No. 05-1272

In the Supreme Court of the United States

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

PETITIONERS,

v.

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

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONERS ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.

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QUESTION PRESENTED

Whether the Tenth Circuit erred by affirming the entry of judgment in favor of a *qui tam* relator under the False Claims Act, based on a misinterpretation of the statutory definition of an "original source" set forth in 31 U.S.C. § 3730(e)(4)?

LIST OF PARTIES

Petitioners Rockwell International Corp. and Boeing North American, Inc., were the appellants in the Tenth Circuit. The respondents are the United States of America and the United States of America *ex rel.* James S. Stone.

RULE 29.6 STATEMENT

Petitioner Rockwell International Corp. was renamed Boeing North American, Inc. Petitioner Boeing North American, Inc. has since been merged into The Boeing Company. State Street Bank and Trust Company beneficially owns 10% or more of The Boeing Company's stock.

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JURISDICTION

The Tenth Circuit denied rehearing and rehearing *en banc* on January 4, 2006. Pet. App. 56–57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The text of 31 U.S.C. §§ 3729 and 3730 is reprinted in the appendix to this brief.

STATEMENT OF THE CASE

This is a *qui tam* action brought under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–33, by James S. Stone, a former employee at the Rocky Flats nuclear weapons plant in Golden, Colorado. Rockwell International Corporation ("Rockwell")[1] operated Rocky Flats for the Department of Energy ("DOE"). The jury found that Rockwell secured payments from DOE in violation of the FCA by making false statements concerning a stored waste form known as "pondcrete." *See* Pet. App. 18a, 50a; JA 402-06, 416-17, 548-50; Tr. 5290. Pondcrete was manufactured by mixing sludge from solar evaporation ponds with Portland cement, pouring the resulting mixture into large boxes, and allowing it to solidify. JA 467; Tr. 982. This was the "generally accepted" method to handle such wastes. Tr. 4739, 4815. Stone and the United States argued to the jury that pondcrete blocks at Rocky Flats failed to solidify because Rockwell employees cut the amount of cement being added to the mixture. *See, e.g.*, Tr. 5177.

From the outset of this case, it has been undisputed that Stone's pondcrete claims were based on "allegations or transactions" that had been previously disclosed to the public, and that the *qui tam* provisions of the FCA accordingly barred Stone's claims unless he qualified as an "original source" within the meaning of 31 U.S.C.

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[1] In 1996, The Boeing Company acquired Rockwell and changed its name to Boeing North American, Inc. Thereafter the contract between Rockwell and DOE for management of Rocky Flats was amended to reflect the contractor's name change.

§ 3730(e)(4)(B).[2] *See* JA 312–13 & n.2; CA App. 1408–58; *see also infra* note 7 and accompanying text. The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing" the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B).

The undisputed facts establish that Stone had no firsthand knowledge of the fraud at issue because his employment was terminated more than a year before all of the events that gave rise to the jury's finding of liability. *See* Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). Stone instead claims to have *predicted* the fraud based on incidents that occurred years before. He claims to have *predicted* that pondcrete would be insolid because he had concerns about the proposed design of a piping system reflected in an Engineering Order (which had nothing to do with why the pondcrete actually later failed), and to have *predicted* that Rockwell would ultimately make false claims about it based on his general observation of Rockwell's corporate culture and handling of different environmental issues during the time he was employed there. The Court of Appeals held that these speculative inferences and predictions qualified as "direct and independent knowledge" of the later fraud because it interpreted the statute to require only limited "knowledge 'underlying or supporting' the fraud allegation." Pet. App. 20–21a. Applying that standard, it made no difference that Stone did not even claim to have direct knowledge of the key false statements and environmental violations that he actually sought to prove at trial. As Judge Briscoe explained, the "direct and independent knowledge possessed by" Stone was so tangential that it "could have been omitted entirely at trial

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[2] The Tenth Circuit found—based on the jury's verdict, record evidence as to the timing of Stone's allegations, and Stone's own concessions—that Stone could only prevail if he qualified as an original source of "his 'pondcrete' claims." Pet. App. 50–51a; *see also infra* note 5.

without affecting the outcome." Pet. App. 48a. Indeed, it was. Stone did not testify, and the Engineering Order allegedly representing his "original" information about pondcrete was never even introduced into evidence.

The Court of Appeals also held that Stone's production of that irrelevant Engineering Order, buried in 2,300 pages of documents, was itself sufficient to meet his additional burden of proving that he "voluntarily provided the information" on which the allegations of his action were based "to the Government before filing." 31 U.S.C. § 3730(e)(4)(B). In other words, the court held that Stone satisfied this central statutory limitation on jurisdiction by delivering a single page of paper, even though the piping problem Stone claims to have predicted from that Order did not in fact occur and had nothing to do with his allegations at trial. Indeed, the Order does not even spell out Stone's supposed prediction and Stone failed to prove that he ever explained the Order's significance to the Government.

Procedural History

1. Background. The pondcrete problem at Rocky Flats developed after Stone left. Stone worked at Rocky Flats between November 1980 and March 1986, when he was laid off as part of a reduction in force. Pet. App. 3a; CA App. 85, 105. In June 1985, Rockwell began manufacturing pondcrete as a method of disposing of waste materials. CA App. 1824. During Stone's tenure at Rocky Flats, the pondcrete blocks that were manufactured came out "concrete hard." *See* Tr. 5177 (foreman Fryback "was able to get concrete hard pondcrete blocks"); Tr. 4884–85 (Fryback replaced in October 1986). On July 31, 1986, four months after Stone left Rocky Flats, DOE and the Environmental Protection Agency ("EPA") "entered into a compliance agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were" regulated by the Resource Conservation and Recovery Act ("RCRA"). JA 52. Prior to this time, it was unclear whether RCRA applied at all to mixed wastes such as pondcrete. *Id.*; CA App. 0790, 2031–32. After this agreement was reached, Rockwell came

under pressure to "substantially increase[]" the "rate of production" of pondcrete blocks. Tr. 618, 595–96.

In May of 1988, several insolid pondcrete blocks were discovered on an outdoor pad where they were stored. Tr. 601–02, 631–32, 1124–25; JA 486. This discovery prompted a canvass revealing "several thousand boxes" of insolid pondcrete. Tr. 636–38, 784–87. The media reported that the pondcrete blocks, which were "supposed to be solid," actually "had the consistency of mayonnaise" because instead of mixing "3.5 pounds of cement" into every "1 gallon of the sludge," workers had used only "1.8 pounds of cement to 1 gallon of sludge." CA App. 889-38–39, 1343–45.

2. The Government Investigation. Before Stone filed this action, the FBI and the DOE began a "massive" investigation to determine whether Rockwell was concealing RCRA violations at Rocky Flats, making false certifications of compliance with RCRA, and thereby improperly securing payments from DOE. Pet. App. 6–7a; JA 113–28, 133–38, 356, 366–67. Stone played a limited role in that investigation. In 1987 Stone had the first of two documented meetings with Agent Jon Lipsky of the Federal Bureau of Investigation ("FBI"). Pet. App. 73a. Stone's communications with the FBI are memorialized in the FBI's 302 reports. JA 250–67. Those reports show that Stone's principal accusation against Rockwell concerned illegal incineration of hazardous and radioactive wastes. JA 251–52, 256–57, 265. The Government later determined that the incineration charges were meritless. CA App. 803. The 302s make no reference to pondcrete. Pet. App. 73–74a.

Using information developed in his own investigation as well as some information provided by Stone, Agent Lipsky prepared an affidavit that was used to procure a search warrant for Rocky Flats. Pet. App. 4a; *see also* JA 97; Lipsky Aff. ¶¶ 1.20, 6.3, 7.20–22, 8, *attached to* Def.'s Mot. in Limine (Nov. 10, 1997). On June 6, 1989, the FBI and the EPA raided Rocky Flats. Pet. App. 4a. DOE promptly announced its own investigation. JA 113–28, 133–38.

Agent Lipsky's affidavit was unsealed a few days later. Pet. App. 4a. It included the three key allegations that would later form the basis for Stone's FCA action: (1) that pondcrete blocks were insolid "due to an inadequate waste-concrete mixture," JA 429; (2) that Rockwell secured "performance bonus[es] … based on Rockwell's alleged 'excellent' management at Rocky Flats," JA 98; and (3) that Rockwell deceived the Government about its environmental performance, making "false statements and conceal[ing] … material facts … in violation of [RCRA] and 18 U.S.C. §1001." JA 99.

Local papers picked up these "allegations," reporting that "performance bonuses" were "paid to Rockwell based on falsified evaluations." JA 141–44; *see also* JA 113–20, 133–40, 145–57. For example, on June 7, 1989, the Los Angeles Times reported allegations of "concealment of environmental contamination" and referenced a December DOE report that "listed 32 new safety problems." JA 129–32. One of those 32 problems was insolid pondcrete, caused by insufficient cement. *See* Final Pretrial Order, Ex. E at 23, Feb. 4, 1999 (quoting 1988 DOE "Safety Performance Review" of Rocky Flats as describing pondcrete failure due to "use of insufficient cement").

The FBI's investigation of pondcrete was not attributable to information received from Stone. What "led" the FBI to "commence [its] investigation of pondcrete" in the first week of the investigation was the FBI agents' own observation of pondcrete blocks in an area "designated … RCRA Unit 15." Tr. 3515–16. By June 14, Representative Pat Schroeder was publicly calling for Rockwell to return bonus payments to the Government as "reparations," and to pay to "clean[] up pollution 'caused by Rockwell in the first place.'" CA App. 1047.

The Government did not view Stone as a whistleblower. In a statement after the FBI raid, the U.S. Attorney who led the investigation said that the Rocky Flats case was unusual because "at no time … did any knowledgeable 'insider' come forward." JA 343. "Almost always," he

explained, "someone eventually 'cracks' and steps forward to provide an 'insider's' cooperation. That simply did not happen here." *Id.* Instead, the Government discovered the facts through its own efforts, "stringing together thousands of documents to create inferences of criminality." *Id.* The day after the raid, newspapers quoted an unnamed DOJ source who said "[n]o 'whistle blower' was involved." JA 118. The DOJ attorney who led the plea bargain negotiations later told Congress that "candidly … in the criminal investigation we found the information that [Stone] supplied to have very limited usefulness." Add'l Record on Remand filed Apr. 24, 2002, Tab 3(A), at 367.

At the conclusion of the Government's investigation, Rockwell pled guilty to four RCRA violations and six Clean Water Act violations, each of which occurred after Stone left Rocky Flats. Pet. App. 6–7a; JA 50–72. The first two counts in the Plea Agreement charged Rockwell with knowingly storing insolid pondcrete in violation of RCRA. JA 53–57.

