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Article

***1 WHO'S MAKING FALSE CLAIMS, THE QUI TAM PLAINTIFF OR THE GOVERNMENT CONTRACTOR? A
PROPOSAL TO AMEND THE FCA TO REQUIRE THAT ALL QUI TAM PLAINTIFFS POSSESS DIRECT KNOW-
LEDGE**

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Congress has let loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government.
[FN1]

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I. INTRODUCTION

Although *qui tam* actions under the False Claims Act (FCA) are not universally favored, they play a vital role in the government procurement process. [FN2] By encouraging private citizens to uncover and report fraud perpetrated against the U.S. Government, the law serves as a deterrent and keeps dishonest contractors in check. Moreover, while the *qui tam* plaintiff receives a percentage of any recovery, the bulk of recovered funds are returned to their *2 rightful owner, the Government. When distilled to this basic premise, *qui tam* actions are largely an unobjectionable concept.

Despite the important role of *qui tam* actions, when they are left unchecked, as is currently the case, they have the potential for significant abuse in practice. The modern-day *qui tam* action typically offers the potential for a significant monetary reward. Over the last twenty years, *qui tam* plaintiffs personally have received nearly \$1.8 billion in the 5,514 actions filed. [FN3] Unfortunately, however, “opportunism rather than legitimate whistle-blowing [often] motivate[s] the filing of ... complaint[s].” [FN4] In fact, statistics show that the large majority of *qui tam* actions end in dismissal. [FN5]

Because the FCA does not explicitly require that *qui tam* plaintiffs possess direct or firsthand knowledge of the information underlying their allegations, many actions are filed based upon suspicion or speculation and without a sufficient basis. In many instances, these lawsuits are not dismissed at the outset of the case but rather linger on for months, or even a year or longer, before a court ultimately determines that the suit lacks merit and grants the defendant's motion to dismiss. [FN6] Moreover, it is not uncommon for courts to grant plaintiffs leave to amend their complaints multiple times before ultimately dismissing the case with prejudice after finding that the complaint fails to state a claim upon which relief can be granted. The casualties of the dismissed suits are not the plaintiffs. Rather, it is the government contractor whose reputation is tarnished and who is now without hundreds of thousands of dollars or possibly on the verge of bankruptcy after having defended against speculative allegations.

At a time when government contractors are the lifeblood of the Government, from assisting our country in the fighting of a war to providing pens and paper to our federal agencies, Congress should amend the FCA to provide a check on *qui tam* actions. [FN7] This article proposes the imposition of direct knowledge and particularity requirements on *all qui tam* plaintiffs. “[T]he Act has been repeatedly amended, representing ‘a long history of repeated *3 congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.’” [FN8] With 382 *qui tam* actions filed in 2006 alone, the FCA needs additional refinement to discourage what appears to be growing opportunistic behavior. [FN9]

The proposed amendments are likely to produce significant benefits without negative consequences. The proposed direct knowledge and particularity requirements are likely to deter frivolous suits from being filed, serve an important gatekeeper function by reducing the number of speculative suits from advancing, promote consistency in the treatment of *qui tam* actions by the courts, and provide defendants with precise allegations to prepare a defense before one, two, or even three complaints are dismissed without prejudice. These potential benefits come at little expense to the Government, as the proposed amendments preserve the important role *qui tam* actions play in the procurement process. While plaintiffs would be required to state their allegations with more substance and precision, which will certainly require that plaintiffs sharpen their teeth before attempting to bite off a *qui tam* complaint, such requirements are unlikely to affect *qui tam* suits that are well-founded. Ultimately, the likely result would be a decrease in the number of speculative suits that waste government resources and tarnish the reputations of contractors. [FN10]

In support of this proposal, this article first discusses the events leading to the enactment of the FCA and its evolution from 1863 to present. Second, from the perspective of defending against *qui tam* actions, this article discusses the lack of a statutory knowledge requirement, while acknowledging that the courts have adopted Rule 9(b)'s [FN11] particularity

requirement to fill this void. It also discusses the FCA's "direct and independent knowledge" requirement found in the "original source" provision and questions why knowledge is not required outside this limited context. Finally, this article proposes to amend the FCA by imposing a direct knowledge requirement and suggests that Congress also should consider codifying the particularity requirement currently applied by the courts.

*4 II. BACKGROUND

Lawsuits in the nature of *qui tam* actions are engrained in our legal system. In fact, they have been in existence since the founding of this country. [FN12] By providing citizens with an economic incentive to report fraud, Congress envisioned that more fraud actions would be filed and, thus, potentially more fraud would be discovered. [FN13] As a natural result, additional funds would flow back to their rightful owner, Uncle Sam, on behalf of all taxpayers. [FN14]

Enacted in 1863, the FCA was commonly referred to as "the Lincoln Law" because President Abraham Lincoln advocated in favor of its passage. [FN15] Congress enacted the FCA in response to reports of "widespread corruption and fraud in the sale of supplies and provisions" by large contractors to the Union Army during the Civil War. [FN16] The reports indicated that some war profiteers had engaged in the practice of defrauding the Government by shipping boxes of sawdust in place of supplies or by tricking the Government into purchasing the same horses more than once. [FN17] Congress hoped the FCA would curb the "the massive frauds perpetrated by large [private] contractors during the Civil War." [FN18]

