this case exemplifies, many cases governed by the public-disclosure bar as it stood before the 2010 amendments remain pending. Indeed, because the pre-2010 version of the bar continues to apply to newly-filed cases where the allegedly false claims at issue were submitted before the 2010 amendments, the courts will struggle to apply the pre-2010 version of the bar deep into the future. This Court's guidance is sorely needed.

I. The Courts Of Appeals Are Divided On What Constitutes A "Public Disclosure."

This case is a perfect illustration of where the government did not need a relator's help and where the public-disclosure bar should apply: Not only was the government aware of the fraud allegations and capable of pursuing them, but it in fact *did* pursue them, conducting a thorough multi-year investigation and audit of the very allegations and transactions that respondent seeks to relitigate and ultimately resolving the matter to its satisfaction. In addition, during the government's investigation, the fraud allegations were disclosed to many people both inside and outside the government—including employees of AdvanceMed and Deloitte, as well as innocent employees of Erlanger.

The Sixth Circuit, however, disagreed. It held that respondent's *qui tam* action filed long after the government concluded its investigation could proceed because the disclosures were not made broadly enough to qualify as "public" because they were not disseminated to "outsiders" in the general public. App. 16a–17a. The decision below deepened two related circuit splits over the meaning of the word "public" in the public-disclosure bar.

1. The court below adopted the Ninth Circuit's holding that "public" disclosure means disclosure to "outsiders" to an investigation and that disclosure to innocent employees of the defendant or other individuals in some way involved in the investigation—"insiders"—does not count. App. 19a–20a.

The Ninth Circuit initially so held in *Hughes Aircraft*, expressly rejecting the Second Circuit's holding that disclosure to innocent employees of the defendant triggers the bar. *See* 63 F.3d at 1519 ("Thus, we reject the *Doe* court's definition of 'public disclosure' . . . ."). This Court granted certiorari to review the Ninth Circuit's holding even though the split at the time involved only two circuits. *See Hughes Aircraft Co.*, 519 U.S. 926 (granting certiorari); Pet. for Writ of Certiorari at 11–15, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (No. 95-1340), 1996 WL 33413839. The Court, however, also granted certiorari in *Hughes Aircraft* to review the Ninth Circuit's antecedent holding that the 1986 version of the public-disclosure bar applied in that case, and the Court reversed on that ground without reaching the question "whether the Government's release of its audits to Hughes employees constituted a public disclosure bar under the 1986 amendment." *Hughes Aircraft*, 520 U.S. at 945.

The Ninth Circuit has since reaffirmed its holding that the public-disclosure bar requires disclosure to "outsiders" to an investigation and that disclosure to innocent employees of the defendant does not trigger the bar. *See, e.g.*, *Berg v. Honeywell Int'l, Inc.*, 502 F. App'x 674, 676 (9th Cir. 2012); *Seal I v. Seal A*, 255 F.3d 1154, 1161–62 (9th Cir. 2001).

In the Second Circuit, in stark contrast, it remains good law that disclosure to any "stranger[] to the fraud," including specifically innocent employees of the defendant, triggers the bar. *Doe*, 960 F.2d at 322–23; *United States ex rel. Kirk v. Schindler*

Elevator Corp., 601 F.3d 94, 104 (2d Cir. 2010) (restating holding of *Doe* as "reject[ing] the contention that, in order for public disclosure to have taken place, the information must be more broadly disseminated"), *rev'd on other grounds* 131 S. Ct. 1885.

The Tenth Circuit also appears to be aligned with the Second Circuit and in conflict with the Ninth Circuit. Although the Tenth Circuit has not addressed disclosure to innocent employees of the defendant in so many words, it has held that disclosure to even a single person "not previously informed" of the allegations triggers the bar. *United States ex rel. Fine v. Advanced Scis., Inc.*, 99 F.3d 1000, 1005–06 (10th Cir. 1996); *see also, e.g.*, *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1206 n.5 (10th Cir. 2003) (en banc). And a district court within the Tenth Circuit has held that disclosure to an "innocent" employee of the defendant constituted a public disclosure. *See United States ex rel. Lancaster v. Boeing Co.*, 778 F. Supp. 2d 1231, 1245–46 (N.D. Okla. 2011).

Likewise, without expressly addressing *Doe*, the Seventh Circuit has held that a public disclosure occurs when a government contractor reveals *to the defendant* allegations made during an audit and investigation. *See Glaser*, 570 F.3d at 913–14; *see also United States ex rel. Tahlor v. AHS Hosp. Corp.*, No. 2:08-cv-02042, 2013 WL 5913627, at *9 (D.N.J. Oct. 31, 2013) (same).

The government, whose interests *qui tam* actions are supposed to vindicate, has sided with the Second Circuit. In fact, in *Doe* it was the government that

moved to dismiss based on the public-disclosure bar, and the Second Circuit upheld the government's position. *See* 960 F.2d at 320, 323. The government adhered to that position in *Hughes Aircraft*, explaining that "[i]n our view, a public disclosure occurs whenever allegations or transactions are revealed to any person outside the government other than the suspected wrongdoer, so long as that person is under no duty not to reveal the information to others." Brief for the U.S. as *Amicus Curiae* Supporting Respondent at 19, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (No. 95-1340), 1996 WL 744847 ("U.S. *Hughes Aircraft* Br."). And the government reiterated that view in advocating a grant of certiorari in *Graham County*, arguing that "a 'public disclosure' of a governmental fraud investigation occurs whenever that investigation is disclosed to even a single 'stranger to the fraud' outside the government, so long as the outsider is not precluded from further disseminating the information." Brief for the U.S. as *Amicus Curiae* Supporting Pet. for Writ of Certiorari at 18–19, *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010) (No. 08-304), 2009 WL 1422970 (citing, *inter alia*, *Doe* with approval) ("U.S. *Graham Cnty.* Invitation Br.").

This split is dispositive here. It is undisputed that the same allegations of fraudulent billing that respondent seeks to press in this case were disclosed during the government's audit and investigation to numerous individuals who were not implicated in those allegations and who were "not previously informed" about them. Detailed disclosures were

made by the government directly to Erlanger's Chief Compliance Officer and Chief Financial Officer and also to numerous other Erlanger employees who were interviewed during the investigation and at least seven Deloitte employees who participated in Deloitte's independent audit. *See* App. 11a–12a, 31a; Dkt. Nos. 107-07, 107-09. The court below held that these disclosures were "more akin to the 'private' disclosure to the defendant's employees in *Schumer*" that the Ninth Circuit held insufficient and that "the Deloitte auditors cannot be said to have been 'outsiders' to th[e] investigation." App. 19a.

The court also stated that the disclosures to Deloitte's auditors did not trigger the bar because they were bound to keep the information confidential. App. 18a–19a. But the court cited nothing to support that assertion, and respondent presented no evidence that the Deloitte auditors—or, for that matter, any of the many recipients of the disclosures—were forbidden to use or disclose the information. To the contrary, Erlanger's Chief Compliance Officer had an affirmative duty to report the information, and she did so. App. 25a, 18a.[4] At a minimum, then, at least some of the disclosures to innocent employees satisfied the standard adopted by the Second Circuit and endorsed by the government.

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[4] The Chief Compliance Officer was required to report allegations of fraud to senior management and to a monitor within OIG. *See* Dkt. No. 107-4, at 3, 20. And Erlanger's Code of Conduct required employees to report violations of federal healthcare regulations and subjected employees to discipline for failing to do so. *Id.* at 4.

2. The decision below also exacerbated a related circuit split concerning whether disclosure to a responsible public official constitutes "public" disclosure. The Seventh Circuit has answered that question in the affirmative, holding that disclosing allegations of fraud to a public official with oversight and enforcement authority triggers the bar even if the allegations are not disclosed outside of the government. *Bank of Farmington*, 166 F.3d at 861. And while the Seventh Circuit has overruled a different aspect of *Bank of Farmington*, *see Glaser*, 570 F.3d at 910, it continues to adhere to *Bank of Farmington*'s holding that disclosure to an appropriate government official triggers the bar. *See United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 736 (7th Cir. 2007) ("Caremark's disclosure of information to the U.S. Attorney's Office during the government's investigation of Caremark's business practices qualifies as a public disclosure of the Relators' allegations."), *overruled on other grounds by Glaser*, *supra*.[5]

Several circuits, including the Sixth Circuit below, have expressly rejected the Seventh Circuit's view and have held that disclosures must be made outside of the government to trigger the bar. *See* App. 13a–17a; *see also United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist.*, 777

[5] The Fifth Circuit may be aligned with the Seventh Circuit. In *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 384 F.3d 168, 174–75 (2004), the Fifth Circuit held that disclosures during an audit by a Medicare fiscal intermediary and an investigation by the government triggered the bar without asking whether the disclosures extended outside of the government.

F.3d 691, 697 (4th Cir. 2015); *United States ex rel. Oliver v. Philip Morris USA, Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014); *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1200–01 (9th Cir. 2009), *overruled on other grounds by United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, ___ F.3d ___, 2015 WL 4080739 (9th Cir. July 7, 2015) (en banc); *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 728–31 (1st Cir. 2007), *overruled on other grounds by Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499–1500 (11th Cir. 1991).

This split is equally dispositive here, as it is undisputed that the allegations at issue were disclosed to OIG and the U.S. Attorney's Office—surely responsible public officials when it comes to policing Medicare fraud.

II. The Sixth Circuit's Interpretation Is Contrary To The Text And Purpose Of The Public-Disclosure Bar.

The FCA's *qui tam* mechanism was intended to strike an important balance by furthering "the[] 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." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). As made clear by the text and structure of the statute, as well as the history that led to enactment of the public-disclosure bar, Congress did not intend to provide an unwarranted bounty to "would-be relators

who add nothing to the government's own enforcement efforts." U.S. *Graham Cnty.* Invitation Br. at 16. Where the public-disclosure bar applies, the FCA still permits a relator to proceed and to share in any recovery if the relator meets Congress's "original source" standard. This statutory scheme is as sensible as it is carefully crafted: the government must share its recovery with a relator if, but only if, the relator contributes "direct and independent knowledge" to the case to aid the government. 31 U.S.C. § 3730(e)(4)(B).