3. Stone's FCA Action. Stone hurried to the courthouse and, within a month after the public disclosures of the Government's investigation, filed his *qui tam* lawsuit alleging that Rockwell concealed RCRA violations.[3] Pet. App. 4–5a, JA 43. Stone's complaint was scattershot, covering a broad range of issues and "contain[ing] little or no specification of the statements he believed were false." JA 364; *see also* Pet. App. 4–5a.

When Stone filed his complaint in 1989, he provided the Government with a Confidential Disclosure Statement that disclosed "substantially all [of his] material evidence and information," as mandated by 31 U.S.C. §3730(b)(2). Pet. App. 6a; JA 299. Stone took pains in this Statement to claim that he was "an original source of information" supporting his allegations. JA 277–78. The Statement alleged 26 environmental or safety issues, ranging from alleged illegal

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[3] Stone added a claim for retaliatory discharge that was not present in Agent Lipsky's affidavit. JA 47–48. Stone also brought that claim in state court, and lost. CA App. 0105.

waste incineration to inadequate energy conservation. JA 282–93. Many of these allegations duplicated those in the Lipsky Affidavit. CA App. 137, 190–196, 601–603. Only one concerned pondcrete. JA 289–90. Stone claimed to have reviewed "a design for the process and mechanical system" that would be "used for removing sludge" from solar evaporation ponds "used to treat RCRA hazardous wastes," and to have "fores[een] that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement." *Id.*

While it alleged a general culture "of concealment and cover-ups," JA 278, the Statement did not identify any false statements or claims made to the Government. The closest it came was to allege that, in 1981, Stone decided that a design schematic called for the installation of cooling towers that Stone judged to be unjustified. JA 279. When Rockwell declined Stone's invitation to cancel the cooling tower order, Stone departed from the chain of command and took his complaint directly to DOE. *Id.* Thereafter, manager William Nichol told Stone "not to communicate" unilaterally with DOE. JA 280. Nichol was not involved in or responsible for pondcrete production. And in Stone's deposition, his counsel represented that the cooling tower incident is "not part of the case" and "doesn't matter." JA 106.

Along with his Statement, Stone also provided the Government with 2,300 pages of documents. Pet. App. 73a.

4. The Government's Intervention. Government attorneys at the time felt that Stone lacked sufficient information to sustain his FCA claims. In March 1992, the Government declined to intervene. Pet. App. 6a; JA 350. In December of 1992, the Government attorney in charge of the *Stone* case reviewed the Sentencing Memorandum in the criminal case. JA 366–67. Upon reviewing information uncovered by the FBI in its publicly disclosed investigation of allegations of wide-ranging RCRA violations, false statements, and false claims, he "realized that there might be merit to the allegations in *Stone* after all." *Id.* He therefore "embark[ed] upon additional investigation," which

entailed reviewing interview memoranda generated by the EPA and the FBI as part of the criminal case. JA 367; *see also id.* at 350–51, 366–79. Based on that information, in November of 1995, the Government decided to intervene and, with Stone, filed an Amended Complaint. Pet. App. 8–9a; JA 352.

The Amended Complaint asserted that Rockwell committed "violations of RCRA" which it "concealed … from DOE" and "thereby fraudulently induced DOE … to pay Rockwell more in award fees." JA 402. Specifically, the Amended Complaint charged that Rockwell violated RCRA by storing leaky pondcrete blocks. JA 402-06.[4] Stone, but not the United States, asserted another FCA count charging concealment of plutonium contamination. Pet. App. 8–9a; JA 418-24. The district court ordered a separate trial on Stone's plutonium claim, Pet. App. 9a, which has not yet been scheduled. Per the pre-trial order, plaintiffs submitted a detailed Statement of Claims, which enumerated specific examples of "false … statements … to DOE regarding the pondcrete … operations [and] their conformity with RCRA." JA 465-90.

5. Trial. The pondcrete claims were tried to a jury, Pet. App. 9a, but none of the evidence upon which plaintiffs relied came from Stone. Plaintiffs told the jury that "the three years that are important to this case" were 1987 through 1989—years in which Stone never set foot inside Rocky Flats. Tr. 209. Stone never testified at trial. In discovery, Stone had identified 48 individuals with relevant knowledge, CA App. 1232–80, not one of whom testified at trial. Of the 55 witnesses who did testify, none even mentioned Stone's name. And although Stone supplied four boxes of documents to the Government along with his confidential disclosure statement, JA 293–97, he later signed an affidavit which identified only four documents in those

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[4] The Amended Complaint also charged concealment of "saltcrete" and "spray irrigation" problems. JA 402-12. Counts II-V asserted various common law and contract claims. Pet. App. 8a; JA 417-18.

boxes relevant to the claims that went to trial, JA 174–75, 179. Those four documents were never used at trial.

The verdict form divided the FCA count into ten different claims, corresponding to various periods for which Rockwell was paid. JA 548-50. The jury found for Rockwell on seven, but found for plaintiffs on the remaining three—covering only the pondcrete allegations. *Id.*; Pet. App. 9a, 50–51a.[5] The court entered judgment for both plaintiffs in the amount of $4,172,327.40. CA App. 1569.[6]

Proceedings Related To The Original Source Rule

Rockwell moved to dismiss Stone's claims under § 3730(e)(4). JA 73–93. Stone acknowledged that "here, [his] FCA case is 'based upon the public disclosure of allegations in … a criminal hearing … or from the news media.'" JA 312–13.[7] The district court agreed and held that Stone's claims were based on publicly disclosed

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[5] The jury found that Rockwell did not breach its contract with DOE, and the court dismissed the remaining non-FCA claims with prejudice. Pet, App. at 9–10a. All spray irrigation allegations corresponded to time periods as to which the jury found for Rockwell. Pet. App. 50a & n.9. It would do Stone no good to establish original source status as to the spray irrigation theories, as that would merely establish jurisdiction over claims he lost at trial. As explained *infra* note 14, courts have uniformly recognized that § 3730(e)(4)(B) requires a claim-by-claim analysis.

[6] The district court deferred Stone's motion for attorneys' fees pending appeal. Pet. App. 9a & n.2. Reversal of the judgment would, at a minimum, foreclose Stone's claim for over $10 million in attorneys' fees as a prevailing party. *See* 31 U.S.C. § 3730(d)(1) (prevailing party "shall" receive fees and costs).

[7] Stone further conceded "that some of the allegations in this case had been publicly disclosed." JA 313 n.2. Although he noted that his "claim regarding the heating and cooling of Building 250" had not been publicly disclosed, he did not (indeed, could not) deny that his pondcrete claims had been publicly disclosed. *Id.* After the verdict, Rockwell renewed its motion to dismiss. Pet. App. 9a; CA App. 1152–54. Again, Stone did not dispute that he was required to establish his status as an original source of the pondcrete claims due to the public disclosures. CA App. 1408–58. The district court adhered to the prior ruling and denied Rockwell's motion with no findings specific to Stone's knowledge of the pondcrete claims. Pet. App. 14a, 64–65a, 67a.

allegations and thus that Stone could only proceed if he "satisf[ied] the 'original source' requirement." Pet. App. 60a. Stone never argued to the contrary at any point in the district court, before the Tenth Circuit, or in his Brief in Opposition before this Court. The district court then held that Stone had satisfied his burden of proof but did not make any findings regarding Stone's direct knowledge about pondcrete—relying instead on Stone's awareness that Rockwell's compensation was tied in part to environmental compliance and on his allegation that he was generally "instructed not to divulge environmental … problems to the DOE." Pet. App. 61a. The following paragraphs detail the evidence Stone produced as to his original source status.

1. Stone sought to prove his direct and independent knowledge through three documents: an affidavit filed with the district court, the Confidential Disclosure Statement he provided to the Government, and a one-page Engineering Order, dated 1982. Pet. App. 17–20a. The Tenth Circuit relied on these documents to conclude that Stone had reviewed "a design for the process and mechanical system intended to be used for removing sludge from" the solar evaporation ponds and had predicted "that the piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement such that the 'pondcrete' blocks would rapidly disintegrate." CA App. 0509; Pet. App. 19a. Stone handwrote on the 1982 Engineering Order "[t]his design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation." Pet. App. 18a; JA 228. The Court of Appeals construed this annotation as explicitly "articulating [Stone's] belief that the proposed design for making pondcrete was flawed." Pet. App. 18a.[8] This information, in turn, was found to

[8] Although Stone's affidavit includes general statements that "the design proposed by Rockwell management for making pondcrete" was defective, the only specific defect identified was the system for piping sludge from the solar ponds. JA 175. Moreover, Stone's Confidential

"support[]" Stone's allegation that Rockwell "ultimate[ly]" made false statements about pondcrete some five years after he reviewed the Order. Pet. App. 21a.

2. Although the Tenth Circuit relied on Stone's information about predicted defects in the piping as the "bas[is]" of Stone's FCA claims, Stone never actually advanced that theory as a basis for liability in the case. (And the Tenth Circuit made no finding that he did.) The Amended Complaint did not allege that known defects in the piping system caused the blocks to fail. JA 402-06. Nor did Stone's Statement of Claims, which (like the public disclosures) instead blamed pondcrete insolidity primarily upon "an incorrect cement/sludge ratio used in [Rockwell's] pondcrete operations." JA 468-70. The Statement asserted that in late 1986, after Stone had departed and for reasons having nothing to do with any of Stone's predictions about the piping system, Rockwell "*reduc[ed] the amount of cement added to the blocks*." JA 476 (emphasis added). Although the Statement of Claims also mentioned peripheral factors such as "inadequate process controls and inadequate inspection procedures," it alleged that the reduction in cement was the "*major contributor* to the existence of insufficiently solid pondcrete blocks"—and never mentioned the supposedly defective "piping" that Stone relied upon to establish his status as an original source. JA 469-70, 477 (emphasis added).

Nor did Stone introduce any evidence of defects in the piping system at trial. Instead, the evidence centered on Rockwell's decision to reduce the amount of cement—conduct that had been publicly disclosed. The evidence established that sludge and cement were not mixed in the piping system Stone critiqued, but rather in a "pug mill" that was not installed until 1985—three years after Stone

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Disclosure Statement, which by law must include "substantially all material evidence and information" Stone possessed, *see* 31 U.S.C. § 3730(b)(2); Pet. App. 6a; JA 299, only described a defect in the piping system. JA 289–90.

made his prediction. Tr. 983–85, 2989; CA App. 1661.

