No. 09-55010

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

P. VICTOR GONZALEZ, QUI TAM PLAINTIFF, ON BEHALF OF THE UNITED STATES & STATE OF CALIFORNIA,

Plaintiff-Appellant,

v.

PLANNED PARENTHOOD OF LOS ANGELES, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF APPELLANT

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INTRODUCTION

The federal False Claims Act (FCA) prohibits frauds against the federal government. As a remedial measure, the FCA authorizes certain private individuals -- called "relators" -- to bring civil suits, in the name of the United States, to enforce the FCA and to recover the fraudulently obtained funds. Such private enforcement actions are known as "qui tam" suits. The relator bringing such a qui tam suit, if successful, receives a portion of the fraud recovery as a bounty -- an incentive to bring these suits in the first place.

"[T]he paradigm qui tam case is one in which an insider at a private company brings an action against his own employer." *U.S. ex rel. Fine v. Chevron, U.S.A.,* 72 F.3d 740, 742 (9th Cir. 1995) (en banc). *Accord U.S. ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); *U.S. ex rel. Stinson, Lyons, Gerlin and Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991) ("The paradigmatic original source is a whistleblowing insider").

The relator in this case, P. Victor Gonzalez, is a paradigmatic whistleblower. Yet the district court dismissed his case. The decision

below rests upon two asserted objections to Gonzalez's suit. As demonstrated herein, neither objection has merit. This Court should reverse and remand.

STATEMENT OF JURISDICTION

(a) Subject matter jurisdiction is precisely the issue before this Court. The district court had jurisdiction over relator's federal False Claims Act (FCA) counts under 28 U.S.C. §§ 1331, 1345 and 31 U.S.C. § 3732(a), unless that jurisdiction was barred by 31 U.S.C. § 3730(e)(4). *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-70 (2007). If the district court had jurisdiction over the federal FCA counts, it also had jurisdiction, under 28 U.S.C. § 1367 and 31 U.S.C. § 3732(b), over relator's state law counts under the California FCA.

(b) The district court entered a final judgment in this case. Doc. 48 (EOR 2). *See* Rule 58, Fed. R. Civ. P. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

(c) The district court dismissed all counts on Oct. 30, 2008, and entered judgment on Nov. 14, 2008. Relator filed a timely motion to alter or amend the judgment under Rule 54, Fed. R. Civ. P., on Nov. 5, 2008.

The district court denied this motion on Dec. 5, 2008. On Jan. 5, 2009, relator filed a timely notice of appeal. *See* Rules 4(a)(1)(A) & 4(a)(4)(A)(iv), Fed. R. App. P.

STATEMENT OF ISSUES

I. Whether the district court erred in holding that there was a "public disclosure" under the jurisdictional provisions of the False Claims Act (FCA).

Defendants argued in their motion to dismiss (Doc. 33) that there was a "public disclosure" under the FCA, 31 U.S.C. § 3730(e)(4)(A). The district court agreed. Doc. 43 (EOR 4). "Whether a particular disclosure triggers the jurisdictional bar of § 3730(e)(4)(A) is a mixed question of law and fact, which we review de novo." *U.S. ex rel. Meyer v. Horizon Health Corp.,* 565 F.3d 1195, 1199 (9th Cir. 2009) (internal quotation marks and citation omitted).

II. Whether the district court erred in holding that relator was not an "original source" under the jurisdictional provisions of the False Claims Act (FCA).

Defendants argued in their motion to dismiss (Doc. 33) that relator was not an "original source" under the jurisdictional provisions of the FCA, 31 U.S.C. § 3730(e)(4)(B). The district court agreed. Doc. 43 (EOR 4).

Review of a dismissal for want of subject matter jurisdiction is de novo. *U.S. ex rel. Fine v. Chevron U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) (en banc).

III. Whether the district court erred in holding that the California False Claims Act (CFCA) counts had to be dismissed in light of the district court's disposition of the federal claims.

Defendants argued in their motion to dismiss (Doc. 33) that because the same "public disclosure" and "original source" rules governed the CFCA, those counts had to be dismissed as well. The district court agreed. Doc. 43 (EOR 4). Review of this issue is de novo, as the ruling on the CFCA counts merely piggybacked on the federal FCA ruling.

STATEMENT OF THE CASE

Nature of the Case

This is a whistleblower qui tam suit under the federal False Claims Act, 31 U.S.C. § 3730, and the corresponding California False Claims Act, Cal. Gov't Code § 12652(c). Essentially, the plaintiff (called a "relator" in a qui tam case) alleges that the defendants Planned Parenthood of Los Angeles et al. fraudulently overbilled the state, and through it the federal government, to the tune of tens of millions of dollars.

Course of Proceedings

Victor Gonzalez, relator, filed his suit under seal, as required by the False Claims Act, on Dec. 19, 2005. 31 U.S.C. § 3730(b)(2).[1] After extended consideration, *see* § 3730(b)(3), the United States Government on Nov. 1, 2007, declined to intervene, *see* § 3730(b)(4)(B). Doc. 26. The district court subsequently unsealed the case as to all documents beginning with the federal government's notice of declination. Doc. 27. On May 1, 2008, relator filed a First Amended Complaint (FAC). Doc. 31 (EOR 17). On July 9, 2008, defendants filed a motion to dismiss. Doc. 33.

The FAC contained twelve separate counts. Counts I-III were brought under the FCA. Counts VIII-XI were brought under the California False Claims Act (CFCA). Relator did not defend the remaining counts, which were brought on other theories, and those counts are no longer at issue.

Disposition Below

The district court on Oct. 30, 2008, dismissed the FCA counts for want

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[1] The False Claims Act (FCA) was amended by a bill signed into law on May 20, 2009. Pub. L. 111-21, Fraud Enforcement and Recovery Act of 2009. The private qui tam section of the FCA, 31 U.S.C. § 3730, was not amended, with the exception of § 3730(h), the retaliation provision, which is not at issue here.

of subject matter jurisdiction under § 3730(e)(4). Doc. 43 (EOR 4). The district court dismissed the CFCA counts on the theory that identical jurisdictional rules governed those state law counts. *Id.* The district court entered judgment on Nov. 14, 2008. Doc. 48 (EOR 2). Also on Nov. 14, 2008, relator timely moved to alter or amend the judgment. Doc. 49. The district court denied that motion on Dec. 5, 2008. Doc. 53 (EOR 15). Relator filed a timely notice of appeal on Jan. 5, 2009. Doc. 56 (EOR 1).

FACTS

The crux of relator's False Claims Act (FCA) suit is that numerous Planned Parenthood (PP) affiliates in California, including the one for which relator worked (PP of Los Angeles), knowingly overbilled the state government, and through it the federal government, to the tune of tens of millions of dollars, for birth control drugs and devices provided to clients.

The lower court did not reach the merits, but instead dismissed this case under the jurisdictional provisions of the FCA. Because the timing of events is important to the jurisdictional elements, relator provides the following chronology of events. "FAC" refers to the First Amended Complaint.

