IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
EX REL. STEPHEN M. SHEA

-and-

STEPHEN M. SHEA,

Plaintiffs,

v.

VERIZON BUSINESS NETWORK SERVICES, INC.; VERIZON FEDERAL INC.; MCI COMMUNICATIONS SERVICES, INC. d/b/a VERIZON BUSINESS SERVICES; and CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Defendants.

No. 1:09-cv-01050-GK

Pretrial Conference: Not Yet Scheduled

RELATOR'S OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

Verizon's Motion to Dismiss should be denied. The first-to-file rule[1] does not bar the Second Amended Complaint for three reasons, any one of which defeats the first-to-file bar: (1) Relator Stephen Shea filed both actions at issue – *Verizon I* only bars someone other than Shea from filing a related action;[2] (2) *Verizon I* was not pending when the Second Amended Complaint was filed; and (3) *Verizon I* and *Verizon II* are not related actions because the Second Amended Complaint alleges that Verizon committed fraud on contracts and U.S. agencies not at issue in *Verizon I*.[3]

The public disclosure bar also does not apply. First, the Second Amended Complaint is not based on publicly available "allegations or transactions." Shea did rely, in part, on publicly available Verizon contract *information*. But that public information did not contain any allegations of fraud and did not reveal all of the material elements of fraud.[4] Without Shea's extensive personal knowledge of Verizon's fraudulent billing practices, the publicly available documents disclose nothing.

Second, even if the public information had revealed Verizon's fraud, the public disclosure bar still does not apply because Shea is an "original source" with "direct and

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[1] 31 USCS § 3730(b)(5) provides "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."

[2] "*Verizon I*" refers to Civ. Action No. 07CV0111(GK). "*Verizon II*" refers to this case.

[3] As discussed below, the *Verizon I* settlement agreement was specifically limited to the FTS2001 and FTS2001 Bridge Contract. Both parties understood that Verizon's other contracts with the United States were not part of that settlement agreement. If Verizon felt that the two cases were so related that they could not be brought separately, Verizon could have moved to consolidate. Verizon chose instead to resolve the first case piecemeal.

[4] *See United States ex rel. Springfield Terminal Ry. v. Quinn* , 14 F.3d 645, 655 (D.C. Cir. 1994) ("[h]owever, where only one element of the fraudulent transaction is in the public domain (e.g., X), the qui tam plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud (e.g., Y) or allegations of fraud itself (e.g., Z)).

independent" knowledge of the information on which the allegations are based. To qualify as an "original source," a relator only needs "direct and independent knowledge of *any* essential element of the underlying fraud transaction." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (emphasis in the original). Shea did not learn about Verizon's fraud by reading Verizon's contracts. Rather, he independently learned that (a) Verizon had a custom and practice of charging its commercial customers illegal surcharges, and (b) Verizon did not have a separate tax module for its commercial customers and the government.[5] From that, Shea reasonably inferred that Verizon was likely defrauding the United States. Shea's investigation only confirmed that fraud. Shea's knowledge independent of the public Verizon information makes him an original source.[6]

Finally, the Second Amended Complaint satisfies Rule 9(b). Where a complaint provides sufficient information to allow a defendant to prepare a defense, Rule 9(b) is satisfied. *United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 79 (D.D.C. 2011) (Lamberth, J.) ("Rule 9(b) is not intended to be a formalistic bar to substandard pleadings, but rather a guarantee that all defendants have sufficient information to allow for preparation of a response")(internal citations and quotations omitted). Here, Verizon cannot claim that it does not know how to prepare a defense in this case. All Verizon has to do is review the 20 contracts at issue, determine what surcharges Verizon billed under each contract, and then construct arguments that those surcharges were allowed under the contracts and the FARs. To the extent that the Second Amended Complaint lacks particularity, it is because Verizon possesses

[5] Second Amended Complaint, ¶¶ 3, 4, and 27.

[6] *See Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1046 (10th Cir. 2004) (In holding that relator was an original source: "[i]t is important to note that none of the public documents disclosed the alleged fraud. It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud.")

documents to which Shea lacks access. *See United States ex rel. Williams v. Martin-Baker Aircraft Co*., 389 F.3d 1251, 1258 (D.C. Cir. 2004) (The D.C. Circuit "provides an avenue for plaintiffs unable to meet the particularity standard because defendants control the relevant documents--plaintiffs in such straits may allege lack of access in the complaint").

BACKGROUND

Verizon I

In 2007, Shea filed Civ. Action No. 07CV0111(GK), in the United States District Court for the District of Columbia ("*Verizon I*"). *Verizon I* was limited to the FTS2001 Contract and the FTS2001 Bridge Contract with GSA. Complaint, ¶¶ 28-64. *Verizon I* did not allege a corporate-wide Verizon/MCI fraud on every telecommunications contract with the United States. GSA was the only U.S. agency at issue in *Verizon I*. And *Verizon I* specifically *excluded* the Federal Universal Service Charge from its list of illegal surcharges. Complaint, ¶ 66 ("The Federal Universal Service Fund surcharge, the PICC surcharge, and certain other taxes were acceptable line item charges under the FTS 2001 Contract.") Verizon paid the United States $93.5 million to settle the case, with no admission of liability.

Verizon II

The Second Amended Complaint in *Verizon II*, alleges that Verizon committed fraud on 20 contracts not at issue in *Verizon I*. SAC, ¶ 28. While some of these contracts were with GSA, the other contracts were with the following U.S. agencies not at issue in *Verizon I*: United States Postal Service, Department of Defense, Federal Emergency Management Agency, Department of Justice, Department of Navy, and the Federal Aviation Administration. SAC, ¶ 28. The Second Amended Complaint repeatedly alleges that Verizon improperly charged the Federal Universal Service Charge, a surcharge not at issue in *Verizon I*. ¶¶ 30-41.

The allegations in *Verizon II* are based in part on Shea's extensive consulting experience. SAC, ¶ 3. Shea became so familiar with Verizon's billing practices that Verizon asked his consulting company, TechCaliber, to train Verizon's employees:

> Q. Okay. In your position for TechCaliber, were you hired by Verizon to perform any services for Verizon?
> A No, we specifically stayed away from working for them.
> Q Okay. In your position --
> A. Even though they offered several times. We would get offers from -- it was the most bizarre thing. Verizon actually would come to me and it would be some mid level manager or something that says, you know more about some of our billing stuff than we do, can you train us on how you do this? Or can you train our sales force how to better respond to our RFPs?

Shea Dep., 17:7-2.[7] Through Shea's extensive consulting experience he learned that:

> most telecommunication carriers, including Worldcom, later named MCI Communications Corp., acquired by Verizon in 2006 (collectively "MCI/Verizon"), had a custom and practice of charging "Federal, State and local taxes," "fees," "surcharges," "tax-like surcharges" (and similar names), state and local 911 charges, state service universal service funds, public utility commission fees, Federal Regulatory Fees/Common Carrier Recovery Charges ("CCRC"), Federal Universal Service Charges, ad valorem/property taxes, and business, occupational, and franchise taxes. Carriers then used misleading language to conceal these overcharges from their commercial customers. Shea also learned that surcharges passed on to the carriers' customers frequently had no correlation with the surcharges levied on the carriers. Shea found that sophisticated commercial customers did not realize they were being overbilled and recovered over $50 million for commercial customers due to his expertise in identifying overcharging.

SAC, ¶ 3.

Based on Shea's direct and personal knowledge of improper billing practices, he discovered that MCI/Verizon overcharged the United States, just like its commercial customers. SAC, ¶ 4. In 2004, Shea received an MCI document indicating that the company was charging the government the same illegal surcharges it was charging commercial customers. Shea described his reaction to this document:

[7] Attached as Exh. 1 to Declaration of Randolph D. Moss In Support of Defendants' Motion to Dismiss The Second Amended Complaint.

> Q Other than conversations with lawyers, what did you say about the document to your colleagues at TechCaliber?
> A Check this out. They're -- they're – [MCI] they're screwing the government just like they screw all of our corporate customers. Look at this. Can you believe it? Can you believe it? Because I knew and we would talk about some of these charges. And ad valorem was on there. Ad valorem, ad valorem, ad valorem. What was that? We knew from our work in the enterprise is MCI had created a charge, at the beginning very small and minute, to essentially collect back its property taxes, its cost of doing businesses from its customers, and then it stuck it on the bill and told customers it was taxes. It was really --
> Q Did anybody -- I'm sorry.
> A No, I want to finish. It was really small and that was the thing that popped out to me. Because I think it's just egregious for a company to slide an extra charge in on a bill and -- and have that be a cost recovery mechanism over price that essentially enriches them and makes some of their customer pay their property taxes. . . .

Shea Dep., 88:10 – 89:14.

Through his consulting practice, Shea learned that it was difficult for Verizon/MCI to turn off the surcharges: "[b]ut what we were being told by the tax department is, yeah, that tax module, that's not customer specific, it's -- that just kind of tacks on and we don't waive the crap for anybody. We just -- it just does its thing." Shea Dep., 199:2-6. As alleged in the Second Amended Complaint, "[a] former Verizon employee, who worked at the company for over 30 years and retired as a manager, senior staff consultant, confirmed that Verizon did not have a separate billing system for federal customers and commercial customers, and that Verizon's billing system did not have the capability to turn off the surcharges that were generally charged to all customers." ¶ 27.[8]

As part of his investigation, Shea also reviewed an individual invoice issued to a government employee under Verizon's Contract No.GS-35F-OI19P with GSA. Shea Dep., 126:21 – 137:15. Shea recalls that the invoice confirmed that Verizon was billing a Federal Universal Service Charge and a Regulatory Charge. Shea Dep., 133:18-134:4. The Second

[8] Relator's counsel inartfully used the word billing system, when that should read "taxing module."