Not only did plaintiffs tell the jury that reductions in the amount of cement used caused the solidification problem, Tr. 5079–80, 5128, 5135, 5144, 5161, they affirmatively told the jury that the pondcrete system itself was *not* the cause. Norman Fryback was pondcrete foreman while Stone was at the plant; his successors were Ron Teel and Dan Tallman. Tr. 980–82, 1108–09, 1638–39, 4884–85. The evidence showed that it was Teel who reduced the cement used in the pondcrete mixture. Tr. 994, 1002–03, 1041, 5079. And the Government explained that *this change alone* was responsible for the pondcrete problem, emphasizing:

> the contrast between the pondcrete produced when Mr. Fryback was foreman … and the pondcrete that was later produced under Mr. Teel first and Mr. Tallman later. Mr. Fryback was able to get concrete hard pondcrete blocks *using the same methods* that Mr. Teel and Mr. Tallman used *with the exception of one thing, and that is the reduction of cement.*

Tr. 5177 (emphasis added). And Stone did not even contest Rockwell's assertion on appeal that Stone "presented no evidence whatever about the piping that transmitted sludge from the solar ponds to the holding tank." Appellants' Opening Brief at 37 (Feb. 7, 2000).

Of course, Stone never claimed to have direct and independent knowledge of Teel's decision to reduce the concentration of cement, or of any actual insolid pondcrete blocks. He could not have known about Teel's actions because the personnel change occurred well after his departure. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part); Tr. 0980–82, 1002–03, 1108–09, 4884–85. And he could not have observed actual insolid pondcrete blocks because he had left Rocky Flats before the insolid blocks were manufactured. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part); *see also* Tr. 1108–09, 5177; Pet. App. 3a.

3. The district court did not find that Stone had direct and independent knowledge of any false statements actually

made by Rockwell. Nor did the Tenth Circuit purport to find any evidence in the record that Stone knew of the actual false statements. Instead, the Tenth Circuit held as a matter of law that a relator need not know of "the actual act of fraud." Pet. App. 21a. And the record contained ample evidence that Stone did *not* know of any actual fraudulent statements. All of the environmental violations and concomitant false claims alleged by plaintiffs took place long after Stone's employment with Rocky Flats ended. Pet. App. 46a (Briscoe, J. concurring in part, dissenting in part). In his deposition, Stone conceded that he did not "have any personal knowledge or evidence regarding Rockwell's presentation of claims or solicitations for payments or receipt of payments from the government." JA 110. He further conceded that he did not know whether DOE was aware of "any of the environmental, safety, or health violations that [he was] alleging in this lawsuit." JA 111–12; *see also* JA 102–04.

Proceedings On Appeal

1. The Tenth Circuit held "that Stone has adequately established himself as having direct and independent knowledge of his allegation that Rockwell manufactured insolid pondcrete." Pet. App. 22a. The Tenth Circuit found legally irrelevant the fact that Stone did not know of any actual false claims, holding that a relator need not have direct and independent knowledge of "the actual submission of inaccurate claims." *Id.* at 21a. And the Tenth Circuit found it legally "immaterial" that Stone did not know why the pondcrete actually failed. *Id.* The Tenth Circuit merely required relators to know some background facts "underlying or supporting" the "fraud allegations contained in the plaintiff's *qui tam* complaint." *Id.* And under that permissive test, the Tenth Circuit approved Stone as an original source based merely on his prediction that Rockwell "*would be* using a defective process for manufacturing pondcrete," irrespective of whether the problem Stone predicted "actually caused the production of malformed pondcrete blocks." *Id.* at 21–22a (emphasis added).

In its initial order, the Tenth Circuit held that Stone satisfied the voluntary production requirement of § 3730(e)(4)(B) by providing his confidential disclosure statement. *See* 2001 WL 1117107, at *12 (10th Cir. Sept. 24, 2001). On rehearing, Rockwell pointed out that under the plain language of the statute and prior Tenth Circuit precedent, the *mandatory* (b)(2) disclosure, which occurred *contemporaneously* with the filing of Stone's complaint could not satisfy (e)(4)(B)'s requirement of *voluntary* disclosure *before filing*. The Tenth Circuit agreed, and remanded for findings on this issue, holding that if "the trial judge finds there was no proper pre-litigation disclosure," the judgment for Stone would be vacated. Pet. App. 22–23a, 44a. On remand, the district court found that neither Stone's affidavit nor the FBI's 302 reports sufficed to carry Stone's burden to prove that he orally told the FBI about his pondcrete allegations before filing.[9] Pet. App. 71–74a. The court found that Stone did turn the 1982 Engineering Order over, buried among 2,300 pages of documents he produced before filing, but further found that the Order did not communicate Stone's pondcrete allegations. Pet. App. 73a. The Tenth Circuit accepted the district court's finding that Stone timely turned over the Engineering Order, but rejected the finding that it did not communicate Stone's pondcrete allegations. Pet. App. 51–52a. The Tenth Circuit held that its prior statement that the Order was "explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed" constituted law of the case.

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[9] The district court "held a hearing on November 25, 2002, at which all counsel agreed that the record was adequate to enable the judge to make the findings and conclusions necessary." Pet. App. 50a. In its December 17, 2002 findings, the court reiterated that counsel had agreed those findings "should be made based on the record contained in these submissions without the need for any additional evidentiary hearing." Pet. App. 70a. After the court issued its findings, Stone sought to supplement the record with additional affidavits. The court denied Stone's motion. Stone then filed a similar motion in the Tenth Circuit, which was denied as moot. Pet. App 53a.

Pet. App. 51a. The Tenth Circuit held that the Engineering Order was alone "*sufficient to carry Stone's burden of persuasion on this point.*" Pet. App. 52a.[10]

Judge Briscoe concurred in part and dissented in part. Pet. App. 44a. Characterizing the majority's rule as requiring only "background knowledge," *id.* at 44a, 46a, she noted that "there is *no evidence* that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or Rockwell's efforts to conceal those problems from the DOE. Indeed, *Stone was terminated from his employment with Rockwell well before either event occurred.*" *Id.* at 46a (emphasis added). And Stone's engineering predictions were insufficient, in Judge Briscoe's view, because "it is not Rockwell's decision to go forward with the proposed manufacturing process that gave rise to the … FCA claims. Rather, [those] claims are based on Rockwell's concealment of actual problems that arose after the manufacturing process began." *Id.* at 47a n.2. As evidence of Stone's ignorance, Judge Briscoe pointed out that "the direct and independent knowledge possessed by Stone could have been omitted entirely at trial without affecting the outcome." *Id.* at 48a. Because Stone "lacked direct and independent

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[10] The district court also inferred that Stone did not communicate his pondcrete concerns in oral interviews with the FBI because the 302s did not mention pondcrete and "it is … fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks that later became the principal issue litigated at trial, there would be some reference to it in the agent's reports." Pet. App. 74a. The Tenth Circuit characterized the inference that Stone never discussed the Engineering Order with the FBI as "unsound," but did not identify record evidence or make any finding that Stone actually told the FBI that pondcrete was insolid or that Rockwell was concealing pondcrete insolidity. Pet. App. 52–53a n.7. The Tenth Circuit instead held that "[t]here is no statutory requirement that the relator have emphasized the specific facts on which a claim is based, so long as the facts are disclosed"—even if they are only "disclosed" in a cryptic notation on an Engineering Order buried in a 2,300 page pile. Pet. App. 53a n.7.

knowledge of any of the essential elements" of his FCA claims, she concluded, he could not qualify as an original source. *Id.* at 47–48a. Judge Briscoe also dissented from the panel's decision after the limited remand, noting that the Engineering Order "addressed neither the failure of pondcrete when it was later produced nor Rockwell's concealment of that failure from the DOE." *Id.* at 55a.

SUMMARY OF ARGUMENT

To prevent abuse of the False Claims Act's *qui tam* provisions, Congress barred jurisdiction where public disclosures already reveal the potential presence of fraud. This strict jurisdictional bar has one very narrow exception—for a person who has "direct and independent knowledge of the information on which the allegations are based," and who "has voluntarily provided the information to the Government before filing." 31 U.S.C. § 3730(e)(4)(B). Congress designed that exception to allow whistleblowers to share in the Government's recovery, but only if they come forward with genuinely important firsthand knowledge of the fraud.

The Tenth Circuit expanded that narrow exception so broadly that it effectively swallows the jurisdictional bar. Under the Tenth Circuit's rule, a relator need only know limited background facts "underlying or supporting" his fraud allegations, Pet. App. 21a, which in practice appears to mean any information that is just *tangentially relevant* in an evidentiary sense to the allegations on which the action is based—even if unsupported inferential leaps are required to derive even a suggestion of fraud from what the relator knows, and even if the fraud suggested by that inference is not what actually happened. That interpretation cannot be correct and greatly disserves the purpose of the statute.

The statutory requirement of "direct … knowledge" requires the relator to have "firsthand" knowledge of the fraud, and precludes reliance on speculative predictions or large inferential leaps. The requirement of "independent" knowledge bars reliance on information that the relator would not have obtained but for the public disclosure. And

the requirement that the direct and independent knowledge must be "of the information on which the allegations are based" requires a tight nexus between what the relator claims to have known, and the specific fraud that the relator seeks to prove at trial. The statute does not specify exactly *how much* direct and independent knowledge the relator must have. Since Congress used the phrase "the information" rather than "some information," and tied it directly to the "bas[is]" of the relator's claims, the best reading is that the relator must have direct and independent knowledge of information sufficient to permit the trier of fact to conclude that a false statement was made to the Government in support of a fraudulent claim for payment. Various courts have suggested other verbal formulations, such as that the relator must know "essential," "substantive," or "core" information relating to the particular fraud. *See, e.g.*, *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) ("essential"); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) ("substantive"); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) ("core"). But wherever the line is drawn, a drib and a drab "underlying or supporting" the claim is not enough; if it were, anyone even tangentially connected to a case could qualify as an original source.

Under any defensible view of the statute, the judgment below must be reversed. Stone had no "direct and independent knowledge" that Rockwell's pondcrete was insolid, or that Rockwell had represented otherwise to DOE. He left Rockwell before either the pondcrete or the statements were made. If Stone saw *any* pondcrete at all, the pondcrete he saw was "concrete hard." *See* Tr. 1108–09, 5177; Pet. App. 3a. He asserts that he *predicted*, based on his analysis of an Engineering Order, that a problem with the piping that extracted sludge from the solar ponds would later cause the cement mixed with that sludge not to harden. Predictions or inferences of this type are not

"direct and independent knowledge," and in any event that supposed prediction was irrelevant and had nothing to do with what actually happened. Variations in the consistency of sludge coming out of the piping system were normal and expected—hence Rockwell put a *human operator* there to regulate the flow of cement to compensate. Tr. 987–88, 1029–30, 1037, 1040–41. The Government stressed to the jury that it was not the machinery that failed but rather the *human operator*. Tr. 5177. The machinery, the Government conceded, was perfectly capable of producing "concrete hard pondcrete" and did so when properly used. *Id.* Nothing changed, said the Government, except "one thing, and that is the reduction of cement." *Id.* Stone had no basis for predicting that a foreman would alter the formula that had reliably produced solid pondcrete.