- **1970 to Present**: PP clinics bill California's Department of Health Services (DHS) at their "usual and customary" rates for oral contraceptives (and by implication, for other birth control drugs and devices), rather than at the lower rate of acquisition cost. FAC Ex. 3d, Planned Parenthood Affiliates of California, Inc. (PPAC) handout "AB 2151 (Jackson) Q&A," p. 2 (EOR 74). (DHS in turn seeks reimbursement from the federal government, making this a matter within the ambit of the FCA.)
- **May 1997 - Jan. 1998**: In correspondence with Kathy Kneer, Executive Director of PPAC, the California Department of Health Services (DHS) repeatedly instructs PP that it may seek reimbursement for drugs, specifically oral contraceptives, only at acquisition cost, not at "usual and customary" rates. FAC Exs. 2a, 2b, 2c, 2d (EOR 60-67). PP clinics nevertheless continue billing DHS at their "usual and customary" rates. FAC Ex. 3d, PPAC handout "AB 2151 (Jackson) Q&A," p. 2 (EOR 74). In particular, "[t]his has been the practice of all PP affiliates since the FPACT program was inaugurated in 1997," FAC Ex. 10 (EOR 114). *See also* EOR 132-46

(background on FPACT).

- **Dec. 9, 2002**: PPLA hires relator P. Victor Gonzalez as Chief Financial Officer (CFO). FAC ¶ 1 (EOR 18).
- **Jan. 26, 2004**: The California DHS visits PP of San Diego and Riverside Counties (PPH), initiates an audit focusing on oral contraceptive purchases and reimbursement rates, and announces a plan to audit all state PP affiliates. PPH's President and CEO Mark Salo emails this information to other PP affiliates, including Martha Swiller of PPLA. Swiller forwards the Salo email to PPLA staff, including CEO Mary-Jane Wagle and CFO Victor Gonzalez, with the message, "This is bad." FAC Ex. 5 (EOR 80).
- **Jan. 27, 2004**: DHS Audits and Investigations representative Stephan J. Edwards, Chief of the Medical Review Section - South III, e-mails Bob Coles, Vice President and CFO of PPH, recounting Coles's admission that PPH bills at its "usual and customary" rates rather than at product acquisition cost. Edwards agrees to "pend" this part of the audit temporarily in light of objections from PP attorney Lilly Spitz, Chief Legal Counsel, California Planned

Parenthood Education Fund. FAC Ex. 14 (EOR 125-26).

- **Jan. 29, 2004**: PPH's Bob Coles forwards the Edwards e-mail to Victor Gonzalez, who in turn forwards it to Mary-Jane Wagle, PPLA CEO. FAC Ex. 14 (EOR 125-26).
- **Feb. 5, 2004**: Spitz e-mails PP affiliate CEO's and CFO's, including Victor Gonzalez, to report that Kim Belshe of DHS "declined to halt the cost audit at this time." Spitz states that PPAC "needs some up-to-date information from you" including a "[c]omplete list of oral contraceptives and contraceptive supplies, the purchase price under nominal pricing, and the amount billed to Medi-Cal." PPAC's Kneer forwards the Spitz e-mail to Victor Gonzalez and other PP staff, adding her own message. Kneer reports that "Kim" (Belshe) "did state that DHS legal office has advised her that the law requires us to bill at acquisition cost." Kneer opines that "we have a good chance to succeed on a policy basis to allow clinics to bill at usual and customary" rates, and that "[t]his change" would best be enacted through "trailer bill language." Kneer adds:

> We have asked each affiliate to provide our office with information about our affil[ia]tes['] billing practice for nominal

> and 340B priced contraceptive methods. I will assure you that this information will not be used publicly except in a state aggregate and to assure we are accurately reflecting the de[]pth of the impact and to insure we are fully covering ourselves with any statute change. . . .
> . . . .
> . . . At this time we are asking that no further public action be taken -- quietly resolving this as a policy issue within the administration is the best strategy at this time.

FAC Ex. 14 (EOR 127-30).

- **Feb. 6, 2004**: PPLA CEO Wagle forwards Kneer's Feb. 5 e-mail to "PPLA Senior Staff" and identifies Victor Gonzalez as the individual assigned to provide the requested "cost impact information." FAC Ex. 7 (EOR 100-01).

- **Feb. 9, 2004**: Various PP personnel, including Victor Gonzalez, participate in a conference call with Kneer regarding the DHS audit and PP's response. EOR 102.

- **Feb. 16, 2004**: Victor Gonzalez e-mails PPLA CEO Wagle, summarizing the Feb. 9 conference call and proposing a remedial course of action. The Gonzalez e-mail closes with the following: "I would also add that PPAC obviously did not handle this issue well and as a result left the entire system exposed." FAC Ex. 8 (EOR

102-03).

- **Feb. 16-18, 2004**: Victor Gonzalez prepares a draft Report to the Finance Committee of PPLA and submits the draft to PPLA CEO Wagle. The draft repeats portions of the Feb. 16 Gonzalez e-mail, including the proposed remedial course of action. EOR 104-11. Gonzalez also supervises the preparation of a detailed spreadsheet on PPLA revenues from birth control drugs and devices.
- **Feb. 18, 2004**: PPLA CEO Wagle e-mails Victor Gonzalez her revised version of the Finance Report, now "[r]eady to go out with attachments," adding "Go for it!" The revised version does not contain Gonzalez's proposed remedial course of action. The revised version does contain the admission that PP affiliates bill the state at their "usual and customary" rates and have done so at least "since the FPACT program was inaugurated in 1997." FAC Ex. 10 (EOR 112-16).
- **Feb. 20, 2004**: Victor Gonzalez e-mails PPLA's outside accountant Tom Schulte at RBZ, attaching the spreadsheet. Gonzalez explains the problem of PPLA's "hefty markup over cost" being "proscribed by

DHS regulations," with a consequent multi-million dollar impact. Gonzalez proposes the retention of "adequate legal counsel" and the "booking of a contingency at 50% of the $2m annual effect" for the new fiscal year. FAC Ex. 4 (EOR 76-79).

- **Mar. 9, 2004**: PPLA fires Victor Gonzalez. FAC ¶ (EOR 18).
- **Aug. 9, 2004**: The California legislature's Senate Health and Human Services Committee releases an analysis of AB 2151, the bill designed to solve PP's billing illegality. Doc. 34-3, Ex. 5 (EOR 159-65).
- **Nov. 19, 2004**: The California DHS releases its audit report on Planned Parenthood of San Diego and Riverside Counties (PPH). The audit covers two periods, viz., July 1, 2002 to June 30, 2003 for two billing codes (for oral contraceptives and contraceptive barrier methods), and Feb. 2, 2003 to May 30, 2004 for a third billing code (for Plan B products). The audit found that "PPH did not comply with the published billing requirements" because it billed at its "customary" rates rather than "at cost." The audit report found that this "[f]ailure to comply" resulted in overbilling for the audit period

in the amount of $5,213,645.92. FAC Ex. 7 (EOR 90-99). An accompanying letter from Stan Rosenstein, Deputy Director, Medical Care Services at DHS, purports to excuse PP's overbilling and states that "it is the decision of DHS that no demand [for recovery of the $5 million-plus in overbilling] will issue pursuant to the audit of Planned Parenthood Associates for the cited period." Doc. 34-3, Ex. 3 (EOR 148-49). No mention is made of the previously planned audits of all other PP affiliates in California.

- **June 2005:** Victor Gonzalez sues in state court for wrongful termination. Doc. 34-3, Ex. 4 (EOR 151-57).
- **Nov. 18, 2005**: Victor Gonzalez, through counsel, alerts the United States Attorney General (AG) et al. to the fraudulent overbilling. FAC Ex. 7 (EOR 82-84).
- **Nov. 21, 2005**: Victor Gonzalez, through counsel, supplies supplemental information and documents to the AG et al. FAC Ex. 7 (EOR 88-89).
- **Dec. 19, 2005**: Victor Gonzalez files his qui tam suit under the FCA and the California FCA in federal district court.