As originally enacted, the statute imposed civil and criminal liability for essentially any effort to defraud the Government. Specifically, it imposed liability for "presenting false claims against the Government; preparing a written instrument that contained fraudulent or fictitious statements with the purpose of aiding in the payment or approval of such a claim; and conspiring to defraud the Government by obtaining payment of allowance of a false claim." [FN19] Like the modern-day version of the FCA, the original also contained *qui tam* provisions allowing private individuals to file suit on behalf of the Government. [FN20] The statute provided for double damages and a \$2,000 civil *5 penalty for each false claim submitted. [FN21] Notably, early *qui tam* plaintiffs were given a very generous reward, 50 percent of the recovery. [FN22]

In the 1930s, as the Government grew and entered into more contracts, the number of *qui tam* actions increased. [FN23] Many of these suits were lodged by "enterprising individuals" based upon information they gleaned entirely from public sources. [FN24] Such suits later became known as "parasitic" lawsuits. [FN25] These individuals had no independent or firsthand knowledge of the fraud upon which their allegations were based but rather based their allegations upon publicly available information including criminal indictments. [FN26]

The most famous of these parasitic lawsuits is the Supreme Court case of *United States ex rel. Marcus v. Hess*, wherein the *qui tam* plaintiff apparently lifted his allegations from the criminal indictments of several electrical contractors. [FN27] Appalled by the *qui tam* plaintiff's actions and aware of the obvious implications of having such precedent on the books, the U. S. Department of Justice argued, in relevant part, that the plaintiff's suit should be dismissed because he relied solely upon publicly available information and had not put forth any new information. [FN28] Justice Black, writing on behalf of the majority and employing principles of strict statutory construction, held that the statute, itself, does not limit suits to those who have firsthand knowledge or who are offering new information. [FN29]

The Court recognized that "[t]here is of course no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward." [FN30] The Court further stated that even if the relator contributed nothing to the discovery of the fraud, he "contributed

much to accomplishing one of the purposes for which the Act was passed” because “[t]he suit results in a net recovery to the Government of \$150,000, three times as much as the fines imposed in the criminal proceedings.” [FN31] In response to the Government’s *6 position that allowing “outsiders to sue might bring unseemly races for the opportunity of profiting from the Government’s investigations,” Justice Black indicated that this argument is “addressed to the wrong forum” and the statute, as written, does not prohibit such suits. [FN32]

In light of the Supreme Court’s ruling and its obvious implications, Attorney General Francis Biddle proposed that Congress repeal the *qui tam* provisions entirely. [FN33] The House of Representatives passed legislation in support of his proposal. [FN34] Despite the House’s position on *qui tam* actions, there was significant opposition in the Senate. In fact, Senator Langer stated: “I submit that the present statute now on the books is a most desirable one. What harm can there be if 10,000 lawyers in America are assisting the Attorney General of the United States in *digging up war frauds*?” [FN35] Ultimately, the Senate passed an amendment to the House bill providing for the retention of *qui tam* suits *with restrictions*. [FN36]

On December 21, 1943, President Franklin Delano Roosevelt signed the legislative amendments to the FCA. [FN37] The amendments reflect a compromise between those who thought the *qui tam* provisions should be removed entirely and those who supported the provisions. [FN38] As amended, the FCA provided that where the Government had prior knowledge of the information underlying the allegations in the plaintiff’s complaint, the suit was jurisdictionally barred even if the relator was the source of the Government’s information. [FN39] Additional amendments to the FCA included granting the Government the authority to take control of *qui tam* actions and a reduction in the plaintiff’s award to a maximum of 10 percent where the Government intervened and a maximum of 25 percent where the Government elected not to intervene. [FN40]

The number of *qui tam* actions filed decreased significantly in light of the amendments because the amendments had the effect of “closing the *qui tam* door on putative relators from whom the Government had learned about fraud just because these persons gave their knowledge to the Government before filing suit under the FCA.” [FN41] As a result, “[p]ublic perception of this new obstacle depressed the use of *qui tam* suits to enforce the FCA ... and *7 the Seventh Circuit transformed the perception into judicial reality with its 1984 decision in *United States ex rel. Wisconsin v. Dean*.” [FN42] In *Dean*, the Seventh Circuit held that the lower court lacked jurisdiction because the plaintiff’s suit was based upon evidence or information in possession of the Government at the time it was brought, notwithstanding that the state of Wisconsin was the source of the information and had reported it to the Government as part of its participation in the Medicare reimbursement program. [FN43]

Where the original version of the FCA opened the door too wide, inviting all types of speculative suits, Congress ultimately realized that the 1943 amendments effectively shut the door on *qui tam* suits. As a result, in 1986, Congress enacted the current version of the *qui tam* provisions of the FCA. [FN44] In so doing, Congress intended to overrule *Dean*, thereby making it easier for private citizens to enforce the FCA. [FN45] In an effort to achieve this goal, Congress enacted the “original source” exception to the previously existing “public disclosure” bar, which provides:

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. [FN46]

As amended, the “original source” of the publicly disclosed information is no longer barred from bringing suit. The FCA defines “original source” as “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.” [FN47]

