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

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

CHRISTOPHER J. KOENIGS
MICHAEL B. CARROLL
SHERMAN & HOWARD L.L.C.
633 17TH STREET, SUITE 3000
DENVER, CO 80202
(303) 297-2900

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
MATTHEW K. ROSKOSKI
BARRY J. BLONIEN
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

OTHER AUTHORITY

ARGUMENT

James Stone's "direct and independent knowledge," to the extent he has any at all, is so meager that Respondents are compelled to endorse implausible interpretations of the statute. They contend that the "allegations" in the "action" must be identified through exclusive reference to the first complaint, permitting a relator to establish "original source" status by reliance on one theory of fraud and then to prove and recover under a different theory drawn from publicly disclosed sources. They argue that speculative inferences and predictions qualify as "direct ... knowledge." They contend, like the Tenth Circuit, that the statute imposes no requirements at all about the *amount* of "direct and independent knowledge" required, such that even a scintilla of relevant information would suffice. And they suggest that the Government's intervention grants relators an arbitrary windfall by eliminating any subsequent scrutiny of "original source" issues. None of those interpretations are reasonable. Taken together, they would eviscerate the public disclosure bar.

Stone originally alleged false claims "on a massive scale," covering the entire decade of the 1980s and worth over $1 billion. *See* Stone Br. at 2, U.S. Br. at 21, JA 40.[1] In the end, however, the jury found only three misstatements covering a year and a half, worth less than $1.4 million. JA 549. Yet Stone had no knowledge at all about any of the facts offered to prove the one theory of fraud presented to and accepted by the jury. Respondents try to deflect attention from that glaring gap by describing both Stone's knowledge and his allegations at an implausibly high level of generality—*e.g.*, "Rockwell hid ES&H problems from the Government in order to obtain fees." Stone Br. at 44. But Respondents'

[1] "Pet. Br." refers to Petitioner's Merits Brief. "Stone Br." refers to Stone's Merits Brief. "U.S. Br." refers to the United States' Merits Brief. "Pet. App." refers to Petitioner's appendix to its Petition for Certiorari. "Pet. Reply" refers to Petitioner's Reply to Respondents' Opposition to Petition for Certiorari. "CA App." refers to Rockwell's appendix filed in the Court of Appeals. "Tr." refers to the trial transcript.

own Statement of Claims, which by the terms of the district court's Pretrial Order superseded all prior pleadings, described the one "ES&H problem" underlying the false statements actually alleged and proved at trial this way: "[d]uring the winter of 1986, Rockwell replaced its then pondcrete foreman, Norman Fryback, with Ron Teel. Teel increased pondcrete production rates in part by, among other things, reducing the amount of cement added to the blocks. ... [T]his reduced cement-to-sludge ratio was a major contributor to the existence of insufficiently solid pondcrete blocks on the storage pads." JA 476–77. Stone knew nothing about Teel's decision to reduce the cement ratio, or about any statements to the Government about the resulting pondcrete. All these events occurred long after he left Rocky Flats and moved to New Jersey. Like everyone else, Stone could easily have read these allegations in the newspaper before filing his case. Pet. Br. at 4–5.

1. Stone argues that a relator's original source status should be evaluated only once, on the basis of the original complaint. But as even the Government concedes, if the relator's "theory of liability changes substantially along the way," there simply must be "some requirement that the ultimate theory have some relationship to the original theory that satisfied the 'original source' test." U.S. Br. at 40. Otherwise parasitic relators could easily evade the original source bar by pleading a theory of fraud about which they could claim "direct and independent knowledge," and then actually pursue allegations based on publicly disclosed information. Indeed, that is precisely what Stone is trying to do here. The non-specific allegations in Stone's original complaint may have been broad enough to encompass some now-abandoned claim of fraud based on his direct and independent knowledge.[2] Well before trial,

[2] Despite Respondents' misleading insistence that "Stone's claims [always] included pondcrete," Stone Br. at 26 n.21; *see also* U.S. Br. at 43, pondcrete is never mentioned in Stone's original complaint. *See* JA 38–49. That complaint was so generic that, under the analysis Respondents now proffer, it could retrospectively be read to cover virtually *any* ES&H

however, Stone and the Government were required to make those vague allegations specific. Stone's firsthand knowledge is irrelevant to, and indeed actively inconsistent with, those clarified allegations—which were drawn straight from the public disclosures. Respondents argue, in effect, that Stone is an original source of different allegations they *might have* pursued. But that does not make him an original source of the allegations on which *this* action is based.[3]

a. First, Respondents suggest that the word "allegations" refers only to the allegations of the original complaint. But § (e)(4) never uses the word "complaint"—it refers exclusively to allegations and information in the "action." *See* § 3730(e)(4)(A), (B) ("action ... based upon the public disclosure of allegations" and "action ... based on the information"). "Action" is not a synonym for "complaint." Under § 3730(b)(2), for example, the Government may intervene in the "action" after it receives "the complaint." And "allegations" are not found only in complaints. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113–14 (1986) ("allegations" found in pre-trial order).