Amended Complaint quotes extensively from the modifications to Contract No.GS-35F-OI19P and alleges:

> Verizon's careful wordsmithing in the above modifications indicates that Verizon knew that FUSC, Regulatory charges, and similar surcharges were not allowable charges under the contract. Instead of filing a request for an economic price adjustment, which would have required full disclosure of these charges and would have allowed the government to deny the request, Verizon pursued a strategy of "bill, but don't ask." In an effort to provide some legal cover, Verizon filed its confusing and misleading modifications.

SAC, ¶ 41.[9]

Based on the above information, Shea reasonably inferred that Verizon was also charging the United States illegal surcharges. Shea searched the internet and found chunks of contracts and modifications with misleading language that confirmed his suspicions of fraud. SAC, ¶¶ 29-41. As Shea explained at his deposition, this was not just speculation:

> Q. Based on your experience with commercial contracts, you're making an educated guess that these charges would appear on the government contracts at issue in your complaint?
> A. I would disagree with that and – and I'm not guessing. . . It's -- again, it's this, I know these things and I know them because I've been in the industry forever doing this type of stuff for commercial customers. And I take it and I marry it to what I see in the commercial -- in the government contracts and the bits and pieces together. And when you combine that to -- it's -- you just know it's going to happen. You've seen it a million times. You've got to put those two together. And it's a lot of hard work to read these contracts, it's a lot of hard work to have all the experience, and without putting that -- those two of them together, it -- it tells you -- tells you what I know. And we keep --
> Q. You use –
> A. -- going over it and over it again.

Shea Dep., 190:20 – 192:4.

[9] Verizon completely mischaracterizes Shea's testimony when it claims that Shea "conceded" that the modifications permitted these illegal surcharges. Verizon Memo., p. 25, n. 17. Shea conceded nothing. He only said: "Q Are you aware of any language that says that those two charges are disallowed? A Using the word 'disallowed,' no." Shea Dep., 135:21-136:1. As discussed above, the modifications do not "permit" these surcharges – the misleading language demonstrates that Verizon was not allowed to charge FUSC and Regulatory Charges.

ARGUMENT

I. THE FIRST TO FILE RULE DOES NOT BAR RELATOR'S SECOND AMENDED COMPLAINT.

The first-to file bar provides: "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 USCS § 3730(b)(5). The rule does not bar the Second Amended Complaint for three reasons, any one of which is independently sufficient to defeat Verizon's first-to-file argument: (1) Relator Shea filed both actions at issue – *Verizon I* only bars someone other than Shea from filing a related action; (2) *Verizon I* was not pending when the Second Amended Complaint was filed; and (3) *Verizon I* and *Verizon II* are not related actions because the Second Amended Complaint alleges that Verizon committed fraud on contracts and U.S. agencies not at issue in *Verizon I*.

A. Verizon I Cannot Bar Verizon II Under The First-To-File Rule Because Shea Filed Both Complaints.

Verizon's motion to dismiss completely ignores the threshold issue of whether the first-to-file rule applies to the same relator who later files a second related action. Every circuit opinion addressing the issue, and a leading defense treatise, say that it does not.[10]

In *Bailey v. Shell W. E&P Inc.*, the relator first filed his qui tam complaint in the U.S. District Court for the District of Colorado. 609 F.3d 710 (5th Cir. 2010). Defendants then filed a complaint against relator in Texas state court. Relator removed that second case to the Southern

[10] *See Bailey v. Shell W. E&P Inc.*, 609 F.3d 710, 720-721 (5th Cir. 2010); *United States ex. rel. Precision Companies. v. Koch Industries.*, 31 F.3d 1015, 1017-1018 (10th Cir. 1994). *See also, United States ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032, 1035 (6th Cir. 1994); *Walburn v. Lockheed Martin Corp*., 431 F.3d 966, 970 (6th Cir. 2005); Boese, John T., *Civil False Claims and Qui Tam Actions* (2nd ed. 2005) at 4-124.2-1. Relator's counsel are not aware of any district or circuit court opinion in the D.C. Circuit addressing the issue.

District of Texas, filed a counterclaim alleging the same False Claims Act violations in the Colorado complaint, and moved to transfer the Texas case to Colorado. Defendants won the venue battle, persuading the Colorado district court to transfer its case to Texas. Relator argued that transfer was improper because the first-to-file rule deprived the Texas court of jurisdiction. The Fifth Circuit rejected this argument:

> We agree with the reasoning of the District of Colorado court when ordering the transfer to the Southern District of Texas: the first-to-file bar "does not apply when the same plaintiff, for whatever reason, files the same claim in a different jurisdiction as the Plaintiffs did here." [*United States v. Kinder Morgan Co2 Co., L.P.*, 2005 U.S. Dist. LEXIS 31103 (D. Colo. Nov. 21, 2005)], 2005 WL 3157998, at *2. As we recently noted in [*United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371 (5th Cir. 2009)], if an FCA claim "ha[s] already been filed by *another*, the district court lack[s] subject matter jurisdiction . . . ." 560 F.3d at 376 (emphasis added).
>
> The two competing policy goals of § 3730(b) are to encourage whistleblowing and to discourage opportunistic behavior. *Id*. Neither of the statutory purposes are served when the same plaintiff makes the same claim in a different jurisdiction. *Kinder Morgan Co.*, 2005 U.S. Dist. LEXIS 31103, 2005 WL 3157998, at *2. We therefore construe the first-to-file bar of § 3730(b)(5) as inapplicable to one plaintiff who files the same claim in multiple jurisdictions.

Bailey, 609 F.3d at 720-721.[11]

In *United States ex. rel. Precision Companies v. Koch Industries*, 31 F.3d 1015 (10th Cir. 1994), the majority shareholders of Precision Companies had brought previous personal

[11] Verizon may try to limit *Bailey* as a mere procedural exception for a second case brought in a different jurisdiction. But that would sell *Bailey* short. The Fifth Circuit based its holding on well-reasoned policy grounds from another Fifth Circuit opinion and a district court opinion. *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *United States v. Kinder Morgan Co2 Co., L.P.*, 2005 U.S. Dist. LEXIS 31103 (D. Colo. 2005). As the *Branch Consultants* opinion noted, "[i]t would be reasonable to read the statute as prohibiting the same claim being made by a different party rather than the same party as is the case here. With such an interpretation, the first-to-file rule would attach and eliminate duplicative proceedings while still serving the purposes of the False Claims Act." 560 F.3d at 376. Nothing in the text of the first-to-file rule supports an interpretation that a relator could file a subsequent related case in a second jurisdiction, but cannot subsequently file a related action in the same jurisdiction. Verizon can attempt to argue that *Bailey*'s reasoning is wrong, but that reasoning did not turn on any fact differences with this case.

litigation that included allegations against defendants for defrauding the United States. Precision Companies later filed a False Claims Act case on behalf of the United States against the same defendants. The district court granted defendants' motion to dismiss, finding that the previous litigation by the majority shareholders publicly disclosed the False Claims Act violations and that Precision Companies was not an "original source" under the FCA. Precision Companies then filed an amended complaint adding its majority shareholders as relators. 31 F.3d at 1015-1017.

Defendants moved to dismiss the amended complaint, arguing that the first-to-file rule barred the majority shareholders from bringing FCA claims. The District Court granted the motion. The Fifth Circuit reversed, holding that the first-to-file rule did not prohibit the majority shareholders from joining the suit because they were related to the original relator, Precision Companies: "[t]hus, when § 3730(b)(5) speaks of intervention, it means to prohibit parties unrelated to the original plaintiff from joining the suit to assert a claim based on the same facts relied upon by the original plaintiff." 31 F.3d at 1017-1018.

While *Precision Companies* involved the intervention prong of the first-to-file rule, rather than the "bring a related action" prong, there is no textual basis for treating the two prongs differently. *See* 31 USCS § 3730(b)(5) ("[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.") Both prongs are preceded by the same word, "person." If "person" means someone other than the original relator in the intervention prong, then "person" must have the same meaning in the "bring a related action" prong. Again, Verizon can attempt to argue that *Precision Companies*' statutory interpretation is wrong, but that interpretation does not turn on any fact differences with this case.

In both *Precision Companies* and *Bailey*, the key issue was whether "person" in the first-to-file rule meant someone unrelated to the original *qui tam* plaintiff. Both courts said yes. The Sixth Circuit, in dicta, has suggested it would reach the same result. *See United States ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032, 1035 (6th Cir. 1994) ("[a relator] is precluded from collecting a bounty if *someone else* has filed the claim first") (emphasis added); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005)(the district court was required to dismiss the action under the first-to-file bar if the "claim had already been filed by *another*")(emphasis added). The leading treatise on the FCA, written by an attorney who specializes in defending qui tam actions, adopted the same interpretation. *See* Boese, John T., Civil False Claims and Qui Tam Actions (2nd ed. 2005) at 4-124.2-1 (the first-to-file bar "applies only to parties unrelated to the original plaintiff.")