While the allegations underlying a *qui tam* complaint vary depending upon the nature of the government contract at issue, all *qui tam* plaintiffs must *8 allege that the defendant violated Section 3729 of the FCA. In relevant part, Section 3729 of the FCA currently provides:

Any person who:

(1) knowingly presents, or causes 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;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person ... [FN48]

“Knowingly” and “claim” are the two significant terms used in this statute. The FCA defines these terms as follows:

For purposes of [section 3729], the terms “knowing” and “knowingly” mean that a person, with respect to information-

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

For purposes of [section 3729], “claim” includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, *9 grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will

reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded. [FN49]

In short, while the facts underlying each *qui tam* complaint are unique, all *qui tam* plaintiffs must allege, in essence, that defendant has presented a false claim for payment to the Government.

III. DEFENDING CONTRACTORS IN THE QUI TAM CONTEXT

By overhauling the *qui tam* provisions, Congress's overall intent was "to encourage more private enforcement suits." [FN50] The FCA has been successful in fulfilling this objective. In fact, since 1986, over 5,500 *qui tam* suits have been filed and over \$11 billion has been paid out, in total, under settlements and judgments. [FN51] Despite this huge recovery for the Government, statistics show that the majority of *qui tam* actions lack merit. In fact, more than 73 percent end in dismissal. [FN52] Notably, the Government intervenes in less than 25 percent of all cases filed by *qui tam* plaintiffs. [FN53] Tellingly, 96 percent of all recoveries come from those suits where the Government intervened. [FN54]

While there is little question that *qui tam* actions have been beneficial for the Government from a purely monetary perspective, the *qui tam* provisions are being abused by many individuals who are motivated by "opportunism" rather than legitimate "whistle-blowing." [FN55] Moreover, the FCA does little to ensure that *qui tam* actions are well founded. As a result, government contractors are left to fend off speculative suits while their reputations are tarnished and pockets emptied. When we consider that the FCA, also known as the Whistleblower Act, was designed to encourage corporate employees to blow the whistle-not outsiders looking to profit financially-it is evident that the FCA needs additional refinement to place a check on *qui tam* plaintiffs. [FN56]

*10 Many proposals to amend the FCA have been raised over the years. [FN57] None, however, have considered the interests of those who voluntarily deal with the Government, the government contractors.

A. The FCA Does Not Consider the Interests of Government Contractors

The FCA itself offers little protection to government contractors having to fend off frivolous *qui tam* suits. [FN58] The FCA provides no mechanism by which to test or check these lawsuits at the initial stage. The *qui tam* provisions merely state that private individuals may bring actions. [FN59] The FCA proscribes the procedures for how such a suit must be initiated and details the role of the *qui tam* plaintiff. [FN60] It also discusses the particular percentage of profit to be shared by the plaintiff. [FN61] In 1986, when *qui tam* actions were on the decline, Congress's focus was on the federal purse and encouraging the influx of additional funds into it. Despite all this precision, the FCA fails to address a very important issue: the foundation of knowledge or basis for the *qui tam* plaintiff's allegations.

While surely the focus of the FCA need not be on protecting the interests of contractors, the FCA, at the very least, should only seek to encourage private suits that are based on legitimate allegations of fraud. The FCA should not encourage individuals to assert speculative allegations of fraud as if the risk of dismissal is one worth taking in light of the potentially significant payout. Rather, the statute should recognize the economic damage that can result from unfounded allegations of fraud and require allegations to be sufficiently founded. While contractors are typically successful in fending off such allegations in the majority of cases, [FN62] the contractor is, nonetheless, left with the arduous and expensive task of repairing his reputation.

Although defendants may test the plaintiff's complaint by filing a motion to dismiss for failure to state an FCA claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, courts apply a lenient standard of review and only *11 dis-

miss the complaint if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” [FN63] As long as the individual pleads a *prima facie* FCA case, i.e., that the defendant presented a false or fraudulent claim to the Government for payment, the plaintiff has met his burden and may proceed. [FN64] Being able to make out a *prima facie* case, however, does not necessarily signify that the plaintiff has a sufficient basis for his allegations. It certainly does not indicate that the suit is founded upon firsthand knowledge of the alleged fraud. Thus, as written, the FCA encourages anyone-insider, outsider, or speculator-to bring suit but does little to ensure that the plaintiff has any legitimate basis for his allegations.

Why should Congress be concerned with protecting defendants from frivolous suits? The contractor enters into such relationships voluntarily, right? The contractor does so with the goal to profit, right? And honest and reputable contractors have nothing to worry about, right? It is certainly true that contractors deal with the Government voluntarily and are often profitable. It is also true that those who have done nothing wrong are unlikely to be found liable. However, while these are legitimate points, they fail to recognize that merely being the subject of an FCA suit carries grave consequences. [FN65]

The notion, alone, of defrauding our country sends a message of ill repute. Reputation or image is everything and, once tarnished, is extremely difficult to restore. Just think about a professional athlete who is accused of doping only to be cleared months later. Just like the athlete's name, the government contractor accused of defrauding our country may never be revered the same again. Their names are always associated with the taint of wrongdoing. Where the contractor depends upon repeat business from the same government agencies, the mere presence of allegations of fraud may cause those agencies to question the contractor's business practices.

