ORAL ARGUMENT NOT YET SCHEDULED
No. 23-7044 (Related Case: 23-7041)

In the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES OF AMERICA EX REL.
MARK J. O'CONNOR AND SARA F. LEIBMAN,

Plaintiffs-Appellants,

v.

USCC WIRELESS INVESTMENT, INC., ET AL.,

Defendants-Appellees.

Appeal from the U.S. District Court for the District of Columbia
Case No. 20-cv-2071 (Hon. Tanya S. Chutkan, J.)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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GLOSSARY

DE	Designated Entity
DOJ	Department of Justice
FCA	False Claims Act
FCC	Federal Communications Commission
JA	Joint Appendix
MSA	Master Services Agreement

INTRODUCTION

Defendants do not dispute that the post-2010 public disclosure bar is an affirmative defense on which they have the burden of proof. Nor do they contest that plaintiffs are "not required to negate an affirmative defense in their complaint." *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 607-08 (D.C. Cir. 2013) (cleaned up) (collecting cases). "Instead, as long as a plaintiff's potential rejoinder to the affirmative defense is not foreclosed by the allegations in the complaint, dismissal at the Rule 12(b)(6) stage is improper." *Id.* at 608 (cleaned up); *see* Opening Brief ("Br.") 32 (setting forth standard of review). This is especially so regarding the affirmative defense under the public disclosure bar. For a host of reasons, it is improper to require relators to affirmatively plead all the details surrounding their voluntary disclosures, which are largely privileged communications. *Infra* (I)(A).

And given plaintiff Mark O'Connor's role in the prior litigation, it should have been patently obvious that he is an original source of the allegations in the 2008 Complaint. 31 U.S.C. § 3730(e)(4)(B)(i). It is thus no surprise that, rather than defend the district court's reasoning, defendants attempt to avoid the argument by suggesting that plaintiffs

forfeit it. Defendants acknowledge, though (at 32), that the first argument in plaintiffs' opposition to defendants' public-disclosure defense (indeed, the first *sentence*) states that O'Connor is an original source on this basis. The district court simply failed to address the claim. *Infra* (I)(C).

On the merits, defendants focus solely on the 31 U.S.C. § 3730(b) written disclosures to argue that such disclosures are not "voluntary." Response Brief ("Resp.") 36-37. Even if that were correct, it is irrelevant. Plaintiffs have never argued that the required written disclosures were the sole basis of meeting the voluntary-disclosure requirement. Rather, O'Connor voluntarily disclosed the allegations within the 2008 Complaint to the Government in several ways, including the § 3730(b) disclosures, long before it was unsealed. *See* Br.40-41. That is all that is required to establish original-source status. It is thus immaterial whether he was *also* the named relator in the prior case. *Infra* (I)(B).

This Court need not go further to reverse in both related cases on appeal. *See* Reply Br.3-4, No. 23-7041 (explaining how defendants concede that if O'Connor is an original source of the allegations in the 2008 Complaint, he is necessarily an original source of the allegations

underlying the complaint in the related case). But plaintiffs are *also* an original source of the allegations here because their knowledge "materially adds" to the allegations that were publicly disclosed. 31 U.S.C. § 3730(e)(4)(B)(2). The 2008 Complaint did not allege—because it *could not* have at the time—plaintiffs' independent knowledge that USCC fully incorporated King Street's spectrum into USCC's 4G LTE network; defendants' creation and concealment of the 2011 King Street Lease; the *fake* 2012 King Street Lease defendants created and USCC submitted in FCC Auction 901, falsely representing the amount of its control of King Street's spectrum; USCC's payment for, construction of, and ownership of the facilities and equipment necessary to operate the 4G LTE networks that use King Street's licenses; or King Street's submission of false statements and material omissions in its designated-entity Annual Reports and Construction Notices. *See* Br.51-57; *infra* (II).

Moreover, the allegations in the 2008 Complaint and the operative complaint are not "substantially the same," because the FCC and SEC documents defendants rely on do not disclose the essential elements of the alleged frauds. *Infra* (III). And those filings are not "public disclosures" under the current statute. *Infra* (IV).

ARGUMENT

The district court dismissed the case solely on the ground that the 2008 Complaint publicly disclosed the allegations here. This was error. Plaintiffs are plainly an original source of those allegations, and in all events, it was inappropriate for the district court to resolve the question at the pleading stage.

This Court should also reject defendants' arguments based on public documents the district court did not consider. The FCC and SEC documents on which defendants rely do not disclose all the essential elements of the fraud alleged, and even if they had, they are not "public disclosures" under the statute.

I. PLAINTIFFS ARE AN ORIGINAL SOURCE OF THE ALLEGATIONS IN THE 2008 COMPLAINT.

A. Defendants Do Not Dispute That the Public Disclosure Bar Is an Affirmative Defense That Plaintiffs Are Not Required to Anticipate in the Pleadings.