Verizon's memorandum never addressed whether the first-to-file bar applies to the same relator, and did not cite the extensive authority saying that it does not. However, at the end of its first-to-file argument, Verizon did cite a single case that applied the first-to-file bar against the same relator. *United States ex rel. Bane v. Life Care Diagnostics*, 2008 U.S. Dist. LEXIS 91067 (M.D. Fla. Nov. 10, 2008). *Bane* is an unpublished opinion adopting a magistrate judge's recommendation.[12] The magistrate judge's recommendation devoted a single paragraph to the issue, and, like Verizon, never addressed the precedent to the contrary.[13]

The unanimous circuit court precedent interpreting the first-to-file rule as inapplicable to the same relator is the only way to interpret the word "person" consistently with the statutory framework. The purpose of the FCA is to encourage "whistleblowers to approach the government and file suit as early as possible." *United States ex rel. Ortega v. Columbia*

[12] Verizon Memo., p. 19.
[13] Recommendation attached as Exh. 6.

Healthcare, 240 F. Supp. 2d 8, 12 (D.D.C. 2003) (Lamberth, J.). The first-to-file bar advances that goal in two ways. First, the rule encourages "prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud." *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005). Second, the bar provides a financial incentive for relators to come forward with knowledge of wrongdoing by eliminating parasitic lawsuits that reduce the original relator's share. *See Ortega, supra,* 240 F. Supp. 2d at 12 ("permitting infinitely fine distinctions among complaints has the practical effect of dividing the bounty among more and more relators, thereby reducing the incentive to come forward with information on wrongdoing"); *see also*, *In re Natural Gas Royalties ex rel. United States v. Exxon Co., USA*, 566 F.3d 956, 961 (10th Cir. 2009) ("The first-to-file bar thus functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim.")

Applying the first-to-file rule to subsequent complaints filed by the same relator does not advance either of the above goals. First, relators can't race themselves to the courthouse. That incentive only makes sense if the first-to-file rule applies to third-parties unrelated to the original relator. Second, Verizon's interpretation would not create any additional financial incentive for a relator. Subsequent suits filed by the same relator do not "divide the bounty" amongst third-parties. The original relator still retains the full economic benefit from the suits.

No underlying policy would be advanced by applying the first-to-file rule to subsequent complaints filed by the same relator. While the government has an interest in preventing piecemeal litigation, the government does not have an interest in discouraging relators from discovering additional fraud and coming forward with knowledge of that wrongdoing. And to the extent that Verizon claims that the rule somehow protected it from a subsequent suit on

different contracts, the first-to-file rule's requirement that the first suit be "pending" gave Verizon the tools for self-help. Verizon had notice of Shea's second case before it settled *Verizon I* for $93 million. If Verizon felt that the two cases were so related that they could not be brought separately, Verizon could have moved to consolidate. Verizon chose instead to resolve the first case piecemeal, and now there is no other case "pending" to protect it against Shea's later-filed amended complaints.

B. The First To File Rule Does Not Apply Because *Verizon I* Was Not "Pending" When The Second Amended Complaint Was Filed.

Even if this Court concludes that the first-to-file bar applies to the same relator, the bar still does not apply because *Verizon I* was not "pending" when the Second Amended Complaint was filed. Every circuit to consider the issue has recognized that once a prior action is no longer "pending" because it has been dismissed or resolved, that action no longer bars later-filed related suits. *See United States ex rel. Chovanec v. Apria Healthcare Group Inc*., 606 F.3d 361, 365 (7th Cir. 2010) ("§ 3730(b)(5) applies only while the initial complaint is 'pending.'"); *In re Natural Gas Royalties ex rel. United States v. Exxon Co.,* USA, 566 F.3d 956, 964 (10th Cir. 2009) ("And yet, if that prior claim is no longer pending, the first-to-file bar no longer applies."). *See also, United States ex rel. Batiste v. SLM Corp*., 659 F.3d 1204, 1210 (D.C. Cir. 2011) ("The statutory text imposes a bar on complaints related to earlier-filed, 'pending' actions. The command is simple: as long as a first-filed complaint remains pending, no related complaint may

be filed.").[14] These cases analyzed whether an earlier-filed action had been dismissed or resolved by the time the later action was *filed*. They did not involve amended complaints filed after the earlier case was no longer pending.

Again ignoring a threshold issue, Verizon blithely argues in a footnote that "[t]he fact that the 2007 Lawsuit has now been settled and dismissed is irrelevant for purposes of the first-to-file bar, since the 2007 Lawsuit was indisputably pending at the time Shea filed his current suit in 2009." Verizon Memo., p. 17, n. 8. Verizon then quotes *Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186 (9th Cir. 2001)("to hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute and the legislative intent.")[15] But Lujan filed her case in 1992. An earlier relator, Schumer, filed in 1989, and his case remained pending until at least 1997. *Lujan* did not involve an amended complaint filed after Schumer's case was dismissed, and thus misses the mark entirely.

The D.C. Circuit's opinion in *Batiste* expressly recognized that it was an entirely different issue if a relator filed an initial complaint while an earlier, related case was still pending, but then filed an amended complaint after the earlier case was no longer pending. 659

[14] Batiste filed his complaint in 2008. Another relator, Zahara, had filed a related FCA case in 2005, which remained pending until 2009. The district court dismissed Batiste's complaint on first-to-file grounds 18 months after the Zahara dismissal. The D.C. Circuit held that the first-to-file rule applied because the Zahara case was pending when Batiste filed his action, and that dismissal of the Zahara case in 2009 did not retroactively cure the first-to-file bar. The D.C. Circuit recognized that Batiste's ability to file an amended complaint after the earlier case was dismissed was an entirely separate issue. However, unlike here, Batiste never moved to file an amended complaint in the district court. Accordingly, the D.C. Circuit found that Batiste had waived any objections to a dismissal with prejudice. 659 F.3d at 1211.

[15] Verizon Memo. at 17 & n. 8. Verizon did not have to go to the Ninth Circuit for that proposition; it could have cited the D.C. Circuit's opinion in *Batiste*, but did not. *Batiste* is controlling authority in this Circuit that directly contradicts the incorrect, broad reading that Verizon attempts to give *Lujan*.

F.3d at 1210. *Batiste* did not expressly decide that separate issue, because in *Batiste* the relator did not attempt to amend or refile after the earlier case was over. *Id.* at 1211.

The plain language of the first-to-file bar should control here. There is no doubt that *Verizon I* was no longer pending when Shea filed his amended complaints. In order to avoid that plain language, Verizon would have to make an argument that it did not even attempt in its motion to dismiss—that the amended complaints "relate back" to the initial complaint for purposes of applying the first-to-file bar.

But while the "relation back" argument makes sense in the context of statutes of limitations, it has no application to the first-to-file bar. Judge Lamberth already held that "it is clearly outside the intent and purpose of § 3730(b)(5) to permit relation back." *United States ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8, 14 (D.D.C. 2003). In *Ortega,* the relator attempted to avoid dismissal under the first-to-file bar by arguing that her amended complaint should relate back to her original complaint, which predated the other *qui tam* actions. Judge Lamberth rejected that argument, and held that relation back was a separate doctrine inapplicable to the first-to-file bar.

Any attempt by Verizon to argue relation back here would reflect off *Ortega*'s mirror. The relation back doctrine cannot be a "heads defendants win, tails relators lose" flip under the first-to-file rule. If relators can't avoid the first-to-file bar by having their amended complaints relate back to their original complaints, then defendants shouldn't be able to trigger the first-to-file bar by arguing that amended complaints relate back to original complaints. Relation back either applies to the first-to-file rule, or it doesn't

Further, allowing relators to amend their complaints after an earlier-filed action is no longer pending will avoid forcing them to take the unnecessary step of filing a new complaint.

This is what happened in *Chovanec*, where the Seventh Circuit held that because the earlier-filed actions were no longer pending, relator "is entitled to file a new qui tam complaint--entitled, that is, as far as § 3730(b)(5) goes." 606 F.3d at 365. This is a waste of judicial resources based on an overly mechanistic view of "pending." If a relator can file a new a complaint the day after an earlier-filed action is no longer "pending," then there is no reason not to allow an amended complaint to accomplish the same thing.

Allowing amended complaints in these circumstances will not lead to more parasitic, me-too lawsuits because the public disclosure bar would eliminate all amended complaints, except those filed by relators who qualify as original sources. As the Tenth Circuit explained: "[t]he 'pending' requirement much more effectively vindicates the goal of encouraging relators to file; it protects the potential award of a relator while his claim remains viable, but, when he drops his action another relator who qualifies as an original source may pursue his own." *Natural Gas Royalties*, 566 F.3d at 964.

C. *Verizon I* And *Verizon II* Are Unrelated Because *Verizon II* Alleges That Verizon Committed Fraud On Contracts And Agencies Not At Issue In *Verizon I*.

Only if this Court concludes that the first-to-file bar applies to the same relator, and that the long-settled *Verizon I* action was somehow constructively "pending" when Shea filed his amended complaints, should the Court even consider whether *Verizon I* and *II* are "related." The first-to-file bar only applies to "a *related* action based on the facts underlying the pending action." 31 USCS § 3730(b)(5) (emphasis added). The D.C. Circuit has interpreted this to prohibit any later filed action "incorporating the same material elements of fraud as an action filed earlier." *United States ex rel. Hampton v. Columbia/Hca Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003). "Under this standard, two complaints need not allege identical facts for the

first-filed complaint to bar the later-filed complaint." *United States ex rel. Batiste v. SLM Corp*., 659 F.3d 1204, 1208 (D.C. Cir. 2011). In determining whether a later-filed complaint incorporates the same material elements, courts consider whether the second complaint would "give rise to a different investigation or recovery." *Id.* at 1210. (*citing United States ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8, 13 (D.D.C. 2003) ("[A]n examination of possible recovery . . . aids in the determination of whether the later-filed complaint alleges a different type of wrongdoing on new and different material facts.")