In addition to having their reputations tarnished, the contractors must spend hundreds of thousands of dollars, if not millions, fending off these actions. [FN66] Moreover, and even where a contractor knows he has done nothing *12 wrong, the costs of defending a *qui tam* suit can motivate the contractor to settle the matter despite his personal feelings of disgust and angst for what such a settlement may suggest to those unfamiliar with modern-day litigation. [FN67] These huge costs may ultimately put the contractor out of business and result in a loss in jobs, cause the contractor to raise his prices, or discourage future involvement with the Government. In all cases, the taxpayers lose out.

B. Exception in the Original Source Context

In one instance, the FCA does expressly require that a *qui tam* plaintiff set forth a basis for his allegations. As mentioned above, where the suit is based upon information that has been publicly disclosed, the FCA provides that courts lack jurisdiction unless the individual bringing the suit is the “original source” of the information. [FN68] “Original source” is defined as “an individual who has *direct and independent knowledge* of the information on which the allegations are based.” [FN69] “This exception was designed to implement Congress's intent to encourage non-parasitic *qui tam* relators to come forward and report fraud, even in cases where public disclosure has occurred.” [FN70]

The courts have further defined the terms “direct and independent knowledge.” Courts have defined “independent knowledge” as “knowledge that is not dependent upon public disclosure.” [FN71] In large part, “direct knowledge” *13 is defined as knowledge that is firsthand. [FN72] “A relator has direct knowledge when he sees it with his own eyes.” [FN73] Courts have recognized that knowledge acquired and witnessed during one's employment is “direct knowledge,” [FN74] whereas knowledge learned through the efforts of others or secondhand knowledge is not. [FN75]

Most recently, the Supreme Court in *Rockwell v. United States* placed its imprimatur on the definition of “direct and independent knowledge” when it held that plaintiff's knowledge fell short. [FN76] In so holding, the Court based its con-

clusion on the fact that plaintiff was no longer an employee of defendant at the time the alleged fraud took place and, thus, he could not have the requisite degree of knowledge. [FN77] Therefore, the Supreme Court's reasoning supports the view that where a public disclosure is involved, the *qui tam* plaintiff must have firsthand knowledge to qualify as an original source. [FN78]

The “original source” exception to the public disclosure bar furthers an important function. While barring parasitic lawsuits, it allows the true and original source of the information to bring suit. It does this by requiring knowledge that could only be held by someone who actually witnessed the fraud. Requiring firsthand knowledge ensures that the individual is not *14 merely echoing information already in the Government's possession. [FN79] Such a requirement is certainly critical in the “public disclosure” context.

Despite this narrow context where knowledge is required, the large majority of *qui tam* actions need not be based on any “direct” or firsthand knowledge. Rather, plaintiffs may institute actions based upon a scintilla of knowledge and a great deal of suspicion, something they overheard; something conveyed by a friend, neighbor, or co-worker; or simply speculation based upon their knowledge of an industry. [FN80] As long as the suit is not based upon a “public disclosure,” these suits are allowed under the FCA.

Moreover, and even where a suit is based upon information obtained in the public domain, it still may not be barred because the public disclosure bar is technically limited to certain disclosures enunciated in the statute. [FN81] Thus, and aside from suits founded upon hearsay and speculation, there are likely a host of other media by which an individual can accumulate publicly known information and file a complaint. [FN82] The public disclosure bar does not prohibit these parasitic lawsuits.

C. Knowledge Outside the Original Source Context

The reasoning employed by a few courts suggests that they support the notion that all *qui tam* plaintiffs should possess the same level of knowledge regardless of whether a public disclosure is involved. In *United States ex rel. Detrick v. Daniel F. Young, Inc.*, the court recognized that although the “question of the nature and quantum of a relator's knowledge of the fraud” is addressed only in the context of an “original source” inquiry under Section 3730(e)(4) of the FCA, no logical reason exists for requiring a different level of knowledge simply because some information has been publicly disclosed. [FN83] Rather, in *all qui tam* actions, the plaintiff should be required to demonstrate the same “core of knowledge.” [FN84] In so stating, the court reasoned:

No reason in logic or principle suggests that different standards should come into play in the event a prior disclosure triggers the operation of the jurisdictional *15 “original source” provisions of § 3730(e)(4). If, in the absence of any publicly disclosed information, a person can achieve relator status because the fraud allegations in his complaint pass muster under Rules 9 and 11, then so, too, should a person achieve relator status where, in the face of public disclosures, the person's direct and independent knowledge of the fraud meets the requirements of Rules 9 and 11. A person seeking relator status as an “original source” should not be required to meet standards, in terms of the nature and quantum of information about the fraud, that are different from those that must be met by the person seeking relator status in the absence of any public disclosure. Put another way, the nature and quantum of fraud evidence that a putative relator must possess should be the same whether or not the person's relator status is assessed under § 3730(e)(4). [FN85]

“Fairness, consistency, and sound policy considerations ...” require such a conclusion. [FN86]

In addition to *Detrick*, two other courts appear to endorse the policy that all relators should possess a certain level of

knowledge. Specifically, in *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, the First Circuit, after seemingly finding that no public disclosure occurred, still went on to affirm the dismissal of plaintiff's complaint, stating that "LeBlanc was not someone with 'independent knowledge of the information' as required by the statute." [FN87] Similarly, in *United States v. Rockwell Int'l Corp.*, where the court, after stating that "[p]laintiffs filed this action *prior* to public disclosure of the alleged activities," went on to hold that one of the plaintiffs was not a "proper plaintiff" because it lacked "direct and independent knowledge." [FN88] While these holdings may be debatable in light of the current state of FCA law, [FN89] they nonetheless suggest that some courts believe all *qui tam* plaintiffs should be required to possess a certain level of knowledge.