As plaintiffs explained in their Opening Brief, the public disclosure bar is an affirmative defense on the merits. Br.32 (citing *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 738 n.1 (10th Cir. 2019)). Thus, dismissal is appropriate only if it is clear from the face of the complaint that plaintiffs cannot rebut the affirmative defense. *Ibid.*

(citing *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997)).

As this Court has explained, plaintiffs are "not required to negate an affirmative defense in their complaint." *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 607-08 (D.C. Cir. 2013) (cleaned up) (collecting cases). "Instead, as long as a plaintiff's potential rejoinder to the affirmative defense is not foreclosed by the allegations in the complaint, dismissal at the Rule 12(b)(6) stage is improper." *Id.* at 608 (cleaned up).

Defendants nowhere dispute this legal standard. Instead, they argue that under the prior version of the statute—when the public disclosure bar was jurisdictional—a relator must "allege specific facts" to "establish original source status." *See* Resp.39 (quoting *United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1285 (10th Cir. 2010); *United States ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (D.C. Cir. 1999)). Defendants do not dispute that the 2010 amendment shifted the burden to them by making the public disclosure bar an affirmative defense. The "Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), did not alter the principle that 'complaints need not anticipate, and attempt to plead around, potential

affirmative defenses.'" *de Csepel*, 714 F.3d at 608 (explaining and citing, with approval, *Davis v. Indiana State Police*, 541 F.3d 760, 763-64 (7th Cir. 2008)) (cleaned up).

Defendants' only post-2010 amendment case is *United States ex rel. Ambrosecchia v. Paddock Lab'ys, LLC*, 855 F.3d 949, 955 (8th Cir. 2017). But the Eighth Circuit there acknowledged that the public disclosure bar is no longer jurisdictional and merely noted the uncontroversial point that, under some circumstances, a relator's case may be dismissed at the pleading stage. *Id.* at 953-54. And defendants do not disagree with plaintiffs' explanation, *see* Br.32, that it is not appropriate to dismiss a complaint based on an *affirmative defense* unless "the facts that give rise to the defense are clear from the face of the complaint." *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998); *see de Csepel*, 714 F.3d at 608 (collecting cases) (same).

Plaintiffs credibly allege that they are original sources who "voluntarily provided" disclosures to the Government "before filing." JA39¶37. Defendants challenge those allegations in the complaint as insufficient—including, for example, questioning whether plaintiffs shared the results of their engineering spectrum analysis or other

findings with the Government. Resp.39-40. But such factual disputes are not an appropriate basis on which to dismiss plaintiffs' claims at this stage. Defendants cannot show that it is "*unequivocally* apparent from the *face*" of the 2020 Complaint that plaintiffs have pleaded themselves out of refuting defendants' affirmative defense, as required to dismiss the case at this stage. *See Doe v. DOJ*, 753 F.2d 1092, 1116 (D.C. Cir. 1985) (emphasis in original).

This is especially so in a *qui tam* suit. A relator's voluntary disclosures to the Government are protected by the common interest or joint prosecutorial privilege. *See, e.g.*, *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 26-27 (D.D.C. 2002). And it is common practice in *qui tam* litigation for relators to provide protected voluntary disclosures of information to the Government before the allegations become public, as O'Connor did prior to the public disclosure of the 2008 Complaint. *See* Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 11:64 (4th ed. 2023). There is every reason to do so—the remedial provisions of the FCA incentivize relators to provide their allegations to the Government voluntarily before their *qui tam* complaints become public, and doing so protects a relator's original-source status. *See* 31

U.S.C. § 3730(d); *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 83-84 (D.D.C. 2012) (prompt voluntary disclosure among factors to decide how much of the recovery goes to relators). Defendants simply question whether O'Connor voluntarily disclosed the allegations to the Government—with no basis for thinking he did not.

B. Plaintiffs Qualify as an Original Source Because O'Connor Voluntarily Disclosed the Allegations in the 2008 Complaint Before the Public Disclosure.

Plaintiffs qualify as an original source because plaintiff O'Connor voluntarily disclosed the allegations in the 2008 Complaint prior to its public disclosure in April 2009. Indeed, O'Connor's voluntary disclosures create original source status as to *any* public disclosures that occurred after the original action was filed.

Defendants fail to provide meaningful authority in support of their argument, despite their burden of proof. *Cf.* Resp.34-35. And defendants do not doubt the text of the statute, which grants original source status to *anyone* who voluntarily discloses fraud allegations to the Government before a public disclosure of the fraud. *See* Br.11-12, 41. Instead, they argue that the written disclosures required by 31 U.S.C. § 3730(b)(2) are

not "voluntary" and that O'Connor was not himself the named relator on the 2008 Complaint. Resp.36-38.

In fact, though, plaintiffs claim original source status because O'Connor voluntarily disclosed the *allegations* of fraud reflected in the 2008 Complaint prior to its unsealing. *See* Br.40-41 (arguing "that plaintiff O'Connor was an original source of the allegations of fraud in the 2008 Complaint, and so, always will be," *and* that the complaint "was served on counsel for the Government on April 25, 2008"). And in any event, the fact that the statute requires written disclosures does not make the disclosure (either the decision to disclose or the contents of the disclosure) involuntary. *See United States ex rel. Babalola v. Sharma*, 746 F.3d 157, 163 (5th Cir. 2014) (explaining that § 3730(b)(2) disclosure may confer original source status). After all, a relator has no obligation to file a *qui tam* suit—and thus serve a written disclosure—in the first place.