In *Batiste*, the most recent D.C. Circuit case to address whether two complaints are related, both complaints named the same parent company as the lead defendant. 659 F.3d at 1209. While the complaints focused on different subsidiary offices, both alleged a nationwide scheme. *Id.* Both complaints alleged a fraud beginning in 2004, that this fraud involved falsifying forbearances, and that corporate culture encouraged it. *Id.* The D.C. Circuit concluded:

> Under the *Hampton* material facts test, these complaints allege essentially the same corporation-wide scheme. The Zahara Complaint would suffice to equip the government to investigate SLM's allegedly fraudulent forbearance practices nationwide. Batiste's additional details would not give rise to a different investigation or recovery.

659 F.3d 1204, 1209-1210.

Here, *Verizon I* and *Verizon II* plainly give rise to different investigations and different recoveries. *Verizon I* was limited to the FTS2001 Contract and the FTS2001 Bridge Contract with GSA. Complaint, ¶¶ 28-64. *Verizon I* did not allege a corporate-wide Verizon/MCI fraud on every telecommunications contract with the United States. GSA was the only U.S. agency at issue in *Verizon I*. And *Verizon I* specifically *excluded* the Federal Universal Service Charge from its list of illegal surcharges. Complaint, ¶ 66 ("The Federal Universal Service Fund

surcharge, the PICC surcharge, and certain other taxes were acceptable line item charges under the FTS 2001 Contract.")

Verizon II alleges that Verizon committed fraud on 20 contracts not at issue in *Verizon I*. SAC, ¶ 28. While some of these contracts were with GSA, the other contracts were with the following U.S. agencies not at issue in *Verizon I*: United States Postal Service, Department of Defense, Federal Emergency Management Agency, Department of Justice, Department of Navy, and the Federal Aviation Administration. SAC, ¶ 28. The Second Amended Complaint repeatedly alleges that Verizon improperly charged the Federal Universal Service Charge, a surcharge not at issue in *Verizon I*. ¶¶ 30-41.

The different contracts, different U.S. agencies, and different surcharges make *Verizon II* materially distinct from *Verizon I*. Each of the 20 contracts at issue in *Verizon II* requires a separate investigation and will lead to a recovery independent from *Verizon I*. *Verizon II* will not lead to a double recovery. Verizon's payment of $93.5 million to settle *Verizon I* was solely for the "Covered Conduct" in that agreement.[16] Verizon's Motion to Dismiss glosses over these differences and claims that "[f]ollowing the 2007 complaint, the Government was on notice of

[16] The agreement defined "Covered Conduct" as follows: "From April 20, 2004, through September 30, 2010, in connection with the provision of services and products to any department, agency, branch, or institution of the United States through Verizon's General Services Administration (GSA) Contract No. GSOOT99NRD2002 (also known as FTS2001) and Contract No. GSOOT06NSD0001 (also known as FTS2001 Bridge Contract), and any delivery and task orders issued thereunder (hereinafter collectively referred to as "Contracts"), Verizon submitted false claims for payment under the Contracts for reimbursement or credit of the following taxes, duties or surcharges- Ad Valorem Surcharge (a/k/a Property Tax Surcharge); Federal Regulatory Fee Surcharge (a/k/a Carrier Cost Recovery Charge (CCRC)); all taxes, duties or surcharges applied to the GSA Management Service Fee, except the Federal Universal Service Fund (FUSF); State Telecommunications Relay Service Surcharge; Deaf Equipment Acquisition Fund (DEAF) Tax Surcharge; High Cost Fund Surcharge; Lifeline Surcharge;· Public Utility Commission Fee Surcharge; Tele Relay Service (M); CCRC Interconnected Voice Over Internet Protocol; State Universal Service Fund; and FUSF applied to unallowable surcharges."

Relator's allegations about Verizon's billing systems and practices." Memo., p. 19. According to Verizon, "[o]nce the Government was on notice, Relator's ability to proceed as a relator in a *qui tam* suit came to an end." *Id.*

Two D.C. district courts have held that complaints which allege similar fraudulent schemes on different contracts with different federal agencies do not materially differ under the first-to-file rule. *See United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 73 (D.D.C. 2011) (Lamberth, J.); *United States ex rel. Folliard v. CDW Tech. Servs.*, 722 F. Supp. 2d 37 (D.D.C. 2010) (Huvelle, J.). Both courts applied a notice-based standard to the first-to-file bar. Under this standard, the dispositive factor in determining whether two complaints are related is whether the earlier-filed complaint gave the government sufficient notice to discover the fraud in the later filed-complaint. *See Synnex,* 798 F.Supp.2d at 73 ("Crennen's allegations pertaining to HP products gave the government sufficient notice to discover the allegedly fraudulent Cisco products."); *CDW,* 722 F.Supp.2d at 43 ("It is reasonable to conclude that the government, armed with Liotine's allegations about government procurement of HP products from CDWG, was 'equipped . . . on its own' to discover the extent to which defendants had other federal procurement contracts that were governed by the TAA and, in turn, whether any wrongdoing had occurred.")

For the reasons discussed below, undersigned counsel respectfully suggest that *Synnex* and *CDW* incorrectly applied a notice-based standard to the first-to-file bar, and that such a standard undermines the policies underlying the FCA and would prevent valuable *qui tam* suits. The Tenth Circuit – the only Circuit to squarely address the issue – rejected applying a notice-based standard to the first-to-file bar. *See Natural Gas Royalties, supra,* 566 F.3d at 964 (10th Cir. 2009) ("While the allegations in the Coalition complaint might have been sufficient to put

the government on notice of the fraud that Mr. Grynberg alleges against Exxon, ARCO, Oxy-USA, and Cross Timbers, that complaint did not name any of these parties as defendants.")

But even if this Court applies a notice-based standard to the first-to-file bar, *Synnex* and *CDW* were still incorrectly decided, because they go far beyond *Batiste* and wrongly conclude that fraud by a defendant on one contract provides notice to the government of fraud by the same defendant on a different contract with a different agency. In directly analogous circumstances, the Fifth Circuit has held that complaints alleging similar fraudulent schemes by different defendants are unrelated under the first-to-file bar. *See Branch Consultants, supra*, 560 F.3d 371, 379 (5th Cir. 2009) (allegations in a first-filed action did not bar related allegations against wholly unrelated defendants brought in a subsequent action).[17] The United States concurs with Relator's interpretation. *See* Exh. 1.

i. The Tenth Circuit Correctly Concluded That Courts Should Not Apply A Notice-Based Standard To The First-To-File Bar.

In *Natural Gas Royalties*, the Tenth Circuit held that "[t]he defendant's identity is a material element of a fraud claim. Two complaints can allege the very same scheme to defraud the very same victim, but they are not the same claim unless they share common defendants." 566 F.3d at 962. The court reasoned:

> Requiring a common identity between defendants when applying the first-to-file bar makes more sense within the overall structure of the FCA. While the bar does eliminate opportunistic relators, most of these relators would be eliminated by the public disclosure bar anyway. Its true value lies in protecting the recovery of the first relator who files, even when other legitimate relators might exist with direct and independent knowledge of their own. This maintains the monetary incentive

[17] These decisions do not conflict with *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003). In Hampton, the earlier-filed complaint named HCA, while the later filed complaint named HCA and HCA's subsidiaries. The court found that merely adding on subsidiaries was not a material difference. *Id.* In contrast, *Natural Gas Royalties* and *Branch Consultants* involved two complaints naming different, unrelated defendants, not corporate subsidiaries.

> to bring a qui tam action by avoiding division of the spoils. It also encourages a relator to hurry up and file. When the pending action is against an entirely different defendant, however, the two relators are not fighting over the same spoils. The first relator's recovery remains unaffected whether the second relator files or not. If that second relator brings nothing to the table that the first suit had not already offered, then his suit will be barred under the public disclosure bar; otherwise, the purposes of the FCA are best vindicated by allowing his suit to proceed.
>
> The fact that § 3730(b)(5) applies only when another qui tam action is "pending" makes a notice-based standard even more dubious. If the first-to-file bar had been meant simply as a more draconian public disclosure bar, Congress would not have limited it to "pending" actions. While filing the complaint might put the government on notice, and while the government might remain on notice while the action is pending, the government does not cease to be on notice when a relator withdraws his claim or a court dismisses it. And yet, if that prior claim is no longer pending, the first-to-file bar no longer applies. The "pending" requirement much more effectively vindicates the goal of encouraging relators to file; it protects the potential award of a relator while his claim remains viable, but, when he drops his action another relator who qualifies as an original source may pursue his own.

566 F.3d at 963-964.

The Tenth Circuit also noted that the government may "lack the resources (or, indeed, the political will) to pursue a claim, even if it has been set on its trail. The government might lack sufficient evidence of its own to win in court. In these cases, qui tam suits provide a valuable way to deter false claims and compensate the government for its lost revenue." Id. at 963. In *Natural Gas Royalties*, the court concluded that allowing the later-filed complaints (a) would assist the government in detecting fraud and (b) would lead to a recovery distinct from the earlier-filed action. Id. Both factors are true here: Verizon II will assist the government in identifying other telecommunications contracts where Verizon likely committed fraud, and will result in a recovery independent from Verizon I. This Court should follow the Tenth Circuit and conclude that a notice-based standard does not apply to the first-to-file bar and that Verizon I and II are unrelated.

ii. Applying A Notice-Based Standard To The First-To-File Bar Would Prevent Valuable Qui Tam Lawsuits.