D. Rule 9(b)'s Particularity Requirement

Although Rule 9(b) of the Federal Rules of Civil Procedure requires plaintiffs alleging fraud to set forth their allegations with "particularity," the courts have allowed its use in the FCA context to fill a void in the FCA. While it may serve as a useful mechanism by which defendants can attempt to defend against speculative or baseless suits, stating one's allegations with particularity *16 is distinct from alleging that one has "direct knowledge" of the information underlying the allegations. The FCA itself should include a knowledge requirement for all *qui tam* plaintiffs and possibly even incorporate such a "particularity" requirement in an effort to make the law more consistent in this area. [FN90]

While every federal court of appeals has now determined that Rule 9(b) applies to FCA actions, [FN91] this is not entirely clear from the text of the rule and was debated for some time as plaintiffs challenged its application in this context. [FN92] Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." [FN93] Opponents of applying Rule 9(b) have argued that "the False Claims Act creates liability for false, but not necessarily fraudulent claims and does not require proof of specific intent." [FN94] In rejecting this argument and finding that Rule 9(b) "does apply to actions under the False Claims Act," the Eleventh Circuit, like many others, seemed to recognize that while an FCA action may not be identical to a common-law fraud claim, Rule 9(b) is necessary in light of the lack of any statutory particularity requirement. [FN95]

Courts have largely held that 9(b) has several purposes:

First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of ... Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all of the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation. [FN96]

Because Rule 9(b) provides little guidance on what is meant by "particularity," the courts have designed various tests to assess the sufficiency of the *qui tam* plaintiff's allegations. Most courts begin their analysis by stating that a *qui tam* plaintiff must allege, at a minimum, "the 'who, what, when, where, and how' of the alleged fraud." [FN97] Courts then typically apply a more detailed *17 test. While often stated in a variety of ways, courts have found that Rule 9(b) is satisfied where a plaintiff identifies

(1) precisely what statements were made in what documents or oral representation or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the [Government], and (4) what the defendants obtained as a consequence of the fraud. [FN98]

Some courts also require that the plaintiff identify the indispensable element or the "sine qua non" of an FCA violation—an actual false claim. [FN99]

While each federal court of appeals has adopted [Rule 9\(b\)](#) and has applied similarly worded tests, in application, there appear to be a variety of approaches. Some courts approach [Rule 9\(b\)](#) very liberally in favor of the plaintiff. Others take a more stringent, gatekeeper approach.

In *Sanderson*, the Sixth Circuit attempted to balance [Rule 9\(b\)](#)'s particularity requirement with Rule 8(a)'s requirement that civil complaints need only state a "short and plain statement of the claim showing that the pleader is entitled to relief." [FN100] The court stated that when deciding a motion to dismiss under [Rule 9\(b\)](#) for failure to plead fraud with particularity, a court must "consider the policy favoring simplicity in pleading, codified in the 'short and plain statement of the claim' requirement of [Federal Rule of Civil Procedure 8](#)." [FN101] *18 "[T]he two rules must be read in harmony." [FN102] While the court ultimately found that the complaint failed to satisfy [Rule 9\(b\)](#), the court's analysis suggests that it employed, or at least considered employing, a relaxed approach to [Rule 9\(b\)](#).

Despite the Sixth Circuit's approach in *Sanderson*, in *Karvelas*, the First Circuit flatly rejected the notion that [Rule 8](#) applies to FCA actions. [FN103] The court stated, "[i]t is true that the [Supreme] Court held in *Swierkiewicz* that '[Rule 8\(a\)](#)'s simplified pleading standard applies to all civil actions, with limited exceptions.' However, it expressly noted that one such exception is [Rule 9\(b\)](#), which 'provides for greater particularity in all averments of *fraud* or mistake.'" [FN104] *Karvelas* is in direct contrast with *Sanderson* on this basic but important point.

Other courts, including the Eleventh and Eighth Circuits, require that the plaintiff provide a basis for his allegations. [FN105] Specifically, in *Clausen*, the Eleventh Circuit affirmed the lower court's finding that plaintiff failed to meet the particularity requirements. In so doing, the court laid out the four pieces of information a plaintiff must identify with particularity to clear the [Rule 9\(b\)](#) hurdle. [FN106] The court then added that "if [Rule 9\(b\)](#) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of an actual false claim for payment being made to the Government." [FN107] After so stating, the court found that plaintiff failed to provide any factual basis for his "conclusory statement tacked on to each allegation." [FN108]