Stone also had no sufficient basis for any prediction or inference that Rockwell would make false claims. Stone claims that he observed that Rockwell kept getting paid despite his observation of environmental problems, and that a supervisor once told him to follow the chain of command and not contact DOE directly. In other words, he claims to have had reason to suspect that Rockwell had a general propensity or character for concealing problems—and to have inferred that that propensity would cause Rockwell not to report any problems with the pondcrete that developed years later. That inference rests on his assumption that Rockwell's conduct "remained essentially unchanged" after he left, CA App. 1526, 1530, which is entirely unreasonable for many reasons, not least of which that the legal regime governing whether pondcrete disclosures were required changed fundamentally four months after his departure. JA 52. Regardless, no trier of fact would ever be permitted to infer the existence of the specific false statements and claims at issue here from such paltry and general propensity "evidence." And if the test is whether the relator supplied "essential" or "core" evidence about the fraud, Stone obviously fails. His "evidence" predicted a sequence of events that concededly did not

occur, and was so peripheral that none of it was even presented to the jury.

Finally, the statute also requires that "the information on which the allegations are based" must have been "voluntarily provided … to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). Even if any of these speculative inferences or predictions that Stone claims to have made were sufficient to qualify as "direct and independent knowledge," they plainly were not provided to the Government. The district court found that Stone had not carried his burden of proving that he adequately disclosed whatever pondcrete information he had to the FBI. Pet. App. 71–74a. The Tenth Circuit reversed solely on the ground that Stone turned the 1982 Engineering Order over to the Government. Pet. App. 52a. A handwritten notation on that Order indicates Stone's belief that the system "will not work in my opinion," which Stone now claims was a prediction that defects in the piping system would somehow lead to insolid pondcrete. But that prediction was irrelevant, it is not apparent from the Order itself, and Stone even failed to satisfy his burden of proving that it was communicated to the Government. The Order also obviously fails to communicate any supposed inference or prediction by Stone that Rockwell would lie to cover up any pondcrete problems. The Order was also buried in a disclosure of 2,300 pages of insignificant documents, and Stone did not even show that he ever brought it to the Government's attention. The Government is not assisted when a relator buries a single cryptic needle in a 2,300 page haystack. There is no reason to indulge *qui tam* relators with such an unlikely interpretation of congressional intent.

The judgment of the Court of Appeals should be reversed, and this case should be remanded with instructions to vacate the judgment in favor of Stone, and to modify the judgment for the United States accordingly.

ARGUMENT

As set forth, there has never been any dispute that the public disclosure bar applies on the facts at issue here. This case accordingly turns on the question whether Stone met his burden of proving that he satisfied the statutory exception for an "original source." He did not. First, Stone does not have sufficient "direct and independent knowledge of the information on which [his] allegations are based." Second, Stone did not "voluntarily provide[]" the Government with the meager direct and independent knowledge he now claims to have possessed prior to filing this action. 31 U.S.C. § 3730(e)(4)(B).

I. THE TENTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE ORIGINAL SOURCE EXCEPTION CANNOT BE RECONCILED WITH THE SIGNIFICANT LIMITATIONS CONGRESS IMPOSED ON *QUI TAM* SUITS AFTER *MARCUS V. HESS*

The Tenth Circuit held that Stone was an "original source" because he had some limited information "supporting" the allegations, even though the information Stone claimed to know was irrelevant to, and inconsistent with, the theory of fraud actually submitted to the jury. History shows that Congress plainly intended to bar *qui tam* actions where, as here, the relator contributed (at best) only background information but lacked firsthand knowledge of the fraud.

Congress enacted the False Claims Act of 1863 to curb the fraud and price-gouging seen in the early years of the Civil War. *See* John T. Boese, 1 Civil False Claims and *Qui Tam* Actions § 1.01[A] (3d ed. 2006). The Act in its original form permitted "any person" to pursue violations of the Act, "as well for himself as for the United States." Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696. If successful, the relator was entitled to half of the Government's recovery. *Id.* § 6.

There were few reported *qui tam* cases in the decades following the Civil War. In the 1930s and 40s, however, a rash of "parasitic" suits was brought by individuals who had

no knowledge of wrongdoing besides what they had learned from publicly available sources. In one such suit, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the defendant and the United States challenged the relator's right to maintain an action under the Act on the ground that the relator based his suit upon information he had gleaned from a criminal indictment. *Id.* at 545. The Supreme Court construed the FCA to authorize the relator's action "[e]ven if … the [relator] has contributed nothing to the discovery of" the fraud, because the Act contained "no words of exception or qualification." *Id.* at 545–46. The Court noted that Congress could have "provided specifically for the amount of new information which the informer must produce to be entitled to the reward," but it did not do so. *Id.* at 546 n.9. Justice Jackson, in dissent, conceded that "a literal reading" supported the majority's construction, *id.* at 556, but argued that Congress surely could not have "intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed." *Id.* at 558.

After the *Hess* decision, the number of parasitic *qui tam* suits skyrocketed,[11] propelling Congress to revise the statute. The House of Representatives passed a bill that would have repealed the FCA's *qui tam* provisions altogether, while the Senate voted to authorize *qui tam* actions only if they were "based upon information, evidence, and sources original with [the relator] and not in the possession of or obtained by the United States in the course of any investigation or proceeding instituted or conducted by it." H. R. 1203, 78th Cong., 1st Sess. (1943); *see also* S. Rep. No. 291 (1943); H.R. Rep. No. 933 (1943). The resulting

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[11] According to Attorney General Francis Biddle, nineteen *qui tam* actions were pending on March 22, 1943, eighteen of which were based entirely on information from indictments. *See* 89 Cong. Rec. 7571 (Mar. 22, 1943) (letter from Att'y Gen. Biddle to Sen. Van Nuys). By December 1943, the count had reportedly risen to 250. *See* 89 Cong. Rec. 10845–46 (Dec. 17, 1943) (statement of Rep. Walter).

compromise kept the jurisdictional bar of suits based upon evidence or information in the Government's possession but dropped the original source exception:

> The court shall have no jurisdiction to proceed with any such [*qui tam*] suit … whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

Pub. L. No. 78-213, 57 Stat. 608, 609 (1943) (codified as 31 U.S.C. § 232(C) (1982)) (superseded).

Even though Congress dropped the original source exception from the 1943 amendments, several relators argued that such an exception should nevertheless be implied. Courts uniformly rejected that view. In *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the State of Wisconsin brought a *qui tam* suit against a doctor for making fraudulent Medicare claims. Well before filing the action, the State had provided the Government with reports about the defendant's fraudulent activity as required by federal law. *Id.* at 1104. The Seventh Circuit held that the State's action was barred, observing that, "[a]lthough Congress's immediate concern in enacting the 1943 amendment was to do away with the 'parasitical suits' allowed by *Hess*, the language and effect of the 1943 amendment [wa]s in fact much broader." *Id.* at 1104. The court refused to speculate "'why [Congress] struck the particular compromise it did,'" *id.* at 1105 (alteration in opinion) (citation omitted), and stated that, in light of the text, the State would have to look to Congress to exempt original sources. *Id.* at 1106.

A few months later, the National Association of Attorneys General adopted a resolution calling upon Congress "to rectify the unfortunate result of the Wisconsin v. Dean decision." S. Rep. No. 345, 99th Cong., 2d Sess., at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278. Congress amended the statute once again. This time, the original source exception made it into the law:

> 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 [sic] 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). Congress defined an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B).

Through these amendments, Congress sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield*, 14 F.3d at 649; *see also id.* at 651 ("The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior."); *United States ex rel. Doe v. Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992) (noting that the Act is structured to prevent "opportunists" from "capitaliz[ing] on public information without seriously contributing to the disclosure of the fraud"); *Stinson*, 944 F.2d at 1154 ("principal intent" of 1986 amendments was "to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision … and the restrictiveness of the post-1943 cases, which precluded suit even by original sources").

The need for *qui tam* actions is at its lowest ebb when enough information has been publicly revealed to put both the Government and the public on notice that a fraud may have been committed. At that point, the Government can

compel would-be relators to cooperate without a promise of a bounty. *See, e.g.*, 31 U.S.C. § 3733 (1986 amendment providing the Attorney General with authority to issue civil investigative demands to "any person" who may have "information relevant to a false claims law investigation"). Congress thus significantly restricted the ability of relators to sue after public disclosure on the belief that public pressure would then be sufficient to "lead to the prosecution of important cases and the jurisdictional bar [would] prevent relators from interfering with the government's interest if there is a legitimate reason to delay the prosecution." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684 n.4 (D.C. Cir. 1997). An expansive reading of the original source exception would disrupt the careful balance that Congress sought to achieve.

The Tenth Circuit's expansive reading is also inconsistent with Congress's decisions in the wake of *Marcus v. Hess* to erect a jurisdictional bar and, later, to provide only a limited exception. Congress expressly made the public disclosure bar jurisdictional. *See* 31 U.S.C. § 3730(e)(4)(A) ("No court shall have jurisdiction …").[12] As this Court recently emphasized, courts "must not give jurisdictional statutes a more expansive interpretation than their text warrants." *Exxon Mobil Corp. v. Alpattah Servs., Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 2620 (2005). Moreover, as an exception to a general rule, the original source exception is to be "read … narrowly in order to preserve the primary operation" of the jurisdictional bar. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *see also Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those *plainly and unmistakably*

[12] The jurisdictional nature of the public disclosure bar and the limited exception for original sources is confirmed by the fact that the relator's legal interest is entirely dependent upon valid assignment of the Government's claim. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). If the relator fails to satisfy the conditions of 31 U.S.C. § 3730(e)(4), then the assignment is ineffective and the relator has no standing to maintain and pursue the *qui tam* action.

within its terms and spirit is to abuse the interpretative process.") (emphasis added). Thus, to the extent that the text of § (e)(4) is subject to multiple permissible readings, courts should adopt the narrowest reasonable construction.

Unfortunately, § 3730(e)(4) "does not reflect careful drafting or a precise use of language," *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.), leading to disagreement among lower courts as to what information (and how much of it) the relator must know to qualify as an "original source." But wherever the jurisdictional lines are drawn, Stone's claim must be rejected. The Tenth Circuit's construction—under which a relator may qualify as an original source based upon nothing more than speculation and background information so disconnected from the specific fraud at issue that none of it was even presented to the jury—fails to preserve even a semblance of balance between the twin aims of the statute, and is inconsistent with Congress's sustained effort since *Marcus v. Hess* to limit *qui tam* suits to individuals with direct and fairly comprehensive knowledge of the fraud.

II. THE TENTH CIRCUIT ERRONEOUSLY HELD THAT STONE HAD "DIRECT AND INDEPENDENT KNOWLEDGE OF THE INFORMATION ON WHICH THE ALLEGATIONS" WERE BASED

Section 3730(e)(4)(B) is best read to require that the relator must have firsthand knowledge, independent of the public disclosures, of enough information to sustain the most critical element of his fraud claim—the allegation that the defendant submitted a false statement in support of a fraudulent claim for payment from the Government. That interpretation is the one most faithful to the text and most consistent with the twin aims of the statute.