Imagine if after *Verizon I* was filed, a Verizon insider, with direct knowledge that Verizon was illegally charging the United States prohibited surcharges under other telecommunications contracts, filed a *qui tam* action alleging violations of the FCA. Under Verizon's interpretation, the first-to-file rule would bar that later-filed complaint because *Verizon I* generally put the government on notice that Verizon was charging illegal surcharges. That cannot be the law. Such an interpretation directly undermines the FCA's goals of encouraging citizens to come forward with knowledge of wrongdoing and enhancing the government's ability to recover losses caused by fraud. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. Of Am., Inc.*, 474 F.Supp.2d 75, 87-88 (D.D.C. 2007) (Lamberth, J.).

iii. Even If This Court Concludes That A Notice-Based Standard Should Apply, Synnex and CDW Still Went Too Far.

Synnex and *CDW* did not address the Tenth Circuit's well-reasoned arguments for rejecting a notice-based standard under the first-to-file bar. Further, both cases are outliers because the frauds alleged on different contracts in the later-filed complaints in those cases would have led to independent recoveries. The lack of independent recovery was a significant factor in the D.C. Circuit's decision in *Batiste.* 659 F.3d 1204, 1209-121 (concluding that complaints are related because "Batiste's additional details would not give rise to a different investigation or recovery.") In analogous circumstances, the Fifth Circuit, which has not expressly rejected a noticed-based standard, considered "whether allegations in a first-filed action can bar related allegations against wholly unrelated defendants brought in a subsequent action." 560 F.3d at 379. The Fifth Circuit concluded:

> Rigsby [the earlier-filed complaint] does not allege a true industry-wide fraud or concerted action among a narrow group of participants. Rather, looking only at the facts pleaded (not any public information, which is not part of the first-to-file analysis), Rigsby implicates, at most, four specific WYO insurers among the approximately ninety-five WYO insurers conducting business in the Louisiana and Mississippi areas during Hurricane Katrina. **Thus, Rigsby tells the government nothing about which of the ninety-one other WYO insurers (and adjusting firms working for or with those insurers), if any, actually engaged in any fraud**. . .
>
> . . .Under these circumstances, forcing the government to expend its limited time and resources wading through the records of ninety-one WYO insurers in an attempt to identify specific instances of fraud would completely undermine the enforcement component of the FCA's qui tam provisions.

560 F.3d at 380.

The same reasoning applies here. If alleging that a different defendant committed the same fraud as alleged in an earlier filed action is a material difference under the first-to-file bar, then alleging that the same defendant committed a similar fraud on different contracts with different federal agencies is also a material difference.

In an ideal world, after receiving *Verizon I*, the government would have examined every telecommunications contract with MCI/Verizon to determine if Verizon was charging illegal surcharges under those contracts. But the government may not have investigated the other contracts for any number of reasons, including a lack of resources. Shea continued his investigation after filing *Verizon I*, applied his industry expertise, and identified the contracts where Verizon/MCI was most likely charging the government illegal surcharges. Determining that *Verizon I* and *Verizon II* are unrelated under the first-to-file bar "further[s] the [FCA's] goal of citizen-assisted enforcement." *Natural Gas Royalties*, 566 F.3d at 963.

iv. *The United States Supports Relator's Position.*

In *CDW*, the United States filed a Statement of Interest which said in part:

> While we have been unable to find any cases that directly address whether an allegation of fraud in connection with one contract with one agency puts the government on notice of potential similar fraud in connection with any or all other contracts with any or all other agencies, that position clearly does not further the intent of the False Claims Act to aid the government in detecting and deterring fraud. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. Of Am., Inc.,* 474 F.Supp.2d 75, 87 (D.D.C. 2007); *United States ex rel. S. Prawer and Co. v. Fleet Bank of Maine*, 24 F.3d 320 (1st Cir. 1994) ("Clearly, the 1986 Amendments, insofar as they were responding to a regime in which the preclusion of opportunistic litigation was too heavily weighted, had as perhaps their central purpose an expansion of opportunities and incentives for private citizens with knowledge of fraud against the government to come forward with that information") (*citing* S.Rep. No. 345, 99th Cong., 2d Sess. 1, reprinted in 1986 U.S.C.A.N. at 5266 ("The purpose of the [1986 amendments] is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government.")).

Exh. 1, p. 3. The United States also recognized that finding two complaints that allege fraud by the same defendant on different contracts with different agencies are "related" would "lead to absurd results" because:

> For example, a relator with information about contractor X defrauding the Department of Defense on a contract to purchase computer equipment would, under CDW's theory, bar a subsequent relator with information about contractor X on a GSA contract for the purchase of computer equipment, even though the first relator did not allege fraud against GSA and had no personal knowledge or information about the GSA contract at issue in the second relator's case. The United States would thus be deprived of valuable information that would aid in the detection and deterrence of fraud. This is clearly not what was contemplated by the first to file rule. The United States respectfully submits that such a determination would run counter to the purpose of the False Claims Act to help the government "detect, punish, and deter the submission of false claims, while seeking to restore funds to the federal fisc." *Pogue*, 474 F. Supp. 2d at 87.

Exh. 1, p. 5.

But even if this Court disagrees and finds that *Verizon I* and *II* are related, then the first-to-file bar still does not apply because, as discussed above, the same relator brought both actions, and *Verizon I* was not pending when Shea filed his amended complaints.

II. THE PUBLIC DISCLOSURE BAR DOES NOT APPLY TO THE SECOND AMENDED COMPLAINT.

From 1986 until March 23, 2010, the FCA had a "public disclosure" jurisdictional bar that read:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a Congressional, administrative, or Government Accounting Office [sic] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4). When Congress passed the public disclosure bar in 1986, it "had come to the conclusion that 'fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud.'" *United States ex rel. Siller v. Becton Dickinson & Co. by & Through its Microbiology Sys. Div.*, 21 F.3d 1339, 1347 (4th Cir. 1994) (*quoting United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1355 (D. Mass. 1988)).

The D.C. Circuit has interpreted the public disclosure bar to create a two-part test:

> First, the reviewing court must ascertain whether the "allegations or transactions" upon which the suit is based were "publicly disclosed" in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). If--and only if--the answer to the first question is affirmative will the court then proceed to the "original source" inquiry, under which it asks whether the qui tam plaintiff "has direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).

United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (internal citations omitted). Here, the public disclosure bar does not deprive this Court of

jurisdiction because: (1) the Second Amended Complaint is not based on publicly disclosed "allegations or transactions" and (2) regardless, Shea is an original source with "direct and independent" knowledge of the information on which the allegations are based.

A. The Second Amended Complaint Is Not Based On Publicly Disclosed "Allegations Or Transactions."

Verizon's Motion to Dismiss repeatedly states that the Second Amended Complaint should be dismissed under the public disclosure bar because it is based on publicly disclosed "information." This is a misstatement of law. The D.C. Circuit has held:

> Courts sometimes speak loosely of barring a qui tam suit because it is based on publicly disclosed information. But the Act bars suits based on publicly disclosed "allegations or transactions" not information. We too find a distinction between "allegations or transactions" and ordinary information as a matter of common usage and sound interpretation of the FCA. The pay vouchers and telephone records disclosed during discovery--the only public information considered by the district court--were not in and of themselves sufficient to constitute "allegations or transactions" of fraudulent conduct within the meaning of the FCA jurisdictional bar.

*Springfiel*d, 14 F.3d at 653 (internal citations and quotations omitted).

"[A]llegation connotes a conclusory statement implying the existence of provable supporting facts." *Springfield*, 14 F.3d at 654 (*citing* Webster's Third New International Dictionary, 55 (1976)). The publicly available contract information that Shea relied on in part contains no allegations of fraud, nor does Verizon suggest that it does. This leaves only the "transaction" prong, which the D.C. Circuit has defined as "an exchange between two parties or things that reciprocally affect one another." *Id.* The D.C. Circuit uses the following formula to determine whether the disclosures are of "transactions" establishing fraud:

> [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

Springfield, 14 F.3d at 654. In other words, without a fraud allegation, there must be a public disclosure of the essential elements of fraud, which are: (1) a misrepresented state of facts (X) and (2) a true state of facts (Y). *Id*. The public disclosures that Verizon relies on never revealed a true state of facts – they did the opposite: the Verizon contract information demonstrates that Verizon repeatedly attempted to deceive the United States about the illegal surcharges. As alleged in the Second Amended Complaint:

> Verizon attempted to hide these surcharges by using misleading language in contracts and modifications indicating that Verizon was "required by law" to "directly" charge the United States these surcharges. These charges were not taxes – they were a cost of doing business imposed on Verizon, not its customers, by regulatory agencies and states.

¶ 1.

> Consistent with Verizon's strategy of "bill, but don't ask," Verizon also played word games with its modifications to the above contracts. Verizon knowingly failed to inform government contract officers that FUSC and other regulatory surcharges were not allowable under the contracts, and used confusing language in contract modifications to make the charges sound justified. Verizon changed the language over time as it realized it needed to be more explicit to provide better legal cover.

¶ 32.

> Verizon's careful wordsmithing in the above modifications indicates that Verizon knew that FUSC, Regulatory surcharges, and similar surcharges were not allowable charges under the contract. Instead of filing a request for an economic price adjustment, which would have required full disclosure of these charges and would have allowed the government to deny the request, Verizon pursued a strategy of "bill, but don't ask." In an effort to provide some legal cover, Verizon filed its confusing and misleading modifications.

¶ 41.

Verizon's publicly available contract information did not reveal a "true state of facts" – it furthered the fraudulent scheme. Without Shea's extensive personal knowledge of Verizon's fraudulent billing practices, the publicly available documents disclose nothing. *See United States*

ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 743 (3d Cir. 1997) (abrogated on other grounds) (finding no public disclosure because "no source makes a public allegation of fraud. The remaining sources disclosed only the actual state of facts. . . .")