The decision below upends this careful legislative scheme. In this case, there is no need to guess at whether the disclosures of the fraud allegations were sufficient to enable the government to pursue the matter on its own: the government *in fact* pursued the matter on its own, conducting a thorough fraud investigation and disclosing the allegations to many people over a three-year period. As explained above, in the Seventh Circuit the disclosure of the fraud allegations to responsible public officials in OIG and the U.S. Attorney's Office would have triggered the bar. Given the bar's purpose, treating disclosures to appropriate public officials as "public" disclosures makes eminent sense. At the very least, the text and structure of the bar make clear that it applies where the allegations are disclosed to a previously uninformed member of the public during a government audit and investigation, as the Second Circuit has recognized.

By rejecting both of these approaches in favor of the Ninth Circuit's rule that only disclosures to "outsiders" to an investigation trigger the bar, the

court below threw wide open the door to *qui tam* actions that "add nothing to the government's own enforcement efforts." The pernicious nature of that interpretation is especially clear here, where the court below in effect permitted respondent to reopen the resolution that the government deemed appropriate—and to do so without even offering "direct and independent knowledge." This outcome destroys the settled expectations of regulators and regulated alike that candid cooperation with a government investigation and compliance with the government's chosen resolution will actually resolve an investigation. No statutory text, no legislative history, and no precedent suggests that Congress intended to permit such an anomalous usurpation of the Executive's constitutional enforcement discretion.

1. To decide what the term "public disclosure" means as used in the public-disclosure bar, the Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). While the "False Claims Act's *qui tam* provisions present many interpretive challenges," *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015), the text and context of the bar make clear that the interpretation adopted by the court below is incorrect.

Following the Ninth Circuit's lead in *Schumer*, the court below seemed to believe that a disclosure could qualify as "public" only if it would likely reach the public as a whole. The court thus dismissed the disclosures to the Deloitte auditors on the rationale

that they "did not release the information into the public domain." App. 19a. In *Schumer*, the Ninth Circuit rejected the Second Circuit's *Doe* holding on the rationale that treating "company employees as members of the public is unrealistic" because they are unlikely to disclose the information more widely or to file a *qui tam* action. 63 F.3d at 1518. And in *Seal 1*, in contrast, the Ninth Circuit found that disclosure to a single "outsider to the [government's] investigation" triggered the bar precisely because that person sought "to take advantage of that information by filing an FCA action." 255 F.3d at 1162.

This approach—deciding whether the public-disclosure bar is triggered based on how likely, in the court's view, the disclosure is to make its way to the public at large or to lead to the filing of a *qui tam* action—cannot be reconciled with the text or structure of the bar. Section 3730 refers not to "public disclosure" in the abstract, but to public disclosure of "allegations or transactions" in (1) "a criminal, civil, or administrative hearing," (2) "a congressional, administrative, or Government Account[ability] Office report, hearing, audit, or investigation," or (3) "the news media." 31 U.S.C. § 3730(e)(4)(A). Government investigations and audits are *supposed* to be closely held while they are in progress; the allegations being investigated usually are not disseminated to the public at large unless and until the investigation leads to formal action like the bringing of criminal, civil, or administrative proceedings. And the public-disclosure bar then *separately* covers disclosures in such a "criminal, civil, or administrative hearing."

Id. Yet Congress nonetheless specified that "administrative . . . audit[s] [and] investigation[s]" are also covered.

The statute thus plainly contemplates that "public disclosure" will take place in channels usually inaccessible to the general public. This is no accident, moreover, because disclosures in government investigations are uniquely likely to signal that the government is already investigating the matter and therefore "is capable of pursuing [the matter] itself" and does not need a relator's help. *Springfield Terminal Ry.*, 14 F.3d at 651. As the government explained to this Court in *Hughes Aircraft*:

> In the circumstances specified in the statute—particularly where there has been a public disclosure through specified types of government reports and actions—it is likely that the government is already investigating the matter, or appropriate government investigatory personnel have sufficient information to trigger an investigation. Unless the relator is an "original source," *qui tam* lawsuits brought in these circumstances—after a public disclosure has occurred showing that the government is itself taking action or is capable of taking action—are likely to bring the Treasury nothing more than what government prosecutors would have recovered on their own initiative, and they divert a portion of that recovery unnecessarily from the Treasury to private hands.

U.S. *Hughes Aircraft* Br. at 19 n.12.

In addition to nullifying Congress's inclusion of disclosures in government audits and investigations in the bar, the Sixth and Ninth Circuits' approach also contradicts settled interpretations of the bar in other respects. First, this Court's recent holding that Freedom of Information Act responses trigger the bar further reinforces the lack of any requirement of broader disclosure, as a FOIA response normally is sent only to the individual requester. *See Schindler*, 131 S. Ct. 1885. A FOIA response is a "report" and thus falls within the same category in the bar as an "audit" or "investigation." *See id.* There is no basis for adding an atextual requirement of disclosure to the general public or to "outsiders" when it comes to the bar's reference to disclosures in a government audit or investigation when no such requirement applies to the bar's parallel reference to reports.

Likewise, the bar's inclusion of disclosures in "news media" reinforces the broad scope of its reference to disclosures in government audits and investigations. Disclosure in a select subset of prominent "news media" may be likely to alert the general public to potential fraud, but disclosure in a far larger universe of obscure outlets is unlikely to get many people's attention and thus unlikely to lead to the filing of a *qui tam* action. But courts have rejected efforts to limit the bar's reference to "news media" to disclosures likely to reach a certain audience. *See, e.g.*, *United States ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 813 (11th Cir. 2015) (holding that information available through newspaper advertisements and defendant's website

counted as disclosure through the news media); *United States ex rel. Kraxberger v. Kansas City Power & Light Co.*, 756 F.3d 1075 (8th Cir. 2014) (holding that information available on the Missouri Public Service Commission's website was a disclosure through news media sufficient to trigger the bar). This Court made the same point in *Graham County*, justifying a broad interpretation of the bar's reference to "administrative . . . report[s]" by noting that the bar's reference to "news media" "describes a multitude of sources that would seldom come to the attention of the Attorney General." 559 U.S. at 300; *see also Schindler*, 131 S. Ct. at 1891 ("The other sources of public disclosure in § 3730(e)(4)(A), especially 'news media,' suggest that the public disclosure bar provides 'a broa[d] sweep.'") (quoting *Graham Cnty.*, 559 U.S. at 290).

And, finally, the "hearings" channel listed in the bar has generated numerous holdings that allegations are publicly disclosed whenever they are included in a civil court filing by a private litigant, regardless of whether the filing is ever disseminated to the public at large or brought to the attention of a public official capable of acting on the allegations. *See, e.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993) ("information was publicly disclosed because it was available to anyone who wished to consult the court file").

The bar's text and structure thus make clear that there is no basis to interpret it to require anything more than what the Tenth Circuit requires: disclosure in a covered channel to a single person

"not previously informed" of the allegation. *Fine*, 99 F.3d at 1005–06; *see also* U.S. *Hughes Aircraft* Br. at 19 (to trigger the bar, "the disclosure need not be widespread or extend to the general public"). This interpretation, unlike the Sixth and Ninth Circuits' interpretation, gives meaningful effect to Congress's express inclusion of audits and investigations as channels of what Congress termed "public disclosure." It also is entirely consistent with the common meaning of "public" rather than depending on an arbitrary distinction between "insiders" and "outsiders" that is nowhere to be found in the statute. Therefore, even if "public" could bear a different meaning when used in a different context, the context of its usage here makes its meaning clear. *Cf. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

2. Indeed, the Tenth Circuit and the Second Circuit may require too much in requiring disclosure to even a single member of the public outside the government. "The point of public disclosure of a false claim against the government," after all, "is to bring it to the attention of the authorities." *Bank of Farmington*, 166 F.3d at 861. As a result, there is logic to the Seventh Circuit's holding that "disclosure to a public official with direct responsibility for the claim in question . . . constitutes public disclosure within the meaning of § 3730(e)(4)." *Id.*

Several circuits have rejected the Seventh Circuit's view on the rationale that treating disclosure to the government as "public disclosure" is contrary to the plain meaning of the word "public," *see* App. 14a–15a, but as the Seventh Circuit observed, its "construction accords with a standard meaning of 'public,' which can also be defined as 'authorized by, acting for, or representing the community.'" *Bank of Farmington*, 166 F.3d at 861 (quoting 12 Oxford English Dictionary 779 (2d ed. 1989)). Even if the Seventh Circuit's reading of the term "public disclosure" were not the "most natural reading," that objection would not be conclusive, as its reading accords with the statutory framework as a whole. *See McCarthy v. Bronson*, 500 U.S. 136, 139–42 (1991). There is no reason to believe that Congress intended to allow relators who fail to qualify as original sources because they lack "direct and independent knowledge" to divert a portion of the government's potential recovery in cases where the government not only was capable of pursuing the matter itself but in fact had already pursued and expended significant resources to resolve the matter before the relator sought a *qui tam* bounty. *Cf.* U.S. *Graham Cnty.* Invitation Br. at 12 ("The applicability of the [1986 version of the bar] turns on whether the federal government is already acting, or [is] likely to act, on the alleged fraud, such as where the government has publicly disclosed the relevant information in the course of exposing, investigating, prosecuting, or otherwise pursuing the allegations of fraud.").

3. In fashioning its requirement of disclosure to "outsiders" and rejecting *Doe*, the Ninth Circuit

reasoned that "[u]nlike others who come across information related to fraud, an innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy. Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Schumer*, 63 F.3d at 1518 (internal quotation marks and citation omitted). In addition to being contrary to the text and structure of the public-disclosure bar as just explained, the Ninth Circuit's rationale also fails on its own terms.

