No. 05-1272

In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DOUGLAS N. LETTER
PETER R. MAIER
MICHAEL D. GRANSTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the *qui tam* relator in this False Claims Act case was "an original source," within the meaning of 31 U.S.C. 3730(e)(4)(B), of the information on which the suit was based.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 49a-55a) is not published in the *Federal Reporter* but is reprinted in 92 Fed. Appx. 708. An earlier opinion of the court of appeals (Pet. App. 1a-48a) is reported at 282 F.3d 787. The opinions of the district court (Pet. App. 58a-63a, 66a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2004. A petition for rehearing was denied on January 4, 2006 (Pet. App. 56a-57a). The petition for a writ of certiorari was filed on April 4, 2006, and was granted on September 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any person from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits an array of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A person who violates the FCA "is liable to the United States Government for a civil penalty * * * plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory damages and penalties may be brought either by the Attorney General or by a private person (known as a relator) in the name of the United States in an action commonly known as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 768-770 (2000). When a *qui tam* action is brought, the complaint is initially filed under seal and served upon the government, together with "substantially all material evidence and information the [relator] possesses." 31 U.S.C. 3730(b)(2). "The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information," *ibid.*, and the court may extend the 60-day period upon a showing of good cause, 31 U.S.C. 3730(b)(3). If the government initially declines to intervene, the relator "shall have the right to conduct the action," but the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3).

If a *qui tam* action results in the recovery of damages and/or civil penalties, the award is divided between the gov-

ernment and the relator. 31 U.S.C. 3730(d). If the government has intervened in the action, the relator shall "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. 3730(d)(1).[1] The relator in such a case "shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." *Ibid.*

The FCA's "public disclosure" provision states:

> (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 [General] 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 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); see *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 944, 946 (1997).

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[1] If the government does not intervene and the *qui tam* suit produces a monetary recovery, the relator receives "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement." 31 U.S.C. 3730(d)(2).

2. From 1975 through 1989, petitioner Rockwell International Corporation operated the Rocky Flats nuclear-weapons facility pursuant to a contract with the Department of Energy (DOE).[2] Under the contract, DOE paid petitioner on a cost-plus fee basis. DOE reimbursed petitioner for allowable costs that petitioner incurred in operating the plant, and petitioner received an annual base fee derived using a predetermined percentage of the contract's overall value. In addition, petitioner received a semiannual bonus based on DOE's evaluation of petitioner's performance in areas that included environmental, safety, and health (ES&H) operations. Pet. App. 2a-3a.

From November 1980 until March 1986, respondent James S. Stone worked as a Principal Engineer in the Facilities, Engineering, and Construction Division at Rocky Flats. Pet. App. 3a. After Stone's employment with the company terminated, he informed a Special Agent of the Federal Bureau of Investigation (FBI) that environmental crimes had allegedly been committed at Rocky Flats during the period of Stone's employment. *Id.* at 3a-4a. Based in part upon the information that Stone provided, the Special Agent prepared an affidavit and obtained a warrant to search the Rocky Flats facility. *Id.* at 4a; see J.A. 94-101, 429 (excerpts from warrant affidavit). The search was conducted on June 6, 1989. Pet. App. 4a. The Special Agent's affidavit was unsealed three days later, and the allegations of environmental violations at Rocky Flats received substantial media coverage. *Ibid.*; see J.A. 113-168 (June 1989 newspaper articles).

3. a. On July 5, 1989, approximately one month after the search of the Rocky Flats facility, Stone filed this *qui tam* action against petitioner. See J.A. 38-49 (complaint).

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[2] Petitioner Rockwell was renamed Boeing North American, Inc., see Pet. Br. ii, after the events that gave rise to this litigation.

Stone's complaint alleged that petitioner, "from about November 1980 and continuing thereafter, has committed and is presently committing numerous and repeated violations of" various federal and state ES&H laws and agreements. J.A. 43-44. Stone further alleged that petitioner had

> knowingly concealed and intended to conceal the true nature of its numerous and continuous violations of [environmental and safety laws and agreements], with the intent to induce the Government to make and continue to make payments to [petitioner] in connection with the operation of Rocky Flats Plant. Had the Government known the true nature and extent of [petitioner's] violations, as well as its concealment of said violations, it would not have made payments and continued to make payments to [petitioner].

J.A. 46.

Stone's complaint asserted an FCA claim for relief premised on those allegations. J.A. 46-47. The FCA claim alleged that petitioner had obtained "payments and approvals from the United States Government in connection with its operation of the Rocky Flats Plant," and that the government had made such "payments and approvals * * * in reliance on false information, documents, reports, and statements made by [petitioner]." J.A. 47; see Pet. App. 5a-6a. While Stone's FCA action was pending, the government conducted a criminal investigation into petitioner's management of Rocky Flats, which culminated in March 1992 in a plea agreement in which petitioner pleaded guilty to ten environmental violations. *Id.* at 6a-7a; see J.A. 50-72 (plea agreement and statement of factual basis).

b. In December 1992, after the government had initially declined to intervene in Stone's *qui tam* action, see J.A. 350, petitioner moved to dismiss Stone's complaint for want of jurisdiction. J.A. 73-93. Under the FCA, a court lacks

jurisdiction over a *qui tam* suit that is "based upon" publicly disclosed "allegations or transactions" in specified fora unless the relator is an "original source of the information." 31 U.S.C. 3730(e)(4)(A); see p. 3, *supra*. Petitioner contended that Stone's complaint was based upon information that had been publicly disclosed through (i) the FBI agent's search warrant application and affidavit and (ii) subsequent reports in the news media. See J.A. 75-78, 83-85.

Petitioner further contended (J.A. 85-92) that Stone could not qualify as an "original source" because he lacked the requisite "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B); see p. 3, *supra*. Petitioner did not contend that Stone lacked "direct and independent knowledge" of the ES&H violations that petitioner was alleged to have committed. Rather, petitioner argued that Stone lacked the requisite knowledge of the alleged fraudulent requests for payment. Thus, petitioner asserted:

> Stone has admitted that he not only lacks the "direct and independent" knowledge of false statements/concealments required by the FCA; he lacks *any* knowledge of such misconduct. Specifically, Stone has admitted that he cannot identify: (1) a single Rockwell employee who falsely told the Government that Rockwell was in compliance with the ES&H provisions; (2) a single Rockwell employee who concealed ES&H violations from the Government; (3) a single document which falsely stated that Rockwell was in compliance with the ES&H provisions; or (4) a single document indicating that Rockwell concealed ES&H violations from the Government. Stone has also admitted that [he] has no personal knowledge regarding [petitioner's] presentation to the Government of claims for payment for the operation of Rocky Flats. * * * Under these circumstances

> Stone cannot possibly satisfy the FCA's "direct and independent knowledge" test.

J.A. 92.[3]

c. Stone filed an opposition, supported by an additional affidavit, to petitioner's motion to dismiss. See J.A. 169-183. The affidavit stated that Stone's duties during his six years at Rocky Flats "included plant-wide 'troubleshooting' and the review of designs and existing operations for safety and cost effectiveness." J.A. 170. The affidavit then described in detail, with reference to contemporaneous documents appended to the affidavit, Stone's experiences monitoring ES&H issues during the period that he was employed by petitioner, J.A. 171-179, including the process of manufacturing "pondcrete," a mixture of cement with the sludge and liquid from evaporation ponds at Rocky Flats

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[3] Approximately two years before moving to dismiss Stone's complaint for lack of jurisdiction under 31 U.S.C. 3730(e)(4), petitioner had moved to dismiss Stone's *qui tam* claim for failure to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b). See Br. in Supp. of Rockwell's Mot. to Dismiss 2 (filed Dec. 28, 1990). Like the later-filed motion under Section 3730(e)(4), the Rule 9(b) motion relied on the fact that Stone had failed to identify specific false claims. The district court denied that motion, see Aug. 8, 1991, Order 2-3, stating:

> In *qui tam* actions, the plaintiff does not allege that he or she was personally defrauded by the defendant, but rather that the defendant defrauded a third party. Thus, at the time the complaint is filed, the plaintiff may not have had access to the information required by Rule 9(b). Requiring *qui tam* plaintiffs to provide the level of detail "normally" required under Rule 9(b) would be contrary to the policy that the federal rules of civil procedure are to be construed liberally in the interest of attaining justice.