But this Court need not resolve the question, because, in addition to his disclosure obligations, O'Connor separately and voluntarily communicated with the Government regarding the allegations in the 2008 Complaint before it was unsealed. If it seems improper that the parties are having this factual dispute at the motion to dismiss stage,

that is because none of this background was required for the complaint. *de Csepel*, 714 F.3d at 607-08. If this Court disagrees, plaintiffs could easily amend the complaint to allege and ultimately prove that O'Connor was in regular, voluntary communication with the Government as early as 2007 regarding the allegations underlying the 2008 Complaint. Courts commonly permit amendment to allow relators to rebut public-disclosure arguments or bolster original source allegations. *See United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 309 (4th Cir. 2008); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 409 (9th Cir. 1993).[1] Plaintiffs were never given the opportunity to do so. Instead, the district court dismissed plaintiffs' complaint with prejudice after a single motion to dismiss—without any futility analysis and despite plaintiffs' request for an opportunity to amend. JA900.

Defendants' cases regarding pre-filing disclosures are thus inapposite. Resp.36-37. None involves a situation where, as here, a

[1] *See also, e.g.*, *United States ex rel Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 815 (10th Cir. 2002); *United States ex rel. Scott v. Pac. Architects & Engineers (PAE), Inc.*, 327 F.R.D. 17, 22 (D.D.C. 2018); *United States v. Huron Consulting Grp., Inc.*, 843 F. Supp. 2d 464, 468 (S.D.N.Y. 2012), *aff'd sub nom.* 567 F. App'x 44 (2d Cir. 2014); *United States ex rel. Guzman v. Insys Therapeutic, Inc*, 2021 WL 4306020, at *5 (C.D. Cal. May 19, 2021).

relator's *own prior* FCA complaint was the public disclosure at issue. And there is no disputing that O'Connor's other voluntary communications with the Government—untethered to the requirements of § 3730(b)—bestow original source status. Finally, defendants do not point to any authority requiring O'Connor to have *also* been named as the relator on the 2008 Complaint to be an original source given his voluntary, pre-unsealing disclosures of the allegations therein. *Cf.* Resp.34-36 (red herring argument that O'Connor's titular law firm was the named relator, not O'Connor himself).

C. The District Court Failed to Address This Argument.

As defendants acknowledge, plaintiffs argued to the district court that O'Connor was the original source of the allegations in the 2008 Complaint and that it would be "contrary to logic, fact and law" to bar plaintiffs' suit based on a relator's own prior complaint. JA872-73; Resp.32. In fact, this argument is the very first sentence in plaintiffs' opposition to defendants' public disclosure defense. Thus, plaintiffs did not forfeit this argument. The district court simply failed to address it.

In opposing defendants' affirmative defense, plaintiffs argued that "Relator O'Connor was the original source of the 2008 Complaint."

JA872. Plaintiffs cited *United States ex rel. Shea v. Verizon Communications, Inc.*, 160 F. Supp. 3d 16 (D.D.C. 2015), *aff'd sub nom. United States ex rel. Shea v. Cellco Partnership*, 863 F.3d 923 (D.C. Cir. 2017). JA872 n.15. And plaintiffs explained, quoting *Shea*, "that the public disclosure bar is designed to 'discourage opportunistic plaintiffs who have no significant information to contribute of their own,' but where a prior complaint was filed by the Relators themselves, they 'could not possibly have "opportunistically" relied on the unsealing of that complaint.'" *Ibid.* (quoting 160 F. Supp. 3d at 28) (cleaned up); *see also* Br.42-45.

The "obvious reading" of plaintiffs' argument below is that O'Connor's involvement in the prior litigation makes him an original source. *See Edmond v. U.S. Postal Serv. Gen. Couns.*, 949 F.2d 415, 421-22 (D.C. Cir. 1991) (question is whether "plaintiff sufficiently raised the issue below"). Any refinement of that argument on appeal "is—at most—a new argument to support what has been a consistent claim," and thus

not forfeited. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (cleaned up).[2]

This Court need go no further to reverse and remand.

II. PLAINTIFFS' INDEPENDENT KNOWLEDGE "MATERIALLY ADDS" TO THE ALLEGATIONS IN THE 2008 COMPLAINT.

Plaintiffs also qualify as an original source because their independent knowledge materially added to the publicly disclosed allegations and transactions within the 2008 Complaint, and they voluntarily provided the information to the Government. 31 U.S.C. § 3730(e)(4)(B)(2).