While the original complaint may be the first articulation of the "allegations" upon which an "action" is "based," it is hardly the last word. After the Government intervened, Plaintiffs jointly filed an Amended Complaint. Pet. App. 8a. And even the Amended Complaint was not the operative pleading by the time this case went to the jury. Before trial, the district court advised that it would issue a "final pretrial order *which will ... supersede all the pleadings*." CA App. 1635 (emphasis added). All prior "pleadings [were] deemed merged" into the Pretrial Order, which then "control[led] the subsequent course of this *action*." CA App. 1072 (emphasis added). Attached to and referenced in the

---

violation the grand jury eventually charged.

[3] Stone wrongly asserts (at 38) that the Tenth Circuit's conclusion that he is an original source is reviewed only for clear error. This case is about whether the information Stone claims "direct and independent knowledge" of is "the information on which the allegations are based" under § (e)(4)(B)—a question of statutory construction reviewed *de novo*.

Pretrial Order was "[a] description of the plaintiffs' claims," written by Respondents themselves, containing pondcrete allegations tracking the public disclosures rather than the different (and inconsistent) theory of pondcrete failure about which Stone claims personal knowledge. CA App. 1064. Independently, the significant divergence between the original pleadings and the allegations actually presented to the jury would have effected a constructive amendment of the pleadings. *See* Fed. R. Civ. P. 15(b).

Stone protests that Rockwell's interpretation would require "the relator [to] have direct and independent knowledge of *the particular evidence introduced at trial.*" Stone Br. at 16–17. Rockwell has never suggested a relator must know all the evidence, but nothing in the statutory text renders the proof at trial irrelevant to the inquiry. To the contrary, the FCA elsewhere uses the word "information" in precisely this way. As Stone concedes, § 3730(d)(1) clearly contemplates a direct comparison of the trial evidence and the relator's personal knowledge when evaluating whether the action is "based primarily on disclosures of specific *information* (other than information provided by the person bringing the action)." Stone Br. at 32–33. Perhaps the allegations of a relator's action could, in theory, be "based" on his "direct and independent knowledge" even if none of his original source knowledge or evidence is introduced at trial. But the absence of any overlap is, at a minimum, a powerful indication that his original source knowledge is not the actual basis of the allegations in the action, or that his personal knowledge is trivial or tangential to those allegations. Both are true here.

b. Second, Stone argues that jurisdiction depends "upon the facts as they existed at the time the complaint was filed." Stone Br. at 27–28 & n.23. That misses the point—it is not Stone's knowledge that changed but rather his *allegations*, and/or their "bas[is]." A change in allegations or legal theory can of course affect jurisdiction. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966), for example, this Court held that the propriety of pendent

jurisdiction over state law claims "remains open throughout the litigation," and that if the allegations later evolve to make clear that "a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."[4] Jurisdiction must be established at all stages of a litigation, and if a factual allegation necessary to jurisdiction is proven untrue, then jurisdiction is destroyed. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The same must be true if jurisdictional allegations are withdrawn, modified, or clarified in a way that would no longer support jurisdiction.

Of course it is ordinarily preferable for jurisdiction to be determined at the outset. But Respondents' proposed rule would incentivize relators to obscure the true basis and nature of their allegations at the outset, or to plead with such generality that meaningful scrutiny of the relationship between those allegations and the relator's "direct and independent knowledge" is impossible. The Government ups the ante by arguing that Fed. R. Civ. P. 9(b) should be completely toothless in FCA cases. *See* U.S. Br. at 28 n.12; *see also id.* at 27 n.11. It then reasons that if (as here) the first complaint is hopelessly vague and general then there is no requirement that the relator's knowledge be related in any direct or specific way to the theory of fraud actually presented to the jury. *Id.* at 24-25. It is enough, apparently, that both involved "ES&H violations." Proceeding at this level of generality would qualify Stone as an "original source" for almost *any* case against Rockwell, forever.