Id. at 2. The court also stated that "Rule 9(b) must be read in conjunction with Rule 8's requirement that a pleading contain a 'short and plain statement of the claim.' " *Id.* at 3.

that he had learned contained toxic wastes, J.A. 174-175. Stone explained that he had reported to Rockwell management concerns that the proposed pondcrete process would not work, but that Rockwell went forward with the project without making changes necessary to eliminate the insolidity of the pondcrete blocks. J.A. 175.

The affidavit further explained that Stone had learned during his period of employment that (i) "[petitioner] could and did earn substantial 'bonuses' every six months for its operations of the plant," J.A. 179, and (ii) petitioner's entitlement to such bonuses depended on its compliance with applicable ES&H laws, J.A. 180. Stone appended a document that he had received while employed at Rocky Flats that described the process by which Rockwell could earn bonuses. *Ibid.*; see J.A. 247-249 (appended document). That document identified subject areas, including environmental protection and waste management, for which a satisfactory performance was required in order to receive an award fee under the contract. See J.A. 180, 248-249; see also Pet. App. 61a. The affidavit also stated that Stone had been instructed by his superiors within the company that he "should not discuss the environmental, health and safety problems that [he] was discovering with representatives of [DOE] or any other agency of the government." J.A. 180.

d. The district court denied petitioner's motion to dismiss. Pet. App. 58a-63a. The court first held that the allegations in Stone's complaint were "based upon" a "public disclosure" within the meaning of 31 U.S.C. 3730(e)(4)(A) because those allegations "involve[d] incidents that were widely covered in the news media." Pet. App. 60a. For that reason, the court explained, Stone was required to demonstrate that he was an "original source" under 31 U.S.C. 3730(e)(4)(B) in order for his *qui tam* suit to go forward. Pet. App. 60a. The court observed, in that regard, that the

"'original source' requirement applies even if a *qui tam* plaintiff's allegations are based only partly upon publicly disclosed allegations or transactions." *Id.* at 59a-60a (citing *United States ex rel. Precision Co.* v. *Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993)).[4]

The district court concluded that Stone qualified as an "original source" even though he could not identify the specific individuals who had made misrepresentations to the government on petitioner's behalf or the specific documents in which those misrepresentations had been made. See Pet. App. 60a-61a. The court explained that, in the course of his employment at Rocky Flats, Stone had "gained knowledge of various environmental, health and safety problems"; had been "informed that [petitioner's] compensation was based on compliance with applicable environmental, health and safety regulations"; and had been "instructed not to divulge environmental, health and safety problems to the DOE." *Id.* at 61a. The court concluded that Stone "had direct and independent knowledge that [petitioner's] compensation was linked to its compliance with environmental, health and

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[4] In *Precision Co.*, the Tenth Circuit explained that, under 31 U.S.C. 3730(e)(4), "the threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis." 971 F.2d at 552. The court in *Precision Co.* further held that the relator's allegations were "based upon * * * public disclosure[s]" within the meaning of Section 3730(e)(4)(A) because those allegations were substantially identical to allegations made in prior civil litigation involving a different plaintiff. See *id.* at 553-554. Thus, under applicable Tenth Circuit precedent, petitioner was not required to demonstrate in this case that Stone had actually relied on media reports in formulating his complaint. Rather, for purposes of establishing that Stone's suit was "based upon" a "public disclosure," it was sufficient under Tenth Circuit precedent that a significant overlap existed between Stone's allegations and allegations already in the public domain. See p. 36 & note 15, *infra.*

safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." *Ibid.* The court held on that basis that Stone had the requisite "direct and independent knowledge of the information on which the allegations are based" and therefore qualified as an "original source." *Ibid.*

4. In November 1995, the United States moved to intervene in Stone's *qui tam* action. J.A. 347-348. In support of that motion, the government submitted affidavits prepared by a Justice Department attorney, who described the sequence of events through which the government had acquired additional relevant information after its initial decision not to intervene. See J.A. 349-381. The affidavits explained that the additional information had been obtained through (i) discovery conducted by the government in a civil breach-of-contract suit filed by petitioner against DOE in the Court of Federal Claims, see J.A. 350-351, (ii) documents provided by Stone's counsel, see J.A. 351-352, and (iii) documents created during the criminal prosecution of petitioner (see p. 5, *supra*) and subsequently provided to Civil Division personnel, see J.A. 366-367.

In November 1996, the district court granted the government's motion to intervene. J.A. 382-388. In holding that the government had established "good cause" to intervene at that date, the court explained that the government's declarations "persuasively show that information obtained during discovery in the claims court case and made available to [the declarant] by counsel for Mr. Stone have been important to the decision to intervene." J.A. 388; see J.A. 387-388.

The following month, the United States and Stone jointly filed an amended complaint. J.A. 395-426. In Count 1 of the complaint, both the United States and Stone alleged that petitioner had violated the FCA by falsely repre-

senting to DOE that it was in compliance with applicable ES&H requirements, and by obtaining increased award fees and other payments on the basis of those misrepresentations. See, *e.g.*, J.A. 402, 416. The amended complaint described in some detail specific types of ES&H violations that petitioner was alleged to have committed. See J.A. 402-412. Those violations included improper production and storage of pondcrete and saltcrete, another form of processed hazardous waste. See J.A. 402-406. The United States (but not Stone) also asserted a variety of common-law claims, see J.A. 417-418, and Stone (but not the United States) asserted an additional FCA claim that alleged improper handling of other toxic substances, including plutonium. See J.A. 418-424.[5]

At the ensuing jury trial, "[t]he main issue * * * was whether [petitioner] concealed from DOE environmental, safety, and health problems related to the processing and storage of saltcrete and pondcrete." Pet. App. 9a. The jury found that petitioner had violated the FCA during each of three consecutive 6-month periods beginning April 1, 1987. J.A. 548-549.

After the jury rendered its verdict, petitioners, relying on the "public disclosure" bar contained in 31 U.S.C. 3730(e)(4), urged the district court to enter judgment solely in favor of the United States and not in favor of Stone. See J.A. 569. The United States opposed that request. See J.A. 568-572. The government explained that its conduct of the litigation had been "assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys," and that "[t]he allegations actually tried clearly came within the gravamen of Mr. Stone's [original] complaint." J.A. 570. The govern-

[5] Stone's claim concerning plutonium was severed from the rest of the suit by the district court, and it has not yet been tried. See Pet. App. 8a-9a, 67a; J.A. 562-563.

ment stated that "the narrowing that occurred in this case" was "done at the government's behest for tactical litigation reasons" and "did not transform the case into a 'different case.'" *Ibid.*

The district court determined that it would "adhere to the ruling previously made in the case, and say that James Stone is properly a relator under the False Claims Act." Pet. App. 65a.[6] The court subsequently entered judgment in favor of the United States and Stone in the amount of $4,172,327. *Id.* at 10a; see J.A. 30. The court reserved its ruling on Stone's request for attorneys' fees and expenses pending the disposition of any appeals. J.A. 578.

4. The court of appeals affirmed in part and remanded the case to the district court for additional findings on one aspect of the "original source" question. Pet. App. 1a-48a.

a. The court of appeals held that Stone had established the "direct and independent knowledge of the information on which the allegations are based" (31 U.S.C. 3730(e)(4)(B)) that a relator is required to possess when a *qui tam* suit is based upon publicly-disclosed information. Pet. App. 11a-22a. The court stated that, to satisfy the FCA's "direct and independent knowledge" requirement, "the knowledge possessed by the relator must be marked by the absence of an intervening agency and unmediated by

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[6] At a hearing to address issues concerning the proper scope of the judgment, the district court stated:

> [T]he division of the recovery on damages between the government and Mr. Stone is a matter between the government and Mr. Stone, and as of now, as far as I'm aware, there's no dispute about that. * * * [Petitioner] has to pay, and how the government and Mr. Stone divide it up is up to them. If there were to be a dispute, it would be up to me, but I'm not here to generate disputes that don't exist.

J.A. 577.

anything but the relator's own labor." *Id.* at 15a (ellipses, brackets, internal quotation marks, and citation omitted). The court rejected petitioner's contention that an "original source" must have "direct and independent knowledge of the actual fraudulent submission to the government." *Id.* at 20a. Rather, the court explained, under the "plain text" of the FCA, a relator "need only possess 'direct and independent knowledge of the *information on which the allegations are based*.'" *Ibid.* (quoting 31 U.S.C. 3730(e)(4)(B)).

The court of appeals also rejected petitioner's contention that "Stone could not be an original source for the pondcrete claim because he no longer worked at Rocky Flats when the manufacture of pondcrete blocks commenced." Pet. App. 21a. The court explained:

> The gravamen of Stone's claim is that he learned from studying [petitioner's] plans for manufacturing pondcrete that the blocks would leak toxic waste. The fact that he was not physically present at Rocky Flats when production began is immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case [petitioner's] awareness that it would be using a defective process for manufacturing pondcrete.