1. Specifically, plaintiffs allege that their independent knowledge and investigations uncovered:

- the incorporation of King Street's spectrum into USCC's own 4G LTE network serving USCC customers, JA62-63¶¶98-99;
- the creation and concealment of the 2011 King Street Lease, JA60-62¶¶92-97;

[2] In all events, this Court *should* resolve this "straightforward legal question" given that "both parties have fully addressed the issue on appeal." *See Lesesne v. Doe*, 712 F.3d 584, 588 (D.C. Cir. 2013) (quotation marks omitted).

- the submission of the *fake* 2012 King Street Lease by USCC in FCC Auction 901, concealing the extent of its control of King Street's spectrum, JA76-78¶¶138-146;
- USCC's payment for, construction of, and ownership of the facilities and equipment necessary to operate the 4G LTE networks that use the King Street licenses, JA63-65¶¶100-105;
- King Street's failure to function as a telecommunications provider, JA66-69¶¶107-14; and
- King Street's submission of false statements and material omissions in its designated-entity Annual Reports and Construction Notices, JA70-73¶¶118-30.

These cascading discoveries were made by plaintiffs, who commissioned a nationally recognized engineering firm to conduct a "drive-test" of markets where King Street held spectrum licenses and provide a written analysis of the spectrum usage at each antenna site.

The firm's analysis, which included Google Earth maps of the tested areas and detailed spectrum signal graphs, demonstrated that USCC had incorporated a disqualifying amount of King Street's spectrum into its

own network. Thus, after filing their original complaint (which alleged an undisclosed agreement), plaintiffs continued to seek out the written agreement by which defendants effectuated the disqualifying spectrum transfer. That, in turn, led them to discover the false 2012 King Street lease. (But none of the Comsearch areas themselves were the subject of the 2012 lease—USCC never disclosed its use of King Street's spectrum there in whole or in part to the public or the FCC.) And before filing their 2015 complaint, plaintiffs provided significant evidence of post-licensing fraud to the Government and supplemented their submissions as more evidence came to light. The Government followed up on this evidence by conducting a *second* (this time lengthy) investigation of King Street's relationship with USCC, proving that plaintiffs materially added to the allegations in the 2008 Complaint.[3]

By prompting an actual investigation, plaintiffs "affect[ed] the Government's decision-making," *United States ex rel. Maur v. Hage-Korban*, 981 F.3d 516, 525 (6th Cir. 2020) (quotation marks omitted), and brought "something to the table that … add[ed] value for the

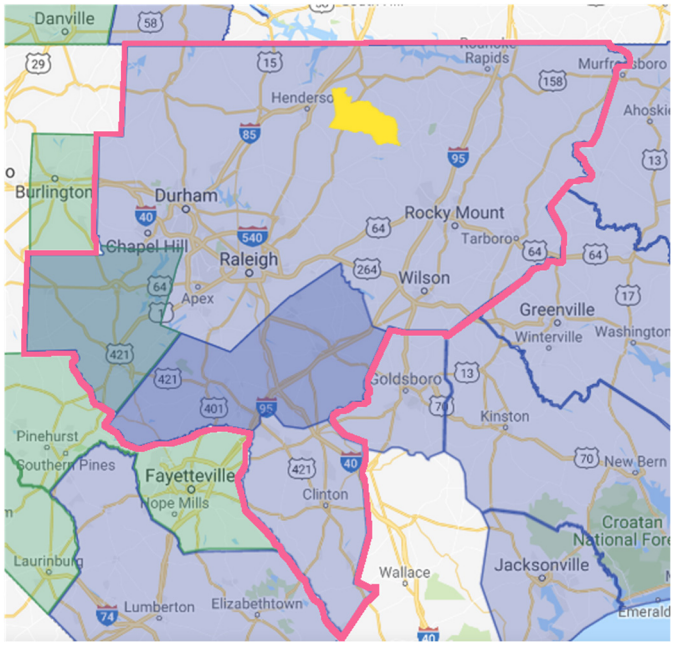
[3] Again, none of this background was necessary for the complaint, and in any event could easily have been added in an amended pleading. *Supra* pp.9-10 & n.1.

[G]overnment," *United States ex rel. Rahimi v. Rite Aid Corp.*, 3 F.4th 813, 831 (6th Cir. 2021) (quotation marks omitted). Defendants note only that the DOJ had investigated plaintiffs' *pre-auction, fraud ab initio* claims based on the allegations in the 2008 Complaint. Resp.12, 30. But they have nothing to say in response to plaintiffs' argument that their additional voluntary disclosures, prior to filing the 2015 complaint, led to the Government's lengthy *second* investigation of these *post-auction* allegations. *See* Br.54-55. The obvious upshot is that plaintiffs' independent knowledge materially added to what the Government already knew. Instead, defendants repeat their (incorrect) refrain that plaintiffs needed to do more than plead that they "voluntarily provided the information to the Government before filing this *qui tam* action," JA39¶37. *See* Resp.40; *contra de Csepel*, 714 F.3d at 608.