Stone's alternative argument that § 3730(e)(4) is not

[4] Similarly, in *Washer v. Bullitt County*, plaintiffs' initial complaint had sought relief below the required amount in controversy. 110 U.S. 558, 561 (1884). This Court held that "[w]hen a petition is amended ... the cause proceeds on the amended petition ... [and] jurisdiction will be maintained without regard to the original petition." *Id.* at 562; *see also In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 928–29 (8th Cir. 2005) ("It is well-established that an amended complaint supersedes an original complaint" for purposes of "resolv[ing] questions of subject matter jurisdiction"), *cert. denied, Stainless Sys. v. Nextel W. Corp.*, 126 S. Ct. 356 (2005); *see also* Pet. Br. at 29 & cases cited therein.

jurisdictional at all bears little discussion.[5] Because § 3730(e)(4) was written in jurisdictional terms, "courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1245 (2006). Moreover, because Stone's Article III standing depends upon an assignment of the Government's claim, failure to satisfy § (e)(4) withdraws that assignment and eliminates his standing. Pet. Br. at 24 n.12.[6]

c. The Government argues that while intervention does not "moot[] any *pre-existing* defects in Stone's initial *qui tam* complaint," it moots defects arising from amendments to the pleadings occurring after the Government intervenes. U.S. Br. at 40–41. This argument fails for two reasons.

First, the Government's argument rests upon the proposition that § (e)(4)(A) does not bar actions "brought by the Attorney General." *See* U.S. Br. at 41; *see also* Stone Br. at 19. But the mere act of intervention does not transform a claim initially brought by a relator into one "brought by the Attorney General." Section 3730 authorizes three different kinds of actions: (1) an action brought by the Attorney General under § 3730(a); (2) an action brought by a relator that the Government elects to "proceed with" under § 3730(b)(4)(A); and (3) an action brought by a relator that the Government does not "proceed with" under § 3730(b)(4)(B). Respondents conflate the first and second types of proceedings, but the statute clearly differentiates them. The statute describes intervention with the words

---

[5] Stone claims he can receive fees without being an original source. Stone Br. at 33 n.25. But he concedes that he must be an original source to receive a share of any award, *id.* at 33, and the statute does not authorize fees for a relator who cannot share in the award. *See also United States ex rel. Fed. Recovery Servs. v. Crescent City E.M.S., Inc.*, 72 F.3d 447, 453–54 (5th Cir. 1995) (same).

[6] Stone repeatedly mentions that Rockwell did not renew its original source motion until after trial. Stone Br. at 9–10 & n.10. Of course, jurisdictional defects may be raised at any time. Both the district court and Stone also concluded that Stone's original source status should be considered only after trial. *See* JA 428; CA App. 1058. The parties jointly agreed "to defer this matter until after trial." CA App. 1056.

"the Government proceeds with the action," and Section (d)(1) even speaks of the "Government proceed[ing] with an action brought by a person under subsection (b)." The statute gives relators authority to bring claims on behalf of themselves and the United States, but does *not* give the Attorney General authority to bring claims on behalf of the United States *and a relator*. *Compare* § 3730(b)(1) ("A person may bring a civil action ... for the person and for the United States.") *with* § 3730(a). It is only once the relator is ousted under § 3730(e)(4) that a claim becomes one "brought by the Attorney General"—because at that point, the claim fits within the authority conferred upon the Attorney General by § 3730(a). Indeed, if this claim has become one "brought by the Attorney General," then Stone can receive no award whatsoever, because § 3730(a) does not provide for a relator share, nor for fee shifting. To Petitioner's knowledge, every court to consider the issue since the 1986 amendments has held that Government intervention does not protect a relator against dismissal under § 3730(e)(4)—and none has differentiated between original source defects arising before intervention and those arising after.[7]

Second, even if Stone's vague original complaint can be read to encompass a pondcrete claim, Stone *never* had direct and independent knowledge that any leaking pondcrete was actually present at Rocky Flats in violation of RCRA, nor that any such pondcrete was concealed from DOE. *See* Pet. Br. at 38–43; *infra* Part 4. And his voluntary production was insufficient before the Government intervened. *See* Pet. Br. at 43–49; *infra* Part 5. Stone's original source problem, thus, is not moot under the Government's own analysis.

d. Finally, the Government argues that the "narrowing" of allegations that occurred here should be ignored, lest a

---

[7] *See, e.g.*, 1 John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.02[E] (3d ed. 2006) (collecting cases); Reply Brief for the United States at 13, *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) (Nos. 98-1497, 98-1498, 98-1499) (noting that this argument "has been rejected by every court to consider the issue under the 1986 amendments").

wedge be driven between the Government and relators over trial strategy. U.S. Br. at 42–44. But "[t]he FCA grants the *qui tam* relator no role whatever in formulating the government's *own* litigation strategy." Brief for the United States in Opposition at 23, 22. Relators need not be encouraged to "acquiesc[e]" when the Government seeks to amend or narrow its allegations. U.S. Br. at 44. If a change in trial strategy eliminates those allegations for which a relator would have been an original source, then the relator is no longer necessary or entitled to a share under the plain language. The Government clearly believes that Stone and his lawyers were helpful, and deserve a share. But that policy argument, "whatever its ... merits, is better directed to Congress than to the Court." Stone Br. at 25.