Ibid.

b. In addition to possessing "direct and independent knowledge of the information on which the allegations are based," an "original source" must "voluntarily provide[] the information to the Government before filing" an action under the FCA. 31 U.S.C. 3730(e)(4)(B). The court of appeals concluded that the record was insufficient to enable it to determine whether Stone had satisfied that requirement. Pet. App. 22a. The court therefore remanded the case to

the district court for additional proceedings to resolve that question. *Id.* at 22a-23a.[7]

d. Judge Briscoe concurred in part and dissented in part. Pet. App. 44a-48a. Judge Briscoe would have held that Stone failed to qualify as an "original source" because the record contained "no evidence that [Stone] directly and independently knew about the actual problems that arose with the pondcrete after it was produced or [petitioner's] efforts to conceal those problems from the DOE." *Id.* at 46a.

5. On remand, the district court issued additional findings and conclusions pursuant to the court of appeals' order. Pet. App. 69a-76a. The court noted that Stone had "concede[d] that he did not provide any information to any government representatives concerning claims relating to saltcrete." *Id.* at 70a. With respect to pondcrete, the district court found, inter alia, that Stone had submitted to the government an engineering order with Stone's handwritten notation commenting on the design of one particular aspect of Rockwell's proposed toxic waste removal system. *Id.* at 72a-73a. The handwritten notation stated: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify & optimize each phase of the operation." *Id.* at 73a. In accordance with its understanding of the limited scope of the remand order, the district court declined to determine the legal significance of its findings. *Id.* at 75a.

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[7] Petitioner also raised various constitutional challenges to the *qui tam* provisions of the FCA. The court of appeals rejected those contentions. Pet. App. 23a-29a. The petition for a writ of certiorari sought review of the Tenth Circuit's rulings on the constitutional issues, see Pet. 24-30, but this Court limited its grant of certiorari to the "original source" question, see 127 S. Ct. at 35.

6. The court of appeals affirmed the judgment in favor of the United States and Stone. Pet. App. 49a-55a. In concluding that Stone had adequately apprised the government of the allegations on which his *qui tam* suit was based, the court attached "critical importance" to the engineering order with Stone's handwritten notation. *Id.* at 51a.

Judge Briscoe dissented, again expressing the view that Stone did not qualify as an "original source" under 31 U.S.C. 3730(e)(4)(B). Pet. App. 53a-55a.

SUMMARY OF ARGUMENT

A. With respect to the allegations set forth in Stone's original *qui tam* complaint, Stone qualified as an "original source" because he demonstrated the requisite "direct and independent knowledge" of the information that underlay those allegations. As a Rockwell employee, Stone observed extensive ES&H violations committed by the company. Although Stone did not observe the submission of false claims during his period of employment, he learned facts as a Rockwell employee from which he reasonably inferred that petitioner had represented itself to be in compliance with ES&H requirements. Because Stone based his own allegations on information that he acquired as a Rockwell employee, he satisfied the "direct and independent knowledge" requirement of 31 U.S.C. 3730(e)(4)(B).

While there are limits on a relator's freedom to premise his FCA claims on logical inferences from personal observations, those limits are imposed not by 31 U.S.C. 3730(e)(4)(B), but by *other* provisions of law that are not currently at issue here. Petitioners have not contended that Stone's FCA allegations lacked "evidentiary support" within the meaning of Federal Rule of Civil Procedure 11(b)(3). Although petitioner argued in the district court that Stone had failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b), the dis-

trict court rejected that contention, and petitioners have not pursued it. Section 3730(e)(4)(B) does not impose a heightened-pleading requirement, and it does not require a relator to have more extensive or more specific knowledge of fraud than the Federal Rules would otherwise require.

Petitioners' construction of 31 U.S.C. 3730(e)(4)(B), under which an "original source" must have "direct and independent knowledge" both of specific claims and of information showing those claims to be false, would subvert the balance that Congress struck between encouraging private assistance to the government's anti-fraud efforts, providing appropriate incentives and rewards for deserving relators, and discouraging opportunistic *qui tam* suits. A relator who learns of the defendant's claims to the government only through publicly-available materials, but who has personal knowledge of significant information that shows those claims to be false, may contribute substantially to the detection and remediation of fraud. Indeed, the relator's knowledge of the root source of the fraud can lead to a government investigation, which in turn can lead to public disclosures that make clear that fraudulent demands for payment were made. Nothing in the logic or text of Section 3730(e)(4) suggests that the provision should be read to deny a recovery to the person whose actions led to the discovery of the fraud. Section 3730(e)(4)(A)'s "public disclosure" provision is intended to apply broadly and can be expected to encompass many *qui tam* suits that would significantly assist the government's efforts to redress fraud. An unduly narrow construction of the term "original source" would subvert the balance struck by Congress between encouraging citizen assistance to the government's anti-fraud measures and discouraging opportunistic suits.

B. If Stone was an "original source" of the information on which his initial *qui tam* complaint was based, the district court was not required to conduct any further "original source" analysis with respect to the FCA claim asserted in Count 1 of the amended complaint and litigated at trial after the government intervened. When an FCA action is "based upon" a covered "public disclosure," the action may go forward *either* if the suit is "brought by the Attorney General" *or* if the private plaintiff qualifies as an "original source." 31 U.S.C. 3730(e)(4)(A). Because the FCA claim on which petitioners were ultimately held liable was asserted jointly by the United States and Stone, that claim was "brought by the Attorney General" within the meaning of Section 3730(e)(4)(A). It was therefore unnecessary for the district court to determine whether Stone was an "original source" of the information underlying the specific theory of liability on which the government and Stone prevailed at trial.

If the government had regarded the successful pondcrete claims as "new" claims not encompassed by Stone's complaint, it could have argued on that ground that Stone was not entitled to any portion of the government's recovery. A dispute of that nature may arise whether or not an FCA suit is "based upon" any "public disclosure." In this case, however, the government urged the district court to include Stone in the favorable judgment. The government explained that its litigation efforts had been assisted by Stone and his attorneys, that Stone's earlier allegations encompassed the FCA claim litigated at trial, and that the legal theories presented to the jury had been narrowed and refined at the government's behest. To require Stone to demonstrate his "original source" status anew, with respect to the precise theory of liability on which the government ultimately focused at trial, would create artificial disincen-

tives to cooperation between the government and private relators.

C. There is no merit to petitioners' contention that Stone failed to provide the government with the information on which his *qui tam* suit was based. A relator satisfies the prior-disclosure obligation imposed by 31 U.S.C. 3730(e)(4)(B) so long as he tells the government what he knows, and petitioners do not contend that Stone withheld significant information from federal officials. In any event, Stone's disclosures were extensive in an absolute sense, involving repeated meetings with federal officials and the submission of more than 2300 pages of documents. Petitioners' contention that Stone was required to identify extensive *pondcrete-related* disclosures is mistaken, since it is premised on their incorrect view that the district court was required to conduct a new "original source" analysis with reference to the specific theory of liability that prevailed at trial.

ARGUMENT

BECAUSE RESPONDENT STONE IS AN "ORIGINAL SOURCE" OF THE INFORMATION ON WHICH HIS *QUI TAM* SUIT WAS BASED, THE ENTRY OF JUDGMENT IN HIS FAVOR WAS PROPER

Petitioners contend (Br. 17) that, in order to qualify as an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B), a *qui tam* relator "must have direct and independent knowledge of information sufficient to permit the trier of fact to conclude that a false statement was made to the Government in support of a fraudulent claim for payment." In petitioners' view, respondent Stone's knowledge was deficient because he did not personally observe any specific requests for payment in which petitioner falsely represented that it was in compliance with applicable

ES&H laws, and because Stone was not personally familiar with the specific environmental violations (*i.e.*, the releases of toxic substances into the environment as a result of the inadequate cement content of petitioner's pondcrete) that underlay the jury's ultimate liability determination. Petitioners' argument reflects a misunderstanding of Section 3730(e)(4)(B)'s text and purpose, and acceptance of their proposed standard would largely eviscerate the "original source" provision.

Petitioners insist that the relator must have—before the complaint is even filed—"direct and independent knowledge" of information sufficient to support judgment in the relator's favor. But nothing in the "original source" requirement suggests such a deviation from the normal rules of civil procedure. To the contrary, the statutory definition of "original source" refers to the "information on which [the relator's] *allegations* are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). The "original source" inquiry thus focuses on the allegations at the complaint stage and does not limit recovery to a relator who has no need for discovery. The analysis in this case should therefore focus on the claims and factual averments actually asserted in Stone's original complaint.