Regardless, the judgment in favor of Stone would have to be reversed under any defensible interpretation of the statute. No other circuit besides the Tenth has allowed a relator to escape the public disclosure bar with merely some information "underlying or supporting" his fraud

allegations, and the text of the statute and governing canons of construction do not permit that interpretation.

A. The Tenth Circuit Misinterpreted The Statutory Text

The original source exception requires courts to conduct three separate but interrelated inquiries. The Tenth Circuit misconstrued the statute at each step of the analysis.

First, the text requires the court to identify the core "information on which the allegations" of the relator's FCA action are "based," in order to assess the sufficiency of the relator's knowledge of that information. "[T]he information" that § 3730(e)(4) puts at issue is, most logically, the information that the relator relies upon to establish his allegation of fraud.[13] As this Court recognized in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the "basis" or

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[13] Some courts have suggested that the relator must have direct and independent knowledge of "the information" that actually formed the "basis" of the public disclosure, and not merely information that would serve to prove allegations in the relator's own action (including publicly disclosed "allegations or transactions" at issue in the relator's case). *See, e.g., United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 353–55 (5th Cir. 2003). But that interpretation fails to recognize that, sometimes, "[a]n allegation can be made public, even if its proof remains hidden." *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). In those circumstances, it is impossible to determine what information the public allegation was actually "based on," which the court would have to know in order to evaluate whether the relator had direct and independent knowledge of such information. And as a policy matter it is hard to understand why Congress would want to bar a relator with sufficient direct information about the fraud, simply because the relator's information may differ from what the (unknown) disclosing party may have relied upon. Unless the Court interprets the statute to require the relator to be the actual source of the public disclosure, *see infra* Part IV, that reading is completely unworkable. Although Stone would be barred under any of these interpretations, by far the better reading is that the relator must have direct and independent knowledge of "the information" on which the allegations (including the publicly disclosed allegations) of *his* action is based. *See Mistick*, 186 F.3d at 389 (§ 3730(e)(4)(B) requires relator "to have 'direct and independent knowledge of the information on which [its fraud] allegations are based'") (alteration in original).

"foundation" of an action is its "'gravamen,'" or "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (quoting *Callejo v. Bancomer*, 765 F.2d 1101, 1109 (5th Cir. 1985)). The gravamen of an FCA claim is that the defendant made a representation to the Government that was false in order to secure payments.[14] The lower courts are in broad agreement, therefore, that the core "basis" of an FCA claim is a statement to the Government and a true state of affairs showing that statement to be false. *See, e.g.*, *Mistick*, 186 F.3d at 385; *Springfield*, 14 F.3d at 655.

According to the Tenth Circuit, the "gravamen of Stone's claim" with respect to pondcrete was that "he learned from studying Rockwell's plans for manufacturing pondcrete that the blocks would leak toxic waste" because the piping system used in the manufacturing process itself was "defective." *See* Pet. App. 21a. Even if that were a proper characterization of the fraud theory on which Stone's claim was based, the information he claims to have known is woefully inadequate to qualify him as an original source, as explained below. *See infra* Part II(B). More importantly, however, Stone *abandoned that theory before trial*. In their pre-trial Statement of Claims and at trial, Stone and the Government instead asserted a new theory (which is entirely inconsistent with Stone's original theory of fraud on which the Tenth Circuit relied). They alleged that Rockwell

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[14] Although the statute refers to an "action," courts have recognized that the statute necessarily contemplates that a relator's original source status must be evaluated on a claim-by-claim basis. *See, e.g.*, *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (Alito, J.) ("[E]ach claim in a multi-claim [*qui tam*] complaint must be treated as if it stood alone."); *Hays v. Hoffman*, 325 F.3d 982, 990 (8th Cir. 2003) ("[W]e must resolve the original source issue on a claim-by-claim basis."). Otherwise, a relator could effectively avoid the jurisdictional bar by bootstrapping claims about which he has no direct and independent knowledge with claims for which he qualifies as an "original source." Thus, the relator must satisfy the requirements with respect to every theory of fraud in his action that is subject to the public disclosure bar.

committed fraud when one employee shorted the amount of cement, resulting in insolid pondcrete blocks, Rockwell hid that fact in order to secure award fees.[15] Stone's sudden change of course revealed that his supposed "direct and independent" knowledge was merely a façade. His claim morphed to restate the allegations that had appeared in the press long before he filed his action—that the pondcrete failed because of a poor cement-to-sludge ratio. The Tenth Circuit completely ignored that Stone had abandoned his original theory; it held that Stone's prediction based on alleged deficiencies in the piping system (which turned out to be both untrue and irrelevant to Stone's amended allegations) constituted "information 'underlying or supporting' his allegation concerning Rockwell's alleged ultimate fraudulent activity." *See* Pet. App. 21a.[16]

The Tenth Circuit erroneously applied the original source exception as though it were a static requirement that applied only to the theory of fraud stated in the initial complaint. Because §3730(e)(4) is jurisdictional in nature, the requirements of the original source exception must be

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[15] Stone and the Government amended the allegations in Plaintiffs' Statement of Claims attached to the Pretrial Order, which made no mention of the piping system critiqued by Stone but rather alleged that Ron Teel, a foreman who took over after Stone left, "increased pondcrete production rates" by "reducing the amount of cement added to the blocks." JA 469-70, 476. And in any event the Federal Rules provide that, when the issues presented at trial differ from those raised in the pleadings, the pleadings are deemed amended and the issues "shall be treated in all respects as if they had been raised in the pleadings." Fed R. Civ. P. 15(b).

[16] The Tenth Circuit missed the point when it held that the original source inquiry did not turn on "whether the plaintiff's theory has merit" or "is ultimately flawed on the merits." Pet. App. 22a. In the limited circumstances where, as here, the relator fundamentally changes his allegations in a way that potentially impacts his original source status, then the court must assure itself that it retains jurisdiction over the action as amended. Whether his theory is persuasive to the jury or not is not directly relevant—except in the sense that it does a relator no good to qualify as an original source of a claim he has long since abandoned.

satisfied at all stages of the litigation. *E.g.*, *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) ("The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met."); *see also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). A court obviously does not have to stand watch over a relator's claim and constantly reassess jurisdiction every time there is a slight change in approach, but surely a relator cannot entirely abandon theories used to establish jurisdiction and substitute a new theory of fraud about which he has no direct and independent knowledge. As the Fifth Circuit observed in *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (1985), "the plaintiff must be held to the jurisdictional consequences of a voluntary abandonment of claims that would otherwise provide federal jurisdiction."[17]

Congress obviously did not intend for courts to ignore the fraud that actually formed the "basis" of an action and assess a relator's original source status merely by reviewing the allegations contained in a superseded initial complaint, even where the allegations change over the course of litigation. If § 3730(e)(4) were treated as a mere pleading requirement, relators could easily evade the jurisdictional bar by pleading a trivial fraud that had not been publicly disclosed (or for which they could satisfy the original source exception) while ultimately proving and recovering under much broader allegations drawn entirely from the public domain or from information only the Government possesses. The Tenth Circuit erred by accepting, as "direct and

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[17] *See also United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1164 n.10 (10th Cir. 1999) (for purposes of § 3730(e)(4) analysis, court's "main concern is [relators'] knowledge of the information on which the Second Amended Complaint is based"); *Wellness Cmty.-Nat'l v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995) ("[O]ur jurisdictional inquiry must proceed on the basis of the First Amended Complaint, not the original one.").

independent knowledge of *the information on which the allegations are based*," Stone's sketchy claimed knowledge and inferences that had nothing to do with the claims of fraud ultimately alleged and presented to the jury.

Second, the court must determine whether the relator's knowledge of the relevant information is "direct and independent." Section 3730(e)(4)(B) "impose[s] a conjunctive requirement—direct *and* independent—on *qui tam* plaintiffs." *Springfield*, 14 F.3d at 656; *see also*, *e.g.*, *Stinson*, 944 F.2d at 1160.

The lower courts are in general agreement that knowledge is "independent" if it does not "depend or rely on the public disclosures." *Findley*, 105 F.3d at 690. In other words, "a relator who would not have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of original source.'" *Mistick*, 186 F.3d at 389 (citation omitted).

The other circuits also agree that "in order to be 'direct,' the information must be first-hand knowledge." *Findley*, 105 F.3d at 690; *see also Stinson*, 944 F.2d at 1160 ("Direct" signifies "'marked by the absence of an intervening agency'") (citation omitted). The relator must have obtained the information through his own efforts, not through the efforts of others. *See*, *e.g.*, *United States ex rel. Devlin v. California*, 84 F.3d 358, 361 (9th Cir. 1996) (relators' knowledge not "direct" because "[t]hey did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else").[18]

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[18] The Government has repeatedly endorsed this very understanding of "direct knowledge." *See*, *e.g.*, *United States v. Enriquez*, No. 94-4760 (11th Cir. 1994), Br. for United States at 16 ("Individuals with 'direct' knowledge are 'insiders' with 'unmediated' and 'personal knowledge' of a fraud that is being perpetrated on the government.") (citing *Wang*, 975 F.2d at 1419); *id.* ("Original sources will have 'first-hand knowledge' about the fraud, and will typically be 'individuals who are close observers or otherwise involved in the fraudulent activity.'"); *Hays v. Hoffman*, No. 01-3888 (8th Cir. 2002), Br. for United States at 21 ("A *qui tam* relator who, before the government embarked upon its own investigation, had no

Thus, courts have often disqualified relators who did not have firsthand knowledge of the actual fraud. In *Mistick*, for example, the relator knew that HUD was paying for lead paint encapsulation and that the actual work being done did not conform to HUD's standards. 186 F.3d at 381. That relator could certainly have *inferred* that a false claim was made—simply by reasoning that HUD almost certainly required a letter, statement, or certification that the contract was being performed in accordance with HUD specifications. Yet the Third Circuit found the original source rule unsatisfied because the relator did not *directly* know of the actual fraud. *Id.* at 389.

The Tenth Circuit nevertheless held that highly inferential predictions of future events qualified as "direct … knowledge." Pet. App. 21–22a. The ordinary meaning of the phrase forecloses that conclusion. Inferences or predictions are not *knowledge*. And in ordinary legal terms, "[d]irect evidence" means "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Black's Law Dictionary 577 (7th ed. 2000). The analogous phrase "direct … knowledge" must carry the same firsthand meaning. Of course, some level of inference may be permissible. A relator who watches her supervisor prepare false Medicare bills may be entitled to infer that those bills were submitted. But if "direct" is to be given meaning, the inferential portion of the relator's knowledge surely cannot outstrip his first-hand observations. "[T]he purposes of the Act would not be served by allowing a relator to maintain a qui tam suit based on pure speculation or conjecture." *United States ex rel.*

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personal knowledge of specific conduct by the defendant that violated the statute is precisely the kind of 'opportunistic plaintiff' that the public disclosure bar was intended to disqualify."); *United States ex rel. Fine v. California*, No. 93-15728 (9th Cir. 1993), Br. for United States at 17 (arguing that relator failed to satisfy the "direct" knowledge requirement because "Mr. Fine saw no fraud with his own eyes" but merely "saw reports and audits of alleged fraud, presented by various intermediaries").