2. Implicit in Stone's brief is the assumption that § (e)(4) is applied in gross—such that if Stone was an original source as to any of his claims (even the spray irrigation claim he lost), jurisdiction is established. Stone Br. at 43–44. Every court to consider this question has held that § 3730(e)(4) must be applied on a claim-by-claim basis. *See United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000); *Hayes v. Hoffman*, 325 F.3d 982, 990 (8th Cir. 2003); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1415–16 (9th Cir. 1992); *see also* Pet. Br. at 27 n.14. In *Merena* the Government agreed, arguing that the language of the Act "mandate[s] that relators' allegations be analyzed for all purposes on a claim-by-claim basis." Brief for the United States at 24, *Merena*, 205 F.3d 97 (Nos. 98-1497, 98-1498, 98-1499) (capitalization altered). Here the Government recognizes that § (d)(1), which also uses the word "action" rather than "claim," must be applied "on a claim-by-claim basis." U.S. Br. at 42. In *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 417–21 (2005), this Court applied different statutes of limitations to different claims in a *qui tam* action, even though § 3730(b) defines a single statute of limitations for "[a] civil *action* under section 3730." *See also Keene Corp. v. United States*, 508 U.S. 200, 210 (1993)

(holding that "cause of action" in 28 U.S.C. § 1500 is synonymous with "claim"). And this Court recently reiterated that "standing is not dispensed in gross," but rather on a claim-by-claim basis. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1868 (2006). Jurisdiction under § 3730(e)(4), which directly controls a relator's standing, *see* Pet. Br. at 24 n.12, should be treated no differently.[8]

Under the required claim-by-claim analysis, Stone has *never* been an original source as to his pondcrete allegations and thus should have been ousted with respect to that claim long before the Government intervened. Notably, in its brief the Government stops well short of ever asserting that Stone qualifies as an original source of the information on which the pondcrete allegations, specifically, are based.

A claim-by-claim analysis also reveals that Stone's spray irrigation allegations, which were rejected by the jury, cannot create jurisdiction over the pondcrete allegations. Stone says his spray irrigation allegations "*did* include the time periods as to which the jury found against Rockwell," citing the Amended Complaint. Stone Br. at 44. But the Statement of Claims narrowed the spray irrigation allegations down to a single "false claim with respect to spray irrigation consist[ing] of Rockwell's request for and receipt of the Cost-Plus Award Fee ("CPAF") for the six-month period encompassing the month of January 1987 (October 1, 1986 through March 31, 1987)." JA 492. And in closing argument, he specifically told the jury that the spray irrigation claim was "limited to" the "award fee period of

---

[8] The remainder of the statute supports that reading. Sections 3730(b)(2) & (4) speak of the Government intervening in "the *action*." Yet the Government properly insists it must be free to intervene on a claim-by-claim basis, lest it "either ... violat[e] Rule 11 by pursuing unsupported claims, or violat[e] its duties to the taxpayers." Reply Br. for U.S. at 26 n.11, *Merena*, , 205 F.3d 97 (Nos. 98-1497, 98-1498, 98-1499). Similarly, the fact that § 3730(c)(2)(A–B) speaks of dismissing or settling "the action" does not mean the Government cannot dismiss or settle specific claims. *Id.* at 27. And § 3732(b)'s grant of pendent jurisdiction over "[c]laims under state law" uses the term "action" interchangeably to define the state claims that can be joined with the federal claims.

October 1, 1986 through March 30, 1987." (Tr. 5072–73.) The jury found no liability for *that* period. JA 548. Moreover, at the Tenth Circuit, Rockwell argued that Stone's "spray irrigation [claim] involved but one of plaintiffs' ten alleged false claims for payment, and resulted in a jury verdict for Rockwell." Appellant's Opening Brief at 15 n.4, *United States ex rel. Stone v. Rockwell Int'l Corp.*, 287 F.3d 787 (10th Cir. 2002). Stone did not disagree—instead, he affirmatively told the Tenth Circuit that the jury found Rockwell liable "with respect to its pondcrete operations." Appellee/Cross-Appellant James S. Stone's Opening/Response Brief at 3, 22. The Tenth Circuit agreed, holding that spray irrigation issues are "moot because the verdict for the time frame including this claim was in [Rockwell's] favor." Pet. App. 50a & n.3.