In the instant case, Stone clearly qualified as an "original source" because his information concerning *both* petitioner's representations to the government *and* the company's actual ES&H violations was acquired through his experiences as a Rockwell employee, "direct[ly] and independent[ly]" of any "public disclosure." In arguing that Stone lacked sufficient firsthand knowledge concerning petitioner's claims for payment, petitioner contends in substance that Stone's *total* body of knowledge on this point was inadequate—not that Stone acquired the necessary quantum of relevant information through means that were

other than "direct and independent." The question whether Stone's information about petitioner's claims for payment was a sufficient predicate for an FCA suit, however, is governed by Federal Rules of Procedure 8, 9, 11, and 56, not by 31 U.S.C. 3730(e)(4).

Even if Stone had acquired his information about petitioner's billing practices from public sources, he would not thereby be disqualified as a *qui tam* relator. When a relator has firsthand knowledge of substantial information showing that the defendant's claims for government funds or property are knowingly false, the relator may qualify as an "original source" even if his knowledge of the claims themselves is derived from publicly available materials. Disqualification of potential relators under those circumstances is in no way compelled by the statutory text, and it would disserve the purposes that underlie the "original source" exception to the "public disclosure" bar. See pp. 30-39 *infra*.

To the extent that Stone's prior allegations were refined or clarified after the government intervened, no new "original source" inquiry was necessary or appropriate. The FCA claim on which petitioner was ultimately held liable was pursued jointly by the United States and Stone, and the government's assertion of the claim provided an independent basis for the district court's exercise of jurisdiction. The courts below therefore were not required to determine whether Stone possessed "direct and independent knowledge" of information concerning the precise theory of liability on which the co-plaintiffs ultimately prevailed.

A. Respondent Stone Demonstrated "Direct And Independent Knowledge Of The Information On Which The Allegations" Contained In His Original Complaint Were Based

1. Based on information that he had acquired as a Rockwell employee, Stone concluded that petitioner had committed widespread ES&H violations and had falsely claimed to be in compliance with ES&H requirements

In his initial *qui tam* complaint, Stone alleged that petitioner had committed frequent and recurring violations of various federal and state ES&H laws over an extended period of time. J.A. 42-44. Stone further alleged that, by concealing those violations and by misrepresenting the relevant facts, petitioner had induced the United States to make payments in connection with the Rocky Flats Plant that the government would not have made if it had been aware of petitioner's misconduct. See J.A. 46, 47. Thus, petitioner broadly alleged:

> From at least November 1980 to the present [July 1989] *all* monies and payments approved on application of [petitioner] and/or received by [petitioner], including annual guaranteed fees, bonuses awarded due to [petitioner's] performance, and reimbursement of the expenses and costs of operating the Rocky Flats Plant, in a total amount presently unascertained, were so applied for and received by defendant with the knowledge and intention on defendant's part to defraud and deceive the United States Government, all in violation of the False Claims Act.

J.A. 45-46 (emphasis added). The complaint did not identify specific documents in which petitioner had falsely represented that it was in compliance with applicable ES&H requirements.

Although the *qui tam* complaint alleged that Stone was an "original source" within the meaning of 31 U.S.C. 3730(e)(4)(B) of the information on which the suit was based, see J.A. 41, the complaint itself did not explain how Stone had determined that petitioner had obtained federal funds through concealments and misrepresentations concerning ES&H compliance. After petitioner moved to dismiss the complaint under 31 U.S.C. 3730(e)(4), however, respondent Stone submitted an affidavit in which he discussed how his experiences as a Rockwell employee at the Rocky Flats Plant had led him to that conclusion. See J.A. 169-183. The affidavit explained that, "during [his] six-year tenure at Rocky Flats, [Stone] was assigned to numerous projects that required [him] to learn about, and recommend solutions for, various environmental, health and safety issues at the plant." J.A. 170. The affidavit recounted in detail Stone's experiences monitoring ES&H issues during that period. J.A. 171-179. In particular, the affidavit described various instances in which Rockwell management had declined to take ameliorative action even after Stone had identified serious environmental problems at the plant. See J.A. 174, 175, 176, 178, 179.

The affidavit also explained Stone's bases for concluding that petitioner had made false representations of compliance with applicable ES&H laws. Stone attested that he had learned during his period of employment that, "under its contract with the United States, [petitioner] could *and did* earn substantial 'bonuses' every six months for its operations of the plant." J.A. 179 (emphasis added). Stone further stated:

> I also learned during my employment at Rocky Flats that, under its contract with the United States, [petitioner] was required to operate Rocky Flats in accordance with federal, state and local environmental,

> health and safety laws. In addition, I learned that [petitioner's] compensation under its contract was based in part on Rockwell's satisfactory performance in various subject matter areas, including "Environmental Protection" and "Waste Management." * * * I understood * * * that [petitioner] would not even be considered for an award fee if it did not perform at least at a satisfactory level in each of the applicable performance areas.

J.A. 180; see J.A. 247-249; Pet. App. 61a. The affidavit also stated that Stone had been instructed by his superiors within the company that he "should not discuss the environmental, health and safety problems that [he] was discovering with representatives of [DOE] or any other agency of the government." J.A. 180.

Because Stone was aware both that award bonuses were contingent on satisfactory ES&H performance and that petitioner had received such bonuses for its operation of the Rocky Flats plant, Stone could reasonably infer that petitioner had represented to the government that it was in compliance with applicable ES&H requirements. Stone's observation of recurring ES&H violations at the Rocky Flats plant, which (according to Stone's affidavit) continued unabated even after Stone brought them to the attention of Rockwell management, supported the further inference that those representations were false. The conclusion that petitioner had misled the government was reinforced by the directive from Stone's superiors that he should not discuss the company's ES&H problems with federal personnel. And, at least absent some affirmative reason to believe that petitioner's conduct had changed, Stone could also reasonably infer that petitioner had continued to submit false claims after Stone left petitioner's employ. Thus, even though Stone did not claim to have observed the actual submission by petitioner of false claims to the government, his

conclusion that FCA violations had occurred was based on "direct and independent knowledge" that he had acquired during his tenure as a Rockwell employee.

2. An individual need not personally observe the preparation or submission of specific false claims in order to qualify as an "original source"

Petitioners do not contend that Stone lacked "direct and independent knowledge" of the information that he provided in his affidavit. Rather, they argue that Stone was not an "original source" because he did not personally witness the preparation or submission of particular false claims. That argument lacks merit.

By its terms, 31 U.S.C. 3730(e)(4)(B) does not require that the relator have direct and independent knowledge of particular fraudulent documents or other details of the fraud. Rather, Section 3730(e)(4)(B) states that an "original source" must have "direct and independent knowledge of the *information* on which the *allegations* are based." 31 U.S.C. 3730(e)(4)(B) (emphasis added). And, as petitioners recognize (Br. 26 n.13), the word "allegations" in Section 3730(e)(4)(B) is properly construed to refer to the averments contained in the relator's complaint.[8] There is consequently no merit to petitioners' contention that Stone was required to demonstrate "direct and independent knowl-

[8] As petitioners point out (Br. 26 n.13), some courts have construed Section 3730(e)(4)(B)'s reference to "the information on which the allegations are based" to refer to the information that underlies the relevant public disclosures, rather than the information that underlies the relator's complaint. We agree with petitioners (see *ibid.*) that the word "allegations" in Section 3730(e)(4)(B) is properly construed to refer to the averments in the relator's complaint. That does not mean, however, that an original source" must have "direct and independent knowledge" of the information that underlies *every* aspect of his complaint. See pp. 30-39, *infra*.

edge" of particular false claims. Stone did not need to establish personal knowledge of specific misrepresentations because his own "allegations" were not "based" (31 U.S.C. 3730(e)(4)(B)) on information of that character.

Of course, Stone could not have stated a claim under the FCA simply by alleging that petitioner had committed widespread ES&H violations. Stone was required to (and did) allege in addition that petitioner had sought money or property from the United States by misrepresenting that it was in compliance with applicable ES&H requirements. Another relator might have determined that such misrepresentations were made by examining specific documents through which petitioner had requested federal funds. Stone, however, reached his conclusion by a different route. Having learned as a Rockwell employee that petitioner had sought and obtained award bonuses from DOE, and that satisfactory ES&H performance was a prerequisite for such payments, he reasonably inferred that petitioner had claimed to be in compliance with ES&H requirements. Because Stone had "direct and independent knowledge" of all the information on which his own allegations of fraud were based, he was an "original source" within the meaning of Section 3730(e)(4)(B).