In reality, relators typically are current or former employees of the defendant. "The most common *qui tam* plaintiff is the current employee." 1 John T. Boese, *Civil False Claims and Qui Tam Actions* 4-13 (4th ed. Supp. 2012-2). "The second most common *qui tam* plaintiff is the former employee." *Id.* at 4-15; *accord* U.S. *Hughes Aircraft* Br. at 34 (agreeing that "the employees of government contractors are . . . the 'paradigm' relators") (internal quotation marks omitted). There is simply no basis for the Ninth Circuit's speculation that innocent employees of a company under investigation—or employees of a separate consulting firm working with that company—will be unlikely to further disseminate allegations of fraud or to seek to file *qui tam* actions. Respondent himself was a consultant working for petitioner. And there is thus neither need nor basis to go beyond the text of the bar to create a requirement of disclosure to an ill-defined and arbitrary class of "outsiders."

4. The decision below also should raise a red flag because its interpretation of the public-disclosure bar effectively permits respondent to reopen the government's resolution of its investigation. The Executive, not a private citizen like respondent, is responsible for exercising prosecutorial discretion. U.S. CONST., art. II, § 3; *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The government did just that here—it conducted a thorough investigation in response to a "Fraud Case Referral" and then determined not to pursue the matter criminally or under the FCA and directed instead that it be resolved administratively.

Respondent evidently believes that the government should have been more aggressive. But it would be unusual, to say the least, for Congress to want to give private citizens like respondent a warrant to second-guess and reopen such a resolution. Private citizens regularly disagree with how the government exercises its enforcement discretion, and courts regularly dismiss efforts by private citizens to air those disagreements in the Judicial Branch. *See, e.g.*, *Wehunt v. Ledbetter*, 875 F.2d 1558, 1567–68 (11th Cir. 1989) (per curiam) (holding that plaintiff could not sue a state for failing to adequately enforce child-support requirements).

To be sure, the FCA's *qui tam* mechanism is unusual to begin with. But there is no indication that Congress meant to go so far as to allow relators motivated by personal financial gain to reopen fully resolved matters because they disagree with how the Executive Branch exercised its enforcement discretion. Still less is there any indication that Congress meant to grant such anomalous and

constitutionally questionable authority to relators who do not even have "direct and independent knowledge" of the information underlying their allegations. *See Reagan*, 384 F.3d at 179 (holding that public-disclosure bar applied where relator's claims sought to "re-tread the same ground that [Medicare fiscal intermediary and government] had already covered, and to reach a different conclusion"). Accordingly, any ambiguity in the public-disclosure bar should be interpreted to avoid such a result. *See, e.g.*, *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

5. The legislative history confirms that Congress did not intend to preserve *qui tam* actions based upon disclosure of fraud allegations in a government investigation or audit. Legislators expressed concern that the government-knowledge bar—the public-disclosure bar's predecessor—applied whenever the information was in any sense in the government's possession, "even if the Government makes no effort to investigate . . . ." S. Rep. No. 99-345, at 12–13 (1986); *see also* H.R. Rep. No. 99-660, at 22–23 (1986) ("[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the qui tam suit, but in which the Government took no action."). But there is no legislative history suggesting that Congress intended the public-disclosure bar to permit *qui tam* actions when the government *has* investigated and the allegations were disclosed during the investigation. To the contrary, "[r]ather

than simply repeal the Government knowledge bar . . . 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 . . . ." *Graham Cnty.*, 559 U.S. at 294–95.

The Sixth Circuit's interpretation would resurrect the parasitic suits that Congress has been determined to bar ever since the Court's 1943 decision in *United States ex rel. Marcus v. Hess* allowed a relator to seek a bounty by copying allegations from an indictment. 317 U.S. 537. Although respondent was not a recipient of the disclosures during the government's investigation (he had left Erlanger by then), many other consultants and employees received the disclosures and could have followed in Marcus's footsteps by filing a *qui tam* action that simply repeated the allegations they had heard from the government. If the Sixth Circuit were correct that the disclosures during the investigation and audit do not count as "public," the original-source exception would never come into play—meaning that any of those individuals could have pursued their bounty even as the investigation was ongoing, in an effort to preempt it, or after it was resolved, in an effort to second-guess the government's resolution. It is hard to conceive of a reason why Congress could have wanted to allow such *qui tam* actions, which fully deserve the epithet "parasitic."

To the contrary, courts have recognized that the public-disclosure bar is supposed to be a "quick trigger," resulting in early dismissal unless a relator

proves she is an original source. *See Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1042–43 (10th Cir. 2004). Because original sources offer "direct and independent knowledge," they tend to be the most valuable relators. The "broa[d] sweep" this Court has recognized that Congress intended for the public-disclosure bar (*Graham Cnty.*, 559 U.S. at 290) is thus balanced by an exception that permits "insiders" with truly valuable information to help the government and earn a relator's share. *See id.* at 301 (explaining that Court's holding that public-disclosure bar applied was "buttressed by the fact that Congress carefully preserved the rights of the most deserving qui tam plaintiffs: those whistle-blowers who qualify as original sources").

* * *

Where the government investigates fraud allegations and resolves them to its satisfaction and those allegations are disclosed during the investigation to numerous innocent employees of the defendant as well as numerous other individuals, the text, context, and purpose of the public-disclosure bar all require the conclusion that the bar applies.

III. Certiorari Is Needed Because The Question Presented Is Recurring And Important

The proper interpretation of the public-disclosure bar is of enormous importance, and the Court should not allow the existing deep division of authority to persist.

1. FCA litigation has exploded in recent years. In fiscal year 2014 the government recovered $5.69 *billion* in settlements and judgments under the FCA,

with relators collecting $435 million.[6] Over 700 new *qui tam* actions were filed in 2014 alone, with thousands more still pending from prior years. *Id*. Moreover, the question whether the public-disclosure bar applies is one of the most frequently litigated issues in FCA cases. *See* Boese, *supra*, at 4-53 (observing that, "despite Congress's attempts to simplify jurisdiction over qui tam suits," the public-disclosure bar "has become the most frequently litigated issue in such actions"); Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* 730 (2d ed. 2010) (observing that the public-disclosure bar has "generated much of the litigation over the [FCA]"). As a result, clarifying what disclosures count as "public" is of great practical importance.

The FCA's broad venue provision makes the existing circuit split even more problematic. It permits venue "in any judicial district in which the defendant . . . can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred." 31 U.S.C. § 3732(a). Relators whose claims would be barred in the Second, Seventh, and Tenth Circuits can simply file in the Sixth or Ninth Circuit instead. *See* Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar*," 1 Liberty U. L. Rev. 111, 113 n.17 (2006) (noting potential "forum shopping"

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[6] *See* Dep't of Justice Press Release, *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014* (Nov. 20, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

because FCA "permits nationwide jurisdiction and has generous venue provisions").

Perhaps the clearest testament to the certworthiness of this circuit split regarding the public-disclosure bar is that the Court already granted certiorari to resolve it, in *Hughes Aircraft*. More recently, the government recognized the importance of properly interpreting the public-disclosure bar when it recommended certiorari in its invitation brief in *Graham County*—and did so despite arguing that the decision below was correct. *See* U.S. *Graham Cnty.* Invitation Br. at 7 ("The court of appeals correctly construed the second clause of the 'public disclosure' bar . . . . The court's decision, however, deepens a pre-existing circuit conflict . . . . This Court should grant the petition for a writ of certiorari to resolve the split among the circuits on an important legal issue affecting the federal courts' jurisdiction over FCA *qui tam* actions."). The specific issue here is different, but the split is just as deep and persistent. Indeed, it has persisted—and grown—since the Court decided *Hughes Aircraft* on other grounds.

2. Although this case involves the 1986 version of the public-disclosure bar, the question presented will be critically important going forward, both because most pending cases are (and many future cases will be) governed by the 1986 bar and because the split regarding the meaning of the word "public" will apply equally to the new version, which still turns on whether allegations "were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (2015).

As to the first point, several factors explain why the 1986 version of the bar continues to apply to so many active cases and will apply to cases filed for years to come. Among other reasons, the FCA has a lengthy statute of limitations that can extend up to ten years, 31 U.S.C. § 3731(b); *qui tam* actions often remain under seal for years while the government investigates and decides whether to intervene; and the 1986 version applies to actions based on alleged false claims submitted before the 2010 amendment, even if the action itself is filed after the 2010 amendment, *see, e.g.*, *United States ex rel. Antoon v. Cleveland Clinic Found.*, ___ F.3d ____, 2015 WL 3620519, at *6 (6th Cir. June 11, 2015) (collecting cases so holding and relying on *Hughes Aircraft*, 520 U.S. at 946, which held that the 1986 amendment creating the public-disclosure bar did not apply retroactively to conduct that occurred before its effective date).

And as to the second point, the 2010 amendment narrowed the covered channels of disclosure in other respects (and expanded the original-source exception), but retained federal "audit[s]" and "investigation[s]" without modification. *See* 31 U.S.C. § 3730(e)(4)(A)–(B) (2015). The deep split over whether disclosures in an audit or investigation must be disseminated to "outsiders" to qualify as "public"—or, rather, whether disclosures to responsible public officials or to innocent employees (or consultants) of the defendant suffice—thus will be just as problematic in cases governed by the new version of the bar.

Under similar circumstances in *Schindler*, the Court granted certiorari after the 2010 amendment to decide the meaning of the 1986 version of the public-disclosure bar. 131 S. Ct. at 1889 n.1. The Court should do the same here.[7]

[7] Although the question presented here will apply equally under the new version of the bar, the Court has previously granted certiorari to address statutes that were no longer in effect. For example, in *Judulang v. Holder*, 132 S. Ct. 476 (2011), this Court granted certiorari to consider the Board of Immigration Appeals' interpretation of a provision of the Immigration and Nationality Act even though Congress had repealed that provision fifteen years earlier. The Court explained that the provision continued to have ongoing effects because relief under it remained available to certain aliens. *See id*. at 480–81.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-6645

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

ROBERT WHIPPLE,

Plaintiff-Appellant,

v.

CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY, dba Erlanger Medical Center, dba Erlanger Health System,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:11-cv-00206—Todd J. Campbell, District Judge.