SUMMARY OF ARGUMENT

The federal False Claims Act (FCA) authorizes private parties to sue to recover (and to receive a portion of) funds obtained in violation of the FCA. 31 U.S.C. § 3730(b). However, the FCA denies subject matter jurisdiction -- and thus bars private civil actions -- in certain cases of "public disclosure" of the alleged fraud, unless the person bringing the suit is an "original source" of the information. 31 U.S.C. § 3730(e)(4). The pertinent text is as follows:

> Public Disclosure Provision
>
> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

§ 3730(e)(4)(A).

> Original Source Provision
>
> 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.

§ 3730(e)(4)(B).

Public Disclosure

Defendants in this case identified four purported public disclosures under the FCA, and the district court agreed that two of them qualified. This was error. None of the proffered disclosures triggered the FCA's jurisdictional bar.

(1) The state Department of Health Services (DHS) audit investigation of the defendants fails as a public disclosure for two reasons.

First as the district court correctly held, the investigation was not "public." The defendants deliberately kept the matter quiet. Discussion of the investigation among the staff of those being investigated is not "public."

Second, only *federal*, not state, audits qualify as sources of public disclosures under the FCA. Hence, the state audit is categorically ineligible to trigger the FCA jurisdictional bar. The text, legislative history, and purposes of the FCA all show that the sources listed in the

jurisdictional provisions are (aside from news media) exclusively *federal* in nature. While current Ninth Circuit precedent is to the contrary, the U.S. Supreme Court has granted review of a case raising this issue. *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, No. 08-304 (U.S. cert. granted June 22, 2009). Relator presses this argument in light of the Supreme Court's upcoming clarification of the issue or, in the event the Supreme Court for some reason does not entirely resolve the merits of that question, to highlight the issue for en banc rehearing or Supreme Court review in the present case. (Of course, since the audit investigation here was not "public," this Court can reject this purported disclosure without addressing the broader *Graham* issue.)

(2) The California state legislative committee report does not qualify as a source of public disclosure under the FCA for two reasons.

First, both the statutory text and Ninth Circuit precedent agree that the term "congressional" in the FCA refers to *Congress*, *i.e.*, the *federal* legislature. The district court therefore erred by treating the *state* legislature as "congressional."

Second, and more broadly, as noted above, the sources of public

disclosures (aside from the news media) under the FCA jurisdictional bar are categorically *federal*, not *state*, sources. For this additional reason, a state legislative report does not qualify as a public disclosure.

(3) The various media reports defendants invoke fail to trigger the FCA "public disclosure" element. The district court did not even deem defendants' argument on this score worthy of discussion. And in fact, the media accounts neither identify the particular defendants nor identify the allegedly fraudulent practices. Under Ninth Circuit precedent, each of these deficiencies is independently fatal to defendants' argument.

(4) The state court wrongful termination complaint which relator Gonzalez filed also fails as a public disclosure. As noted above, the sources enumerated under the FCA are all (aside from the news media) *federal* in nature, so state court proceedings do not trigger the bar. While current Ninth Circuit case law (which the district court followed on this point) treats state court proceedings as an enumerated source under the FCA, this rule may fall in light of the forthcoming *Graham* decision in the Supreme Court, or, if necessary, in en banc review or review on certiorari in this case. In any event, relator Gonzalez qualifies as an "original

source" who may proceed with his qui tam suit, as discussed below.

Original Source

The absence of any "public disclosure" suffices to overturn the district court's judgment; absent a public disclosure, there is no jurisdictional bar under § 3730(e)(4). But even if there were a public disclosure, relator could proceed with his qui tam suit as an "original source" of the "information" at issue. § 3730(e)(4)(A), (B).

The pertinent "information" which the FCA refers to is that underlying the relator's complaint, not the information underlying any public disclosure. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470-72 (2007). Under the FCA, relator Gonzalez is an original source of this information because he voluntarily provided it to the federal government before filing his qui tam suit (which is undisputed), and because he possessed "direct and independent knowledge" of the pertinent information.

Under Ninth Circuit precedent, a relator's knowledge is "independent" if it precedes any public disclosure, and here Gonzalez learned of the unlawful overbilling well before any supposed "public disclosure" in the

state legislative committee report or the state court lawsuit (the two events which the district court held were public disclosures).

Under Ninth Circuit precedent, knowledge is also "direct" under the circumstances here, namely, that Gonzalez studied it with his own eyes, in the course of his employment, and by working to fix the problem.

While a line of Ninth Circuit precedents have imposed an additional, non-textual requirement -- namely, that the relator "play a role" in any public disclosure that triggers the jurisdictional bar -- this requirement is no longer tenable in light of *Rockwell*. The *Rockwell* Court clearly severed any link between the relator's "information" and the "information," perhaps unknowable, underlying any public disclosure. 549 U.S. at 471-72. If, as the Supreme Court held, Congress did not "care whether a relator *knows* about the information underlying a publicly disclosed allegation," *id.* at 471 (emphasis added), then it is likewise unjustifiable to require a relator to *contribute* to such a disclosure. Thus, while the state court lawsuit in this case would satisfy this additional requirement -- Gonzalez obviously "played a role" in his own lawsuit -- the requirement itself must be discarded.

Since neither the public disclosure trigger nor (if there were a public disclosure) the original source requirements bars the present qui tam action, this Court should reverse the district court and reinstate Counts I-III.

The district court's dismissal of the California FCA claims rested entirely upon the dismissal of the federal FCA claims, based upon the proposition that the same jurisdictional rules governed. Whereas the ruling dismissing the federal FCA counts must be reversed, this Court should likewise reverse the district court's ruling as to the California FCA and reinstate Counts VIII-X as well.

ARGUMENT

This appeal turns on the question whether the jurisdictional provisions of the federal False Claims Act (and similar provisions under the CFCA) bar relator Victor Gonzalez from bringing the present action. That question in turn hinges upon whether certain events qualify as "public disclosures" under the FCA, and if so, whether relator Gonzalez is an "original source" of the information at issue.

To understand this dispute clearly, it is helpful first to consider briefly

the history and operation of private civil actions under the FCA.

History and Operation of FCA Qui Tam Suits

"The FCA establishes a scheme that permits either the Attorney General, [31 U.S.C.] § 3730(a), or a private party, § 3730(b), to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the 'relator.'" *U.S. ex rel. Eisenstein v. City of New York*, No. 08-660 (U.S. June 8, 2009), slip op. at 3-4 (citation omitted).

The FCA was "enacted in 1863 with the principal goal of stopping the massive frauds perpetrated by large private contractors during the Civil War." *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000) (internal quotation marks, editing marks, and citation omitted). This original version of the FCA "contained a qui tam provision allowing *any* person to sue as a relator," *U.S. ex rel. Zaretsky v. Johnson Controls*, 457 F.3d 1009, 1017 n.5 (9th Cir. 2006) (emphasis added). As an extreme example, in one case "the Supreme Court held that even individuals who had done nothing more than copy allegations from a criminal indictment could be qui tam relators." *Id.* (citing *U.S. ex rel.*

Marcus v. Hess, 317 U.S. 537 (1943)).