3. Determinations concerning the specificity with which fraud must be pleaded, and the quantum of evidence that a plaintiff must possess in order to allege that fraud has occurred, are governed by provisions of law other than 31 U.S.C. 3730(e)(4)

Although there are limits on a *qui tam* relator's freedom to base his FCA claims on inferences or speculation, those limits are imposed by provisions of law *other than* 31 U.S.C. 3730(e)(4), and their application does not depend on whether a particular *qui tam* suit is based upon a "public disclosure." As in any federal civil action, Stone was re-

quired to include in his complaint "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy Rule 8(a)(2), a plaintiff must plead facts that demonstrate "a reasonably founded hope that the [discovery] process will reveal relevant evidence" sufficient to establish the plaintiff's claim. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)).[9] And, as in any federal civil action, a complaint in a *qui tam* suit constitutes an implicit representation that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3).[10] See *United States ex rel. Detrick* v. *Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1018 n.25 (E.D. Va. 1995) (noting in the *qui tam* context that, "[i]f, after a reasonable pre-complaint inquiry, a person still bases the factual allegations of his complaint only on rumor or suspicion, he does not have an adequate Rule 11 basis to make those allegations").

Thus, after Stone submitted his affidavit explaining the bases for his conclusion that petitioner had submitted false claims to the government, petitioner might have argued that the inferences Stone drew from his personal observations were unduly speculative, and that Stone's allega-

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[9] The application of Rule 8(a)(2) to claims under Section 1 of the Sherman Act is currently before the Court in *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126 (to be argued Nov. 27, 2006).

[10] Rule 11 was amended to its current form in 1993. In December 1992, when petitioner moved to dismiss Stone's complaint under 31 U.S.C. 3730(e)(4), Rule 11 provided that an attorney's signature on a complaint or other filing constituted a representation by the signer that the filing was "well grounded in fact." Fed. R. Civ. P. 11 (1988).

tions of fraud therefore lacked a sufficient factual basis to satisfy Rule 11.[11] That challenge would not have required any antecedent showing that Stone's *qui tam* suit was "based upon" a "public disclosure" within the meaning of 31 U.S.C. 3730(e)(4)(A). Petitioners have not contended, however, that Stone failed to satisfy the requirements of Rule 11. Nor have petitioners argued that Stone's initial complaint failed to comply with the pleading requirements of Rule 8(a)(2).

Petitioner did move in the district court for dismissal of the FCA claim in Stone's initial *qui tam* complaint on the ground that Stone had failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b). See note 3, *supra*. That motion argued that Stone's allegations failed to satisfy Rule 9(b) because the complaint did not identify "the dates or amounts of the alleged false claims, who (knowing them to be false) made them, who in the Government was thereby misled, or any reference to the documents containing them." Br. in Supp. of Rockwell's Mot. to Dismiss 2 (filed Dec. 28, 1990). The district court

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[11] This is not to suggest that such a challenge would have been *meritorious*. Under the relatively relaxed standard embodied in Rule 11(b)(3), Stone's attestation to facts within his knowledge (*i.e.*, that petitioner had committed frequent ES&H violations yet had requested and received federal award bonuses for which ES&H compliance was a prerequisite) provided "evidentiary support" for Stone's FCA claims, even though greater specificity was required in order to prove those claims at trial. See Fed. R. Civ. P. 11(b) and (c) advisory committee's note (1993) (Amendment) (explaining that the Rule in its current form reflects a "recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation").

denied that motion, see note 3, *supra*, and petitioners have not challenged that ruling.[12]

Thus, Federal Rules of Civil Procedure 8(a)(2), 9(b), and 11 establish pleading and evidentiary-basis requirements that apply to *qui tam* suits generally, whether or not a particular suit is based on publicly disclosed allegations or transactions. Taken together, those Rules protect *qui tam* defendants against the burdens of litigation when a relator's allegations of fraud are inadequately defined or factually unsupported. Federal Rule of Civil Procedure 56, which governs summary judgment motions, provides an additional mechanism for terminating a *qui tam* suit before trial if the relator is unable to amass evidence sufficient to prove the elements of his claim. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-327 (1986); J.A. 74-75 (petitioner's motion to dismiss pursuant to 31 U.S.C. 3730(e)(4) states that petitioner "believes Stone has no facts to support these allegations of false statements and concealments, and has accordingly filed a motion under Fed. R. Civ. P. 56 seeking judgment in its favor"). In short, "[t]o the extent that [a *qui tam*] plaintiff comes forward only with a bare allegation unsupported by proof, the district court has ample tradi-

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[12] In the view of the United States, it is possible for a relator (or the government) in an FCA action to describe the alleged fraudulent scheme with sufficient specificity to satisfy Rule 9(b)'s "particularity" requirement even without identifying specific false claims. See *United States* v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005) (holding that relator's allegations concerning the defendant's general billing practices were sufficient to satisfy Rule 9(b)), cert. denied, No. 06-152 (Nov. 6, 2006). That is particularly so in light of "the flexibility provided by Rule 11(b)(3)," which "allow[s] pleadings based on evidence reasonably anticipated after further investigation or discovery." *Rotella* v. *Wood*, 528 U.S. 549, 560 (2000). But see *United States ex rel. Karvelas* v. *Melrose-Wakefield Hosp.*, 360 F.3d 220, 227-235 (1st Cir.), cert. denied, 543 U.S. 820 (2004).

tional tools with which to dismiss the case." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 655 n.10 (D.C. Cir. 1994) (citing Fed. R. Civ. P. 9(b), 12(b)(6), and 56). Petitioners, however, raise no claims in this Court under any of the Rules that afford that protection.

As the case comes to this Court, it therefore may appropriately be assumed that Stone's original complaint complied with the requirements under the Federal Rules of Civil Procedure that generally serve to protect civil defendants (including defendants in *qui tam* cases) from ill-defined or factually baseless allegations of wrongdoing. And because the allegations in Stone's original complaint were based solely on information that he acquired in his capacity as a Rockwell employee, Stone easily satisfied the statutory criteria for status as an "original source." Under those circumstances, the fact that Stone's original complaint was based in part on publicly-disclosed information did not trigger any heightened-pleading requirement, and it did not compel Stone to demonstrate more specific evidence of petitioner's fraudulent conduct than the Federal Rules of Civil Procedure would otherwise have mandated.[13]

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[13] In arguing that Stone's *qui tam* suit was precluded by 31 U.S.C. 3730(e)(4)'s "public disclosure" bar, petitioners do not identify any pre-filing public disclosure of allegations that petitioner had submitted false claims for payment to the federal government, let alone any public disclosure that identified specific false claims. Petitioners thus do not dispute that Stone based his allegations concerning petitioner's billing practices on inferences drawn from his own observations as a Rockwell employee. Therefore, in this case, for the reasons stated above, any argument that those observations provided an insufficient basis for inferring fraud would raise an issue under Federal Rules of Civil Procedure 9(b), 11(b)(3), and 56, not under Section 3730(e)(4)(B).

4. A relator may qualify as an "original source" even if his information concerning the nature of the defendant's representations to the government is derived from publicly available materials

Petitioners raise a further argument that, while not directly implicated by the circumstances of this case, would substantially undermine the purposes of the "original source" exception to the "public disclosure" bar to *qui tam* suits. In a typical FCA case, the government or a private relator alleges that (a) the defendant requested government funds or property by making certain (explicit or implicit) representations concerning its entitlement to payment, and (b) the actual state of affairs was such that those representations were false. See, *e.g.*, *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir.) ("X (misrepresented state of facts) + Y (true state of facts) = Z (fraud)"), cert. denied, 522 U.S. 865 (1997). Consistent with that usual pattern, Stone alleged in his original complaint that petitioner had sought and obtained government funds by claiming to be in compliance with applicable ES&H requirements, and that petitioner had in fact engaged in widespread ES&H violations. Petitioners contend (*e.g.*, Br. 26-27) that, to qualify as an "original source," Stone was required to demonstrate "direct and independent knowledge" of information concerning *both* the nature of petitioner's representations to the government and petitioner's actual non-compliance with the ES&H laws.