3. Stone rejects *any* minimum threshold requirement as to the "significance or quantum of information an original source must possess," on the ground that Congress did not expressly articulate the standard to be applied. Stone Br. at 30, 35. He endorses the Tenth Circuit's holding that a scintilla of information that "'underl[ies] or support[s]' the fraud allegations [of his] complaint" suffices, *id.* at 21 (quoting Pet. App. 21a), even if that information is not evidence of fraud, *id.* at 24 n.20. The Government also contends that § 3730(e)(4) imposes no requirements as to the *amount or quality* of the relator's information beyond those in Federal Rules. And both Respondents contend that a relator need not have direct and independent knowledge of any actual claims to the government, but only of the "true state of affairs" or "the facts on the ground ... that show the defendant's claims to be knowingly false." U.S. Br. at 31.

As Rockwell explained in its opening brief (at 32–37), those interpretations are inconsistent with Congress's use of the phrase "*the* information on which the allegations are based" and with this Court's holding in *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993), that the "basis" of an action is "those elements ... that, if proven, would entitle a plaintiff to relief under his theory of the case." The most reasonable

interpretation of the statutory language is that an allegation of fraud is "based upon" information that would allow a reasonable person to conclude, in the absence of any contrary evidence, that fraud has occurred. That is just another way of saying that a proper relator should have enough "direct and independent knowledge" of his own to allow a reasonable person to come to the conclusion that a particular fraud has been committed—hardly an unreasonable burden. Respondents' suggestion that any information "underlying or supporting" the allegations can be "the information on which the allegations are based" is contrary to the text and would permit any disgruntled employee or competitor to qualify on the basis of mere background information. Both Stone and the Government betray their unease with their own argument by describing appropriate relators as "people who observe the fraud" or "individual[s] knowing of ... fraud," Stone Br. at 37, or who "possess[] firsthand knowledge of substantial information about the core of the defendant's fraud—the facts on the ground concerning the defendant's actual course of conduct that *show* the defendant's claims to be knowingly false," U.S. Br. at 31 (emphasis added); *see also id.* at 20 ("firsthand knowledge of substantial information showing that the defendant's claims for government funds or property are knowingly false"); *id.* at 35 ("information concerning the facts that show those claims to be knowingly false"). All of those formulations require direct and independent *knowledge of the fraud* in some meaningful sense.

Respondents suggest that relators need not have knowledge of fraudulent claims for payment, but only of "the true state of affairs that renders the defendant's representations to the government knowingly false." *Id.* at 33–34. That parsing of the allegations necessary to establish fraud is arbitrary and atextual, as the Government essentially admits. *Id.* at 32. As a policy matter perhaps the claims will usually be "innocuous" while the true state of affairs will represent valuable information worth paying for, *id.* at 34, but sometimes the opposite will be true. Here, for

example, many persons who read the Denver papers recounting the pondcrete spill would know that Rockwell likely violated the environmental laws. The Government did not need Stone to tell them that even if he had known about it (which he did not). The Government's policy reasoning accordingly argues for a more flexible standard requiring the relator to have "direct and independent knowledge" of whatever element or elements are judged to be "core" or "essential" to uncovering the fraud on the particular facts of the case. Sometimes "the core of the fraud," *id.* at 35, that the Government needs to make its case will be the true facts, sometimes the statement, and sometimes (often) scienter. Of course, Stone supplied nothing essential to *any* of the constituent allegations making up a fraud claim.

The Government also argues that any requirements about the *amount* of evidence a relator must possess "are imposed by provisions of law *other than* 31 U.S.C. § 3730(e)(4)," such as Federal Rules 8, 9, 11, and 56. That misunderstands the different purposes served by the Rules and by § 3730(e)(4). Rule 11 merely requires an attorney submitting a pleading to certify that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). A relator could satisfy that test with publicly disclosed information or even just the hope of obtaining evidence of fraud through discovery. Rule 11 thus cannot substitute for real scrutiny of a relator's "direct and independent knowledge." The purpose of the public disclosure bar is to exclude parasitic relators, not frivolous claims. The Government's alternative argument that § 3730(e)(4) and Rule 11 converge here "because the allegations in Stone's original complaint were based solely on information that he acquired in his capacity as a Rockwell employee," U.S. Br. at 29 & n.13, is plainly incorrect. Though his vague original complaint leaves the basis of his allegations unclear, Stone soon relied extensively on the publicly disclosed information

in his filings with the district court. *See* JA 88–90.

It also would not be appropriate to look to Rule 11 as a model when articulating the standard for how much "direct and independent knowledge" a relator must have to satisfy § 3730(e)(4). Rule 11 focuses on what a litigant knows *or might find*, and is very lenient, consistent with the liberal pleading and discovery policies of the Federal Rules. Section 3730(e)(4) is a jurisdictional bar designed to screen out relators whose personal knowledge is insufficient. (Although it bears noting that even a Rule 11 analogy would not permit Stone to proceed after discovery with only a scintilla of direct knowledge that is plainly insufficient to sustain his allegations). And if Rule 11 is somehow imported into the meaning of "direct and independent knowledge" in § 3730(e)(4), then Rule 9(b) should be as well—which would require a relator to show that he has direct and independent knowledge of information that supports the "who, what, when, where, and how" of the fraud. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990). Stone's knowledge comes nowhere close. *See Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013 (11th Cir. 2005), *cert. denied*, 127 S. Ct. 42 (2006).