Argued: September 30, 2014
Decided and Filed: February 25, 2015

Before: GUY, CLAY, and WHITE, Circuit Judges.

OPINION

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* * *

RALPH B. GUY, JR., Circuit Judge.

Robert Whipple, the relator in this qui tam action, appeals from the district court's determination that certain claims he brought under the federal False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1), were jurisdictionally barred under the FCA's public-disclosure bar, 31 U.S.C. § 3730(e)(4). Finding there was not a "public disclosure" sufficient to trigger the jurisdictional bar, we need not decide whether the original-source exception to that bar would apply here. The dismissal of these claims is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.[1]

I.

The FCA imposes civil liability on those who submit false or fraudulent claims for payment to the United States, 31 U.S.C. § 3729(a)(1), "and authorizes *qui tam* suits, in which private parties bring civil actions in the Government's name, § 3730(b)(1)." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 (2011). If a *qui tam* action is successful, the party bringing it—known as the relator—shares in the proceeds of the action or settlement. *See* 31 U.S.C. § 3730(d). A relator seeking to bring a qui tam action under the FCA must first disclose his claims to the government, and then the government decides whether to take

[1] The complaint also alleged that false claims were made in violation of Tennessee, North Carolina, and Georgia statutes, which the district court dismissed under each state's parallel public-disclosure bar. Whipple has abandoned any arguments concerning those state law claims by failing to raise them on appeal.

over the action or allow the relator to proceed. See id. at § 3730(b). The FCA places several other restrictions on a relator's ability to bring a qui tam action, one of which is the public-disclosure bar at issue here. *See United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 507 (6th Cir. 2009).

This action alleged, in part, that defendant Chattanooga-Hamilton Hospital Authority, d/b/a Erlanger Medical Center and Erlanger Health System ("Erlanger"), violated the FCA by knowingly submitting false or fraudulent claims for reimbursement to federally funded healthcare programs (including Medicare, Medicaid, and Tricare/Champus). Specifically, as grouped into categories by the district court, the complaint alleged that Erlanger had submitted fraudulent claims for: (1) inpatient care for patients who should have been billed on an outpatient or observation basis (short-stay claims); (2) observation services improperly added to charges for outpatient surgeries (same-day-surgery claims); (3) inpatient admissions of patients in order to bill for hemodialysis procedures that would not be reimbursable if performed on an outpatient basis (renal-dialysis claims); and (4) carotid artery stenting procedures performed without receiving authorization (stent claims). Whipple maintained that he discovered the alleged fraud during the six-month period that he worked at Erlanger in early 2006, first as a Revenue Cycle Consultant on assignment from ACS Healthcare

Solutions and then as Erlanger's Interim Director of Care Management.[2]

Whipple testified that he identified the fraud by analyzing past billing data, reviewing patient records, and observing operations in each of the revenue cycle departments. He also claimed to have direct knowledge of the fraudulent practices from supervising patient admissions, planning discharges, and reviewing the submission of claims for payment. Unbeknownst to Whipple, the government conducted an audit and investigation into concerns that Erlanger had improperly billed Medicare for inpatient admissions. The audit began with a request for records from Erlanger in November 2006. An administrative investigation was opened in February 2008, and the matter was resolved administratively without a hearing by Erlanger's payment of a refund to the government of $477,140.42 in September 2009.

Whipple disclosed his *qui tam* claims to the United States in October 2010, a complaint alleging those claims was filed under seal in March 2011, and the United States declined to intervene in Whipple's action in April 2012. Erlanger promptly moved to dismiss the complaint on several grounds, including lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The district court denied the motion without prejudice in March 2013, concluding that subject matter jurisdiction should be decided on a

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[2] ACS was retained by Erlanger, at the behest of its bond insurer, after Erlanger settled an unrelated investigation in late 2005 by agreeing to pay $40 million to the Department of Health and Human Services ("HHS") and abide by a Corporate Integrity Agreement ("CIA").

more developed factual record. After limited discovery, Erlanger moved for partial summary judgment with respect to the short-stay, sameday-surgery, and renal-dialysis claims. The district court granted the motion, dismissing those FCA claims as jurisdictionally barred. Whipple's motion for reconsideration was denied, and the remaining claim was dismissed by stipulation in November 2013. This appeal followed.

II.

"As originally enacted, the FCA did not limit the sources from which a relator could acquire the information to bring a qui tam action." *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 293–94 (2010). Congress amended the FCA in 1943 in order "to preclude *qui tam* actions '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.'" *Id.* at 294 (citation omitted). But that limitation—referred to as the government-knowledge bar—proved to be too restrictive, and "the volume and efficacy of *qui tam* litigation dwindled." *Id.*

Congress overhauled the FCA again in 1986, this time replacing the government-knowledge bar with the public-disclosure bar set forth in § 3730(e)(4). *Id.* (explaining that Congress was "'[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own'") (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C.

Cir. 1994)). Although Congress amended this section again in 2010, it is the 1986 version of § 3730(e)(4) that we apply in this case.[3]

The public-disclosure bar enacted in 1986 is recognized to be a clear and explicit withdrawal of subject matter jurisdiction. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467–70 (2007). Specifically, § 3730(e)(4) provides that no court shall have jurisdiction over a *qui tam* action that is:

> "based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or [3] 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."

Graham, 559 U.S. at 286 (quoting § 3730(e)(4)(A) (1986)) (footnote omitted) (alteration in original). The FCA defines "original source" as an individual "who has direct and independent knowledge of the information on which the allegations are based and

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[3] Substantive amendments to § 3730(e)(4) were enacted March 23, 2010—after the alleged misconduct occurred and before Whipple filed his *qui tam* complaint in 2011. *See* Patient Protection and Affordable Care Act ("PPACA"), Publ. L. 111-148, § 10104(j)(2), 124 Stat. 119, 901–02 (2010). Whipple has not argued or offered analysis supporting application of the 2010 amendments to his claims, but asserted instead that he would qualify as an original source under either version. Issues averted to in a perfunctory manner and without developed argumentation are deemed waived. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997).

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)(B) (1986).

To determine whether the public-disclosure bar applies, we consider, "first whether there has been any public disclosure of fraud [through one of the specified channels], and second whether the allegations in the instant case are 'based upon' the previously disclosed fraud." *Poteet*, 552 F.3d at 511 (quoting *United States ex rel. Gilligan v. Medtronic, Inc.*, 403 F.3d 386, 389 (6th Cir. 2005)) (internal quotation marks omitted). If either requirement is not satisfied, the bar does not apply and the *qui tam* action may proceed. *Id.* If both requirements are satisfied, the relator's suit may nonetheless proceed if he qualifies as an "original source." *Id.*

For the reasons that follow, we find that the district court erred in concluding that there was "public" disclosure of fraud through the prior administrative audit and investigation of Erlanger's inpatient billing practices. *See Graham*, 559 U.S. at 286–87 (holding "administrative" refers to activities of governmental agencies or their contractors).[4]

A. Standard of Review

Whipple contends that the district court erred by failing to evaluate Erlanger's motion using the

[4] *Graham* held that "administrative" encompassed the activities of federal, state, or local government, but the current version of the statute narrows qualifying disclosures to those made in a "Federal report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A)(ii) (2010).

standards applicable to a motion for summary judgment under Fed. R. Civ. P. 56(a). Despite the summary-judgment label given to Erlanger's motion, the district court's reasoning and analysis explicitly recognized the motion to be a factual attack on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). When a Rule 12(b)(1) motion is a factual attack, as opposed to facial, on subject matter jurisdiction, "no presumptive truthfulness applies to the allegations" and "the district court must weigh the conflicting evidence to arrive at the factual predicate that subject matter does or does not exist." *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). There is a caveat, however. When a factual attack on subject matter jurisdiction "also implicates an element of the cause of action, then the district court should 'find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's claim.'" *Id.* (citation and emphasis omitted); *see also Wright v. United States*, 82 F.3d 419, 1996 WL 172119, *4 (6th Cir. 1996) (Table).

Whipple contends that the factual determination made with respect to the original-source exception was intertwined with the element of scienter—*i.e.*, whether Erlanger knowingly submitted fraudulent claims for reimbursement. But, in fact, the question whether Whipple had direct and independent knowledge of the information on which his allegations were based does not implicate the question whether Erlanger knowingly submitted false claims for reimbursement. Two other circuits have similarly held that the factual findings necessary to resolve an attack on subject matter

jurisdiction under § 3730(e)(4) did not also implicate an element required to prove a substantive violation of the FCA under § 3729(a)(1). *See United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347–50 (4th Cir. 2009); *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514–15 (3d Cir. 2007); *but see United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 326 (5th Cir. 2011) (holding that a jurisdictional challenge under § 3730(e)(4) is necessarily intertwined with the merits).[5]

Because the district court properly evaluated Erlanger's motion under Rule 12(b)(1), we review the district court's factual findings for clear error and the application of the law to those facts *de novo*. *See United States v. A.D. Roe Co.*, 186 F.3d 717, 722 (6th Cir. 1999). The relator bears the burden of establishing the court's subject matter jurisdiction over his FCA claims. *Id.* at 722–23.

B. Public Disclosure of Fraud

For the first requirement to be met—that there was a public disclosure of fraud in the prior administrative audit and investigation—"the disclosure must have (1) been public, and (2) revealed

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[5] Although the Fifth Circuit has taken the position that a challenge under the FCA's jurisdictional bar is necessarily intertwined with the merits because it arises out of the same statute, that rationale is inconsistent with this court's focus on whether the disputed fact implicates an element of the cause of action. *See United States ex rel. Laird v. Lockheed Martin Eng'g. and Sci. Servs. Co.*, 336 F.3d 346, 350 (5th Cir. 2003) (*abrogated on other grounds by Rockwell Int'l Corp. v. United States*, 549 U.S. at 457, 472 (2007)).

the same kind of fraudulent activity against the government as alleged by the relator." *Poteet*, 552 F.3d at 511. "[A] public disclosure reveals fraud if 'the information is sufficient to put the government on notice of the likelihood of related fraudulent activity.'" *Id.* at 512 (citation omitted). The disclosure need not specifically allege fraud, and the information may come from more than one source, as long as the information leads to an inference of fraud. *Id.* Although the audit and investigation disclosed facts from which fraud could be inferred, whether a public disclosure occurred is a separate question.