Plaintiffs' independent knowledge not only resulted in the second investigation, but ultimately forced King Street to turn over the 2011 King Street Lease during the Government's investigation of plaintiffs' claims. That previously undisclosed document fully establishes defendants' violations of the FCC's bright-line attributable material relationship rule. *See* Br.55. As explained in the Opening Brief (at 15,

17), the attributable material relationship rule at the time set a clear test by which designated entities could not convey more than "25% of the spectrum capacity of any one of the applicant's or licensee's holdings." 47 C.F.R § 1.2110(b)(3)(iv)(A) (2015).

The areas covered by the 2011 King Street Lease, as opposed to the false description in the fake 2012 Lease, corroborate plaintiffs' allegations and conclusively rebut the district court's contrary (and inappropriate) factfinding. To take just one example (and one is all that is needed under the attributable material relationship rule to disqualify King Street entirely as a designated entity, *see* Br.23-25, 55), King Street won the auction for "BEA 19," located in the Raleigh-Durham-Chapel Hill area of North Carolina, and outlined below in red:



See JA325-29. In the 2011 King Street Lease that defendants concealed from the FCC, King Street leased the entirety of its BEA 19 spectrum to USCC. JA77¶143. By contrast, USCC (not King Street) provided a summary of the fake 2012 lease to the FCC in a separate proceeding, which purported to show that USCC had access to a mere 1.03% of King Street's BEA 19 (the 87.1 square mile Census Tract T37185950400 in Warren County, highlighted in yellow). JA77¶143; JA325-29.

Defendants' gamesmanship concerning the competing leases further underscores the materiality of their post-auction violations. As plaintiffs allege, defendants' only purpose in creating the fake 2012 lease—besides qualifying for unrelated auction benefits—was to conceal their rule-breaking 2011 King Street Lease. Br.24-26.

Thus, plaintiffs credibly allege that USCC falsely disclosed that it had acquired only a tiny fraction of King Street's license area, when it had already acquired control of the entirety of the area in King Street's BEA 19 license. That is not, as the district court found, a distinction without a difference. JA947 (finding "difference between the 2011 and 2012 [leases]" immaterial). Without undertaking any assessment of the *extent* of the difference of geographic scope (which, as plaintiffs accurately

allege, far exceeded 25%—*see* JA60-65¶¶92-105, the Court's (inappropriate factual) finding was patently erroneous.[4]

2. Given these allegations, none of defendants' opposing arguments hold water.

Defendants apply the wrong "materially adds" standard. As they acknowledge, there is a circuit split regarding when allegations "materially add[]" to a public disclosure under 31 U.S.C. § 3730(e)(4)(B)(2). Resp.41-42. The First, Third, Sixth, Eighth, and Tenth Circuits have rejected defendants' view and adopted a broad reading in which "a relator 'materially adds' to public disclosures if her information 'is sufficiently important to influence the behavior of the recipient'" or is otherwise "significant." *Reed*, 923 F.3d at 756 (10th Cir. 2019) (quoting *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016)); *see Maur*, 981 F.3d at 525 (similar); *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 306-07 (3d Cir. 2016) (similar); *United States ex rel. Paulos v. Stryker Corp.*, 762 F.3d 688, 694-95 (8th Cir. 2014) (similar).

[4] Plaintiffs' evidence also revealed other disqualifying relationships between USCC and King Street. *See* JA65¶105.

Only the Seventh Circuit found differently. *See Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 721 (7th Cir. 2017) (holding that if "the plaintiff's allegations were 'substantially similar to' the publicly disclosed allegations, the plaintiff did not 'materially add' to the public disclosure and could not be an original source"). This Court should reject defendants' invitation to deepen the existing circuit split because the majority view is correct. The Seventh Circuit's standard "has the effect of collapsing the materially-adds inquiry into the substantially-the-same inquiry. As such, we cannot embrace it." *Reed*, 923 F.3d at 757; Sylvia, *supra*, § 11:71 (Seventh Circuit's interpretation "does not give meaning to the text" because it leaves no work for "materially adds").

But in all events, the Court need not resolve the issue in this case, because plaintiffs plainly meet even the Seventh Circuit's narrower interpretation. Under *any* interpretation of the text, the facts plaintiffs allege they discovered, and their expertise in explaining the context of the FCC's regulations, show that plaintiffs' independent knowledge far surpasses the "materially adds" standard under § 3730(e)(4)(B)(2).

Relying on a 1999 decision from the Seventh Circuit, defendants argue that to be an original source, an outsider relator *must* allege "an exceptionally or unusually complicated allegation of fraud" that "remain[s] hidden until some perspicacious plaintiff puts [the public disclosure] in perspective." Resp.53 (quoting hypothetical in *United States v. Bank of Farmington*, 166 F.3d 853, 864 (7th Cir. 1999), *overruled by Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009)). While those circumstances are *sufficient* for an outsider relator to establish original source status, even the stringent Seventh Circuit has not held that this is *necessary*. Congress expressly rejected the view that *qui tam* suits are limited to insiders. *See*, *e.g.*, *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1044-45 (10th Cir. 2004); *Rahimi*, 3 F.4th at 829.