"In response to *Hess*, Congress amended the [FCA] in 1943, removing jurisdiction over qui tam actions 'whenever . . . such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.'" *Zaretsky,* 457 F.3d at 1017 n.5 (citation omitted).

The 1943 FCA "amendment led to unintended consequences, however, as it deprived courts of jurisdiction over suits in which the would-be relators had given their information to the government before filing their claims." *Seal 1 v. Seal A*, 255 F.3d 1154, 1158-59 (9th Cir. 2001) (citation omitted). By "swinging far in the other direction," *U.S. ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147, 1154 (9th Cir. 2006), Congress "essentially eliminated the financial incentive for private citizens to bring fraudulent conduct to the attention of the government, and the use of *qui tam* suits to fight fraud on behalf of government dramatically declined," *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 966 (9th Cir. 1999).

"In 1986, Congress again amended the [FCA], in part to correct

restrictive court interpretations that tend to thwart the effectiveness of the statute, . . . and to encourage more private enforcement suits." *Zaretsky,* 457 F.3d at 1017 n.5 (internal quotation marks, editing marks, and citations omitted). *See* S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits"). These 1986 amendments added the "public disclosure" and "original source" provisions at issue in the present appeal. As this Court has observed, "the 1986 amendments to the FCA steer a course between an overly restrictive interpretation of the FCA on the one hand, . . . and an unrestrained permissiveness on the other, . . . seeking the golden mean . . . ." *U.S. ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (internal quotation marks and citations omitted).

The current jurisdictional provisions relevant to this case provide as follows:

> Public Disclosure Provision
>
> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or

> transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

§ 3730(e)(4)(A).

> Original Source Provision
>
> 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.

§ 3730(e)(4)(B).

In this case, then, the first question is whether the "public disclosure" bar applies to Gonzalez's suit. If so, then the second question is whether Gonzalez meets the "original source" exception to that bar. The second step -- original source analysis -- is only necessary if there has been a public disclosure. If there has been no "public disclosure," then Gonzalez need not establish "original source" status. *A-1 Ambulance Serv. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991).

I. THERE WAS NO "PUBLIC DISCLOSURE."

The first question is whether there was a "public disclosure" under § 3730(e)(4)(A) of the FCA. As this Court has explained,

> a fair reading of section 3730(e)(4)(A) indicates that a district court lacks jurisdiction when:
>
> (1) there has been a "public disclosure"
> (2) of "allegations or transactions"
> (3) 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"
> (4) and the relator's action is "based upon" that public disclosure
>
> A survey of cases also suggests that each of these elements must be satisfied in order to trigger the bar.

U.S. ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1409 (9th Cir. 1995).

The list of sources of public disclosures set forth in the FCA is exclusive: a disclosure that is "not from one of the sources enumerated in the statute . . . does not trigger the jurisdictional bar." *Haight*, 445 F.3d at 1153. *See also id.* at 1154-55 ("By limiting the enumerated sources to that narrow list . . . Congress sought to capitalize on the independent efforts of prospective *qui tam* relators who call information to the

attention of the government"). *Accord U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009) ("'we must decide whether the public disclosure originated in one of the sources enumerated in the statute'") (quoting *A-1 Ambulance*, 202 F.3d at 1243); *U.S. ex rel. Foundation Aiding the Elderly v. Horizon West, Inc.*, 265 F.3d 1011, 1014 (9th Cir. 2001)[2] ("Public disclosure can occur . . . only [in the listed] categories").

In its Motion to Dismiss, defendants Planned Parenthood of Los Angeles et al. (hereinafter "PP defendants") identified four purported "public disclosures":

1) the DHS audit begun on Jan. 26, 2004;
2) the California legislative committee report issued on Aug. 9, 2004;
3) various media reports from 1997-2004, in combination with state regulations; and,
4) the amended complaint in relator Victor Gonzalez's state court wrongful termination lawsuit, filed in June of 2005.

See Doc. 33 at 3, 15-22.

None of these qualifies as a relevant public disclosure under the FCA.

A. DHS Audit

The PP defendants claim a public disclosure through the DHS auditing

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[2] Opinion amended at 275 F.3d 1189 (9th Cir. 2001).

of PPH.[3] The district court properly rejected this claim. Doc. 43 at 4-5 (EOR 7-8).

1. There was no "public" disclosure of the audit.

The PP defendants kept the DHS audit close to the vest. Indeed, that was their conscious strategy. As PPAC's Kathy Kneer explained to representatives of PP affiliates, "we are asking that no further public action be taken -- quietly resolving this as a policy issue within the administration is the best strategy at this time." FAC Ex. 14 (EOR 127). Thanks to this hush-hush approach, the only "disclosures" were intramural e-mails, phone calls, and conversations among the PP defendants (and PPLA's accounting firm). These are not "public": "disclosure to company employees does not constitute public disclosure." *U.S. ex. rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997). "Under a practical,

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[3] The audit eventually yielded an audit report in November 2004. Defendants have not contended that this report was made public. As the district court noted, "Defendants do not rely on the report as the public disclosure. They rely on the January 2004 e-mail alerting Planned Parenthood CEO's to the existence of the audit." Doc. 43 at 5 (EOR 8). In any event, the audit report would not qualify as a "public disclosure" for the additional reason that it is not an "enumerated source" under the FCA. *See infra* § I(A)(2).

commonsense interpretation of the jurisdictional provision, information that was disclosed in private has not been publicly disclosed." *Id.* at 1518 (internal quotation marks and citation omitted). *Accord Meyer*, 565 F.3d at 1200 ("information that was disclosed in private is not a public disclosure under the [FCA]") (internal quotation marks, footnote, and citations omitted).

The PP defendants argue that a different result should obtain where the circle of affiliated staffers are technically employed by different entities, citing the *Seal 1* case. But *Seal 1* helps Gonzalez, not defendants. *Seal 1* addressed an entirely different situation, namely, where a whistleblower at *one* company learns, *from the federal government investigators*, about a fraud at a *different, competitor* company. *See Seal 1,* 255 F.3d at 1156. The facts in *Seal 1* therefore triggered precisely the concern, motivating the 1943 amendments to the FCA, to "curtail parasitical suits in which the informer rendered no service to the government," *Zaretsky*, 457 F.3d at 1017 n.5 (internal quotation marks and citations omitted). Here, by contrast, the federal government apparently had no inkling of PP's frauds against it until Gonzalez blew the whistle.

The *Seal 1* case did address, however, the rationale for holding that intramural communications are not "public." "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." 255 F.3d at 1161. The same rationale applies here, as the district court noted:

> Although the Planned Parenthood affiliates are incorporated as separate entities, each affiliate had interests identical to those of the San Diego-Riverside affiliate that were threatened by the DHS audit. The very purpose of the e-mail was to alert other Planned Parenthood affiliates to the common threat that they all faced and to initiate a coordinated response. The e-mail even alluded to the protection of internal information concerning the alleged fraud . . . . Indeed, instead of triggering corrective action, the e-mail alert set off a coordinated defense against the audit under the leadership of PPAC, the affiliates' political action committee in Sacramento.

Doc. 43 at 11 (EOR 14).

As the *Seal 1* court noted, a rule that deemed "public" the government's merely advising employees that their corporation was being investigated "would run contrary to the purpose of the FCA, for it drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter." 255 F.3d at 1161 (internal quotation marks, editing marks, and citation omitted).