1. Administrative Audit and Investigation

In April 2006, an anonymous tip received on a fraud hotline reported that Erlanger was improperly billing observation patients as inpatients. The United States Department of Health and Human Services ("HHS"), Office of Inspector General ("OIG"), received the complaint and referred it for review by AdvanceMed Corporation, which is the Medicare Part A Program Safeguard Contractor for Tennessee hired to perform "benefit integrity activities aimed to reduce fraud, waste, and abuse in the Medicare program." AdvanceMed, acting on behalf of the government, identified ninety claims for reimbursement from Medicare for inpatient admissions of two days or less from the period July 2005 through May 2006.

In November 2006, after Whipple had left Erlanger, AdvanceMed sent Erlanger a request for additional records and information supporting those claims. AdvanceMed's audit found evidence of upcoding based on a notably high error rate of 49%,

identified four possible sources of errors and overpayments, and observed that upcoding would be a violation of Erlanger's 2005 Corporate Integrity Agreement. Those findings were outlined and communicated directly to the OIG's Office of Investigations in a Fraud Case Referral dated July 3, 2007.[6]

In February 2008, the OIG's Office of Investigations opened an administrative investigation into whether the errors and potential overpayments identified by AdvanceMed's review violated criminal law. The Opening Investigative Memorandum also indicated that the investigation was being coordinated with the OIG's Office of Counsel to the Inspector General ("OCIG"), which was responsible for monitoring Erlanger's compliance with the Corporate Integrity Agreement. Erlanger was notified that it was under review by the OIG's Office in March 2008. Specifically, on March 19, 2008, Erlanger was advised by OIG Special Agent Jennifer Trussell that several concerns about Erlanger's inpatient billing practices had been identified from the sample of records reviewed by AdvanceMed. The record reflects that Agent Trussell communicated the issues to Erlanger's Chief

[6] AdvanceMed's audit of the records identified potential overpayments resulting from billing: "for services without a valid admission order," "for inpatient services that should have been billed as observation services," "for inpatient services when the physician ordered an observation status," and "for services that do not support the [Diagnosis Related Group] code billed."

Compliance Officer Alana Sullivan and outside counsel for Erlanger, Attorney Sara Kay Wheeler.[7]

Erlanger undertook an internal investigation and retained Deloitte Financial Advisory Services, LLP, as a billing consultant to review the issues raised and conduct a broader independent audit of one-day hospital stays from October 2005 through December 2007. Erlanger, its attorneys, and the auditors presented the results of the internal investigation to OIG Special Agent Trussell on May 29, 2008. Erlanger included the results of Deloitte's audit, which found that Erlanger had improperly billed for inpatient services (without a physician order, without a basis for a change in status, or without documentation to support the level of care) and for observation services after outpatient same-day surgeries. Erlanger offered explanations for the errors and estimated the amount of the overpayments it had received as a result.

The OIG's Office of Investigations consulted with the United States Attorney's Office for the Eastern District of Tennessee, and both the Civil and Criminal Divisions declined to pursue the matter in June 2008. The OCIG's Office received confidential communication from Erlanger's counsel outlining the investigation and compliance efforts, and the OCIG's portion of the investigation was closed in February

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[7] Erlanger also learned that the OIG's Office of Investigation was reviewing issues with swing-bed billing at another Erlanger facility identified from a separate record review by AdvanceMed. Facts pertinent to that aspect of the investigation are omitted because they are not relevant to the issues in this appeal.

2009. At that point, the OIG referred the investigation to AdvanceMed for administrative resolution on behalf of the government. After further review, AdvanceMed estimated the amount of the overpayments resulting from the errors identified and directed Erlanger to submit a voluntary refund check in the amount of $477,140.42. When Erlanger did so in September 2009, the investigation was administratively closed. There is no suggestion that further disclosure occurred before Whipple brought this action.

The district court found that there was a public disclosure of the alleged fraud, apparently accepting Erlanger's contention that the information was publicly disclosed "through the investigations, oversights and audits conducted by the government, consultants, attorneys and contractors." The district court also seems to have concluded, at least implicitly, that the disclosure was public simply because it occurred in the course of an administrative audit or investigation. Whipple contends that the information was not "publicly disclosed" because the information was disclosed privately and was not disseminated beyond the participants in the administrative audit and investigation.

2. "Publicly Disclosed"

Although the Supreme Court has not construed the term "public disclosure" under § 3730(e)(4), the Court has cautioned "against interpreting the public[-]disclosure bar in a way inconsistent with a plain reading of its text." *Schindler*, 131 S. Ct. at 1892; *see also Graham*, 559 U.S. at 285 (explaining that the jurisdictional bar is triggered "when the

relevant information has already entered the public domain through [one of the three categories of disclosures set forth in § 3730(e)(4)(A)]"). Erlanger urges this court to follow the lead of the Seventh Circuit, which has interpreted the term "public disclosure" to include the disclosure of an alleged false claim to a competent public official who has managerial responsibility for that very claim. *See Bank of Farmington*, 166 F.3d at 861. The court in *Bank of Farmington* reasoned, based on one definition of "public," that disclosure to a government official "authorized to act for or to represent the community on behalf of government can be understood as public disclosure." *Id.* The court found this was consistent with the general purposes of the FCA, and that "disclosure to the public official responsible for the claim effectuates the purpose of disclosure to the public at large." *Id.*

This court has not addressed the soundness of the Seventh Circuit's interpretation of "public disclosure", but all of the other circuits to do so have held that the plain meaning of § 3730(e)(4) requires some affirmative act of disclosure to the public outside the government. *See, e.g. United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist.*, -- F.3d --, 2015 WL 427649, at *4–5 (4th Cir. Feb. 3, 2015) (noting that no circuit has adopted the Seventh Circuit's interpretation of "public disclosure"); *United States ex rel. Oliver v. Philip Morris USA Inc.*, 763 F.3d 36, 42 (D.C. Cir. 2014) (holding that the "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 & n.3 (9th Cir. 2009) (citing cases); *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1186 (10th Cir. 2008) ("Interpreting the FCA to establish release of information into the public domain as the trigger to remove subject matter jurisdiction fits with the purposes of the Act and the 1986 amendments."); *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 728–30 (1st Cir. 2007) (rejecting *Bank of Farmington* and citing cases), *overruled on other grounds by Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008). In *Rost*, a leading case involving disclosure of fraud to the government, the First Circuit rejected the Seventh Circuit's interpretation and held that "[t]he 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." *Rost*, 507 F.3d at 728. We agree.[8]

The plain meaning of § 3730(e)(4) "does not bar jurisdiction over qui tam actions based on disclosures of allegations or transactions to the government," but

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[8] This court has held, albeit in another context, that FOIA documents do not constitute public disclosures under the FCA until they are requested and received by someone. *See United States v. A.D. Roe Co.*, 186 F.3d 717, 723 (6th Cir. 1999) ("It would be extreme to hold that all information for which someone might potentially make a FOIA request is 'publicly disclosed.'"). In reaching that conclusion, the court recognized a distinction between actual and merely theoretical availability. *Id.* (discussing *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519–20 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997)).

"only for actions based on qualifying disclosures made to the public." *Rost*, 507 F.3d at 728. If a disclosure to the government in an audit or investigation would be sufficient to trigger the bar, the term "public" would be superfluous. *Id.* at 729 ("If providing information to the government were enough to trigger the bar, the phrase 'public disclosure' would be superfluous."). Moreover, the Seventh Circuit's interpretation, which equates "government" with "public," is inconsistent with other uses of the term "government" in the FCA. *Id.* at 728; *accord 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"). The public-disclosure bar "clearly contemplates that the information be in the public domain in some capacity and the Government is not the equivalent of the public domain." *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004); *see also United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1518 (9th Cir. 1995) ("information that was 'disclosed in private' has not been publicly disclosed"). Accordingly, we conclude that Erlanger's 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.

Alternatively, Erlanger maintains that there was a prior public disclosure of fraud in the administrative audit and investigation to others outside the government who were "strangers to the fraud." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (finding innocent

employees were "strangers to the fraud"); *but see Schumer*, 63 F.3d at 1518–19 (declining to adopt *Doe*). In *Doe*, an investigator divulged allegations of fraud to the defendant's employees while a search warrant was being executed. 960 F.2d at 322. The court found that many of the employees were "strangers to the fraud" who knew nothing about the scheme, were not targets or potential witnesses, and were under no obligation to keep the information confidential when they learned of the fraud. *Id.* at 322–23. Erlanger points specifically to disclosures between OIG and AdvanceMed and between Erlanger and the Deloitte auditors. Neither constituted a public disclosure of fraud that would trigger the public-disclosure bar.

With respect to AdvanceMed, the district court relied on two disclosures in the administrative audit or investigation of information that revealed the same kind of fraud alleged by Whipple: (1) when the OIG referred the anonymous complaint for review by AdvanceMed; and (2) when the OIG referred the matter for administrative resolution by AdvanceMed. Although AdvanceMed is a private corporation, there is no question that AdvanceMed received the information in question in its capacity as the Medicare Part A Program Safeguard Contractor for Tennessee, and for the purpose of acting on behalf of the government as part of the administrative audit and investigation. Further, these disclosures were confidential and remained so until after this action was filed.