In any event, this case involves an exceptionally and unusually complicated allegation of fraud, with an intricate web of corporate entities, voluminous misleading filings, and an extremely technical subject matter governed by carefully reticulated federal law and regulation. It *is* a "profound scheme" that took a "Sherlock Holmes to figure out." *See Farmington*, 166 F.3d at 864. If plaintiffs' investigation disqualifies them as an original source simply because someone else

could have done the same independent investigation, applying the same legal expertise, then no outsider could ever bring an FCA case.

Defendants also attempt to cloud plaintiffs' contributions by arguing they provided only additional examples of an already disclosed or continuing fraud. Resp.42-43. But this Court has recognized that a public disclosure does not necessarily bar suit based on "later instances of fraud." *Settlemire*, 198 F.3d at 919. More to the point, as defendants have repeatedly emphasized, the determination of *de facto* control is an inquiry that involves a multitude of factors. *See, e.g.*, JA627. Here, not only does plaintiffs' independent evidence *by itself* reveal defendants' disqualifying relationships, plaintiffs also contributed to a mounting *accumulation* of facts that together demonstrated defendants never intended to have qualifying relationships. *See, e.g.*, *United States ex rel. Vermont Nat'l Tel. Co. v. Northstar Wireless, LLC*, 34 F.4th 29, 38-39 (D.C. Cir. 2022).

The Government may have been willing to tolerate the aspects of defendants' relationships as alleged in the 2008 Complaint. Br.46-47. At the time, the disqualifying nature of defendants' relationships was arguably theoretical. USCC had the ability to exercise some control, but

one question was whether and to what extent it actually would. And when the FCC inquired, based on plaintiffs' voluntary disclosures in 2007 and 2008, defendants assured the Government that King Street would operate independently. But plaintiffs' independent efforts discovered the truth: USCC thereafter exercised control of everything. *Supra* pp.14-15 (this prompted the DOJ to conduct a *second* investigation).

This case involves independent post-licensing fraud that could not have been known or alleged in 2008. Indeed, much of this post-licensing fraud could not have occurred in 2008 because it stems from separate obligations that become relevant only after licensing occurs, networks are built, and wireless services are provided using the licenses. The designated-entity program imposes a distinct set of post-licensing obligations that operate independently of each other. *Contra* Resp.28-29.

These frauds are alleged under plaintiffs' "reverse false claims" Count Five JA111¶¶229-31. Congress created this independent ground for liability under the FCA to separately punish the use of false records material to an obligation to repay money to the Government, or to knowingly conceal or improperly avoid or decrease an obligation to repay the Government. *See* 31 U.S.C. § 3729(a)(1)(G). By definition, reverse

false claims could not have been alleged in 2008 because defendants had no obligation to repay the bidding credits at that point.

The upshot is that even if defendants had qualifying relationships in 2008 (they did not), they still were required to satisfy their continuing regulatory obligations, particularly those—like certain buildout, management of services, spectrum leasing, and reporting requirements—that were not part of the bidding and licensing processes.[5] Br.26-28.

III. PLAINTIFFS' ALLEGATIONS ARE NOT SUBSTANTIALLY THE SAME AS THOSE DISCLOSED BY THE 2008 COMPLAINT.

A. The 2020 Complaint Alleges Different Frauds From the 2008 Complaint and Is Thus Not "Substantially the Same."

As just described, the allegations in the 2020 complaint involve separate frauds and separate designated-entity requirements than the

[5] Defendants incorrectly argue there is no requirement that designated entities certify "their continued entitlement to bidding credits." Resp.28. Designated entities are required to maintain their eligibility for five years to retain the bid credits, and they are required to notify the FCC of any leases or arrangements that might affect their eligibility. They are also required to file annual reports that "at a minimum" list and summarize "all agreements and arrangements" that "relate to eligibility for designated entity benefits," with a certification under penalty of perjury. 47 C.F.R. §§ 1.2110(n) (2014); *see also id.* § 1.2114(a) (2014).

2008 Complaint. The complaints thus are not "substantially the same"—yet another reason that defendants fail to meet their burden under the public disclosure bar. *See* 31 U.S.C. § 3730(e)(4)(A).

The key evidence underlying these new frauds—including, for example, USCC's disqualifying takeover of King Street's licenses, *see supra* pp.16-18—were *not* disclosed in any publicly filed source or the 2008 Complaint. *See*, *e.g.*, JA60-65¶¶92-105; JA66-69¶¶107-14; JA70-73¶¶118-30; JA76-78¶¶138-46; JA¶162; JA87-89¶¶166-70; JA90-93¶¶173-79; JA97-98¶¶190-93; JA99-100¶¶196-97; JA101¶¶199-201. Far from "[m]erely providing more specific details about what happened," the 2020 Complaint alleges substantial and distinct fraudulent conduct that occurred years after the 2008 Complaint was voluntarily dismissed. *Cf. United States ex rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 472 (D.C. Cir. 2016) (quotation marks omitted). It encompasses a separate fraud violating different FCC and FCA provisions. *See* Br.19. That is enough to overcome the public disclosure bar.