Even if 31 U.S.C. 3730(e)(4)(B) imposed such a requirement, Stone would have satisfied it here. As we explain above, both (a) Stone's allegation that petitioner had repeatedly violated the ES&H laws and (b) his allegation that petitioner had obtained federal funds by claiming to be in compliance with ES&H requirements were based on infor-

mation that Stone had acquired in his capacity as a Rockwell employee. Although the latter allegation was premised in part on logical inferences rather than on inspection of specific requests for payment, Stone obtained the "information" on which those inferences and the resulting allegation were "based" directly and independently of any public disclosure.

In other quite common fact patterns, however, acceptance of petitioners' theory would disqualify potential relators whose suits would clearly further Congress's purposes in allowing certain *qui tam* suits to go forward even when a "public disclosure" has alerted the government to the possible existence of fraud. A relator who possesses firsthand knowledge of substantial information about the core of the defendant's fraud—the facts on the ground concerning the defendant's actual course of conduct that show the defendant's claims to be knowingly false—may provide the key information that makes clear that the defendant's conduct is wrongful, and may thereby make valuable contributions to the government's anti-fraud efforts, even if his information concerning the contents of the certification requirements or representations to the government (which, standing alone, would be innocuous) is acquired from publicly-available sources. Petitioners' interpretation of Section 3730(e)(4)(B), which would deny "original source" status to such a relator, is in no way compelled by the statutory text, and it would largely eviscerate the "original source" provision.

a. The statutory definition of the term "original source" requires "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. 3730(e)(4)(B). When a relator's knowledge of different categories of relevant information has been acquired through different means, the text of Section 3730(e)(4)(B) provides

no formula for determining *how much* of the relevant information the relator must perceive "direct[ly]" and "independent[ly]" in order to qualify as an "original source." Absent a precise textual standard for resolving that question, Section 3730(e)(4)(B) should be construed so as to further the purposes that led Congress to allow certain *qui tam* suits to go forward even after a "public disclosure" has occurred. Cf. *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

Section 3730(e)(4) serves two basic purposes that must be given effect in its proper construction. First, as petitioners recognize (Br. 23), 31 U.S.C. 3730(e)(4) serves in large part to distinguish relators who may provide meaningful assistance in putting the government on the trail of fraud from those who simply exploit pre-existing knowledge of possible wrongdoing. See, *e.g.*, *Springfield Terminal Ry.*, 14 F.3d at 651 (explaining that the FCA's *qui tam* provisions "must be analyzed in the context of [Congress's] 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"); *id.* at 649-651 (describing historical development of the "public disclosure" bar and its role in curbing "parasitic" *qui tam* suits). Section 3730(e)(4) thus balances the congressional objectives of "promot[ing] private citizen involvement in exposing fraud against the government" and "prevent[ing] parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud." *United States ex rel. Rabushka* v. *Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994), cert. denied, 515 U.S. 1142 (1995).

Second, even apart from the potential for certain *qui tam* suits to alert the government to claims that it would otherwise lack the information to pursue, the "original source" exception to Section 3730(e)(4)(A) reflects Congress's judgment that it is sometimes inequitable or unwise to treat an antecedent public disclosure as a ground for denying a relator a share of the government's recovery. That would be most obviously true, for example, where the relator's own investigative or whistle-blowing activities had *caused* the relevant public disclosure to occur. See *Springfield Terminal Ry.*, 14 F.3d at 650-651 (explaining that the "original source" exception to the "public disclosure" bar was intended in part to supersede the holding in *United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100 (7th Cir. 1984), that a *qui tam* suit based on information in the government's possession was barred even though the relator had furnished the information to the government). In other circumstances, a relator's extensive firsthand knowledge of relevant facts might reflect the sort of diligent investigation that Congress wished to encourage and reward. If *qui tam* suits based upon publicly-disclosed allegations or transactions were categorically precluded, potential relators might hesitate to undertake such investigations because fortuitous pre-filing publicity could render their efforts nugatory.[14]

b. Both of the purposes of Section 3730(e)(4) discussed above support the conclusion that a relator may qualify as an "original source" so long as he has knowledge of the true

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[14] In the situations described in the text, the government may be fully capable of pursuing the relevant allegations of fraud *once the public disclosures have occurred.* Congress reasonably concluded, however, that allowing *qui tam* suits under those circumstances would further the government's long-term anti-fraud efforts by creating appropriate incentives for potential future relators to share information with the government in the first place.

state of affairs that renders the defendant's representations to the government knowingly false. See *Springfield Terminal Ry.*, 14 F.3d at 653-657. A relator who has firsthand knowledge of such information may provide substantial assistance to the government's anti-fraud efforts, or may otherwise be deserving of a share of the government's recovery, even if the relator learns of the representations themselves only through publicly-available sources. This makes particular sense because the representations standing alone are almost invariably innocuous and will in any event be shared with the government by the false claims defendant itself. It is the contradictory true state of affairs that will be critical to establishing the fraudulent nature of the representations, and the defendant will often take affirmative steps to conceal that information. For that reason, "[i]f the relator has direct knowledge of the true state of the facts, it can be an original source even though its knowledge of the misrepresentation is not first-hand." *Minnesota Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050 (8th Cir.), cert. denied, 537 U.S. 944 (2002); *Springfield Terminal Ry.*, 14 F.3d at 656-657.

Of course, even if a *qui tam* relator has "direct and independent" knowledge of pervasive illegalities committed by the defendant, he must allege that the defendant has sought to defraud the federal government, and he must comply with the relevant provisions of the Federal Rules of Civil Procedure. Thus, the relator must have an evidentiary basis for alleging fraud on the government that satisfies Rule 11(b)(3); he must plead the fraud with the "particularity" required by Rule 9(b); and, after suitable discovery, he must produce evidence that is sufficient to withstand a motion for summary judgment under Rule 56. See pp. 25-29, *supra*. Those Rules would bar or cut off *qui tam* suits brought by relators who observe unlawful conduct and sim-

ply speculate that the perpetrator misrepresented the true state of affairs in seeking federal money or property. But so long as the relator's allegations of fraud satisfy the requirements of those Rules, his suit may go forward, and he may qualify as an "original source" even if his information concerning the nature and content of the defendant's specific claims is drawn from publicly-available materials.

Indeed, because the FCA addresses efforts to defraud the United States, federal officials will ordinarily be familiar with the claims submitted by the defendant. Any independent knowledge that the relator may possess about what is contained within the four corners of the documents constituting the claims will therefore typically be of less practical benefit to the government than information concerning the facts that show those claims to be knowingly false. By the same token, it may be that only a few employees within a corporation are immediately involved in preparation of documents that are submitted to the government, and that no other employees will actually observe the claims themselves first hand. To be sure, an enterprising person involved in the submission of claims might get wind of information that suggests that the claims include misrepresentations and serve as a proper relator. But in reality, many government contractors are large corporations whose billing functions may be far removed from those with knowledge of the core of the fraud. Accordingly, if "direct and independent knowledge" of the contents of a defendant's claims themselves were a prerequisite to "original source" status under Section 3730(e)(4)(B), a substantial number of potential relators would be disqualified on a ground essentially unrelated to their capacity to assist the government in establishing the underlying fraud. See *Springfield Terminal Ry.*, 14 F.3d at 654 (explaining that, when information concerning the contents of the defen-

dant's representations "by itself is in the public domain, and its presence is essential but not sufficient to suggest fraud, the public fisc only suffers when the whistle-blower's suit is banned").

c. The overall structure of 31 U.S.C. 3730(e)(4) reinforces that conclusion. Under Section 3730(e)(4)(A), a relator must establish his status as an "original source" whenever a *qui tam* suit is "based upon" specific categories of "public disclosure[s]." In holding that Stone's *qui tam* suit was "based upon" a covered "public disclosure," the district court relied (see Pet. App. 59a-60a) on the Tenth Circuit's prior decision in *United States ex rel. Precision Co.* v. *Koch Indus., Inc.*, 971 F.2d 548 (1992), cert. denied, 507 U.S. 951 (1993)), in which the court of appeals recognized that "the threshold 'based upon' analysis is intended to be a quick trigger for the more exacting original source analysis." 971 F.2d at 552. Under that "quick trigger" approach, the "'original source' requirement applies even if a *qui tam* plaintiff's allegations are based only partly upon publicly disclosed allegations or transactions." Pet. App. 59a-60a. And under the construction of Section 3730(e)(4)(A) adopted by the Tenth Circuit and most other courts of appeals, with which the government agrees, a *qui tam* suit may qualify as "based upon" a covered "public disclosure" even if the relator does not actually derive his information from publicly available materials.[15]