The rule the PP defendants propose would yield absurd results and bizarre incentives. Any conspiracy to defraud would be deemed "publicly disclosed" whenever it involved more than one technically distinct corporation or at least one technically separately employed person. Contractors would have an incentive to create multiple internal corporations or affiliates -- e.g., Acme Bolts, Acme Widgets, Acme Support Staff, etc. -- so that any fraudulent operation would likely be "publicly disclosed," for purposes of defeating whistleblower suits, by mere internal communications or operations. This would make no sense, and nothing in the FCA calls for such a counterproductive rule.

The district court correctly held that the internal e-mails regarding the DHS audit were not public disclosures.

2. A state administrative audit is not an "enumerated source" under the FCA.

As discussed in the preceding section, the DHS audit was not "publicly disclosed" for purposes of the FCA. But even if it were, the audit still would not qualify as a jurisdictional bar under the FCA because a *state* audit, as opposed to a *federal* audit, is not one of the enumerated sources under the FCA.

Relator Gonzalez acknowledges that this particular argument is currently foreclosed by a prior Ninth Circuit panel decision. *See U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008). However, the *Bly-Magee* holding is the subject of a circuit split, and the Supreme Court has granted review in a case presenting precisely that question. *See Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, No. 08-304 (U.S. cert. granted June 22, 2009). The single Question Presented in the *Graham* petition is:

> Whether an audit and investigation performed by a State or its political subdivision constitutes an "administrative . . . report . . . audit, or investigation" within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

Gonzalez therefore presses this additional argument in the event the Supreme Court embraces it in the forthcoming *Graham* decision (which would supersede *Bly-Magee*) or, if for some reason the Supreme Court does not reach the question in *Graham*, to highlight it for possible en banc consideration in the Ninth Circuit or for Supreme Court review in the present case.

Importantly, the federal government is on record, now across two separate Administrations, taking the position that *Bly-Magee* was

incorrect on this issue, and that the sources enumerated under the public disclosure bar of the FCA, with the sole exception of the "news media," must all be *federal* sources. The government's arguments are set forth in its amicus brief at the petition stage in *Bly-Magee*, available at www.usdoj.gov/osg/briefs/2007/2pet/6invit/2006-1269.pet.ami.inv.pdf, and in its amicus brief at the petition stage in *Graham,* available at www.usdoj.gov/osg/briefs/2008/2pet/6invit/2008-0304.pet.ami.inv.pdf.

i. Statutory structure and context

At the simplest level, the federal nature of the reference to an "administrative . . . audit" in § 3730(d)(4)(A) appears from its placement. The term "administrative" is sandwiched between two exclusively federal terms: "in a *congressional,* administrative, or *Government Accounting Office* report, hearing audit, or investigation," § 3730(d)(4)(A) (emphasis added). *See Bly-Magee*, 470 F.3d at 917 (acknowledging that "congressional" and GAO "refer exclusively to *federal*" materials) (emphasis in original).

"Statutory language must be read in context and a phrase gathers meaning from the words around it." *Jones v. United States*, 527 U.S. 373, 389 (1999) (internal quotation marks and citation omitted). Thus, this

placement strongly suggests that the term "administrative" refers to *federal* administrative agencies. At least two other federal circuits have so concluded. *See U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744-45 (3d Cir. 1997); *U.S. ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 299-303, 305 (4th Cir. 2008), *cert. granted*, No. 08-304 (U.S. June 22, 2009).

But the argument from statutory context goes beyond the words immediately adjacent to the term "administrative."

The FCA is a statutory whole, and viewed in its entirety, the logic for an exclusively *federal* meaning to "administrative" -- indeed, to all of the non-media disclosure sources -- is compelling.

Section 3729,[4] which immediately precedes § 3730 (the qui tam section), sets forth civil penalty provisions under the FCA. This section spells out the circumstances under which an offender who cooperates with the government faces reduced liability. The offender, for example, must furnish all information about the violation to the government within 30

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[4] The 2009 amendments to the FCA, *see supra* note 1, did not change the language quoted herein. This brief cites to the pre-amendment version.

days of obtaining that information. § 3729(a)(A). Hence, such an offender is a species of whistleblower. Importantly, this section adds the following condition.

> At the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation . . . .

§ 3729(a)(C).

The phrase, "criminal prosecution, civil action, or administrative action . . . commenced under this title with respect to such violation" in § 3729(a)(C) parallels the phrase "criminal, civil, or administrative hearing" in the jurisdictional section, § 3730(e)(4)(A), and was presumably included for similar reasons, namely, to discount the value of a whistleblower who tells the federal government what it already knows and is pursuing.

Notably, the text in § 3729 does not include the modifier "federal" before "criminal prosecution, civil action, or administrative action," yet clearly this provision only applies to actions involving the United States, either directly or through a private relator ("under this title"). This language from § 3729 is then carried forward into three separate subsections of §

3730.

First, the FCA in § 3730(c) authorizes a stay of certain discovery in a qui tam case where such discovery would interfere with "the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," § 3730(c)(4). This same subsection then employs the phrases "the criminal or civil investigation or proceedings" and "the ongoing criminal or civil investigation or proceedings" as synonyms for the "the Government's investigation or prosecution of a criminal or civil matter" already referred to in this subsection. *Id.* The references are thus all exclusively federal.

Next, the FCA in § 3730(d) sets the parameters of an award to a qui tam relator in cases where "the Government" proceeds with the relator's suit. The statute caps the relator's share at 10% of the proceeds where the action is "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," § 3730(d)(1). This subsection closely tracks -- in large part, word-for-word

-- the language in the subsequent jurisdictional provisions. As in the jurisdictional provisions, the text in § 3730(d)(1) does not use the express modifier "federal," but in context the meaning is clear: where the federal government was already aware of and pursuing the matter, and the relator was not an independent source of the information, the reward to the relator should be discounted.

Finally, the FCA includes virtually identical language in its jurisdictional subsection, § 3730(e)(4), set forth *supra* pp. 23-24.

This phrasing, then, is not a collection of isolated words bereft of context, but rather a continuation of phraseology employed (with minor wording differences) over the FCA as a statutory whole. This statutory context points strongly to an interpretation of the "enumerated sources" in § 3730(e)(4) as referring to exclusively *federal* sources (with the exception of the "news media").

ii. Legislative history

The legislative history matches this understanding. On Aug. 11, 1996, Senator Grassley, the lead Senate sponsor of the 1986 FCA amendments, offered a substitute amendment to S. 1562 (the bill that would ultimately pass). 132 Cong. Rec. 20530. This substitute, while not identical to the

version finally adopted, was nearly identical in its jurisdictional subsection. One difference was that the definition of "original source" linked the timing of the public disclosures to the *Government* filing an FCA action, rather than the *relator*. Thus, this near-final version provided:

> (5)(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, a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (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 informed the Government or the news media prior to an action filed by the Government.

132 Cong. Rec. 20531 (proposed § 3730(e)(5)). Addressing this provision, Sen. Grassley explained:

> The use of the term "Government" in the definition of original source is meant to include any Government source of disclosures cited in subsection (5)(A); that is, Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations.

132 Cong. Rec. 20536. The Senate sponsor's comments plainly identify the term "administrative," in the phrase "congressional, administrative, or

Government Accounting Office," as meaning "any executive or independent agency" of the capital "G," *i.e.*, federal, "Government." In addition, these comments identify "all other governmental bodies" involved in any hearing that produces a public disclosure as a "Government" -- i.e., federal -- "source of disclosure."