B. The District Court Did Not Apply the Correct Legal Standard.

The district court applied a "substantially *similar*" standard that is less favorable to relators than the standard in the amended statute. *See*

JA944-45. "'Similar' obviously has a different meaning than 'same.' 'Same' means identical; 'similar' means analogous, comparable, or resembling the other." *United States ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836, 850 n.11 (6th Cir. 2020). Worse, the district court invoked the old "based upon" standard from the pre-2010 public disclosure bar. *See* JA943. "From a textual standpoint, 'substantially the same' facially demands a greater degree of similarity between the *qui tam* complaint and the prior disclosures than [the] 'based upon'" standard in the old statute. *Holloway*, 960 F.3d at 851.

Regardless of whether the district court initially quoted the current statutory text, Resp.20 (citing JA943), the court repeatedly applied a test that is not even consistent with this Court's pre-amendment case law. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (under old statute, public disclosure must "reveal the essential elements of a fraudulent transaction").

IV. FCC AND SEC DOCUMENTS DO NOT BAR THIS LAWSUIT.

Defendants devote much of their brief to arguing a ground not addressed by the district court. According to defendants, other purported public disclosures—e.g., FCC and SEC filings—bar plaintiffs' suit.

Since plaintiffs are original sources of the allegations of fraud in the operative complaint, this Court should reverse on that ground rather than reach an issue the district court did not resolve—and thereby leave these contested legal issues of first impression for another day in a suit where they are outcome determinative. *See* JA945.

If, however, this Court reaches the issue, it should reject defendants' arguments rather than create a circuit conflict with the Ninth Circuit's opinion in *Silbersher v. Valeant Pharms. Int'l, Inc.*, --- F.4th ----, 2024 WL 58386 (9th Cir. Jan. 5, 2024),[6] for the reasons discussed here and in greater detail in plaintiffs' briefing in the related appeal, No. 23-7041.

A. FCC and SEC Documents Do Not Disclose "Substantially the Same" Allegations as Plaintiffs' Suit.

To bar plaintiffs' suit, the purported public disclosures defendants rely on must contain all the "essential" elements of the FCA violations plaintiffs allege—including falsity, scienter, and materiality. No FCC or

[6] On January 5, 2024, after the parties filed the Opening and Response Briefs, the Ninth Circuit issued an amended opinion in *Silbersher*. The opinion and its reasoning is unchanged as to the portions relied upon by the parties. *Compare Silbersher v. Valeant Pharms. Int'l, Inc.*, 76 F.4th 843, 853 (9th Cir. 2023).

SEC document discloses any of these essential elements, individually or in combination. If they had, the FCC would not have granted the bid credits.[7]

A public disclosure must be specific to the fraud alleged in the complaint; "the courthouse doors do not swing shut merely because innocuous information necessary though not sufficient to plaintiff's suit has already been made public." *Springfield Terminal*, 14 F.3d at 657. Accordingly, courts should not conduct the "inquiry at too high a level of generality," but rather must "take a careful look at the details of each alleged fraud." *Sturgeon v. Pharmerica Corp.*, 438 F. Supp. 3d 246, 264 & n.115-16 (E.D. Pa. 2020) (collecting cases).

Defendants point to several public documents—such as those revealing defendants' "ownership structure," Resp.45—but these materials do not reveal any *disqualifying* relationship or any "essential" aspects of the fraud, such as materiality or scienter. They reveal, at most, USCC's *limited* partnership interest. But a limited partnership interest

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[7] The sole SEC filing defendants rely on was not even provided to the FCC. And it conceals the fraud by stating, for example, that USCC "participated in Auction 97 *indirectly* through its *limited* partnership" in Advantage. *See*, *e.g.*, USCC, Annual Report (Form 10-K) at 4, 20, 67 (Feb. 25, 2015), https://perma.cc/JR5Q-2ZZ4.

is not disqualifying. While perhaps "necessary" to plaintiffs' allegations of fraud, this information obviously is not "sufficient" to plead an FCA violation. *Springfield Terminal*, 14 F.3d at 657.

And many of these filings were designed to falsely present *qualifying* relationships among defendants. For example, defendants point to filings that explain USCC's limited participation in King Street's spectrum build-out. Resp.45. But these filings do not reveal that USCC's involvement with King Street's licenses far exceeded the limited participation permitted by the FCC. For instance, USCC's February 2012 10-K suggested only that USCC intended to "work with" King Street to build out its network. Resp.47. But plaintiffs allege (and can substantiate) that USCC built, controlled, and maintained every aspect of the network using at least the entire geographic territory of 90 King Street licenses that King Street never used or even intended to use. *See*, *e.g.*, JA61-62¶¶93-97. That fact alone disqualified King Street as a designated entity, but as defendants acknowledge, this inconvenient fact was never *disclosed*. Resp.50.

Similarly, defendants claim they informed the FCC that: (1) USCC was providing certain build-out of the "King Street Network" for use by

King Street pursuant to a Management Services Agreement ("MSA");[8] (2) "King Street … is partnering with [USCC] to deliver high speed 4G LTE service"; and (3) the two parties will engage in a "joint effort." Resp.46-48. None of these statements, however, could possibly have tipped off FCC investigators to the facts that there was no "King Street network," King Street was not delivering 4G LTE services, and there was no "joint effort" to provide services.