While the various circuits may take different approaches in applying [Rule 9\(b\)](#), they appear to be attempting to walk a very fine line between encouraging whistleblowers, while at the same time protecting defendants from frivolous and unfounded suits. Because of the lack of any statutory requirement and because [Rule 9\(b\)](#) continues to evolve, each jurisdiction treats *qui tam* plaintiffs differently depending upon their interpretation of [Rule 9\(b\)](#) and their jurisprudential views of *qui tam* actions. [FN109] As a result, *qui tam* actions are *19 treated inconsistently. [FN110] Moreover, and because the particularity requirement is not mandated by statute, "[c]ourts infrequently dismiss with prejudice for a failure to plead with sufficient particularity, at least not without providing an opportunity to replead." [FN111]

The widespread application of [Rule 9\(b\)](#) to FCA actions [FN112] and [Rule 9\(b\)](#)'s transformation over the years into a detailed set of requirements support the policy of a direct knowledge requirement. Courts have applied [Rule 9\(b\)](#) because, while not explicitly required by the statute, they recognize that something more should be required of a plaintiff alleging that a business is defrauding the Government. As the statute fails to articulate how *qui tam* complaints should be assessed, courts have been forced to fill the statutory void, and as of now, [Rule 9\(b\)](#) is the only available option. While some may argue that it is akin to putting a square peg in a round hole, it has had some success in preventing frivolous, unfounded, and speculative suits from advancing. Yet, as discussed below, the law would be better served in terms of policy, ease of application for the courts, increased consistency, and effectiveness if the FCA contained a knowledge requirement and the particularity requirement applied by the courts.

IV. PROPOSAL: THE FCA SHOULD BE AMENDED TO INCLUDE A KNOWLEDGE REQUIREMENT

Qui tam actions play an important role in the procurement process by serving as a check on dishonest contractors. By providing an incentive to blow the whistle on fraud, the Government has provided itself with a team of civilian deputies. Even aside from the actual cases that are filed, the mere possibility of such an action serves as a deterrent because contractors know that each of their own employees is a potential government informant.

Despite the vital function of *qui tam* actions, in many situations the economic incentive encourages individuals to speculate. Because of the lack of any statutory check on these suits, any employee with an axe to grind can conceivably put his or her former boss out of business. Even if defending such an action does not ultimately lead to bankruptcy, the reputations of these contractors are undoubtedly tarnished when their names are dragged through the mud.

***20** Although the monetary interests of the Government are served by encouraging *qui tam* suits, contractors are essential to our Government because the system simply could not function without them. Therefore, while encouraging legitimate actions, the FCA should discourage frivolous actions based solely upon speculation and hearsay. While in a small number of cases such suits may ultimately bear fruit once the case enters discovery, the FCA should not encourage far-reaching fishing expeditions because more often than not, these are the types of suits that are dismissed as a matter of law. Instead, the FCA should encourage only those with *actual* knowledge of fraud to come forward in the name of their Government.

Congress has repeatedly amended the FCA in an attempt to correct problems that have been revealed over time. [FN113] Now, at a time when more than one FCA suit is filed each day, [FN114] boundaries must be established to curtail false complaints. Accordingly, this article proposes that Congress amend 31 U.S.C. § 3730 to require that all *qui tam* plaintiffs possess direct knowledge of the information on which their allegations are based and that they set forth the basis of their knowledge with particularity. In addition, this article proposes that Congress incorporate the requirements of Rule 9(b) into § 3730 by requiring that the *qui tam* plaintiff, in alleging a violation of § 3729, set forth his allegations of fraud with “particularity.” [FN115]

This article proposes that Congress amend Section 3730 as follows: by adding after the current subsection (b), labeled “Actions by private persons,” the following: [FN116]

(c) Knowledge required of the *qui tam* plaintiff-persons bringing an action under subsection (b) shall possess direct knowledge of the information on which their ***21** allegations are based and shall set forth the basis of their knowledge with particularity.

(1) For purposes of subsection (c), “direct knowledge” shall mean knowledge based on observations made firsthand.

(d) Allegations must be stated with particularity-persons bringing an action under subsection (b) must set forth their allegations of fraud with particularity. [FN117]

These proposed amendments would have many positive benefits. From a policy standpoint, the amended FCA would send a positive message of reinforcement to contractors that the Government values their business and their contributions and recognizes the hardship that comes along with speculative allegations. It also indicates to the courts and to potential plaintiffs that the Government does not want individuals to speculate or to dredge up allegations of fraud but rather to come forward where they have firsthand knowledge of fraud.

In addition, these amendments would likely reduce the number of frivolous, speculative, or baseless suits from being filed because the purported whistle-blowers and their attorneys would be less willing to risk the legal costs and fees associated with filing their baseless suits and the potential result of having to pay the defendant's costs. [FN118] The more stringent requirements also would ensure that unsupported claims would be dismissed in the incipient stages of the litigation.

tion before significant monies have been expended and reputations tarnished. Because it would likely reduce the number of speculative or baseless suits, it also would conserve both government investigative and judicial resources.