When the bill (S. 1562), now in its final form, came to the House floor, 132 Cong. Rec. 29315-20, Rep. Berman of California included "legislative history for the Record," *id*. at 29321. That "legislative history" contained the following explanation of the jurisdictional provisions:

> The final bill has adopted the Senate version of who may file an action under the False Claims Act. Before the relevant information regarding fraud is publicly disclosed through various *government* hearings, reports and investigations which are specifically identified in the legislation or through the news media, any person may file such an action as long as it is filed before the *government* filed an action based upon the same information. Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action. A person is an original source if he had some of the information related to the claim which he made available to the *government* or the news media in advance of the false claims being publicly disclosed. This person has the right to bring an action after these disclosures are made public as long as it is filed before an action is commenced by the *Government*.

Id. at 29322 (emphases added). While the capitalization is inconsistent, it

is clear that all references to the government are to the federal, capital "G" government, and that the "various government hearings, reports and investigations which are specifically identified in the legislation" are exclusively federal in nature.

iii. Statutory purpose

Reading the enumerated sources in § 3730(e)(4)(A) as exclusively federal furthers the purposes of the 1986 FCA amendments, while construing the sources to include state and local bodies would undermine those purposes.

"[T]he jurisdictional bar provisions must be analyzed in the context of the[] twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Haight*, 445 F.3d at 1154 (internal quotation marks and citation omitted). This Court should therefore hesitate to read the FCA in a way that "does not advance the object and policy of the statute as a whole, or of the public disclosure provision in particular." *Zaretsky*, 457 F.3d at 1016.

As noted earlier, the 1943 amendments to the FCA barred actions where the federal government was already in possession of the pertinent

information. *See supra* p. 23. Congress determined that this restriction posed too great of an obstacle to qui tam suits, and so Congress amended the FCA in 1986 to encourage more private actions. *Supra* pp. 22-23. It therefore makes perfect sense that the 1986 amendments would *limit* the jurisdictional bar by *restricting* the circumstances under which federal possession of the pertinent information would bar a private suit. To read the 1986 amendments as having *expanded* the jurisdictional bar, by adding a whole host of obstacles resting on *state and local* government activities, would be nonsensical. Like the proposed expansion of the jurisdictional bar rejected in *Zaretsky,* such a reading of the FCA "*discourages* qui tam suits, as it establishes yet another roadblock to obtaining jurisdiction for such suits." *Zaretsky*,457 F.2d at 1018 (emphasis in original).

Nor would such an expansion of the jurisdictional bar be logical. Charging the *federal* government with knowledge of *state and local* government acts is unrealistic.

> Congress sought to bar suits in which the government could already be expected to be on notice of the fraud. It determined that the government could be expected to be aware of information derived from the enumerated sources, because the information *originated* from the government or involved governmental work product.

Haight, 445 F.3d at 1154 (emphasis in original; footnote omitted). By contrast, the federal government cannot be presumed to be aware of every state or local audit, hearing, or investigation.

Moreover, treating state and local government disclosures as jurisdictional bars to private FCA suits would enable collusive state and local governments to defeat qui tam suits through careful, low key "disclosures." In the present case, for example, certain state officials willingly catered to the PP defendants by (1) halting further planned audits of the remaining California affiliates, audits that presumably would have revealed additional tens of millions of dollars of unlawful overbilling; (2) excusing the $5 million dollars in overbilling that one limited audit of one particular affiliate found; (3) declining to recoup the massive illegal transfer of taxpayer money to the PP defendants that was found; and, (4) changing the law to allow PP affiliates to continue their "hefty" mark-ups at taxpayer expense. Government officials who are so willing to accommodate and shield the perpetrators of a massive taxpayer fraud are hardly likely to call the matter to the attention of the federal government. Yet the PP defendants would rely on those few points at which the state government went on record in this case -- the tip of the collusion iceberg --

to defeat a whistleblower's federal claim.

The FCA should not be read to be self-defeating. The enumerated sources (aside from the news media) are exclusively *federal*, and hence the state DHS audit (and, for that matter, the state legislative report and the relator's state court lawsuit) does not qualify as an enumerated source of public disclosures.

B. California Legislative Committee Report

The California legislative committee report also does not qualify as an enumerated source under the FCA jurisdictional bar. The district court erred in so holding.

1. "Congressional" refers to Congress, not state legislatures.

The FCA jurisdictional provisions refer to a public disclosure in a "congressional . . . report." § 3730(e)(4)(A). The PP defendants contend that the *state legislative* report on a state bill, AB 2151, counts as a "congressional . . . report." Doc. 33 at 18. The district court agreed. Doc. 43 at 6 (EOR 9). This was error.

The term "congressional" in the FCA is a "'federal' modifier[]," *A-1 Ambulance*, 202 F.3d at 1244. *Accord Bly-Magee*, 470 F.3d at 917 (terms

"congressional" and "Government Accounting Office" in FCA "refer exclusively to *federal*" materials) (emphasis in original). *See also U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997) (congressional and Government Accounting Office are "modifiers which are unquestionably federal in character"); *U.S. ex rel. Wilson v. Graham County Soil and Water Conservation Dist.*, 528 F.3d 292, 302 (4th Cir. 2008) ("congressional" and "GAO" are "clearly *federal* sources") (emphasis in original), *cert. granted,* No. 08-304 (U.S. June 22, 2009). As the federal government observed in its amicus brief in support of certiorari in *Graham*, "Section 3730(e)(4)(A) unambiguously provides that, with respect to legislative bodies, only a report or investigation of the *federal* legislature -- Congress -- qualifies as a public disclosure." U.S. Br. at 9, *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, No. 08-304 (U.S. May 20, 2009) (available at www.usdoj.gov/osg/briefs/2008/2pet/6invit/2008-0304.pet.ami.inv.pdf).

The PP defendants invoked *Bly-Magee* and *A-1 Ambulance* in support of their argument,[5] but neither case dealt with state legislatures, and as

[5] The PP defendants also cited two cases from other circuits. Doc. 33 at 18. Both dealt with the federal legislature -- Congress -- not state

quoted above, both decisions embraced exactly the opposite position from the one the PP defendants urge.

Thus, the state legislative committee report at issue here is *not* an enumerated source under the FCA, and the reliance of the PP defendants upon this report fails under existing Ninth Circuit precedent.

2. The enumerated government sources in the FCA are all federal in nature.

In addition to the foregoing, state legislative committee reports also do not qualify as enumerated disclosures under the FCA for the reasons set forth *supra* § I(A)(2), namely, that these sources (aside from the news media) are all federal in nature, whereas the committee report here was of a state legislature. (As noted earlier, this broader argument is currently foreclosed by Ninth Circuit precedent. Relator presses the argument for the reasons set forth *supra* p. 31.)

C. News Media Reports

The PP defendants contended that various news media reports, in combination with published state and federal regulations, constituted a "public disclosure" of the fraud of the various PP affiliates. The district

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legislatures.

court did not agree, Doc. 43 at 4 (EOR 7), and neither should this Court. The media reports did not disclose the allegations or transactions at issue here.

The media reports which the PP defendants proffered show such things as that Planned Parenthood *nationally* makes enormous amounts of money; that much of their revenue comes from huge mark-ups on birth control products; and that taxpayer funds play a prominent part in Planned Parenthood's overall revenue. Other media reports show that other companies, such as Merck, allegedly illegally overbill for drugs.