Rather, as plaintiffs allege, USCC simply used King Street's spectrum, combined with its own, to deliver USCC-branded services to its customers.[9] To further avert suspicion, King Street asserted that it was offering the 4G LTE services "in conjunction with USCC" but the "joint effort involves only limited [original equipment manufacturer]

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[8] While defendants repeatedly have claimed that FCC staff reviewed and approved the MSA in the King Street licensing process, *e.g.*, Resp.46, this claim is manifestly untrue. King Street never filed a summary of agreement with its other agreements as required under FCC rules.

[9] Similarly, while defendants cite an FCC statement in 2013 that USCC uses *some* King Street spectrum, Resp.47-48, the FCC never stated or implied that it knew of the *disqualifying* nature of the 2011 lease or of all the other material evidence alleged by the plaintiffs.

support at this time." King Street *ex parte* notice, Dkt. No. 11-18 (Nov. 30, 2011), *available at* http://tinyurl.com/2p99fj4p.[10]

B. FCC and SEC Filings Are Not Public Disclosures Under Any Enumerated Channel.

Even if all the essential elements had been disclosed in the public documents defendants rely on, those documents were not "public disclosures" within the meaning of the FCA. The public disclosure bar is triggered only if a qualifying disclosure occurs within one of three enumerated channels, and FCC and SEC filings do not fall within any of them. *See* 31 U.S.C. § 3730(e)(4)(A).

Here too, defendants argue that plaintiffs forfeited this argument. But plaintiffs clearly argued to the district court that FCC and SEC filings are not public disclosures. JA871; JA873-78. Again, any refinement of that argument on appeal "is—at most—a new argument to support what has been a consistent claim." *See, e.g.*, *Citizens United*, 558 U.S. at 331 (cleaned up). This is especially true here, where the most pertinent authority on these issues of first impression was handed down

[10] *See also*, King Street *ex parte* notice, Dkt. No. 11-18 (Nov. 18, 2011) (referring to "King Street's 700 MHz build out" and stating "KSW is building in two ways: (1) LTE and (2) fixed service"), *available at* http://tinyurl.com/4r8v2uyu.

years after plaintiffs filed their opposition to the motion to dismiss. *Compare* JA850-902 (filed November 25, 2020), *with Silbersher*, 76 F.4th at 853 (decided Aug. 3, 2023), *amended opinion* 2024 WL 58386 (Jan. 5, 2024).

Neither the first nor second enumerated channels—the only ones defendants argue—apply to these purported public disclosures. The first enumerated channel, which applies to certain kinds of "hearings," does not apply in this case because it pertains to "adversarial proceedings" that are "adjudicated … before a neutral tribunal or decisionmaker" in which the Government is a "party." *Silbersher*, 2024 WL 58386, at *7. The FCC's designated-entity application process is not such a proceeding. Again, FCC regulations expressly provide that the agency may—as it did here—grant a designated-entity application "*without a hearing*." 47 C.F.R. § 1.945(c) (emphasis added).

And the Government is not "a party" in the FCC's licensing proceedings. In this context, the word "party" refers to litigants—not adjudicators. *Silbersher*, 2024 WL 58386, at *8. Defendants attempt to adopt a much broader definition of "party" in which a party is "[a] person who takes part in a legal … proceeding." Resp.55-56. That can't be right,

or the presence of a federal judge would turn every civil case into a hearing in which the Government is a party, regardless of the litigants' identity.

FCC filings are also not disclosures under the second enumerated channel because they are not disclosed in a "congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A)(ii). That channel must be read to cover "Federal … hearing[s]" only to the extent they are not criminal, civil, or administrative in nature (e.g., congressional hearings, which is the example Congress provided in (ii) itself). Reading it as expansively as defendants urge would render the first channel superfluous.

And FCC filings are not "Federal reports" within the meaning of the second enumerated channel because they are not authored by the Government. Even under the broader understanding of "Federal report" advocated by defendants, the Government had no role in the selection, authorship, or distribution of defendants' filings. *Compare Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011) (information released in response to a FOIA request—which necessarily entail the efforts and selection of Federal agents—was a public

disclosure); *Maur*, 981 F.3d at 522-23 (an agreement with a federal Inspector General that was created pursuant to court order qualified as "Federal report"); *Oliver*, 826 F.3d at 475-76 (materials on public website as mandated by a court order constitute disclosures made within a civil hearing under *pre-2010* public disclosure bar).

CONCLUSION

The district court's decision should be reversed.

Dated: February 2, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7) because it contains 6,449 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Century Schoolbook LT Std.

Dated: February 2, 2024

/s/ Daniel Woofter
Daniel Woofter

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2024, I caused this document to be electronically filed with the Clerk of Court by using the electronic filing system, which will send a notice of electronic filing to all parties who have registered with the electronic filing system.

Dated: February 2, 2024

/s/ Daniel Woofter
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