In directly analogous circumstances, the D.C. Circuit has held that the public disclosure bar does not apply to relators, like Shea, who rely in part on publicly available "information." *Springfield*, 14 F.3d 645. There, relator alleged that an arbitrator had fraudulently billed the government for services not actually rendered. Relator participated in the arbitration at issue. In a subsequent civil case, relator, through discovery, obtained the arbitrator's pay vouchers and telephone records. Based on its participation in the arbitration, relator realized that the arbitrator sought pay on several days where he had no arbitral functions to perform. Relator then called the numbers listed on the phone records and learned that the people called by the arbitrator had no connection to the arbitration. A *qui tam* action followed. 14 F.3d at 647-649

The district court dismissed the complaint because it found that relator's allegations were based upon the pay vouchers and telephone records, which were publicly disclosed through discovery filings. The D.C. Circuit reversed, holding:

> At most, the records provided a convenient vehicle by which Springfield, already suspicious because of its personal experience with the arbitration, could pursue its independent investigation. Recognizing that the task of determining whether "allegations or transactions" have been "publicly disclosed" will never be cut-and-dried, we nonetheless are confident in this case that the information put in the public domain by the discovery filing did not present so clear or substantial an indication of foul play as to qualify as either an allegation of fraud or a fraudulent transaction upon which a qui tam suit could be based.

Springfield, 14 F.3d at 656.

Here, Shea did the same thing. Shea learned about Verizon's fraudulent billing practices through his consulting business with large commercial customers. SAC, ¶¶ 2-3. He then became suspicious that Verizon was also fraudulently billing illegal surcharges to the United States. Shea

confirmed his suspicions by reviewing an insider MCI document indicating that MCI did in fact charge the United States illegal surcharges, learning that Verizon used the same tax module for commercial and government contracts, and reviewing Verizon's publicly available contract information. *Id.*, ¶¶ 4, 27, and 28-41. Again, without Shea's personal knowledge of Verizon's fraudulent billing practices, the publicly available documents disclose nothing.

In a mischaracterization of D.C. law, Verizon claims that "the D.C. Circuit has made clear that the relator cannot overcome the public disclosure bar simply by utilizing his 'expertise' to make allegations of fraud based on publicly disclosed facts." Verizon Memo., p. 22 (*citing Springfield*, 14 F.3d at 655. The D.C. Circuit in *Springfield* actually said:

> Thus, a qui tam action cannot be sustained where **all of the material elements of the fraudulent** transaction are already in the public domain and the qui tam relator comes forward with additional evidence incriminating the defendant. Similarly, there may be situations in which **all of the critical elements of fraud** have been publicly disclosed, but in a form not accessible to most people, i.e., engineering blueprints on file with a public agency. Expertise in the field of engineering would not in itself give a qui tam plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts . . . **However, where only one element of the fraudulent transaction is in the public domain (e.g., X), the qui tam plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud (e.g., Y) or allegations of fraud itself (e.g., Z).**

14 F.3d at 655 (emphasis added) (internal citations and quotations omitted). In other words, if, and only if, all of the critical elements of fraud are publicly disclosed, then a relator may not use expertise to avoid the public disclosure bar. That analysis is irrelevant here, because Verizon cannot get past the first hurdle: the publicly available contract information did not reveal all of the material elements of fraud. As discussed above, Verizon's contract information misled the government, and, standing alone, did not reveal Verizon's fraudulent billing practices.

Under *Springfield*, *Verizon II* is not based on publicly disclosed "allegations or transactions."

B. Shea Is An Original Source.

Even if this Court concludes that *Verizon II* was based on publicly disclosed "allegations or transactions," the public disclosure bar still does not apply, because Shea is an original source with "direct and independent" knowledge of the information underlying *Verizon II*'s allegations. The public disclosure bar contains an exception for an "original source," defined in section 3730(e)(4)(B) as "an individual who has direct and independent knowledge of the information on which the allegations are based." "'Direct' signifies marked by absence of an intervening agency" and "'[i]ndependent knowledge' is knowledge that is not itself dependent on public disclosure." *Springfield,* 14 F.3d at 656.

The D.C. Circuit has interpreted "direct and independent" to mean: "[s]ignificantly, the 'original source' provision requires the relator to possess direct and independent knowledge of the 'information' underlying the allegation, rather than direct and independent knowledge of the 'transaction' itself. . . We think it clear, in light of the aims of the statute, that 'direct and independent knowledge of information on which the allegations are based' refers to direct and independent knowledge of *any* essential element of the underlying fraud transaction." *Springfield*, 14 F.3d at 656-657 (emphasis in the original). Applying these principles, the D.C. Circuit in *Springfield* held:

> Springfield had direct and independent knowledge of essential information underlying the conclusion that fraud had been committed. Because, as stated above, the pay vouchers and phone records did not themselves suffice to indicate fraud, Springfield had to have bridged the gap by its own efforts and experience, which in this case included personal knowledge of the arbitration proceedings and interviews with individuals and businesses identified in the telephone records. Springfield started with innocuous public information; it completed the equation with information independent of any preexisting public disclosure. As such, Springfield is an original source. . . .

14 F.3d at 657.

Springfield is directly on point. Like the pay vouchers and phone records in that case, the publicly available Verizon contract information did not, standing alone, indicate fraud. Only Shea's personal knowledge of Verizon's fraudulent billing practices allowed him to understand the significance of the publicly available contract information and use that to confirm that Verizon was fraudulently charging the United States illegal surcharges. As the Fifth Circuit has recognized, "[s]ome reliance on public records or information is acceptable and, indeed, it is hard to imagine that a non-insider could ever obtain original source status without at least some consultation of publicly available information." *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 522-523 (3d Cir. 2007) (finding relator not an original source where it "was only from review of information in the public domain that Atkinson learned of the failure to record.")(emphasis in the original).

Springfield also demonstrates the fallacy in Verizon's argument that "Relator, however, is obviously not an 'original source' of the contract and billing information about the 20 listed contracts that he found on the internet. Relator lacks 'direct and independent knowledge' of that information." Verizon Memo., p. 29. Verizon is arguing that to be an original source Shea must have "direct and independent knowledge" of the "transactions" between the United States and Verizon. That's not the law in D.C. Under *Springfield*, Shea is not required to have direct and independent knowledge of the "transactions" between the United States and Verizon. 14 F.3d at 656 ("original source" does not require "direct and independent knowledge of the 'transaction' itself.")

In a case even more factually indistinguishable than *Springfield*, the Tenth Circuit held that relators like Shea, who rely in part on publicly available information, are original sources.

See Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1045 (10th Cir. 2004). In *Kennard*, relators owned the right to royalty payments from gas wells. Several Indian Tribes owned the rights to royalty payments from gas wells close to relators' wells. When relators' former operator left and defendants began working the gas wells, relators noticed a dramatic drop in royalty payments. Based on this drop, relators "speculated" that defendant was underpaying them and the Indian Tribes. 363 F.3d at 1040-1041.

Relators then conducted an investigation, which required them to review publicly available Indian Tribe leases. "Based on the investigation and Relators' extensive oil and gas experience, they concluded that Comstock was underpaying royalties to the Tribe and also that Comstock knew that it was underpaying the Tribe." *Id.* at 1041. Relators then filed a *qui tam* complaint alleging that defendants were defrauding the United States by underpaying royalties to the Indian Tribes. The district court dismissed the complaint under the public disclosure bar, and concluded that Relators were not original sources. *Id.*

On appeal, defendant -- in an argument that mirrors Verizon's -- claimed "that Relators were not an original source because: (1) Relators did not possess substantive information about the particular fraud, (2) they were not insiders of Comstock or the Tribe, and (3) they relied on public records. Thus, Comstock asserts that Relators merely conducted background research and relied on their own expertise to speculate that Comstock had defrauded the Government." 363 F.3d at 1044.

In rejecting these arguments and reversing the district court, the Tenth Circuit first noted that "complete and thorough investigation of a fraud on the Government will likely necessarily involve some review of contracts, documents, or other information in the public domain. It is the

character of the relator's discovery and investigation that controls this inquiry." 363 F.3d at 1045. The Tenth Circuit concluded:

> There must be some consideration to the availability of the information and the amount of labor and deduction required to construct the claim. Relators sorted through relatively obscure public documents and, together with personal royalty records, used these documents to discover and support their claim of the alleged fraud. It is important to note that none of the public documents disclosed the alleged fraud. It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud. Relators had direct and independent knowledge of the fraud allegedly committed [since they are] the [people] responsible for ferreting it out in the first place. Relators were not just assemblers of information. This case would not exist but for Relators sniffing it out. Through discovery and deduction, Relators ferreted out the alleged fraud in this case and must, therefore, qualify as an original source.

363 F.3d at 1046 (internal citations and quotations omitted).

That describes exactly what Shea did here. Through Shea's consulting practice, he learned that Verizon/MCI had a custom and practice of overbilling large customers tens of millions of dollars in illegal surcharges. Shea then deduced that Verizon/MCI was likely doing the same thing to the United States. Shea confirmed this fraud through an independent investigation, which required him to review publicly available, but obscure and difficult to understand contract and billing information. Under *Kennard*, Shea is an original source. *See also*, *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 568 (11th Cir. 1994) (per curiam) (relator an original source where he "acquired his knowledge of BCBSF's alleged wrongdoing through three years of his own claims processing, research, and correspondence with members of Congress and HCFA.")