Stone points to § (d)(1) as evidence that Congress intended for the "significance and amount of information possessed by a relator" to be "dealt with flexibly at the award stage." Stone Br. at 35. That section places a ten-percent cap on a relator's bounty where "the court finds" the action "to be based primarily on disclosures of specific information (other than the information provided by the person bringing the action)." It reflects Congress's sensible judgment that an original source relator who contributes little to the ultimate proof should receive a smaller reward. There is nothing inconsistent about a rule that a relator must have, to use the Government's formulation, "firsthand knowledge of *substantial* information showing that the defendant's claims for government funds or property are knowingly false," U.S. Br. at 20 (emphasis added), to qualify as an original source at all, but will be capped at 10% if that

substantial information is not the "prima[ry]" basis of the action. And Stone overlooks the fact that the "flexib[ility]" afforded by § (d)(1) is available only if the Government intervenes. Absent intervention, under § (d)(2) an original source relator is entitled to "not less than 25 percent and not more than 30 percent of the proceeds of the action," regardless of how much or how little information he contributed. A sensible interpretation of the original source requirement itself therefore remains essential to preventing *qui tam* suits that are in substance parasitic, although the relator claims some trivial scrap of personal knowledge "underlying or supporting" his allegations.

Stone's reliance on legislative history is a classic "exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2626 (2005) (citation and quotation marks omitted). Anyone could find a friend in this history. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (the 1986 amendments "underwent substantial revisions" leaving "support somewhere for almost any construction of the many ambiguous terms in the final version"). And floor statements, such as Stone invokes, are the least reliable.[9] As a number of courts have noted, Rep. Berman's statement is even less reliable than usual because it appears to have been drafted *before* an amendment that substantially changed the statute.[10] In any event it does not contradict Rockwell's interpretation; it simply explains that the relator is entitled to a reduced share when another person discloses

---

[9] *See Garcia v. United States*, 469 U.S. 70, 78 (1984) ("Isolated statements ... are 'not impressive legislative history.'") (citation omitted). "[E]ven the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

[10] *Stinson*, 944 F.2d at 1167 (Scirica, J., dissenting); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1354 n.13 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994); *cf. HUD v. Rucker*, 535 U.S. 125, 133 n.4 (2002) (rejecting history commenting on an unenacted version of a bill).

the information to the Government or the media first.

4. Stone can only qualify as an original source of the pondcrete claim (measured at any stage of the case) based on multiple inferential leaps. He must infer (from his alleged observation of ES&H violations, Rockwell's receipt of payments, and the instruction that he not depart from the chain of command) that Rockwell concealed ES&H problems while he worked at Rocky Flats. He must further infer that such concealment *continued after he left.* And he must infer that there would, in fact, be a problem with the pondcrete several years later for Rockwell to conceal. In ordinary parlance the phrase "direct ... knowledge" may embrace some reasonable inferences from personal observation, but it is not consistent with rank speculation. As this Court explained in *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 590 (1993), "the word 'knowledge' connotes more than subjective belief or unsupported speculation." And this Court has long cautioned against "piling inference upon inference." *United States v. Ross*, 92 U.S. 281, 283–84 (1876). Stone's multiple inferences are a bridge too far.

a. Stone claims to have inferred that Rockwell was concealing ES&H problems because he "knew that Rockwell's award fees were contingent on acceptable ES&H performance and he observed that Rockwell continued to receive fees despite its many ES&H deficiencies." Stone Br. at 46. But as Stone himself concedes, ES&H is but *one of many* factors upon which Rockwell was graded. *Id.* at 11 n.11, 45; JA 249 (full list of factors). Stone cannot have known whether the fees Rockwell received had been docked to reflect "ES&H deficiencies." Nor could he have known how the "ES&H deficiencies" he claims to have observed weighed against the rest of Rockwell's environmental performance. And many of the ES&H problems that Stone claims to have observed (including the critical pondcrete piping design issue supposedly reflected in the Engineering Order) were in the nature of engineering disagreements with his coworkers. Stone could not reasonably infer that his bosses were submitting claims for reimbursement that

were knowingly false from the fact that he disagreed with their engineering or scientific judgment. Pet. Br. 40–41.