By providing courts with a uniform statutory requirement, [FN119] it also would provide greater consistency in the application of the law and in the treatment of all *qui tam* suits. Moreover, and as to the proposed particularity requirement, it would serve all the same purposes currently recognized by the courts, *22 including (1) to provide defendants with sufficient notice of the allegations to allow for the development of a defense; (2) to eliminate actions in which all the facts are learned through discovery; (3) to protect defendants from frivolous allegations involving moral turpitude; (4) to protect defendants from harm to their goodwill and reputations; and (5) “to prohibit plaintiffs from unilaterally imposing upon the court, the parties, and society enormous social and economic costs absent some factual basis.” [FN120] Because the particularity requirement would have the congressional stamp of approval, it is likely that the courts would apply it more consistently.

In terms of benefits for government contractors, it also will provide them with a strong statutory defense against speculative suits, thereby allowing them to seek dismissal at the threshold stage before significant time and money have been expended. This may ultimately result in greater savings to the Government in terms of their procurement acquisitions because contractors may not have to budget as much money for litigation into their budgets and overheads. To a lesser extent, it may have the effect of encouraging commercial contractors to enter the world of government contracts or possibly encourage existing government contractors to conduct additional business with the Government by reducing the anxiety of having to fend off frivolous or baseless lawsuits. For all these reasons, the FCA should be amended. [FN121]

V. CONCLUSION

The *qui tam* provisions serve a vital role and are critical to keeping dishonest contractors in check. Because of the significant number of *qui tam* actions filed each year and because the large majority end in dismissal, Congress should amend the FCA, once again, to incorporate the proposed direct knowledge and particularity requirements. From a policy standpoint, the amendments would send a positive message to contractors that the Government values their business and recognizes the significant costs and harm associated *23 with frivolous allegations. Moreover, the amendments would indicate to both the courts and potential plaintiffs that Congress only seeks to encourage individuals with direct knowledge of fraud to come forward in the name of the Government. In practice, the proposed amendments will preserve the role *qui tam* actions play while decreasing the number of suits that are motivated by opportunism rather than legitimate whistleblowing. Now is the time for congressional action.

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[FN1]. *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) (emphasis in original).

[FN2]. *Qui tam* is an abbreviation of the phrase “qui tam pro domino rege quam pro se ipso in hac parte sequitur.” *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000) (stating that this phrase translates to “he who pursues this action on our Lord the King's behalf as well as his own”).

[FN3]. See TAXPAYERS AGAINST FRAUD EDUC. FUND, FRAUD STATISTICS-OVERVIEW 2 (2006), <http://www.taf.org/stats-fy2006.pdf> [hereinafter FRAUD STATISTICS], for a display of a chart showing that from 1986

through 2006, *qui tam* relators have recovered \$1,799,444,848. This amount, however, does not include any personal claims including any damages recovered under [section 3730\(h\)](#) of the FCA, which deals with retaliation claims. *Id.* at 2 n.3.

[FN4]. [Sanderson v. HCA-The Healthcare Co.](#), 447 F.3d 873, 876 (6th Cir. 2006).

[FN5]. See FRAUD STATISTICS, *supra* note 3, for a chart entitled “Fraud Statistics Qui Tam Intervention Decisions & Case Status,” showing that between October 1, 1986, and September 30, 2006, 5,514 *qui tam* actions have been filed. Since 1986, 4,164 cases have concluded. This includes settled cases, cases where the court has entered judgment, and dismissed cases. Notably, 3,068 of the 4,164 cases have ended in dismissal-over 73 percent.

[FN6]. As will be discussed, there is a direct and independent knowledge requirement in the public disclosure context. See 31 U.S.C. § 3730(e)(4)(A), (B) (2000).

[FN7]. See Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASH. POST, June 16, 2007, at A1, for a discussion of the significant role contractors have played in the Iraq war, stating that “[p]rivate security companies ... are fighting insurgents on a widening scale in Iraq, enduring daily attacks, returning fire and taking hundreds of casualties that have been underreported and sometimes concealed, according to U.S. and Iraqi officials and company representatives.”

[FN8]. [Sanderson](#), 447 F.3d at 876 (quoting [United States ex rel. Karvelas v. Melrose-Wakefield Hosp.](#), 360 F.3d 220, 225 (1st Cir. 2004)); see also [United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.](#), 961 F.2d 46, 49 n.2 (4th Cir. 1992) (“We note that Congress has twice struck a new balance when it perceived that the *qui tam* provisions of the False Claims Act were being overused, underused, or misused”) (citing [United States ex rel. Williams v. NEC Corp.](#), 931 F.2d 1493, 1497 (11th Cir. 1991) (discussing the 1943 and 1986 amendments to the False Claims Act)).

[FN9]. See FRAUD STATISTICS, *supra* note 3, for a display of a chart entitled “Fraud Statistics-Overview” showing that, in 2006, 382 *qui tam* cases were filed.

[FN10]. While such amendments would be logical, they would likely see opposition in Congress, as allegations of tremendous contractor fraud are commonplace now, especially on Capitol Hill. Despite the fact that contractor fraud does exist, it “isn’t as severe as some critics suggested.” Charles Babington, *Iraq Contractor Fraud Said to Be Limited*, ASSOCIATED PRESS, June 19, 2007, <http://www.foxnews.com/wires/2007Jun19/0,4670,IraqContractors,00.html>.

[FN11]. FED. R. CIV. P. 9(b).