Having concluded that some disclosure outside the government is required, there is no basis to

conclude that these disclosures to AdvanceMed were "public." *See Maxwell*, 540 F.3d at 1184–86 (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); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1521 n.4 (10th Cir. 1996) (holding disclosure among government employees does not constitute public disclosure). Indeed, the Ninth Circuit has held in an analogous situation that the government's dissemination of an audit report to a private company hired by the government to audit the contract was not a public disclosure for purposes of § 3730(e)(4). *See Berg v. Honeywell Int'l, Inc.*, 502 F. App'x 674, 676 (9th Cir. 2012). Distinguishing an earlier case in which the government disclosed information to an "outsider" to the investigation, the court held that the government contractor "was not an 'outsider' to the investigation, but rather was acting on behalf of the government and had an incentive to keep confidential the information learned during its audit." *Id.*

Finally, we accept, as the district court did, the evidence that, with the approval of the OIG's Office, Erlanger engaged Deloitte to assist in its investigation of the issues concerning the inpatient billing raised by AdvanceMed. In particular, an internal OIG investigative report and the letter from Erlanger's counsel to the OCIG's Office summarizing the investigation and results of Erlanger's internal review both indicated that Erlanger provided seven Deloitte auditors with specific information

concerning the issues raised by the OIG's Office of Investigations. Why, however, disclosure of that information to the Deloitte auditors should constitute a "public disclosure" is not clear.

Erlanger asserts that the Deloitte auditors were "strangers to the fraud." It is true that, like the "innocent employees" in *Doe*, the auditors were not alleged to have participated in the fraudulent billing, and were not potential witnesses. However, it cannot be said that they were under no obligation to keep the information confidential. Deloitte was engaged to assist Erlanger in responding to the government's audit and investigation, and the information was disclosed by Erlanger in order for Deloitte to evaluate the billing issues raised and conduct a broader independent audit to determine the scope of those issues. The results of Erlanger's internal investigation, including Deloitte's findings, were presented to the government. The disclosure of the information by Erlanger to the Deloitte auditors in the course of their work did not release the information into the public domain, and was more akin to the "private" disclosure to the defendant's employees in *Schumer*. Further, to the extent that the disclosures are considered to have been made through the government's audit and investigation, the Deloitte auditors cannot be said to have been "outsiders" to that investigation. *See Seal I v. Seal A*, 255 F.3d 1154, 1161–62 (9th Cir. 2001); *cf. United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 523–24 (9th Cir. 1999) (holding disclosures in internal corporate investigation were not made in an administrative audit and investigation under § 3730(e)(4)).

Accordingly, the district court's dismissal of Whipple's short-stay, same-day-surgery, and renal-dialysis claims as barred under § 3730(e)(4) is **REVERSED** and the matter is **REMANDED** for further proceedings consistent with this opinion.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT WHIPPLE	)	
	)	
v.	)	NO. 3-11-0206
	)	JUDGE CAMPBELL
CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY	)	

MEMORANDUM

(August 26, 2013)

Pending before the Court is Defendant's Motion for Summary Judgment (Docket No. 96). For the reasons stated herein, Defendant's Motion for Summary Judgment (actually a Motion for Partial Summary Judgment) is GRANTED, and Plaintiff's claims related to Short Stay Claims, Same Day Surgery Claims, and Renal Dialysis Claims are DISMISSED.[1]

[1] Basically, short stay claims involve allegations of billing patients for inpatient care when they should have been billed as outpatient or observation. Same day surgery claims involve allegations of improperly adding observation charges to claims for outpatient surgeries. Renal dialysis claims involve allegations that Defendant improperly billed certain dialysis procedures as inpatient claims when they should have been billed as outpatient or observation.

FACTS

Plaintiff brought this action pursuant to the False Claims Act ("FCA"),[2] 31 U.S.C. § 3729 *et seq*., alleging that Defendant intentionally defrauded the United States by knowingly submitting fraudulent reimbursement claims to Medicare, Medicaid, Tricare/Champus, and other federally funded government healthcare programs. Plaintiff alleges that he discovered Defendant's fraudulent behavior in 2006 while working as a Revenue Cycle Consultant for ACS Healthcare Solutions and performing auditing services for Defendant related to its billing procedures for government healthcare programs. Complaint (Docket No. 1). The United States and the States of Tennessee, North Carolina and Georgia declined to intervene herein.

Defendant previously moved to dismiss this action for lack of subject matter jurisdiction, contending that Plaintiff's claims are barred by the "Public Disclosure Bar." The Court determined that this issue should be decided on a Motion for Summary Judgment after limited discovery. Docket No. 71-72.[3] In the pending Motion for Summary Judgment, Defendant claims that Plaintiff's allegations relating to Short Stay Claims, Same Day Surgery Claims, and Renal Dialysis Claims are

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[2] A FCA lawsuit is sometimes referred to as a *qui tam* action.

[3] A challenge under the FCA jurisdictional bar is necessarily intertwined with the merits and is, therefore, properly treated as a motion for summary judgment. *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 326 (5th Cir. 2011).

barred by the Public Disclosure Bar,[4] because these allegations and transactions were publicly disclosed during an audit and investigation that lasted more than three years and resulted in Defendant's payment of almost $500,000 to the government to resolve the allegations.

SUMMARY JUDGMENT

Because this is a factual attack on subject matter jurisdiction under the FCA, the Court is empowered to weigh the evidence and no presumptions apply as to the truthfulness of the relator's allegations. *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717, 722 (6th Cir. 1999). The Court is free to weigh the evidence and resolve factual disputes so as to satisfy itself as to the existence of its power to hear the case. *Hornberger v. Tennessee*, 782 F.Supp.2d 561, 564 (M.D. Tenn. 2011) (non-FCA case).

Relator bears the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof. *United States ex rel. Grynberg v. Pacific Gas and Electric Co.*, 562 F.3d 1032, 1045 (10th Cir. 2009).

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[4] Plaintiff also contends that Defendant improperly billed Medicare for services related to carotid artery stents. Complaint, ¶¶ 166–171. Defendant concedes that the carotid artery stent claims were not within the scope of the alleged public disclosures that occurred between 2006 and 2009. Docket No. 97.

PUBLIC DISCLOSURE BAR

WHICH STATUTE APPLIES

As a preliminary matter, the parties ask the Court to determine which version of the Public Disclosure Bar provisions to apply — the statute before the Patient Protection and Affordable Care Act of 2010 or the statute as it exists today. The former was in effect at the time of the alleged misconduct, and the latter was in effect at the time this action was filed.

The Supreme Court has noted that the 2010 amendments to the FCA make no mention of retroactivity, *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S.Ct. 1396, n.1 (2010), and, relying on *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), declined to apply the 2010 amendments to a case pending at the time of the amendments. In *Hughes*, the Court relied on the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place, noting that this principle has "timeless and universal appeal." *Hughes*, 520 U.S. at 946.

More recently, a District Court in Georgia, citing *Graham* and *Hughes*, applied the statute as it existed at the time of the alleged misconduct. *United States ex rel. Saldivar v. Fresenius Medical Care Holdings, Inc.*, 906 F.Supp. 2d 1264, 1272, n.2 (N.D. Ga. 2012). Another court, noting *Graham*'s holding that the new version of this statute should not be considered retroactive, analyzed the action before it under the

former statute but also addressed the effect of the current statute on the relator's claims. *United States v. Smith & Nephew*, 749 F.Supp.2d 773, 781 (W.D. Tenn. 2010); *see also Little v. Shell Exploration & Production Co.*, 690 F.3d 282, 292 (5th Cir. 2012) (applying preamendment statute because text not retroactively applicable).

Defendant cites *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503 (6th Cir. 2009) for the argument that the jurisdiction of the court depends upon the state of things at the time the action was brought.[5] *See also United States ex rel. Bartz v. Ortho-McNeil Pharmaceutical, Inc.*, 856 F.Supp.2d 253, 260 (D. Mass. 2012) (basis for jurisdiction must be apparent from the facts existing at the time the complaint is brought).

Applying the reasoning of *Graham* and *Hughes*, the Court finds that the alleged misconduct should be judged under the statute as it existed at the time of that alleged misconduct. On the other hand, the Court finds that the jurisdiction of the Court should be determined under the statute as it existed at the time this action was filed. The Court finds, however, that under either statute, Plaintiff's action is barred by the Public Disclosure Rule.

PUBLIC DISCLOSURE STATUTES

The FCA's public disclosure provision limits the subject matter jurisdiction of federal courts over *qui tam* actions based upon previously disclosed

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[5] *Poteet* pre-dates the 2010 amendments, and therefore could not have considered which Public Disclosure Bar provisions to apply.

information. *Poteet*, 552 F.3d at 511. The statute, as it existed before 2010, provides:

> 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.

31 U.S.C. § 3730(e)(4)(A) (pre-2010).[6]

Subsection (B), prior to the 2010 amendments, defined "original source" as an individual who has

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[6] The current version of this public disclosure statute 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 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.

31 U.S.C. § 3730(e)(4)(A).

direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing the action under this section which is based on the information. 31 U.S.C. § 3730(e)(4)(B) (pre-2010).[7]

PUBLIC DISCLOSURE

To determine whether this jurisdictional bar applies, the Court must consider first whether there has been any public disclosure of fraud, and secondly, whether the allegations in the instant case are based upon the previously disclosed fraud. *Poteet*, 552 F.3d at 511.

Defendant alleges that Plaintiff's allegations were previously raised and made public in connection with a 2006–2009 audit and investigation. Defendant also maintains that Plaintiff's Complaint is based upon those publicly disclosed allegations and transactions.

Plaintiff contends that fraudulent activity was never revealed to the government and that the government's information was never disclosed to the public. Plaintiff also argues that his Complaint is not based upon any alleged public disclosures but,

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[7] The current statute defines "original source" as an individual who either: (1) prior to a public disclosure has voluntarily disclosed to the government the information on which allegations or transaction 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 voluntarily provided the information to the government before filing an FCA action. 31 U.S.C. § 3730(e)(4)(B).

rather, upon Plaintiff's own direct and independent knowledge.