The fact that Stone was instructed to follow the chain of command does not bolster his flimsy inference. Just last Term, this Court recognized that employers have a legitimate interest in requiring their employees to observe the chain of command, in order to ensure that "official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). Stone's inference that William Nichols's instruction must reflect an illicit intent to hide the truth from DOE is inconsistent with *Garcetti*. And Nichols had nothing to do with the pondcrete or any related claims for payment six years later. His knowledge and intent was therefore legally immaterial. *See Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 & n.6 (D.C. Cir. 1996) (rejecting concept of collective corporate intent).

b. It is undisputed that Stone's own knowledge was based exclusively on his observations "of Rockwell's ES&H practices while he was employed at Rocky Flats." Stone Br. at 20 n.17. His second inference (that because Rockwell allegedly concealed ES&H problems during his employment, it must have concealed different ES&H problems arising years later) is not just wildly speculative but specifically forbidden by the Federal Rules of Evidence. Rule 404(b) prohibits an inference from prior bad acts to "action in conformity therewith" because "evidence of other crimes, wrongs, or acts ... is irrelevant ... the doing of one act is in itself no evidence that the same or a like act was again done by the same person." 22 Charles Wright & Kenneth Graham, Federal Practice and Procedure § 5239 (1978). Without the forbidden propensity inference, Stone had *no* knowledge whatsoever about ES&H violations or their concealment during the relevant time period.

c. Stone's third critical inference—his prediction that piping defects reflected in the 1982 Engineering Order would cause the pondcrete to become insolid years later—is

equally deficient.[11] As a matter of law, a prediction of future manufacturing problems cannot establish direct knowledge of an ES&H violation, let alone a false claim. Stone could only have "direct and independent knowledge" that Rockwell violated RCRA if he knew that Rockwell was subject to RCRA, that the pondcrete was actually too liquid, that Rockwell did not promptly remedy the defect, and that it began leaking while stored on site. *See* JA 467–69 (RCRA violation required improper storage without immediate remedial action); 475 (storage began in October 1986). Every one of these events occurred long after his departure from Rocky Flats, Pet. Br. at 40–41; Pet. App. 46–47a, and a speculative prediction cannot substitute for "direct and independent *knowledge*."

Stone's prediction also cannot have been the information on which the allegations in this case were based, because it was actually disproven by Respondents' own evidence and argument. Pet. Br. 38–41. Stone now insists that the human operators were irrelevant, and that the piping system he critiqued caused the pondcrete to be insolid. If that were true, Stone would be able to explain how Fryback could produce "concrete hard" blocks of pondcrete *using the very machinery Stone now says was defective.* Tr. 5177. Stone offers no explanation—instead he simply announces that this incongruity does not "undermine[] the manufacturing deficiencies identified by Mr. Stone." Stone Br. at 41. But Fryback used the very equipment Stone predicted would be deficient, and it produced "concrete hard" pondcrete that the Government held up to the jury as an example of exactly how the process was supposed to work. Tr. 5177. Stone says that foreman Fryback also identified "manufacturing defects," implying that the trial evidence supported Stone's theory. But Fryback simply testified that the "star valve," which regulated the flow of *cement* (not sludge), and the paddles inside the pug mill required preventive maintenance

[11] Stone's insistence that Rockwell conceded his original source status, Stone Br. at 7 n.5, 40, is answered at Pet. Reply at 7–8 & n.6.

lest cement build up block the flow of dry cement into the pug mill. Tr. 991–93, 1037–38. This Court will search in vain for any reference to star valves or pug mill paddles in Stone's 1982 Engineering Order. What Stone critiqued was the system for extracting sludge from the ponds.[12] But what his own attorney told the jury was "they were making it wrong, *they weren't using enough cement*, and they were hiding it from the government." JA 546 (emphasis added).

5. Because Stone's 1982 Engineering Order did not identify any of the supposed inferences and predictions on which he now relies, giving it to the Government did not satisfy his voluntary production burden under § (e)(4)(B). In the Government's own words, "unless the information [voluntarily provided] is sufficient to put the Government on the trail of the fraud, the disclosure to the Government is meaningless." United States' Statement of Interest at 9, *United States ex rel. Meshel v. Tenet Healthcare Corp.*, No. EP-02-CA-0525 (W.D. Tex.). The Government now argues that that the disclosures need only "reflect[] substantially all the relevant information that Stone possessed." U.S. Br. at 46. But that misses the point. As its own brief makes clear, Stone relies on an elaborate chain of inference and prediction to qualify as an original source. *Id.* at 23. If those inferences and predictions are the information that "Stone possessed" and relies on to satisfy § 3730(e)(4), then they must also be part of "the information" voluntarily provided.