None of these reports assert anything in particular about PP affiliates in California. "The public disclosure bar cannot be applied . . . unless . . . the allegations against those particular defendants were disclosed in the news media." *U.S. ex rel. Aflatooni v. Kitsap Physicians Servs.,* 163 F.3d 516, 523 (9th Cir. 1998). *Accord Horizon West*, 265 F.3d at 1016 n.5 (disclosures that were not directed at the particular defendants were inadequate to trigger bar). This deficiency is fatal to the argument of the PP defendants.

Equally fatal is the fact that none of these media reports even mention Medi-Cal, much less specifically allege mark-ups in the FPACT program

or any other tax-funded program in California. Hence, the necessary specificity of the allegations is entirely missing from these media reports. *Horizon West*, 265 F.3d at 1015-16 (no jurisdictional bar where purported public disclosures "only remotely support the claims at issue" and do not include "any allegations that the named defendants misrepresented" matters to obtain payments; "none of the evidence in the record 'fairly characterizes' the kind of fraud alleged").

D. State Court Wrongful Termination Lawsuit

The PP defendants assert that Gonzalez's state court complaint for wrongful discharge was a "public disclosure" under the FCA. *See* Doc. 33 at 21-22; Doc. 34-3 at 21-27 (EOR 151-57) (amended complaint filed in California superior court on June 9, 2005). The district court agreed. Doc. 43 at 7-8 (EOR 10-11). This was error. A state court suit is not an enumerated source under the FCA.

Relator Gonzalez acknowledges that current Ninth Circuit precedent provides that state court proceedings do qualify as an "enumerated source" under the FCA. *U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 966-67 (9th Cir. 1995); *Zaretsky*, 457 F.3d at 1013; *Meyer*, 565 F.3d at 1199; *A-1*

Ambulance, 202 F.3d at 1244.[6] However, Gonzalez presses this issue for the reasons set forth *supra* § I(A)(2). For the same reasons set forth in the argument portion of § I(A)(2), *supra*, state court suits are not enumerated sources that trigger the FCA's jurisdictional bar.

In any event, relator Gonzalez is an "original source" under the FCA. *Infra* § II. Thus, even if the state court suit were to be counted as a public disclosure, Gonzalez would still be entitled to proceed with this case.

II. RELATOR VICTOR GONZALEZ IS AN ORIGINAL SOURCE.

As demonstrated above, there has been no "public disclosure" under the FCA's jurisdictional provisions. Hence, relator Gonzalez need not establish status as an "original source." "If and only if there has been such a public disclosure, we next must inquire whether the relator is an 'original source'

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[6] Interestingly, most of these cases do not actually *hold* this. The parties conceded the point in *Zaretsky* and *Meyer*. The *A-1 Ambulance* case did not involve a state court lawsuit. The district court here cited *U.S. ex rel. Harshman v. Alcan Electrical and Engineering, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999), but the previously filed complaint at issue there had been lodged in *federal* court, not *state* court, *id.* at 1016. The *Harshman* court (197 F.3d at 1020) cited *U.S. ex rel. Barajas v. Northrop Corp.,* 5 F.3d 407 (9th Cir. 1993), and a Third Circuit decision. But the prior litigation in *Barajas* was likewise in *federal* court, 5 F.3d at 408-09. Thus, while the rationale of *A-1 Ambulance* (and *Bly-Magee*) points in that direction, only the *Green* case appears directly to have held that state court suits count as public disclosures.

within the meaning of § 3730(e)(4)(B)." *Meyer*, 565 F.3d at 1199 (internal quotation marks and citation omitted).

> Under § 3730(e)(4)(A), if the allegations were not previously disclosed to the public, the relator's complaint benefits the government, and the relator is rewarded without inquiring into the details of how the relator obtained the information. If, on the other hand, the allegations in the complaint do not benefit the government because the government already knew about them, then § 3730(e)(4)(A) bars jurisdiction unless the second policy is furthered, that is, an insider provided information to the government who was under no duty to do so.

U.S. ex rel. Biddle v. Board of Trustees, 161 F.3d 533, 539 (9th Cir. 1998).

Even if there were a public disclosure, Gonzalez would qualify as an original source in this case, allowing his suit to proceed.

A. Elements of "Original Source" Status

The original source exception to the jurisdictional bar applies to "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." § 3730(e)(4)(B). *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007). As the *Rockwell* Court held, the relevant "information" is that "underlying the allegations of the relator's action," *id.* at 472, *not* the "information on which the publicly

disclosed allegations that triggered the public-disclosure bar are based," *id.* at 470.

In this case, it is undisputed that relator Gonzalez voluntarily provided the pertinent information to the government before filing the present suit. *See supra* p. 13. Moreover, as demonstrated below, Gonzalez had "direct and independent knowledge" of "the information" in question.

B. Direct and Independent Knowledge

Here, Gonzalez was personally and intimately aware of the PP defendants' illegal overbilling. As part of an inner circle of high-ranking officers at PP affiliates, Gonzalez from the get-go observed -- indeed participated in -- the intra-PP response to the DHS audit. He was personally responsible for the review of PPLA's records and the preparation of "cost impact information" regarding the extent and magnitude of the overbilling. He also supervised the preparation of a detailed spreadsheet on the overbilling and drafted recommendations for a remedial course of action. *See supra* pp. 8-12.

Gonzalez was therefore one of those "'individuals who are either *close observers or otherwise involved* in the fraudulent activity' that Congress sought to enlist through the *qui tam* provisions of the FCA." *U.S. ex rel.*

Devlin v. California, 84 F.3d 358, 362 (9th Cir. 1996) (emphasis in original) (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269). Gonzalez was an "original source."

This conclusion squares with Ninth Circuit precedent on the question.

1. "Independent"

"A relator has independent knowledge when he knows about the allegations before that information is publicly disclosed." *Meyer*, 565 F.3d at 1202 (citation omitted). *Accord Aflatooni*, 163 F.3d at 525. In other words, a relator's knowledge by definition is "independent" of public disclosures that have not yet taken place. Here, even if the state legislative committee report and state court wrongful discharge complaint (and for that matter the DHS audit report) were deemed public disclosures -- which they are not, *see supra* § I -- it is undisputed that Gonzalez knew about the illegal overbilling at PP's California affiliates prior to these events.

2. "Direct"

Gonzalez's knowledge is not only "independent," but "direct" as well, under this Court's prior decisions.

In *Wang*, this Court held that a former employee whistleblower had

"direct and independent" knowledge of the relevant matters "because he worked (however briefly) on trying to fix them." 975 F.3d at 1417. Gonzalez did the same here. As in *Wang*, the existence of other subsequent disclosures "does not rob [relator] of what he saw with his own eyes," *id.*

In *U.S. ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), the former employee's knowledge of the fraud "was direct and independent because he acquired it during the course of his employment," *id.* at 411. The same is true here.

In *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996), "[b]ecause [the relator] learned of information relevant to the issue independently of its public disclosure," he possessed "direct and independent knowledge," *id.* at 1476. The same goes for Gonzalez.

In *Newsham*, "the relators directly observed . . . the improper billing [at] the heart of their allegations," 190 F.3d at 970. Gonzalez did the same. Indeed, he was in charge of the collation, reorganization, and documentation of the information.