C. Verizon I Was Not A Public Disclosure Because It Remained Under Seal When Shea Filed Verizon II.

In a bizarre argument, Verizon, in a footnote -- without citing any case in support -- contends that *Verizon I* bars *Verizon II* under the public disclosure rule. Verizon Memo., p. 27, n.

20. This argument fails because *Verizon I* remained under seal when *Verizon II* was filed. *See United States ex rel. Debra Hockett v. Columbia/HCA Healthcare Corp.,* 498 F. Supp. 2d 25, 46-47 (D.D.C. 2007) ("Allowing a sealed qui tam complaint to act as a jurisdictional bar is not only counterintuitive -- a sealed document is definitionally not public and thus a poor candidate as a 'public disclosure' -- but also does not serve the purposes aimed at by this provision of the FCA"); *United States ex rel. LeBlanc v. Raytheon Co*., 913 F.2d 17, 20 (1st Cir.1990) ("Last, the district court further assumes that the filing of a qui tam action is itself a 'public disclosure.' This cannot be. Such an action is filed under seal without service on anyone other than the United States and remains non-public until the district court enters an order lifting the seal. To hold otherwise would be to render each and every filing a 'public disclosure,' thus barring all qui tam actions.") *See also, United States v. Bank of Farmington,* 166 F.3d 853, 860 (7th Cir. 1999) (rejecting Third Circuit law because the plain language of the FCA bars material that constitutes "public disclosure" and not material that is "potentially accessible to the public").

Further, the *Verizon I* Settlement Agreement released Verizon only from conduct relating to the to the FTS2001 and FTS2001 Bridge Contracts. *See,* n. 20, *supra,* attached as Exh. 2. The *Verizon I* Settlement Agreement demonstrates that none of the parties signing that agreement understood *Verizon I* to preclude future FCA litigation concerning Verizon's surcharges on other telecommunications contracts.

D. Congress Amended The Public Disclosure Bar In March 2010; This Court Must Consider Different Versions Of The Bar For Conduct Before And After The Amendments.

On March 23, 2010, an amended version of 31 U.S.C. 3730(e)(4) became effective. It now reads:

> (A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed–
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who either (1) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

The Second Amended Complaint alleges continuing FCA violations by Verizon after the effective date of the public disclosure amendments. The Supreme Court has held that the March 2010 amendments are not retroactive. *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S.Ct. 1396, 1400 & n. 1 (2010). Accordingly, this Court should apply the old public disclosure bar to allegations of false claims arising before March, 2010, and the new version to false claims made after the March 2010 amendments. *See United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 512-13 (3rd Cir. 2007)(applying pre-1986 public disclosure bar to claims arising before 1986, and applying 1986 amendments to claims arising after 1986). *See also, United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1031 (9th Cir.1998) ("We conclude that the crucial event for purposes of non-retroactivity is the alleged presentation by Hughes of a false claim, and not the public disclosure of that conduct.").

For claims arising after March 23, 2010, the public disclosure bar is no longer jurisdictional. *Compare* the pre-amendment version of 31 U.S.C. 3730(e)(4)(A) ("No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions") with the amended version ("The court shall dismiss an action or claim under

this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed.") Because the public disclosure bar is not jurisdictional for claims arising after March 23, 2010, Verizon has the burden of proof.

For the reasons discussed above, Verizon cannot demonstrate that Shea did not materially add to any publicly disclosed allegations or transactions. Only Shea's extensive knowledge of Verizon's internal billing procedures allowed him to infer that Verizon has been fraudulently charging the United States illegal surcharges.

Relator has also alleged reverse False Claims Act claims, based on Defendants' obligations under the FCA and the FARs to return money that it knows, or should know, that it owes the United States. That repayment obligation arose on March 23, 2010, and every day thereafter. Accordingly, Relator has alleged substantial claims arising under the amended public disclosure bar.

III. THE SECOND AMENDED COMPLAINT SATISFIES RULE 9(B).

On July 12, 2012, before filing the First Amended Complaint, Relator's counsel wrote Verizon's counsel and said:

> We have satisfied ourselves, based on the information available to us, that Relator has sufficient personal knowledge and information to allege that MCI/Verizon has knowingly billed the government for non-allowable surcharges, in violation of the False Claims Act. However, we recognize that Verizon may possess information that would rebut Relator's allegations, particularly in this context, where Relator has incomplete access to relevant documents. We have no desire to waste court resources, or impose unnecessary litigation expenses on the parties.

Exh. 3. The letter identified the 20 contracts that Shea would allege in the amended complaints, and asked if Verizon contended that any of the contracts explicitly permitted Verizon to charge

the non-allowable surcharges at issue. Verizon declined to provide any substantive information in response.[18] On July 21, 2012, undersigned counsel replied to Verizon:

> Thank you for Ms. O'Connor's letter yesterday. Verizon apparently has made a strategic decision not to share any facts that might contradict the information in my July 12 letter. If Verizon is not willing to provide facts to show that its government contracts specifically authorized the types of charges that Verizon generally charged, and if Verizon is not willing to provide facts to show that it did not bill for such charges under the government contracts listed in my July 12 letter, I have no basis to change my conclusion that Mr. Shea has sufficient information to proceed with an amended complaint.[19]

Consistent with that strategic decision to litigate rather than share facts, Verizon now claims that the Second Amended Complaint does not satisfy Rule 9(b). Verizon's argument fails because the Second Amended Complaint easily satisfies the primary purpose of Rule 9(b): to provide enough information to allow Verizon to prepare a defense. *See e.g., United States ex rel. Head v. Kane Co*., 798 F. Supp. 2d 186, 206 (D.D.C. 2011) (Kessler, J.) ("Plaintiffs' allegations provide sufficient detail to satisfy Rule 9(b)'s overriding purpose of guaranteeing Defendants sufficient information to allow for preparation of a response"). All Verizon has to do is find the 20 contracts at issue, determine what surcharges Verizon billed under each contract, and then construct arguments that those surcharges were allowed under the contracts and the FARs.[20] Verizon never argues that the Seconded Amend Complaint does not provide sufficient information to prepare a defense.

Rule 9(b) applies to FCA cases. *See U.S. ex. rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256, (D.C. Cir. 2004). Rule 9(b) requires that a "party [] state with particularity

[18] Attached as Exh. 4.
[19] Attached as Exh. 5.
[20] Verizon cannot claim that this will be burdensome, because the FARs already obligate Verizon to go through this same exercise: "Overpayments. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment." 48 C.F.R. 52.232-25 (d).

the circumstances constituting fraud or mistake." "'The D.C. Circuit has taken a generous approach to pleadings' in the FCA context, 'finding that a complaint is not deficient even if it fails to set out a prima facie case as an initial matter.'" *United States v. Kellogg Brown & Root Servs*., 800 F. Supp. 2d 143, 154 (D.D.C. 2011) (Lamberth, J.) (*citing United States ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8, 18 (D.D.C. 2003)(which in turn cited *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113-14 (D.C. Cir. 2000)).

This Court has cautioned that "[c]ourts must not rigidly apply the requirements of Rule 9(b), but rather should analyze the Rule on a case by case basis. . . Thus, while some courts have required greater specificity in the allegations of fraud, such heightened pleading requirements may not be appropriate in each and every case." *United States ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 193 (D.D.C. 2011) (Kessler, J.) (internal citations and quotations omitted). "For fraudulent schemes that are particularly complex or extensive, Rule 9(b)'s pleading requirements may be further relaxed." *Id.*, at 203 (internal citations omitted).

Courts must harmonize Rule 9(b)'s particularity requirements with Rule 8(a), which only requires that a complaint contain a "short and plain statement" of the claim. *Kane*, 798 F. Supp. 2d at 202. Consistent with that harmonization, it is "inappropriate to require proof on a 9(b) motion to dismiss." *Id.* at 202-203 (internal citations and quotations omitted). Rather, particularity must be pled "only with respect to the circumstances constituting fraud." *Id.* at 203. "In deciding Rule 9(b) cases, courts should also be guided by the Rule's purpose to discourage the initiation of suits brought solely for their nuisance value, and [to] safeguard potential defendants from frivolous accusations of moral turpitude . . . . And because fraud encompasses a wide variety of activities, the requirements of Rule 9(b) guarantee all defendants sufficient information to allow for preparation of a response." *Id.* at 193.

Where a complaint provides sufficient information to allow a defendant to prepare a defense, courts have found that Rule 9(b) is satisfied. *See e.g., United States v. First Choice Armor & Equip., 808 F. Supp. 2d 68,* 73 (D.D.C. 2011) (Roberts, J.) ("[m]otions to dismiss for failure to plead fraud with sufficient particularity are evaluated in light of the overall purposes of Rule 9(b) to ensure that defendants have adequate notice of the charges against them to prepare a defense"); *United States ex rel. Folliard v. Synnex Corp.,* 798 F. Supp. 2d 66, 79 (D.D.C. 2011) (Lamberth, J.) ("Rule 9(b) is not intended to be a formalistic bar to substandard pleadings, but rather a guarantee that all defendants have sufficient information to allow for preparation of a response")(internal citations and quotations omitted); *United States ex rel. Folliard v. CDW Tech. Servs., Inc*., 722 F. Supp. 2d 20, 33 (D.D.C. 2010) (Huvelle, J.) (internal citations and quotations omitted); ("[Relator's] complaint may be wrong, but defendants have been given enough information to defend against the charge and not just deny that they have done anything wrong"); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.,* 238 F. Supp. 2d 258, 270 (D.D.C. 2002) (Lamberth, J.) ("No further amendment of Relator's complaint is required at this time because it is specific enough to allow DTCA to prepare its defense, which is the purpose of 9(b) as read in conjunction with Rule 8.")