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[15] See, *e.g.*, *Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039, 1043-1044 (10th Cir. 2004) (*qui tam* complaint was "based upon" a prior "public disclosure" because relators' allegations were "substantially similar" to the allegations in a prior civil complaint filed by a different litigant), cert. denied, 125 S. Ct. 2957 (2005); *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) (Section 3730(e)(4)(A) applies when the relator's allegations "are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit * * * , regardless of where the relator obtained his information."); *United*

In light of Section 3730(e)(4)(A)'s expansive scope, that provision (and the accompanying requirement that the relator demonstrate his status as an "original source") will encompass many *qui tam* suits brought by relators who can significantly assist the government's efforts to detect and redress fraud. An unduly narrow construction of the term "original source" in Section 3730(e)(4)(B), when combined with a relatively quick trigger for finding a suit to be "based upon" publicly disclosed information, would thus subvert Congress's effort to strike an appropriate balance between encouraging relators who have meaningful information to contribute, or who are otherwise deserving of a share of the government's recovery, and discouraging opportunistic suits. And there is no logical or practical justification for petitioners' view of Section 3730(e)(4), under which subparagraph (A) encompasses *qui tam* suits based even in part on publicly-disclosed information, while subparagraph (B) requires personal familiarity with all aspects of the fraud.[16]

States ex rel. Mistick PBT v. *Housing Auth.*, 186 F.3d 376, 385-389 (3d Cir. 1999) (same), cert. denied, 529 U.S. 1018 (2000); *United States ex rel. Biddle* v. *Board of Trs. of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 536-540 (9th Cir. 1998) (same), cert. denied, 526 U.S. 1066 (1999); *Findley*, 105 F.3d at 682-685 (same); but see, e.g., *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1347-1349 (4th Cir.) (*qui tam* complaint is "based upon" a "public disclosure" only if the relator actually derives his claims from that public disclosure), cert. denied, 513 U.S. 928 (1994); *United States ex rel. Feingold* v. *AdminaStar Fed., Inc.*, 324 F.3d 492, 497 (7th Cir. 2003) (same).

[16] Even if subparagraph (A) is given the relatively broad interpretation described in the text, the relator's allegations must be based at least in *substantial* part on publicly disclosed information, such that disclosure of relatively minor aspects of the overall claim would not trigger the "public disclosure" bar and the resulting requirement that the relator establish his status as an "original source." For similar reasons, release into the public domain of information concerning the

d. Petitioners contend that, in order to qualify as an "original source," a relator must not only have "direct and independent knowledge" of all elements of the fraud (*i.e.*, both the nature of the defendant's representations to the government and the facts showing those representations to be false), but must in addition possess such knowledge *at the level of specificity needed to establish liability at trial* (*e.g.*, through the identification of particular false claims). See, *e.g.*, Pet. Br. 41. That view is inconsistent with the basic principles governing pleading under the Federal Rules of Civil Procedure, which "allow pleading based on evidence reasonably anticipated after further investigation or discovery." *Rotella* v. *Wood*, 528 U.S. 549, 560 (2000); see pp. 25-27 & note 11, *supra*. Accepting that view also would largely eviscerate the "original source" provision. In a company of any meaningful size, no single employee is likely to possess firsthand knowledge of both the details of the defendant's claims and the circumstances showing the claims to be false, at least not with sufficient specificity to support a jury verdict unaided by discovery.

In *United States ex rel. Harrison* v. *Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), the defendant argued that it lacked the scienter required for FCA liability because no single employee of the company knew of both the company's certifications to the government and of the facts showing those certifications to be false. *Id.* at 918. The court of appeals "decline[d] to adopt Westinghouse's view that a single employee must know both the wrongful conduct and the certification requirement." *Id.* at

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existence of a contract with the government or a claim submitted to it, which in itself or by its nature is entirely lawful, unaccompanied by any suggestion of underlying fraud or illegality, may not constitute a "public disclosure of allegations or transactions" within the meaning of Section 3730(e)(4)(A). Cf. *Springfield Terminal Ry.*, 14 F.3d at 653-655.

919. The court explained that, if that view were accepted, "corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability." *Ibid.* Petitioners' proposed construction of 31 U.S.C. 3730(e)(4)(B) would create an analogous incentive for federal contractors to reduce their potential exposure to *qui tam* suits by segregating workplace functions to assure that no employee could qualify as an "original source."

B. Any Clarification Or Refinement Of The FCA Allegations That May Have Occurred After The Government Intervened In This Case Is Irrelevant To The "Original Source" Inquiry

In its December 1992 motion to dismiss Stone's original *qui tam* complaint (see J.A. 73-93), petitioner did not contend that Stone lacked "direct and independent knowledge" of the ES&H violations that petitioner was alleged to have committed. See Pet. App. 61a. In this Court, however, petitioners argue (*e.g.*, Br. 17-18, 27-28) that Stone cannot qualify as an "original source" because he lacked personal knowledge of the fact that petitioner had used inadequate cement in its manufacture of pondcrete. Petitioners contend (Br. 28 n.16) that "where, as here, the relator fundamentally changes his allegations in a way that potentially impacts his original source status, then the court must assure itself that it retains jurisdiction over the action as amended." That argument is mistaken, at least in the circumstances of this case.

1. The government's intervention in this case provided an independent basis for the district court to adjudicate the FCA claim filed jointly by the United States and Stone

a. For purposes of determining whether the district court had jurisdiction in this case, the Court need not definitively decide the circumstances in which a new "public disclosure"/"original source" inquiry would be necessary if the government declines to intervene in a *qui tam* action, the relator litigates the suit to its conclusion, and the theory of liability changes substantially along the way. Presumably, there would be some requirement that the ultimate theory have some relationship to the original theory that satisfied the "original source" test. It is also unnecessary to determine what rule would apply if the government intervenes in a pending *qui tam* action and the relator thereafter seeks to add new claims to (or amend existing claims in) his own complaint. Whatever the correct approach might be in those situations, no new "public disclosure"/"original source" inquiry was necessary for jurisdictional purposes in this case because the *only* FCA claim presented to the jury was asserted by the United States as well as by Stone.

Under the FCA's "public disclosure" provision, a court lacks jurisdiction over claims based on publicly disclosed information "unless the action is brought by the Attorney General *or* the person bringing the action is an original source of the action." 31 U.S.C. 3730(e)(4)(A) (emphasis added). In the instant case, the government was granted leave to intervene in November 1996, see J.A. 382-388, and the United States and Stone filed an amended complaint the following month, see J.A. 395-426. The *only* FCA claim that was ultimately presented to the jury was the claim set forth in Count 1 of the amended complaint, which was asserted *jointly* by the government and Stone. See J.A. 416-

417.[17] And to the extent that the FCA claim asserted in Count 1 of the amended complaint was clarified or refined during the subsequent course of the litigation, that was done "at the government's behest." J.A. 570; see pp. 11-12, *supra*; pp. 43-44, *infra*. Because the claim on which petitioner was held liable was "brought by the Attorney General," the district court had jurisdiction of that claim under 31 U.S.C. 3730(e)(4)(A), and it therefore was unnecessary, in order to resolve that jurisdictional question, for the court to determine whether Stone was an "original source" of the information on which Count 1 was based.

b. This does not mean that the government's intervention mooted any *pre-existing* defects in Stone's initial *qui tam* complaint. Petitioner argued in the district court in December 1992, see J.A. 73-93, and has consistently maintained throughout this litigation, that Stone's initial complaint was subject to dismissal because it was based in part on publicly disclosed information and Stone lacked "direct and independent knowledge" of any specific false claim. If this Court agrees with petitioners' contention and concludes that Stone's *qui tam* complaint was subject to dismissal *ab initio*, then Stone was never a proper relator, and he was not entitled to participate as a party to the suit after the government's intervention, even though the government's intervention and presentation of Count 1 were sufficient to ensure that the district court had jurisdiction over the suit.[18] But so long as Stone was an "original source" of

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[17] Although the amended complaint did contain one FCA claim that was asserted solely by Stone (see J.A. 418-424), that claim was severed from the rest of the suit (see note 5, *supra*) and is not at issue here.

[18] After the government has intervened in a *qui tam* suit, the government as well as the defendant remains free to contend that the relator's initial complaint was barred by 31 U.S.C. 3730(e)(4), and that the relator therefore should not share in any monetary recovery. As

the information on which the allegations in his *qui tam* complaint were based (see pp. 21-39, *supra*), any clarification or refinement of those allegations that Count 1 of the amended complaint may have accomplished (or that may have occurred at trial) did not necessitate a new "original source" inquiry.