The affidavits Stone cites to claim that he "discussed pondcrete ... with the Government in the 1986-88 meetings," Stone Br. at 48, are not part of the record. On remand,

---

[12] Similarly, the 1988 Unusual Occurrence Report cited by Stone also does not refer to the system he critiqued. Stone Br. at 41 n.28. The "inadequate process control" the UOR describes, CA App. 1825, is the very human oversight Stone now claims was irrelevant. And "the sludge feed to the pug mill," *id.*, is not a reference to the system Stone critiqued (in Stone's own words, the "piping system" that was "intended to be used for removing sludge from the[] ponds," JA 289) but rather to the stage *after* extraction—the "Thickener Tank" in which solids and liquids were separated before solids were passed to the pug mill. CA App. 1831–32.

Stone advised the district court that it could "make the requisite findings on the basis of the present record." JA 585; *see also* JA 588–89; Pet. App. 50a, 70a. When the district court ruled against him, Stone reversed course and moved to add new affidavits (purporting to describe, for the first time, conversations that occurred 15 years earlier). *See* JA 591–603, 614–23; Pet. App. 69a. Unsurprisingly, the district court denied Stone's motion, finding that to accept the affidavits "would be inconsistent with what was stipulated to be the record to be used for the decision in this case" and "would obviously prejudice the defendants." JA 625. Stone does not even argue that the district court abused its discretion,[13] but now cites these very affidavits. *See* Stone's Br. at 48 (citing JA 598, 600, 619–21, 181–82, 599–601, 615–21).[14] This Court has held for over a century that it "must affirm or reverse upon the case as it appears in the record." *Russell v. Southard*, 53 U.S. 139, 159 (1851). Moreover, the district court was right to find that Stone did not discuss his pondcrete theory with the FBI. The record demonstrates that pondcrete was manufactured at Rocky Flats Building No. 788, and stored on outdoor pads Nos. 750 and 904. *See, e.g.*, JA 54–55. The 302 reports reflect that Stone "recapped the building numbers ... of pertinent ... buildings." JA 258. Stone's list did not include Building 788.

Under Stone's reading, a person could satisfy § (e)(4)(B) by hoarding as many documents as possible and dumping them in the Government's lap—without any explanation—so long as at least one piece of paper ultimately proves marginally relevant with 20/20 hindsight *after* trial. Congress intended to reward relators who provide useful information about fraud and help limit the Government's

---

[13] Stone suggests the district court misled him into thinking no adverse inference would be drawn from the FBI 302 reports. *See* Stone Br. at 13 n.13. The district court found as a fact "that the court did not mislead Mr. Stone or his counsel." JA 625.

[14] Stone also cites JA 180–81. This citation is to his original affidavit filed in 1993. As the district court found (Pet. App. 71–73a) it does not establish that he told the Government anything about pondcrete.

"costs of detection and investigation," *United States v. Halper*, 490 U.S. 435, 445 (1989), *overruled on other grounds*, *Hudson v. United States*, 522 U.S. 93 (1997), not those who inundate the Government with raw documents hoping that the Government will make something of them.

6. Finally, Stone's free-floating plea for a remand and a second bite at the apple should be rejected. Stone Br. at 50. There are no material factual disputes, the record here is amply clear about the limits of Stone's knowledge, and the lower courts need the guidance that can only come from this Court's application of the correct statutory interpretation. Stone has had seventeen years to establish his direct and independent knowledge—he is entitled to nothing more.

Similarly, no "additional inquiry" into whether there was a qualifying public disclosure is called for. As the Government explains, § 3730(e)(4)(A) is a "quick trigger." U.S. Br. at 36. The public disclosure here was thus easily sufficient. *See* Pet. Br. at 4–5. And Stone's suggestion that clarifying the specific "information" a relator must know under § (e)(4)(B) would somehow change the test for a disclosure of "allegations" under § (e)(4)(A) is meritless. The two sections operate at very different levels of generality: Subsection (A) is satisfied by disclosures of "allegations" while subsection (B) requires "direct and independent knowledge" of "the information." But regardless, Stone has long since waived any objection to the adequacy of the public disclosure and the applicability of § 3730(e)(4). At no point in this case's seventeen year history has Stone ever argued that the public disclosure was inadequate. He told both the district court and the Tenth Circuit that this "FCA case is 'based upon the public disclosure of allegations.'" JA 312–13; *see also* Pet. Br. at 9–10. The time to contest the applicability of § 3730(e)(4) has long passed.

CONCLUSION

This Court should reverse the judgment of the Tenth Circuit and remand for dismissal of Stone's claims.

Respectfully submitted,

CHRISTOPHER J. KOENIGS
MICHAEL B. CARROLL
SHERMAN & HOWARD L.L.C.
633 17TH STREET, SUITE 3000
DENVER, CO 80202
(303) 297-2900

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
MATTHEW K. ROSKOSKI
BARRY J. BLONIEN
NATHAN H. SELTZER
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200