Here, the Second Amended Complaint plainly satisfies that standard and provides Verizon with sufficient information to prepare a defense. The Second Amended Complaint alleges that Verizon fraudulently billed the United States a specific list of illegal surcharges, limited to 20 particular contracts. SAC, ¶¶ 3 and 28. The scheme is limited to the life of each contract, which Verizon obviously knows. To prepare a defense all Verizon has to do is find the 20 contracts, determine what surcharges it billed under each contract, and construct an argument that the surcharges at issue were allowable. As this Court held in *Kane*:

> In sum, Plaintiffs' allegations provide sufficient detail to satisfy Rule 9(b)'s overriding purpose of guaranteeing Defendants sufficient information to allow for preparation of a response. While significant details which will be necessary for plaintiff[s] to succeed on the merits of the case are indeed absent, these details are not necessary at this very preliminary stage of litigation. Plaintiffs must be allowed to fill in those details [through] the discovery process . . . . Contrary to Defendants' claim, these allegations do not require Defendants to submit to overly burdensome discovery or allow Plaintiffs to conduct a fishing expedition. Rather, on the basis of Plaintiffs detailed allegations, the Court is confident that [d]iscovery can be pointed and efficient.

798 F. Supp. at 206-207 (internal citations and quotations omitted).

Verizon's Motion to Dismiss never claims that the Second Amended Complaint does not provide sufficient information to allow it to prepare a defense. Instead, Verizon spends the entire motion arguing that the Second Amended Complaint fails to plead facts sufficient to support an inference that fraud occurred. This argument lacks merit.

The Second Amended Complaint alleges in part:

> [a]s discussed above, Shea, through his extensive consulting experience, learned that Verizon had a custom and practice of charging its commercial customers Non-Allowable Tax-Like Charges. Upon investigation, Shea learned that Verizon also charged the United States these same Non-Allowable Tax-Like Charges. A former Verizon employee, who worked at the company for over 30 years and retired as a manager, senior staff consultant, confirmed that Verizon did not have a separate billing system for federal customers and commercial customers, and that Verizon's billing system did not have the capability to turn off the surcharges that were generally charged to all customers. Based on Verizon's practice of improperly billing Non-Allowable Tax-Like Charges to commercial customers and the government, on information and belief, *Verizon I*mproperly billed for Non-Allowable Tax-Like Charges on the following federal telecommunication contracts. . .

¶¶ 27-28.

Verizon correctly states that Shea cannot allege with certainty whether any particular contracts at issue permitted the Non-Allowable Tax-Like Surcharges. Verizon Memo., p. 32-35. However, he can allege with certainty that Verizon had a practice of billing such surcharges to large commercial customers and to the United States, and that the available documents he reviewed are consistent with that practice. Verizon has access to all the contracts and invoices at

issue, while Shea has only limited access. The D.C. Circuit "provides an avenue for plaintiffs unable to meet the particularity standard because defendants control the relevant documents--plaintiffs in such straits may allege lack of access in the complaint." *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1258 (D.C. Cir. 2004). Control does not have to be exclusive and plaintiffs may allege lack of access in an opposition to a motion to dismiss. *Kane*, 798 F. Supp. 2d at 206, n. 29.

Similarly, Verizon argues that the Second Amended Complaint lacks allegations sufficient to demonstrate that any improper billings occurred. Verizon Memo., p. 36-37. First, it is absolutely reasonable to infer, based on Shea's knowledge of Verizon's billing practices, the lack of a separate tax module for Verizon's government contracts, and the misleading language used in the contracts and modification cited in the Second Amended Complaint, that Verizon was in fact charging the United States illegal surcharges. *See Folliard*, 722 F. Supp. 2d at 30 ("[a] relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.") Second, again, Verizon controls the documents demonstrating which surcharges it charged the government under each of the contracts. Shea lacks access to those documents.

The Second Amended Complaint does not provide the dates of Verizon's fraud, but, by definition, the fraud could only occur during the effective dates of each contract. Verizon knows the effective date of each contract, so it is not prejudiced by the lack of those allegations. If this Court would like Relator to add the starting effective date of the earliest contract listed in the Complaint, Relator has that information and can amend to include that allegation. *See Kane*, 798 F. Supp. 2d at 204 (D.D.C. 2011) ("[w]hile Relator provides a more open-ended time-period for

the fraudulent plan, alleging that it began in 1999 and continues to 'the present time,' even this lengthier time span is sufficient in a case involving a complex, fraud scheme.")

Finally, Verizon argues that the Second Amended Complaint cannot survive Rule 9(b) because it does not allege who was committing the fraud. Verizon Memo., p. 38 (*citing United States ex rel. Williams v. Martin-Baker Aircraft Co*., 389 F.3d 1251, 1258 (D.C. Cir. 2004)). Verizon's reliance on *Williams* is misplaced. Judge Lamberth rejected a similar argument in *Synnex*:

> Defendants also attempt to attack Folliard's complaint based on the fact that he does not provide the names of individuals involved in the fraudulent scheme, in contravention of the apparent requirement that pleaders 'identify individuals allegedly involved in the fraud.' *U.S. ex rel. Williams v. Martin-Baker Aircraft Co*., 389 F.3d 1251, 1256, 363 U.S. App. D.C. 419 (D.C. Cir. 2004). But other courts in this district have convincingly distinguished *Williams*, pointing out "the Williams court disapproved of that complaint's failure to identify individual defendants where the relator had worked with both defendant companies for five years," and holding instead that in a situation where a relator does not work for a defendant, "the absence of [that defendant's] named . . . employees should not render the otherwise detailed complaint deficient under Rule 9(b)." *United States ex rel. Westrick v. Second Chance Body Armor, Inc*., 685 F. Supp. 2d 129, 138-39 (D.D.C. 2010)

798 F. Supp. 2d at 80. Shea never worked for Verizon. Rule 9(b) does not require him to identify the particular Verizon employees involved in the fraudulent scheme. *See also*, *CDW*, 722 F. Supp. 2d at 32 ("[b]ecause defendants are hardly disadvantaged by relator's failure to identify which of their *own* employees were responsible for country of origin labels on the SEWP website, the allegations about the SEWP listings give[] defendants sufficient information to allow for preparation of a response")(internal citations and quotations omitted) (emphasis in the original).

For the above reasons, the Second Amended Complaint satisfies Rule 9(b).

IV. IF THIS COURT GRANTS VERIZON'S MOTION TO DISMISS, IT SHOULD BE WITHOUT PREJUDICE.

If this Court dismisses the Second Amended Complaint under the first to file bar, dismissal should be without prejudice because, as discussed above, Relator is allowed to re-file his complaint the next day. *See, e.g., Chovanec*, 606 F.3d at 365 (holding that because the earlier-filed actions were no longer pending, relator "is entitled to file a new qui tam complaint--entitled, that is, as far as § 3730(b)(5) goes"). Dismissal under the public disclosure bar or Rule 9(b) should also be without prejudice. This Court has recognized that "[t]he D.C. Circuit has directed that leave to amend is 'almost always' permitted to cure deficient fraud pleadings. *Shekoyan v. Sibley Int'l Corp*., 217 F. Supp. 2d 59, 74 (D.D.C. 2002) (Walton, J.) (*quoting Firestone v. Firestone*, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1209 (D.C. Cir. 1996)). Leave to amend should be permitted unless there is undue delay, bad faith, dilatory motive, repeated failure to cure, undue prejudice, or futility." *United States ex rel. Barrett v. Columbia/Hca Healthcare Corp*., 2002 U.S. Dist. LEXIS 25884, 16-17 (D.D.C. 2002) (Lamberth, J.). In *Barrett*, the court dismissed without prejudice because the complaint was not "obviously meritless." *Id.* Here, the Second Amended Complaint is not "obviously meritless." Accordingly, dismissal should be without prejudice, and Relator will promptly file a motion for leave to amend.

Finally, dismissal should be without prejudice as to the United States on all issues. *See, e.g., United States ex rel. Williams v. Bell Helicopter Textron Inc*., 417 F.3d 450, 455 (5th Cir. 2005) (reversing district court's dismissal of complaint with prejudice against the United States.)

CONCLUSION

Verizon's fraud occurred in a world of complex, difficult to administer contracts and obscure surcharges. Shea understands this world better than just about anyone.[21] Allowing Shea to help the government with his unique expertise is exactly the kind of coordination that Congress sought when it passed the False Claims Amendment Act of 1986.[22]

For all of the above reasons, Relator respectfully requests that this Court deny Verizon's Motion to Dismiss.

Respectfully submitted,
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Dated: September 27, 2012

[21] This Court recognized Shea's expertise in *Verizon I* when it granted Shea's motion for relator's share award: "It is absolutely true that the Government had no knowledge of the fraud. While the GSA auditors undoubtedly did their job as best they could, they simply did not have the relevant experience that Shea had in understanding the extremely complex administration of Government contracts. The General Services Administration auditors, who routinely reviewed the FTS-2001 contract invoices, had never previously identified the overcharges Shea had alleged and had not even audited the relevant section of the invoices or contract." Memorandum Opinion, Dkt. 70, p. 13.

[22] Congress passed the False Claims Amendment Act of 1986 to "encourage more private enforcement suits."1986 U.S.C.C.A.N. at 5288-89. Congress was concerned about "sophisticated and widespread fraud" depleting national funds, and concluded that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." 1986 U.S.C.C.A.N. at 5266-67.

CERTIFICATE OF SERVICE

I certify that on September 27, 2012, I served the above *Relator's Opposition to Defendants' Motion to Dismiss the Second Amended Complaint* via ECF on the following:

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