2. Petitioners' construction of 31 U.S.C. 3730(e)(4)(B) would hinder enforcement of the FCA by discouraging cooperation between the government and private relators

The FCA provides that, "[i]f the Government proceeds with an action brought by" a *qui tam* relator, and the suit produces a monetary recovery, the relator shall "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." 31 U.S.C. 3730(d)(1). Under Section 3730(d)(1), a relator's entitlement to a share of the government's recovery is determined on a claim-by-claim basis. When the government intervenes in a pending *qui tam* action, it "shall have the primary responsibility for prosecuting" the claims brought by the relator, see 31 U.S.C. 3730(c)(1), but it may assert additional claims as well, and the relator would not be entitled

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the United States explained in opposing petitioners' request that Stone be excluded from the judgment in this case, "the question of whether a particular relator is or is not an 'original source' is one which affects the government's interests, and the government itself sometimes raises this issue when the government concludes that a relator fails to meet the requirements in 31 U.S.C. § 3730(e)(4)." J.A. 571. When the government seeks to pursue allegations of fraud that are encompassed within the general parameters of a prior *qui tam* complaint, the government may also contend that the relator has failed to plead fraud with the "particularity" required by Federal Rule of Civil Procedure 9(b) (see pp. 27-28, *supra*) and therefore is not entitled to a share of any proceeds of the suit.

to any portion of the recovery that such new claims might produce.

If the government had regarded the pondcrete claims that ultimately prevailed at trial as "new" claims not encompassed by Stone's original complaint, it could have asserted that Stone was not entitled to any portion of the proceeds of the action. And if Stone had contested that position, the district court would have resolved the dispute. A controversy of that nature could arise even in a *qui tam* action that was not "based upon" any prior "public disclosure," and its resolution would not depend on whether the relator qualified as an "original source" of information supporting the purportedly "new" allegations.

In this case, however, the government did not urge the district court to treat its claims concerning the inadequate cement content of petitioner's pondcrete as distinct from the claims asserted in Stone's initial *qui tam* complaint. To the contrary, the government *opposed* petitioners' contention that judgment should be entered only in favor of the United States and not in favor of Stone. See J.A. 568-572. In that regard, the government explained that its conduct of the litigation had been "assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys"; that "[t]he allegations actually tried clearly came within the gravamen of Mr. Stone's complaint"; and that "the narrowing that occurred in this case, done at the government's behest for tactical litigation reasons, did not transform the case into a 'different case,' it merely made it a more finely-honed case." J.A. 570-571.

Petitioners' view of 31 U.S.C. 3730(e)(4), under which refinements in the theory of liability after the government has intervened may necessitate a new "public disclosure"/"original source" inquiry, would hinder the government's enforcement of the FCA by creating artificial disin-

centives to cooperation between the government and private relators. As the government explained in opposing petitioners' request that Stone be excluded from the judgment, "the narrowing that occurred in this case" after the government had intervened was "done at the government's behest for tactical litigation reasons." J.A. 570; see 31 U.S.C. 3730(c)(1) (explaining that, when the United States intervenes in a pending *qui tam* suit, the government "shall have the primary responsibility for prosecuting the action"). Future relators would be discouraged from acquiescing in such refinements if their potential entitlement to a share of the proceeds depended on proof that they possessed "direct and independent knowledge" supporting the precise theory of liability on which the government preferred to focus. Absent any dispute between the government and the relator as to whether the relator's initial allegations encompassed the theory ultimately presented at trial, the defendant should not be permitted to use Section 3730(e)(4) to drive a wedge between the co-plaintiffs. Cf. J.A. 577 (district court observes that, absent any apparent disagreement between Stone and the government regarding the proper division of the money judgment in this case, the court was "not here to generate disputes that don't exist").[19]

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[19] The most direct and significant consequence of the district court's determination that Stone was an "original source" is that Stone is entitled to a share of the money judgment. As the district court recognized, "the division of the recovery on damages between the government and Mr. Stone is a matter between the government and Mr. Stone" and does not, in and of itself, affect petitioners' interests. J.A. 577. Petitioners contend, however, that "[r]eversal of the judgment [in Stone's favor] would, at a minimum, foreclose Stone's claim for over $10 million in attorneys' fees as a prevailing party." Pet. Br. 9 n.6; see

C. Before Filing His Initial Complaint, Stone Voluntarily Provided The Government With The Information On Which His Allegations Were Based

In order to qualify as an "original source," Stone was required to demonstrate both that he had "direct and independent knowledge of the information on which [his] allegations [were] based," and that he had "voluntarily provided the information to the Government before filing an action under [the FCA] which is based on the information." 31 U.S.C. 3730(e)(4)(B). Petitioners contend (Br. 43-49) that Stone failed to satisfy the latter requirement because he provided the government with no significant information

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31 U.S.C. 3730(d)(1) (relator who receives a share of the recovery after the government intervenes "shall * * * receive * * * reasonable attorneys' fees and costs").

The district court has not yet ruled on Stone's request for attorneys' fees. See J.A. 578. Quite apart from any "public disclosure" issue, petitioners remain free to argue that Stone should receive a reduced fee award, or no attorneys' fees at all, on the ground that he played an insubstantial role in the ultimate success of the litigation. Cf. *Farrar* v. *Hobby*, 506 U.S. 103, 114-116 (1992) (where civil rights plaintiff prevails on the merits but is awarded only nominal damages, the "reasonable" attorneys' fee ordinarily is no fee at all). Of course, the government's prior representation that its conduct of the suit was "assisted by the vigorous prosecutive efforts of Mr. Stone and his attorneys," J.A. 570, and its failure to contest Stone's entitlement to a share of the proceeds, make it unlikely that such an argument would succeed. But once again, those same issues can arise in disputes over a relator's attorneys' fees in *any qui tam* case, without regard to whether a "public disclosure"/"original source" issue arises.

concerning potential defects in petitioners' pondcrete.[20] That argument is wrong for two reasons.

a. Petitioners do not contend that Stone possessed significant information about petitioner's pondcrete that he *failed* to disclose to the government in a timely fashion. Rather, the apparent thrust of petitioners' argument is that Stone's pondcrete-related disclosures were inadequate in some absolute sense, even if they reflected substantially all the relevant information that Stone possessed. Under Section 3730(e)(4)(B), however, the "information" that a relator must have disclosed to the government is the "information on which the allegations [in the *qui tam* complaint] are based." So long as the relator has voluntarily told the government what he knows, he satisfies Section 3730(e)(4)(B)'s prior-disclosure requirement. To the extent petitioners contend that the information Stone presented to the government was inadequate to support the allegations of his complaint, Section 3730(e)(4)(B) in general and the requirement that information be presented to the government in particular is irrelevant to that question, which instead implicates other provisions of law. See pp. 25-29, *supra*.

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[20] Two courts of appeals have held that an "original source" must voluntarily disclose his information to the government not only before the filing of his *qui tam* complaint, but also before any covered "public disclosure" has occurred. See *Findley*, 105 F.3d at 690; *United States ex rel. McKenzie* v. *BellSouth Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997), cert. denied, 522 U.S. 1077 (1998). The question whether those holdings are correct is not presented by this case. Petitioners do not contend that Stone failed to comply with any such requirement, and it does not appear that Stone made significant disclosures to the government between the time of the relevant public disclosures (which occurred in early June 1989) and the filing of his *qui tam* complaint the following month. See Pet. Br. 43 (stating that "[t]he only disclosures germane to this inquiry are the ones that Stone made to the FBI in 1987-88").

b. Even if Section 3730(e)(4)(B) required prior disclosure to the government of a quantum of information that is substantial in an absolute sense, Stone satisfied that requirement here. Stone attested that he first discussed petitioner's ES&H problems with an FBI Special Agent in 1986, that he had meetings and telephone contact with federal officials on several later occasions, and that he ultimately provided the FBI with more than 2300 pages of documents. J.A. 180-181; see, *e.g.*, J.A. 266 (FBI agent's report states that Stone "voluntarily provided over 1100 copies of documents" in March 1988). Petitioners do not question the accuracy of those assertions.

Petitioner's December 1992 motion to dismiss Stone's initial *qui tam* complaint (J.A. 73-93) did not contest the adequacy of Stone's prior disclosures to the government, but argued only that Stone lacked "direct and independent knowledge" of specific false claims. Petitioners' current contention that Stone must identify substantial *pondcrete-related* disclosures is clearly premised on their view that the district court was required to conduct a new "original source" analysis with reference to the specific theory of liability on which the government and Stone prevailed at trial. That argument is mistaken for the reasons stated at pp. 39-44, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DOUGLAS N. LETTER
PETER R. MAIER
MICHAEL D. GRANSTON
Attorneys

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