Aflatooni v. Kitsap Phys. Servs., 163 F.3d 516, 526 (9th Cir. 1998). The Tenth Circuit's approach permits precisely that.

Third, the court must determine if the relator's "direct and independent knowledge" is sufficient. The Act does not explicitly describe *how much* direct and independent knowledge the relator must possess, but the interpretation most faithful to the text is that the relator must have direct and independent knowledge sufficient to permit the trier of fact to conclude that a false statement was made to the Government in support of a fraudulent claim for payment. In other words, the relator's information must be sufficient to sustain a finding for the relator on the core "basis" of his claims (a statement to the Government and the true state of affairs showing it to be false), if no contrary evidence is produced. That interpretation best accounts for Congress's requirement that the relator know "the information" on which his allegations are based, as opposed to "some information." *See, e.g.*, *Rapanos v. United States*, 126 S.Ct. 2208, 2220–21 (2006) (plurality op.) ("The use of the definite article ('the') and the plural number ('waters') show plainly that § 1362(7) does not refer to water in general."). And by requiring knowledge of the information "on which the allegations are based," Congress was invoking both the legal principle that the "basis" of an action is its gravamen, *Nelson*, 507 U.S. at 357, and "the common logical distinction between an assertion and its proof," *Wang*, 975 F.2d at 1418. The most sensible conclusion, then, is that a relator must have direct and independent knowledge of enough information to permit a fact finder to infer, without legally unacceptable speculation, that a false claim was made.[19]

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[19] By contrast the public disclosure bar in subsection (A) is triggered by the public revelation of mere "allegations" or "transactions." Courts have correctly interpreted that language as requiring only a bare "allegation" of fraud or information about the transaction sufficient to alert the Government to the possibility that fraud has been committed. *See, e.g.*, *Springfield*, 14 F.3d at 655; *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 331–32 (6th Cir. 1998).

The Third Circuit's decision in *Mistick* illustrates the correct analysis as to *what* the relator must know. *See Mistick*, 186 F.3d 376. In *Mistick*, the relator alleged that the Pittsburgh Housing Authority made false claims to the United States Department of Housing and Urban Development (HUD) regarding the cost of lead-based paint abatement at various housing projects in the city. *Id.* at 379. The Third Circuit held that the "original source" exception was not satisfied. Although the relator had direct and independent knowledge of the true state of facts, since it was the general contractor that performed all of the abatement work, *see id.* at 379, the court concluded that was insufficient by itself. In order to qualify as an "original source," the relator had to have firsthand knowledge about "the most critical element of its claims, *viz.*, that the Authority had made the alleged misrepresentations to HUD" regarding its paint abatement program. *Id.* at 388.

The Eighth, Tenth, and D.C. Circuits have held instead that § 3730(e)(4)(B) "does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent transaction." *Springfield*, 14 F.3d at 656–57; *see also United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001) (following D.C. Circuit); *United States ex rel. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir. 2002) (same). The Tenth and D.C. Circuits qualify a relator as an original source if he has sufficient knowledge of *either* the statement to the Government *or* the true state of affairs showing it to be false, while the Eighth Circuit requires only knowledge of falsity. *Id.* These constructions do not account for the definite article "the" preceding both "information" and "allegations" in the statute. Nor are they consistent with the scienter provision of 31 U.S.C. § 3729(b)(1)–(3). Section 3729(b) requires that a defendant have knowledge of "the information," which courts have defined as knowledge that a claim was presented and that it was false. *Hindo v. Univ. of Health Sciences/The Chicago Med. Sch.*, 65 F.3d 608, 613

(7th Cir. 1995). If a defendant must know both the statement and the true state of affairs in order to know that he is committing fraud, nothing less should allow a relator to know the defendant is committing fraud.

Further, the Eighth, Tenth, and D.C. Circuits' standard establishes a hurdle that is far too low. Many would-be relators could satisfy that relaxed requirement, even though they contributed no meaningful information to the Government or the public domain and could not have brought an action without relying upon the public disclosure. Indeed, in many cases either the fact of a representation to the Government, or, alternatively, the true state of affairs that makes that representation false, will be uncontroversial and very widely known. It is the combination of the two that may give rise to an inference of fraud in various settings, and therefore may justify giving the relator a share of the Government's recovery. Indeed, when coupled with the Tenth Circuit's willingness to treat inference or prediction as "direct and independent knowledge," that test would frequently gut the independent source requirement entirely. In certain contexts, for example, it is common knowledge that parties contracting with the Government must certify their compliance with the law. Any moderately informed lawyer or government contractor can therefore infer that a statement or claim was made, perhaps from their own experience with contracting with the Government in similar circumstances. Congress cannot have intended to permit such persons to file routine *qui tam* suits whenever, for example, news of a criminal investigation of one of their competitors hits the press.[20]

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[20] This Court has long held that informants are not entitled to statutory rewards unless they provide information that *actually assists* the government within the meaning of the statute. *See, e.g., Titus v. United States*, 87 U.S. 475, 483, 485 (1874) (informer who identified land subject to seizure did "nothing for which the statute has provided a reward" because United States already held title to that land by operation of law, and therefore informer's "[i]nformation … could do no good"); *cf. United States v. Connor*, 138 U.S. 61, 66 (1891) ("Whoever

The Third Circuit's construction is therefore the one most consistent with the text and purposes of the statute.

Although § 3730(e)(4)(B) does not expressly require that the relator's information be sufficient to sustain the core allegation of fraud, any other standard would be subjective and difficult to apply at the outset, where it is typically not clear what the significance of certain information will be. Courts have described the necessary quantum of evidence in various ways, sometimes referring to "essential," "substantive," or "core" information, *supra* p. 17 (collecting citations), but they are in general agreement that the information must have meaningful evidentiary value in establishing the alleged fraud, and must relate in a reasonably specific way to the particular fraud alleged. *See, e.g.*, *Stinson*, 944 F.2d at 1160 (relator must have "substantive information *about the particular fraud*) (emphasis added); *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995) ("a *qui tam* relator must have both independent and direct knowledge *of the fraudulent activity*") (emphasis added); *Doe*, 960 F.2d at 321 (FCA "encourages those *with knowledge of fraud* … to bring that information to the fore"); *see also Hays v. Hoffman*, No. 01-3888 (8th Cir. 2002), Br. for United States at 21 (relator without "personal knowledge of specific conduct by the defendant that violated the statute is precisely the kind of 'opportunistic plaintiff' that the public disclosure bar was intended to disqualify."). "[T]he information on which the allegations are based" certainly must demand something more than simple "background knowledge" that enables the relator "to understand the significance of" the public disclosure. *Kreindler & Kreindler*, 985 F.2d at 1159; *see also Stinson*, 944 F.2d at 1160 (observing that, if background knowledge were

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claims under such an offer must bring himself within its terms."); *The Josefa Segunda*, 23 U.S. 312, 327 (1825) ("It is not permitted to parties to lie by, and allow other persons to incur all the hazards and responsibility … and then to come in, after the peril is over, and claim the whole reward. Such a proceeding would be utterly unjust, and inadmissible.").

enough, "then a cryptographer who translated a ciphered document in a public court record would be an 'original source,' an unlikely interpretation of the phrase").

The Tenth Circuit in this case embraced the far looser requirement that a relator must simply have direct and independent knowledge of some "information *underlying or supporting* the fraud allegations," Pet. App. 20–21a (emphasis added), which the Court used to mean any information *relevant to* the fraud in the ordinary evidentiary sense of making "the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed. R. Evid. 401. Although the Tenth Circuit paid lip service to the settled law that mere "background" information is not enough, its test offers no coherent distinction between background information and the "underlying or supporting" information that it deems sufficient. Indeed, the Tenth Circuit explicitly held that "the relator need not … have in his possession knowledge of the *actual* fraudulent conduct itself; knowledge 'underlying or supporting' the fraud allegation is sufficient." Pet. App. 21a. That formulation is easily broad enough to embrace the background information discussed in *Kreindler & Kreindler* and *Stinson*, and is inconsistent with the basic requirement imposed by other circuits that the relator's knowledge must be knowledge *of the particular fraud*. The Tenth Circuit would, for example, permit a relator to qualify on the basis of general background information about how particular government contracts are structured or how particular waste storage methods are ordinarily conducted. In this case it permitted a relator to qualify on the basis of "information" concerning the defendant's general character or propensities—which will of course open the door to every disgruntled employee or ex-employee of the defendant to claim "original source" status on the basis that they observed inappropriate conduct in other contexts. *Cf.* Fed. R. Evid. 404(b) (generally prohibiting admission of character evidence as proof of conduct).

That cannot be what Congress intended. Exceptions to a general rule are to be "read … narrowly," *Clark*, 489 U.S. at 739, and not extended beyond "those plainly and unmistakably within [their] terms." *Phillips*, 324 U.S. at 493. Yet the Tenth Circuit's interpretation effectively reads the jurisdictional bar out of the statute. Every relator will surely be able to come up with some tidbit that "underlies or supports" his allegations in the sense of being relevant to them as an evidentiary matter—particularly if, as the Tenth Circuit held, that information need not be "knowledge of the *actual* fraudulent conduct itself." Pet. App. 21a.

B. Stone Cannot Qualify As An Original Source Under Any Reasonable Interpretation Of The Statute

Stone cannot prevail under a correct interpretation of the statute, or under any of the plausible interpretations adopted by the other circuits. The record overwhelmingly demonstrates that Stone did not have direct and independent knowledge sufficient to show *either* the false statements on which his action was based *or* the actual facts rendering those statements false. He did not have any information that was "essential," "substantive," or "core" to establishing those issues. Indeed, he did not have any actual knowledge directly pertaining to those claims or their falsity at all.