For Plaintiff's *qui tam* action to be barred by the Public Disclosure Rule, the disclosure must have (1) been public, and (2) revealed the same kind of fraudulent activity against the government as alleged by Plaintiff herein. *Poteet*, 552 F.3d at 511. Stated another way, the Court must determine (1) whether there has been a public disclosure in the enumerated hearings, reports, audits or investigations or the news media (2) of the allegations or transactions which form the basis of Plaintiff's complaint and (3) whether this action is based upon the publicly disclosed allegations or transactions. *United States ex rel. Gale v. Omnicare, Inc.*, 2012 WL 4473265 at *4 (N.D. Ohio Sept. 26, 2012) (citing *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 330 (6th Cir. 1998)). If the answer is "no" to any of these inquiries, then the *qui tam* action may proceed. If the answer is "yes," then the Court must determine whether Plaintiff qualifies as an "original source" under the statute, which would also allow this action to proceed. *Gale* at *4; *Jones* at 330.

For purposes of the Public Disclosure Rule, a "public disclosure" occurs when the critical elements exposing the transaction as fraudulent are placed in the public domain. *United States ex rel. Yarberry v. Sears Holding Corp.*, 2013 WL 12987058 at *7 (S.D. Ill. March 28, 2013). A public disclosure brings to the attention of the relevant authority that there has been a false claim against the government. *Id.* A public disclosure reveals fraud if the information is

sufficient to put the government on notice of the likelihood of related fraudulent activity. *United States ex rel. Robinson-Hill v. Nurses' Registry and Home Health Corp.,* 2012 WL 4598699 at *11 (E.D. Ky. Oct. 2, 2012) (citing *Poteet*, 552 F.3d at 512). The key issue is whether enough information exists in the public domain to expose the fraudulent transaction or the allegation of fraud. *Robinson-Hill* at *11. All that is required is that public disclosures put the government on notice to the *possibility* of fraud. *Poteet*, 552 F.3d at 512. To qualify as a public disclosure of fraud, the disclosure is not required to use the word "fraud" or provide a specific allegation of fraud. *Id.*

Plaintiff argues that disclosure to the government is not sufficient to qualify as "public disclosure." There is a conflict in the case law as to whether disclosure to the government is "public disclosure" under this provision.

The U.S. District Court for the Western District of Tennessee has held that disclosure to government officials does not substitute for disclosure to the public. *Smith & Nephew*, 749 F.Supp.2d at 784 (citing, among others, *United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007, *abrogated on other grounds, Allison Engine Co. v. United States ex rel Sanders*, 128 S.Ct. 2123 (2008)); *see also Bartz.*, 856 F.Supp.2d at 260 ("While the allegations need not be common fodder, they must be disseminated beyond the government's inner precincts.").

Another court has held that disclosure of information to a competent public official about an alleged false claim against the government is "public

disclosure" within the meaning of the Public Disclosure Bar when the official is authorized to act for or to represent the community on behalf of government. *United States ex rel. Lancaster v. Boeing Co.*, 778 F.Supp.2d 1231, 1244 (N.D. Okla. 2011). "The point of public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large about the dangers of misappropriation of their tax money." *Id.* Public disclosure occurs only when the allegations of fraudulent transactions are affirmatively provided to others not previously informed thereof. *Id.* at 1245. The Sixth Circuit has stated that a prior disclosure of fraud is public if it is made in a congressional, administrative or Government Accounting Office report, audit or investigation. *Poteet*, 552 F.3d at 512.

In this case, Defendant maintains that the information was publicly disclosed to more than just the government, through the investigations, oversights and audits conducted by the government, consultants, attorneys and contractors.

For example, the Office of Inspector General ("OIG") agent instructed AdvanceMed Corporation, the Medicare Part A Program Safeguard Contractor for Tennessee, to review the allegations that Defendant was improperly billing observation patients as inpatients. Docket No. 117, ¶ 25. Defendant engaged outside counsel, King & Spalding, to assist with the OIG investigation. *Id.*, ¶ 39. Then Defendant and its counsel engaged Deloitte Financial Advisory Services as an independent billing consultant. *Id.*, ¶ 42.

At a later point, the OIG agent informed and consulted with the U.S. Attorney's Office for the Eastern District of Tennessee about the AdvanceMed "Fraud Case Referral" concerning Defendant. Docket No. 117, ¶¶ 55–56; Docket No. 107-16. During this time period, Defendant also apprised Lee Penninger, monitor from the Office of Counsel to the Inspector General, of the ongoing developments related to the audit and investigation. *See, e.g.,* Docket No. 107-16.

An OIG Report of Investigative Activity concerning Defendant (Docket No. 107-15) states that "Experts with specific knowledge of the issues in question have been secured and have already begun the process of reviewing/auditing the billing." Counsel's June 26, 2008 letter to OIG reflects that the investigation included an "independent audit process and findings" and states that it was acceptable for Defendant to engage independent auditors, which included seven persons from Deloitte. Docket No. 107-7. That letter also reflects that at least ten of Defendant's employees were interviewed by attorneys and auditors regarding the allegations. *Id.*[8]

In *Gale*, the court characterized an audit and administrative hearing as public disclosures under the FCA. *Gale*, 2012 WL 4473265 at *4 (court applied the public disclosure bar even though the previous public disclosures dealt with a subsidiary). In *United*

[8] Plaintiff cites cases which hold that disclosures pursuant to Freedom of Information Act ("FOIA") requests are public disclosures. This is not a FOIA case, however. There is no requirement that information must be available through a FOIA request in order to be publicly disclosed.

States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System, 384 F.3d 168 (5th Cir. 2004), the court held that audits conducted by fiscal intermediaries and investigation conducted by Health Care Financing Administration resulted in "public disclosures" of the information underlying the relator's complaint. *Id.* at 175.

The Sixth Circuit has found two types of disclosures sufficient to put the government on notice of fraud. *Poteet*, 552 F.3d at 512. First, if the information about both a false set of facts and the true state of facts has been disclosed, the court will find that there is adequate public disclosure because fraud is implied. *Id.* Second, if there has been a direct allegation of fraud, the court will find a public disclosure because such an allegation, regardless of the specificity, is sufficient to put the government on notice of the potential existence of fraud. *Id.* at 513.

Here, the prior audit and investigation included disclosure of the true set of facts (what should have been billed) and the false set of facts (what was actually billed) for specific claims. As noted above, if the information about both a false set of facts and the true state of facts has been disclosed, the court will find that there is adequate public disclosure because fraud is implied.

Therefore, since the information has been publicly disclosed, the Court must determine whether the information which was publicly disclosed forms the basis of Plaintiff's Complaint herein.

BASIS FOR PLAINTIFF'S COMPLAINT

A complaint is based upon a public disclosure when it is supported by the previously disclosed information. *Poteet*, 552 F.3d at 514. To determine whether an action is based upon a public disclosure, a court should look to whether substantial identity exists between the publicly disclosed allegations or transactions and the *qui tam* complaint. *Id.* Any action based even partly upon public disclosures will be jurisdictionally barred. *Id.*

The allegations of Plaintiff's Complaint at issue herein concern Short Stay Claims, Same Day Surgery Claims, and Renal Dialysis Claims. Plaintiff alleges that Defendant improperly billed the government for these types of claims in 2005–2006, essentially arguing that the amounts billed were not the amounts which should have been billed, resulting in overpayments to Defendant. The prior investigation and audit included claims from 2005–2006 associated with short stays, same day surgeries, and renal dialysis, claims which were allegedly improperly billed.

For example, the Opening Investigative Memorandum of the OIG indicates that review of the 2005–2006 claims based on inpatient stays revealed "errors" in billing for services without a valid admission order from the physician; billing for inpatient services that should have been billed as outpatient services; billing for inpatient services when the physician ordered observation status; and billing for services that do not support the Diagnosis Related Group (DRG) code billed. Docket No. 107-13. The OIG's Opening Memorandum also noted that the

alleged violations were 18 U.S.C. § 1347 Healthcare Fraud and 18 U.S.C. § 287 False Claims, which are federal criminal statutes.[9] *Id.*

A "Fraud Case Referral" letter, dated July 3, 2007, from AdvanceMed to OIG indicates that Defendant was upcoding outpatient observation claims as inpatient claims. Docket No. 107-11. This behavior is characterized as "alleged fraudulent billing practices." *Id.* The letter also reflects that OIG asked AdvanceMed to review the allegations and refer the matter to OIG "should fraud issues arise." *Id.* This letter reflects that AdvanceMed *did* refer the results of its investigation to OIG. *Id.* The four categories of potential "overpayments" identified by AdvanceMed in its referral were (1) inpatient services without a valid physician order; (2) inpatient services that should have been billed as observation services; (3) inpatient services when the physician had ordered observation services; and (4) services that did not meet Medicare medical necessity standards for inpatient admission. *Id.*[10]

Defendant's Chief Compliance Officer has testified that areas of concern to OIG in the spring of 2008 included billing for inpatient short stays and observation stays and questions about inpatient versus outpatient status. Docket No. 107-26, ¶ 21. She and Defendant's counsel also informed OIG that

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[9] The OIG Closing Memorandum included this same language. Docket No. 107-

[10] The Fraud Case Referral noted that admissions were inappropriately ordered, including routine renal dialysis, which is typically performed with a short-stay expectation and thus is usually an outpatient procedure. Docket No. 107-11.

Deloitte was conducting a "broad-based review of the short stay-related issues." Docket No. 117, ¶¶ 44 and 50.

In counsel's report to the OIG concerning the governmental inquiry, she identifies that OIG was concerned about the following Short-Stay Admission/Observation Issues: billing for inpatient services without a valid physician admission order; billing for inpatient services which should have been billed as outpatient observation services; billing for inpatient services when the physician ordered observation services; and billing for services that did not support the DRG Code for inpatient charges. Docket No. 107-7.

Similarly, Plaintiff's Complaint alleges that Defendant improperly billed patients as inpatients instead of outpatients or observation patients. Plaintiff contends that Defendant's employees changed the admission statuses of patients, sometimes even after discharge, to bill at the higher inpatient rate. Plaintiff avers that Defendant billed outpatient surgeries to the Government with illegal, medically unnecessary, observation admission status charges. Plaintiff asserts that Defendant fraudulently billed patients that met outpatient and observatory admission criteria as inpatients so as to be reimbursed for unauthorized renal dialysis services that are reimbursable only for patients admitted as inpatients. Docket No. 1, ¶ 112.