Thus, Gonzalez satisfies the "direct and independent knowledge" requirement of the original source provision. His situation is quite unlike those cases where this Court has found a lack of "direct" knowledge. *E.g.*,

Devlin, 84 F.3d at 361 (non-employee relators did not "see the fraud with their own eyes" but rather "derived it secondhand from [an employee]"; distinguishing an individual "who had firsthand knowledge of the alleged fraud as a result of his employment"); *Aflatooni*, 163 F.3d at 526 (no direct and independent "knowledge" where relator's information at most gave rise to "pure speculation or conjecture" that fraud had occurred); *Harshman*, 197 F.3d at 1021 ("mere assertion" of awareness of fraud is "insufficiently specific" to show that relator "learned of the allegations first-hand"); *Bly-Magee*, 470 F.3d at 917 ("recital is fatally short of specifics" to show direct and independent knowledge); *Meyer,* 565 F.3d at 1201-02 ("baldly" asserting original source status is insufficient; failure of evidence showing more than mere knowledge of alleged fraud does not suffice).

In the present case, by contrast, Gonzalez has demonstrated specific, personal knowledge of the actual fraudulent overbilling. *Supra* pp. 8-12.

C. Role in Disclosing

The Ninth Circuit, in various pre-*Rockwell* decisions (and one since then, without discussing the question), has

> h[e]ld that to be an "original source," a prospective relator must satisfy an additional requirement under § 3730(e)(4)(A) that is not in the statute *in haec verba* but that *Wang* held inherent in

> it: He must have "had a hand in the public disclosure of allegations that are a part of [his] suit." [975 F.2d] at 1418.

Zaretsky, 457 F.3d at 1013. The *Zaretsky* court noted a conflict with the Sixth and D.C. Circuits over this extra-textual requirement. *Id.* at 1018.

Gonzalez satisfies this additional requirement with respect to his state court employment suit. He obviously "had a hand" in filing his own suit, so this requirement would not bar Gonzalez from original source status as to his state court lawsuit. This purported non-textual element thus only would come into play if this Court were to find some other public disclosure.

In any event, the Supreme Court's decision in *Rockwell* is incompatible with continued adherence to this extra-textual element of original source status.[7]

In *Rockwell*, the Supreme Court explicitly *rejected* the notion that a relator's "original-source status would depend on knowledge of information underlying the publicly disclosed allegations." 549 U.S. at 471.

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[7] The *Meyer* decision in this Circuit post-dated *Rockwell*, but merely quoted *Zaretsky's* treatment of the issue and did not consider the possibility that *Rockwell* had dispensed with this extra-textual requirement. *See Meyer*, 565 F.3d at 1201.

> It is difficult to understand why Congress would care whether a relator knows about the information underlying a publicly disclosed allegation (*e.g.*, what a confidential source told a newspaper report about insolid pondcrete) when the relator has direct and independent knowledge of different information supporting the same allegation (*e.g.*, that a defective process would inevitably lead to insolid pondcrete). Not only would that make little sense, it would raise nettlesome procedural problems, placing courts in the position of comparing the relator's information with the often *unknowable* information on which the public disclosure was based. Where that latter information has not been disclosed (by reason, for example, of a reporter's desire to protect his source), the relator would presumably be out of court. To bar a relator with direct and independent knowledge of information underlying his allegations just because no one can know what information underlies the similar allegations of some other person simply makes no sense.

Id. at 471-72 (emphasis in original).

If, as *Rockwell* makes clear, the relator need not even be *aware* of the source material for a public disclosure, then *a fortiori* the relator need not be *responsible* for that public disclosure. The requirement that the relator "had a role" in the public disclosure cannot survive *Rockwell*. That now defunct requirement accordingly cannot bar the present suit.

D. Rationale of District Court

The district court rested its conclusion that Gonzalez was not an original source on two main points: first, that Gonzalez learned of the overbilling when he heard about the DHS audit, Doc. 43 at 8 (EOR 11); and

second, that Gonzalez played no role in the state legislative committee report, Doc. 43 at 10 (EOR 13).

The second point fails for two reasons: the state committee report was not a public disclosure under the FCA, *supra* § I(B), and the "played a role in the disclosure" requirement is invalid in light of *Rockwell*.

The district court's first point -- that Gonzalez first learned of the overbilling when he found out about the DHS audit -- likewise fails to disprove original source status. Assuming for present purposes that Gonzalez in fact did not become aware of the fraudulent overbilling until he received a forwarded copy of the Salo e-mail, *supra* p. 8, there is no reason that this detail should defeat original source status. Gonzalez was still a "close observer," S. Rep. No. 345 at 4, of the pertinent information "with his own eyes," *Wang*, 975 F.3d at 1417, "during the course of his employment," *Barajas*, 5 F.3d at 411.

The district court believed that Gonzalez failed to show that he "'obtained this knowledge through his own labor unmediated by anything else.'" Doc. 43 at 8 (EOR 11) (quoting *Aflatooni*, 163 F.3d at 525). But the quoted language is simply a rewording of the "direct and independent knowledge" requirement, *Aflatooni*, 163 F.3d at 524 (tracing language

through *Devlin* to *Wang*), a requirement Gonzalez has already shown he meets, *supra* § II(B). Taken literally, the phrase "unmediated by anything else" would disqualify *all* whistleblowers from original source status, as anything they observe, hear, or read will necessarily have been done, said, or written by someone else. As the cases discussed *supra* § II(B) illustrate, this Court has not given the "direct and independent knowledge" requirement such an absurd interpretation.

To hold to the contrary would make no sense. Why in the world would Congress *not* want to encourage whistleblowing by insiders who learned of fraud by observing the acts or communications of fellow employees or affiliated co-conspirators? Gonzalez had inside information of fraud, and he took it to the federal government. That makes him a paradigm whistleblower. *See supra* p. 1.

Gonzalez is an "original source" under the FCA.

* * *

There has been no "public disclosure" under the FCA, and in any event relator Gonzalez is an "original source." Hence, the district court erred by dismissing Counts I-III under the federal False Claims Act, and that portion of the judgment must be reversed.

III. THE DISMISSAL OF THE CALIFORNIA FCA COUNTS MUST BE REVERSED.

The district court conducted no independent analysis of relator's counts under the California False Claim Act (CFCA). Merely observing that the "public disclosure and original source requirements" under the CFCA "are materially identical to those in the federal Act," the district court dismissed the CFCA counts on the strength of its FCA ruling. Doc. 43 at 10 (EOR 13).

As demonstrated *supra* §§ I-II, the district court must be reversed as to the federal FCA counts. Whereas this reversal eliminates the predicate for the district court's CFCA ruling, that portion of its decision must also be reversed. Accordingly, the judgment of the district court as to Counts VIII-X must be reversed.

CONCLUSION

This Court should reverse the judgment of the district court as to Counts I-III and Counts VIII-X, and remand for further proceedings.

Respectfully submitted,

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July 6, 2009

STATEMENT OF RELATED CASES

Relator Gonzalez, appellant here, is not aware of any related cases pending in the Ninth Circuit. A related case is pending in the U.S. Supreme Court: *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, No. 08-304 (U.S. cert. granted June 22, 2009). As described *supra* p. 31, the *Graham* case raises some of the same or closely related

issues regarding the "public disclosure" element of the jurisdictional provisions of the federal False Claims Act.

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(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

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July 6, 2009
Date

/s/ Walter M. Weber
Signature of Attorney or
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