Instead of demonstrating direct and independent *knowledge* that false statements or claims actually were made, Stone has instead repeatedly argued that he *inferred* that they must have been made from his experiences while employed at Rockwell years earlier. *See* JA 102–04 (interrogatory response inferring false statements from contract provisions). Stone bases that inference on four snippets of information (or speculation): (1) a prediction (which never came true) that pondcrete blocks manufactured by Rockwell would be insolid because of possible defects that he identified in a proposed piping system, (2) the fact that "Rockwell's compensation was based on" environmental "compliance," (3) his observation that Rockwell appeared to

get paid even though during his tenure Stone observed "various environmental, health and safety problems," and (4) an allegation that his managers instructed Stone not to take his concerns unilaterally to DOE, but instead to observe the chain of command. Pet. App. 61a. Stone argues that those facts allowed him to infer that a false claim would be submitted five years later. JA 290. That chain of inference was also the basis for Judge Carrigan's finding that Stone was an original source. *Id.*[21]

Judge Briscoe correctly explained in dissent that "although Stone … perhaps may have speculated that Rockwell would conceal [pondcrete] problems from the government, it is apparent that he lacked the 'direct and independent' knowledge required." Pet. App. 46–47a. On certain facts there may be ambiguity in the line between inference and "direct … knowledge," but this is not remotely a close case. Stone's personal knowledge was so disconnected from the allegations on which this action was based that his evidence was not even presented to the jury. If snippets of marginally relevant background information and implausible and speculative inferential leaps like these suffice, then the jurisdictional bar will become a dead letter.

1. Stone did not have direct and independent knowledge of actual facts rendering Rockwell's statements or claims false. As Judge Briscoe noted, "Stone lacked" firsthand knowledge "that Rockwell actually experienced problems in its production of pondcrete." Pet. App. 47a. If Stone saw any pondcrete blocks at all, they were "concrete hard." *See* Tr. 5177 (foreman Fryback "was able to get concrete hard pondcrete blocks"); Tr. 4884–85 (Fryback replaced in October 1986); Pet. App. 3a (Stone left Rocky Flats in early 1986). Stone's chain of inferences starts from a *prediction* that the pondcrete would be insolid

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[21] The Tenth Circuit did not address the sufficiency of Stone's inferences about the false claims, because it held that Stone need not have information about "the *actual* fraudulent submission to the government." Pet. App. 20–21a. That holding was erroneous. *See supra* Part II(A).

due to some unspecified defect in a piping system design that other Rockwell engineers proposed to use to extract sludge from the solar evaporation ponds. That prediction is insufficient to qualify Stone as an original source for three reasons.

First, Stone's inference is far too attenuated and implausible to constitute "direct … knowledge" of fraud. The design Stone analyzed was a system for extracting sludge from solar evaporation ponds. Pet. App. 73–74a. But the final process for making pondcrete was not simply automated—human "operators control[led] the rate at which sludge" and "cement" entered the pondcrete mixing device. Tr. 987, 1029–30. Well aware that "the sludge coming out of" the extraction system would "vary in terms of its concentration of solids," the operator applied human "judgment[]," adding more or less cement "[d]epending on the sludge" to produce solid pondcrete. Tr. 987–88, 1030, 1041. Operators regulated *both* the quantity of sludge and the quantity of cement in order to achieve the proper mix. Tr. 987–88, 1037, 1040. Even if the operator erred and filled a box with an overly liquid mix, workers could manually "add some bagged cement to it and mix it up." Tr. 1048–50. Given these layers of human intervention, the piping system Stone analyzed simply could never have been the cause of insolid pondcrete, standing alone. Stone's inference that the pondcrete would be insolid is therefore not "'direct' … knowledge" of fraud but completely unjustifiable speculation. Pet. App. 46–47a (Briscoe, J. concurring in part, dissenting in part).

Second, the speculative nature of Stone's inference is demonstrated by the fact that it was actually proven wrong and is irrelevant to (and actually inconsistent with) Stone's and the Government's own account of what actually happened. Stone predicted that Rockwell's piping machinery would produce insolid pondcrete blocks. The plaintiffs' evidence at trial proved the contrary. In closing, the Government contrasted the pondcrete produced by foreman Fryback—the foreman who was in charge during

Stone's tenure—with the pondcrete produced by foremen Teel and Tallman—who took over *after* Stone left. The Government argued that "Mr. Fryback was able to get concrete hard pondcrete using the same methods that Mr. Teel and Mr. Tallman used with the exception of *one thing, and that is the reduction of cement.*" Tr. 5177 (emphasis added). In other words, the very piping system Stone critiqued was perfectly capable of generating solid pondcrete—and, in fact, actually did so.

Stone made no effort whatsoever to prove his piping theory to the jury. No witnesses testified about Stone's predicted piping defect. His Engineering Order and its annotation were not introduced into evidence. None of the persons identified on the Order were called as witnesses. Nor did Stone dispute on appeal Rockwell's contention that he "presented no evidence whatever about the piping that transmitted sludge from the solar ponds to the holding tank." Appellants' Opening Brief at 37 (Feb. 7, 2000).

Third, a prediction that a proposed process or machine will not work correctly based on scientific or engineering judgment simply cannot be a permissible basis for inferring that a statement was "false" in the sense meant by the FCA. A contrary interpretation would transform every scientific or engineering dispute into a fraud case. To hold that differences in engineering judgments can suffice to sustain an FCA claim is to fling the door open to every disgruntled engineer, doctor, or scientist whose advice is not heeded. If two doctors disagree on the proper course of treatment for a Medicare patient, the hospital does not commit fraud by submitting its bills to Medicare even if the patient eventually dies. *See, e.g., United States ex rel. Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732–33 (7th Cir. 1999) (Easterbrook, J.) ("Only in Humpty Dumpty's world of word games would anyone apply the label 'fraud' to" statements subject to scientific or engineering disputes). Similarly here, the mere fact that Stone thought the pondcrete system would not work is not alone enough to establish fraud. "The phrase 'known to be false' in" the

FCA "does not mean 'scientifically untrue'; it means 'a lie.' … The Act would not put either Ptolemy or Copernicus on trial." *Wang*, 975 F.2d at 1421.

In summary, Stone had no "direct and independent knowledge" of problems with the pondcrete at Rocky Flats. He had, at most, a speculative and implausible *prediction* of a problem that never materialized, and that is entirely irrelevant to the allegations on which this action is based. His claim therefore must be dismissed under any standard that requires the relator to have direct and independent knowledge that is sufficient to permit a jury to find the true state of affairs rendering any statements or claims to the Government false—or information that is "essential," or "core," or "substantive," or evidence "or of the actual fraud," any other formulation conveying the basic point that the relator must have direct and independent knowledge of meaningful information, directly related to the specific allegations that his FCA claims are based on.

2. Stone did not have direct and independent knowledge of any relevant statements or claims. Stone also had no direct and independent knowledge of any false statements used to support claims for payment. In response to interrogatories, Stone conceded that he did "not know the identities of specific persons who" made false statements nor "the identities of specific documents which contain" such false statements or claims. JA 102–04. In his deposition, Stone described an incident in which he believed Rockwell ordered unnecessary cooling towers—an incident that *did not* become a part of his FCA action. JA 106, 279–80. Counsel for Rockwell then asked "were there any other matters that you know of where Rockwell affirmatively represented to DOE that Rockwell was in compliance with environmental, safety, and health provisions, when it was not?" JA 106. Stone replied "I can't remember any." *Id.* Moreover, Stone's Confidential Disclosure Statement, which by law had to contain "substantially all material … information" possessed by Stone, 31 U.S.C. § 3730(b)(2); *see also* JA 299; Pet. App. 6a, made no mention of any false

statements regarding the solidity of pondcrete or Rocky Flats' environmental record.

Stone's belief that Rockwell would lie to the Government about any pondcrete problems that emerged essentially rests on an inference of future wrongdoing from suspected prior bad acts. That speculative inference is wholly insufficient to sustain an allegation that Rockwell committed a specific fraud years later. No trier of fact could permissibly draw that inference from the information that Stone had "direct and independent knowledge" of. Stone cannot even satisfy the basic requirement imposed by other courts of appeal that the relator must have knowledge directly relating to the particular fraud alleged, as opposed to background information. Stone's inference is based on classic background; he could support any specific allegation of fraud by Rockwell with his background "information" that, in his observation, Rockwell has a propensity for fraud. If that is sufficient, then any disgruntled ex-employee who can allege that he observed a generalized tendency toward unscrupulous dealing will be an "original source" as to any future FCA claim against the company.

Stone's inference is also particularly tenuous and implausible here because it explicitly rests on the assumption "that Rockwell's [reporting] conduct was the same prior to his employment, and/or that such conduct remained essentially unchanged following plaintiff's termination with Rockwell." CA App. 1526, 1530. But Stone had no basis whatsoever for that assumption. Stone could not have developed any opinion about whether Rockwell would report a problem with insolid pondcrete, because it is undisputed that there were no problems with the pondcrete until well after his departure. Even if there had been a problem during Stone's tenure, it was not clear at that point that any disclosures would have been required. During the entirety of Stone's tenure at Rocky Flats, it was unclear whether RCRA applied at all to mixed wastes such as pondcrete—and therefore it was not clear that Rockwell's disclosure obligations covered the pondcrete. JA 52; CA App.

0790, 2031–32. It was not until July 31, 1986, four months after Stone left Rocky Flats, that DOE and EPA "entered into a compliance agreement in which DOE agreed that Rocky Flats' low-level mixed wastes were RCRA-regulated." JA 52. The law changed after Stone left, and Stone had no reason at all to believe that Rockwell would not conform its later disclosure practices to the newly clarified law.

III. STONE FAILED TO PROVIDE SUFFICIENT INFORMATION TO THE GOVERNMENT AS REQUIRED BY SECTION 3730(E)(4)(B)

An original source must not only have "direct and independent knowledge of the information on which the allegations are based," but must also have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). Accordingly, whatever information a relator must directly and independently know, he also must voluntarily provide to the Government before filing suit. *See*, *e.g.*, *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (presumption that identical words used multiple times in the same section are intended to have the same meaning is "surely at its most vigorous when a term is repeated within a given sentence").

The only disclosures germane to this inquiry are the ones that Stone made to the FBI in 1987–88. Information provided to the Department of Justice contemporaneous with the filing of a *qui tam* action pursuant to § 3730(b)(2) is irrelevant to the original source inquiry.[22] The district

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[22] No court has found that the jurisdictional prerequisite that a relator "voluntarily provide[] the information to the Government before filing an action" under § 3730(e)(4)(B) can be satisfied by filing the complaint along with a mandatory written disclosure under § 3730(b)(2). The requirements under § (b)(2) apply to *all qui tam* plaintiffs and are mandatory, whereas § (e)(4)(B) applies only to those plaintiffs seeking to proceed as original sources and the disclosure must be voluntary. Additionally, § (b)(2) requires a written disclosure contemporaneous with the filing of the complaint whereas § (e)(4)(B) requires disclosure *before* an action is filed. *See, e.g.*, *United States ex rel. Zaretsky v. Johnson*

court found that Stone had not carried his burden to prove that he ever discussed any pondcrete allegations with the FBI. Pet. App. 71–74a. The Tenth Circuit found that Stone's production of the 1982 Engineering Order was "sufficient to carry Stone's burden of persuasion" on the voluntary production issue. Pet. App. 52a. That was error. First, the Order was entirely irrelevant to this case and does not provide the required information—a statement made in support of a claim for money and the facts that make that statement false—or even facts from which the Government could reasonably infer the required information. Second, the phrase "voluntarily provided" in § 3730(e)(4)(B) cannot be met by producing a cryptic page in a large production of documents; the would-be relator must at least bring to the Government's attention the relevant facts to be drawn from a document that would have no obvious significance in the absence of an explanation.