The Court finds that Plaintiff's allegations with regard to these short-stay and renal dialysis admissions are based upon and supported by the prior investigations by Defendant, AdvanceMed,

Deloitte and OIG. The information gathered by these investigators, auditors, employees, attorneys and government agencies was sufficient to put the Government on notice that Defendant was submitting improper and allegedly fraudulent bills. That they ultimately found no fraud does not automatically mean that the same information was not disclosed to them. They had information about possible fraud — the misrepresented state of facts and the true state of facts.

As noted above, a public disclosure reveals fraud if the information is sufficient to put the government on notice of the likelihood of related fraudulent activity. *Robinson-Hill*, 2012 WL 4598699 at *11. The key issue is whether enough information exists in the public domain to expose the fraudulent transaction or the allegation of fraud. *Id.*

The alleged billing improprieties were brought to the attention of the government through an anonymous call, not by Plaintiff. The government initiated the 2006–2009 audit and investigation; Plaintiff did not. The information discovered in that audit and investigation was not simply "innocent" information; rather, the information alerted the government to potentially fraudulent activity and apprised the government of the discrepancies between what was billed and what should have been billed.[11]

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[11] As Plaintiff points out, the question is whether the disclosed information suggests an inference of impropriety. Docket No. 116, p. 29 (citing *Jones*, 160 F.3d at 331).

For all these reasons, the Court finds that Plaintiff's Complaint herein is based upon and supported by the information which was publicly disclosed in the prior investigations. Because the Court has determined that Plaintiff's allegations were based upon public disclosure, Plaintiff must show that he was an "original source" for the Court to have jurisdiction over this action.

ORIGINAL SOURCE

An "original source" is 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 the action under this section which is based on the information. 31 U.S.C. § 3730(e)(4)(B) (pre-2010). Thus, under the prior law, Plaintiff must establish two elements to prove he is an original source: both (1) direct and independent knowledge and (2) voluntary provision of the information to the government before filing suit. *Burns*, 186 F.3d at 725.

The word "direct" requires knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others. *Reagan*, 384 F.3d at 177. The relator's knowledge is considered "independent" if it is not derived from the public disclosure. *Id*. Another court has stated: "Independent knowledge is knowledge that does not depend on public disclosures [. . .] [d]irect knowledge is knowledge obtained without any intervening agency, instrumentality or influence." *United States Dept. of Transp. ex rel. Arnold v. CMC Engineering*,

745 F.Supp.2d 637, 643 (W.D. Pa. 2010); *see also United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 59 (1st Cir. 2009) (knowledge based on research into public records, review of publicly disclosed materials, or some combination thereof, is not direct).

Secondhand information, speculation, background information, or collateral research do not satisfy a relator's burden of establishing the requisite knowledge. *Grynberg*, 562 F.3d at 1045. A relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed. *Id.* The fact that a relator has background information or unique experience allowing him to understand the significance of publicly disclosed allegations and transactions is also insufficient. *Id.* "If a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed." *Ondis*, 587 F.3d at 59.

The alleged misconduct in this case took place before Plaintiff worked for Defendant, so Plaintiff's knowledge thereof was secondhand. Plaintiff worked at Defendant's facility from early 2006 until mid-summer 2006. He has no first-hand knowledge concerning the circumstances surrounding the submission of claims before his arrival or concerning the decisions made at the time of submission whether to bill those claims as inpatient, outpatient or observation stays. Plaintiff argues that he was able to discover the allegedly fraudulent claims by

applying his personal experience and knowledge to the "raw data." Even though Plaintiff obtained information during the scope and course of his employment, that information was from other sources, including spread sheets and medical records from past submissions. Plaintiff has not shown that he was involved in or witnessed any fraudulent activity while he was at Defendant's facility.

There is no dispute that Plaintiff provided information to the government before filing this action. The Court finds, however, that, under the pre-2010 statute, Plaintiff did not have direct and independent knowledge of the alleged misconduct.

Alternatively, under the current statute, "original source" is one who either (i) prior to a public disclosure has voluntarily disclosed to the government the information upon which allegations or transactions in a claim are based or (ii) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the government before filing his FCA action. 31 U.S.C. § 3730(e)(4)(B).

Plaintiff does not contend that he falls under subsection (i). Rather, Plaintiff argues that he has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions. Again, there is no dispute that Plaintiff provided the information to the government before filing this action.

Plaintiff specifically asserts that he materially adds to the prior investigation by bringing forth facts

to demonstrate the required scienter to prove fraud. As stated above, however, the scope of the prior investigations offered ample opportunities for others to determine whether scienter existed, whether Defendant intentionally lied to the government. Just because Plaintiff does not agree with what those investigators found does not mean that he is an original source under the FCA.

In *Reagan*, the court found that if the relator informed the government of anything that was new and independent from the earlier audits and investigations, it was only her disagreement with the results of the prior investigative work; that is, that the auditors and investigators simply failed to recognize fully the fraudulent nature of the defendants' activities. *Reagan*, 384 F.3d at 178. "This proffer is not information obtained from 'independent' knowledge; it is only a difference of opinion with respect to the same information." *Id.*

Similarly, here, Plaintiff contends that what was not "publicly disclosed" was fraudulent intent; that is, the auditors, investigators and government failed to find the fraudulent nature of what they characterized as billing errors and overpayments. Plaintiff basically argues that the government, auditors, attorneys, investigators and Defendant did not do enough, did not do a thorough job, did not find the "right" answers. *See, e.g.,* Docket No. 116, pp. 13 and 27. Plaintiff's disagreement with how the investigation was conducted and how the matter was administratively resolved is not the issue. As Defendant notes, the issue is not whether the government could or should have done more to

investigate these improper and allegedly fraudulent submissions.

The Court finds that the information upon which Plaintiff's federal claims for Short Stay Claims, Same Day Surgery Claims, and Renal Dialysis Claims are barred by the Public Disclosure laws.

STATE LAW CLAIMS

Tennessee, North Carolina and Georgia have "public disclosure" statutes which basically mirror the federal law. Tenn. Code Ann. § 71-5-183(e)(2); N.C. Gen. Stat. § 1-611(d); and Ga. Code Ann. § 49-4-168.2. The Court finds nothing to distinguish the analysis under these state law provisions from the above analysis under federal law.

Therefore, for the same reasons that Plaintiff's claims are barred under federal law, the Court finds that the claims at issue are barred under the three states' laws cited above.

CONCLUSION

Therefore, for these reasons, the Court finds that Plaintiff's federal and state law claims regarding Short Stay Claims, Same Day Surgery Claims, and Renal Dialysis Claims are barred by the Public Disclosure Bar, and this Court lacks jurisdiction to hear those claims. Defendant's Motion for Partial Summary Judgment on these claims is GRANTED.

IT IS SO ORDERED.

/s/
TODD D. CAMPBELL
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT WHIPPLE	)	
	)	
v.	)	NO. 3-11-0206
	)	JUDGE CAMPBELL
CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY	)	

ORDER

(August 26, 2013)

Pending before the Court is Defendant's Motion for Summary Judgment (Docket No. 96). For the reasons stated in the accompanying Memorandum, Defendant's Motion (which is actually a Motion for Partial Summary Judgment) is GRANTED. Plaintiff's Short Stay Claims, Same Day Surgery Claims, and Renal Dialysis Claims are DISMISSED.

IT IS SO ORDERED.

/s/
TODD D. CAMPBELL
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT WHIPPLE	)	
	)	
v.	)	NO. 3-11-0206
	)	JUDGE CAMPBELL
CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY	)	

STIPULATION OF DISMISSAL OF
CAROTID ARTERY STENTING CLAIMS

(November 25, 2013)

Relator Robert Whipple ("Relator") and Defendant Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Medical Center and Erlanger Health System ("Defendant") (collectively, the "Parties") respectfully submit the following Stipulation of dismissal:

In view of the Court's Order entering partial summary judgment [Dkt. Nos. 133–34], the only pending claims before the Court are Relator's allegations relating to carotid artery stent procedures ("CAS allegations"). *See* Complaint ¶¶ 166–171. Relator hereby agrees to voluntarily dismiss the remaining claims in this matter without prejudice to himself, the United States, and the states of Tennessee, Georgia, and North Carolina. The United States has informed Relator that it will be filing its own consent to dismissal. The States have advised

through counsel that they consent to dismissal of these claims without prejudice.

Defendant consents to dismissal and agrees not to file any counterclaims against Relator nor make any allegations as to violations of FRCP 11 by Relator or his counsel arising out of Relator's CAS allegations. If this case is appealed and remanded in whole or part to this Court, Defendant retains the right to file counterclaims and make allegations as to violations of FRCP 11 with respect to the claims dismissed by this Court's August 26, 2013 Order (Dkt. No. 134), and not relating to the CAS allegations that will be dismissed pursuant to this Stipulation. The time for filing any appeal will begin to run upon entry of an Order of Dismissal by this Court, as such an Order will constitute a final judgment on the merits.

IT IS SO ORDERED.

/s/
TODD D. CAMPBELL
UNITED STATES DISTRICT JUDGE

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-6645

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

ROBERT WHIPPLE,

Plaintiff-Appellant,

v.

CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY, dba Erlanger Medical Center, dba Erlanger Health System,

Defendant-Appellee.

April 20, 2015

Before: GUY, CLAY, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Appendix F

United States Code, 2009 Edition
Title 31 – Money and Finance
Subtitle III – Financial Management
Chapter 37 – Claims
Subchapter III – Claims Against the United States Government
Sec. 3730 – Civil actions for false claims

* * *

(e) Certain Actions Barred.—

* * *

(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 Accountability] 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.

* * * *

United States Code, 2010 Edition
Title 31 – Money and Finance
Subtitle III – Financial Management
Chapter 37 – Claims
Subchapter III – Claims Against the United States Government
Sec. 3730 – Civil actions for false claims

* * *

(e) Certain Actions Barred.—

* * *

(4) (A) 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—

(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.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a

claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

* * * *