A. Stone's Engineering Order Did Not Contain Sufficient Information To Satisfy § 3730(e)(4)(B)

As explained above, the predictions that Stone claims to have made from the Engineering Order did not come true, and were irrelevant to, and inconsistent with, the claims that he and the Government presented at trial. But even if this Court were inclined to indulge Stone's predictions as "direct … knowledge" that the pondcrete would be insolid and that Rockwell would make false statements concerning the solidity of the pondcrete in order to secure payments from DOE, Stone's 1982 Engineering Order plainly does not communicate any of those inferences.

Controls, Inc., 457 F.3d 1009, 1015–16 (9th Cir. 2006) (noting that the "statutory provisions are different" and "they serve different functions"); *King*, 264 F.3d at 1280 ("It is also clear from the statutes that compliance with the disclosure requirements of § 3730(b)(2) at the time of filing does not satisfy the pre-filing disclosure requirement of § 3730(e)(4)."); *United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1999) (same); *Findley*, 105 F.3d at 690–91 (same). In addition, the information Stone provided to DOJ would have been deficient in any event.

The simplest deficiency in the Engineering Order is the complete absence of *any* mention of a false statement or claim. The Order neither predicts nor identifies *any* false claim to the Government and thus does not disclose "the information on which the allegations are based."

The Engineering Order does not even communicate Stone's alleged conclusion that any piping problem will lead to insolid pondcrete. In his Confidential Disclosure Statement (which, as a matter of law, cannot count as a voluntary pre-filing submission), Stone states that he "foresaw that the piping system … would lead to an inadequate mixture of sludge/waste and cement." JA 290. But that prediction is *not* reflected on the Engineering Order. The Engineering Order on its face is addressed to the process of sludge *removal*, not the subsequent process of sludge *solidification*. *See* JA 228 (Order titled "Solar Evap. Pond Sludge Removal"); *see also* JA 289 (the Engineering Order concerned "a design for the process and mechanical system intended to be used *for removing sludge from these ponds*"). The Tenth Circuit held that the Engineering Order was "explicit in articulating [Stone's] belief that the proposed design for making pondcrete was flawed," Pet. App. 18a, but mere flaws in the sludge removal system are not what Stone had to disclose. Stone had to disclose that the flaws did, in fact, produce insolid pondcrete and that Rockwell concealed that fact from DOE. That information is nowhere to be found in the Engineering Order, and could not even reasonably be inferred from it. *See* Pet. App. 73a (Stone's "comment on that document does not address specifically the plans for mixing the sludge and cement to form the pondcrete blocks. … The document does not speak for itself.").

B. Burying A Cryptic Engineering Order In 2,300 Pages Of Documents Did Not Qualify As Voluntary Production

Section 3730(e)(4)(B)'s reference to "voluntarily provid[ing]" information must include some requirement that the relator present the information in a manner

designed to inform the Government of the salient facts. The *qui tam* statute is designed to conserve scarce Government resources by providing the Government with "genuinely valuable information." *Springfield*, 14 F.3d at 649. As this Court has recognized, the "costs of detection and investigation" are highly significant in FCA cases. *United States v. Halper*, 490 U.S. 435, 445 (1989), *overruled on other grounds*, *Hudson v. United States*, 522 U.S. 93 (1997). And the Senate Report acknowledged the difficulties faced by the DOJ in addressing voluminous fraud allegations. S. Rep. No. 99-345, at 4 n.10 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5269 n.10 (noting that the DOJ received 2,850 fraud referrals in 1984 and 2,734 in 1985). The voluntary production requirement exists to help reduce those costs and to address the "serious roadblocks to obtaining information as well as weaknesses in both investigative and litigative tools" faced by government investigators. *Id.*[23]

Of course this Engineering Order was irrelevant to the case and does not even convey Stone's (irrelevant and ultimately disproven) predictions about the pondcrete piping. Regardless, Stone did not genuinely provide whatever information might be embedded in the Order to the Government before filing, because he buried it in 2,300 pages of documents covering dozens of unrelated allegations. There is no evidence that Stone pointed the Order out to the Government or provided any information to explain the significance of the document. As the district court found, the FBI's 302 reports about their interviews

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[23] As Congress was aware in 1986, Justice Jackson's dissent in *Hess* made the case for the level of assistance contemplated by an original source. As Justice Jackson wrote "[i]t is not shown that he … added anything by investigations of his own, or that his recovery is based on any fact not disclosed by the Government['s investigation] itself." 317 U.S. at 558 (Jackson, J., dissenting). Congress responded, although belatedly, and enacted a provision intended to "reward those who disclose frauds otherwise concealed," *id.* at 559, and "actually and in good faith have contributed something to the enforcement of the law and the protection of the United States," *id.* at 562.

with Stone do not mention the Order and "[n]othing in [those] document[s] refers to pondcrete." Pet. App. 73a. Disregarding the function of the voluntary production requirement, the Tenth Circuit erroneously held that "[t]here is no statutory requirement that the relator have emphasized the specific facts on which a claim is based, so long as the facts are disclosed." Pet. App. 53a n.7. But the Government's ability to uncover fraud is not furthered when a relator buries a single cryptic page in a large document production. Congress meant to reward relators for providing useful information about fraud, not flooding the Government with thousands of undigested documents and then sitting back to see what the Government ultimately manages to make of them. Congress certainly did not intend to reward someone who hides a needle in a haystack, and then looks back with 20/20 hindsight to pick out a single relevant page.

In other contexts, burying a small piece of relevant data in a boxcar of irrelevancies does not count as disclosure. Courts do not tolerate such tactics in briefs—a "skeletal 'argument' … does not preserve a claim … when the brief presents a passel of other arguments …. Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam). The SEC does not permit publicly traded companies to meet their disclosure obligations by burying a disclosure "in a voluminous document" or disclosing "in a piecemeal fashion which prevents a reasonable shareholder from realizing the 'correlation and overall import of the various facts interspersed throughout' the document." *Werner v. Werner*, 267 F.3d 288, 297 (3d Cir. 2001) (quoting *Kas v. Financial General Bankshares, Inc.*, 796 F.2d 508, 516 (D.C. Cir. 1986)); *cf. SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 67 n.4 (D.C. Cir. 1980) ("[D]isclosure may not be buried in a mass of information that, when pieced together, might give the correct impression.") (internal citation and quotation marks omitted). When a contract provision is buried in a contract "in such a way that it is not likely to come to the attention of

the other party," then it is not binding. 7-29 Corbin on Contracts § 29.9. To be effective in the tort context, a warning must "be designed so it can reasonably be expected to *catch the attention* of the consumer." *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984) (emphasis added). The voluntary production requirement in the original source rule should be treated no differently.

The Tenth Circuit's analysis of the voluntary production requirement of § 3730(e)(4)(B) turned entirely on its conclusion that the Engineering Order conveyed sufficient information and was properly provided by Stone. Pet. App. 52–53a. Stone otherwise wholly failed to carry his burden of proof on this point. The district court made express "findings of fact using the standard of a preponderance of evidence with the burden of persuasion being on Mr. Stone." Pet. App. 71a. In those findings, the district court closely studied Stone's affidavit and supporting documents, and found no proof "that Mr. Stone communicated his concerns to the government about the manufacture of pondcrete before the filing of this civil action." Pet. App. 73a. The Tenth Circuit found "unsound" the inference that Stone did not mention his Engineering Order in meetings with the FBI, but did not point to any record evidence sufficient to demonstrate that the district court clearly erred in finding that Stone failed to carry his burden. Pet. App. 52–53a n.7.[24] Accordingly, this Court should hold that Stone failed to satisfy § (e)(4)(B)'s voluntary production requirement

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[24] The district court drew an inference adverse to Stone from the absence of any mention of pondcrete in the FBI 302 reports. *See supra* note 10. That inference is sound. FBI internal procedures expressly demand that a 302 report be an "accurate statement[] of essential facts," that is "complete" and that does not "sacrific[e] thoroughness in order to meet deadlines." Fed. Bureau of Investigation, Manual of Administrative Operations and Procedures, Part II, § 10-17.11 (Effective 1985); *see also United States v. Harrison*, 524 F.2d 421, 425–26 (D.C. Cir. 1975) (describing procedures to "assure the accuracy of" 302 reports).

when the correct legal standard is applied to the facts found by the district court.

IV. STONE CANNOT SATISFY THE ADDITIONAL DISCLOSURE REQUIREMENT FOUND IN SECTION 3730(E)(4)(A) UNDER THE ALTERNATIVE INTERPRETATION ADOPTED BY THE SECOND AND NINTH CIRCUITS

The Second and Ninth Circuits have read the phrase "the information" at the end of § 3730(e)(4)(A) as a reference back to the "allegations or transactions" that were publicly disclosed, which leads to the conclusion that the would-be relator must be the source *to the public discloser* prior to the public disclosure. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990) (under § 3730(e)(4)(A), a relator "must have directly or indirectly been a source to the entity [Government or otherwise] that publicly disclosed the allegations on which a suit is based"); *Wang*, 975 F.2d at 1418 ("To bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit."). Petitioners agree with the majority of circuits that have rejected that view on the ground that it renders the "original source" exception superfluous, *see, e.g.*, *Mistick*, 186 F.3d at 385–88, and believe that "the information" in subsection (A) is instead a reference forward to "the information on which the allegations are based" in subsection (B). But if this Court adopts the Second and Ninth Circuit's approach, Stone loses because there is no evidence that he had a sufficient role in the public disclosure of anything. The newspaper articles cited direct reports of FBI, EPA, DOE, and GAO investigations. JA 113–40, 145–50. Agent Lipsky relied far more heavily on other sources of information than he did on Stone's communications. *See* JA 97; Lipsky Aff. ¶¶ 1.20, 6.3, 7.20–22, 8, *attached to* Defendant's Motion in Limine (Nov. 10, 1997). And the Government officials most knowledgeable at the time—the United States Attorney who led the investigation and another lead prosecutor—said there was no whistleblower and that Stone's information

had "very limited usefulness." JA 118, 343; Additional Record on Remand filed April 24, 2002, Tab 3(A), at 367. For these reasons also, Stone could not prevail under the Ninth Circuit's exception for relators that "trigger" a governmental discovery of fraud. *See Seal 1 v. Seal A*, 255 F.3d 1154, 1162 (9th Cir. 2001).

CONCLUSION

For the reasons set forth, this Court should reverse the judgment of the Court of Appeals and remand this case with instructions to vacate the judgment in favor of Stone, and modify the judgment in favor the United States accordingly.

Respectfully submitted,

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