[FN12]. [Marvin v. Trout](#), 199 U.S. 212, 225 (1905) (recognizing the long history of statutes authorizing individuals with no interest in the controversy to file suit to recover a monetary award); see also [Milam](#), 961 F.2d at 49 (“Statutes authorizing *qui tam* suits are older than the Republic.”).

[FN13]. See [Milam](#), 961 F.2d at 49 (“Congress chose, as a means to encourage citizens to come forward with knowledge of frauds against the Government, to give economic incentives to a *qui tam* plaintiff. In addition, it gave the Executive Branch the option to allocate its resources elsewhere and permit the relator to prosecute the action on its behalf. Through this procedure, Congress could reasonably have envisioned that more fraud would be discovered, more litigation could be maintained, and more funds would flow back into the Treasury.”).

[FN14]. *Id.*

[FN15]. H.R. REP. No. 99-660, at 17 (1986).

[FN16]. *Id.*

[FN17]. *Id.*

[FN18]. *See* *Vt. Agency of Natural Res. v. Stevens*, 529 U.S. 765, 781 (2000) (quotations omitted); *see also* *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1237 n.1 (11th Cir. 1999) (stating that “[t]he purpose of the Act, then and now, is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward”); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1307 (11th Cir. 2002) (same).

[FN19]. H.R. REP. No. 99-660, at 17 (1986). The statute was originally codified as the Act of March 2, 1863, ch. 67, 12 Stat. 696-98. It was later reenacted by Rev. Stat. §§ 3490-94 and 5438 (1878).

[FN20]. *See* *Stevens*, 529 U.S. at 768-69.

[FN21]. *Id.* at 785-86.

[FN22]. *Id.*

[FN23]. *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-11 (3d ed. 2007) (discussing the increase in government contracts in the 1930s and the increased activity in *qui tam* suits); *see also* *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020 n.29 (E.D. Va. 1995) (stating that “[a]s government and the number of government contracts grew in the 1930s, an increasing number of *qui tam* actions were filed by citizens who based their complaints entirely on information gleaned from public sources and who knew nothing about the fraud before acquiring publicly available information”).

[FN24]. *See* *Detrick*, 909 F. Supp. at 1020; *see also* S. REP. No. 99-345, at 10-11 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5275-76.

[FN25]. *See* *Detrick*, 909 F. Supp. at 1020.

[FN26]. *See* S. REP. No. 99-345, at 10-11 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5275-76, for a discussion of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), *reh'g denied*, 318 U.S. 799 (1943).

[FN27]. *Marcus*, 317 U.S. at 545.

[FN28]. *Id.*

[FN29]. *Id.* at 546.

[FN30]. *Id.* at 546 n.9.

[FN31]. *Id.* at 545.

[FN32]. *Id.* at 547.

[FN33]. S. REP. No. 99-345 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5276.

[FN34]. *Id.* (citing 89 CONG. REC. S7606 (1943)).

[FN35]. *Id.* (emphasis added).

[FN36]. *Id.*

[FN37]. *See* BOESE, *supra* note 23, at 1-13.

[FN38]. *Id.*

[FN39]. Notably, the “Senate specifically provided that jurisdiction would be barred on *qui tam* suits based on information in the possession of the Government unless the relator was the original source of that information. Without explanation, the resulting conference report dropped the clause regarding original sources of allegations ...” S. REP. No. 99-345, at 12 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5277.

[FN40]. 31 U.S.C. § 3730(c), (d) (2000).

[FN41]. *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020 n.29 (E.D. Va. 1995).

[FN42]. *Id.*

[FN43]. *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984).

[FN44]. *Id.* (citing 31 U.S.C. § 3730 (2000)).

[FN45]. *Detrick*, 909 F. Supp. 1010, 1020 n.29; *see also* S. REP. No. 99-345, at 12-13 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5277-78.

[FN46]. 31 U.S.C. § 3730(e)(4)(A) (2000) (emphasis added). *See also* BOESE, *supra* note 23, at 1-17 to 1-22 (stating that the most significant changes to the Act include expanding the rights of *qui tam* relators and increasing their financial incentives to bring suit; clarifying that specific intent to defraud was not required to establish a violation; indicating that the preponderance of the evidence standard of proof applies to FCA cases; lengthening the statute of limitations period; and changing the recovery for violating the act from double to treble damages and increasing the penalties under the act).

[FN47]. 31 U.S.C. § 3730(e)(4)(B) (2000) (emphasis added). The amended FCA also contains a host of provisions dealing with *qui tam* actions. Section 3730 of the FCA discusses the procedures that a *qui tam* plaintiff must follow to file such an action; the rights of the *qui tam* plaintiff; the rights of the Government; the role played by the Government in deciding whether to intervene in the action; the monetary award provided to the *qui tam* plaintiff; and the actions that are jurisdictionally barred. *See id.* § 3730(b)-(e).

[FN48]. *Id.* § 3729(a) (2000). Civil violations occurring after September 29, 1999, are subject to increased penalties between \$5,500 and \$11,000 per violation. 64 Fed. Reg. 47,099 (Aug. 30, 1999).

[FN49]. 31 U.S.C. § 3729(b)-(c).

[FN50]. S. REP. No. 99-345, at 23-24 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5288-89.

[FN51]. *See* FRAUD STATISTICS, *supra* note 3, for a display of a chart entitled “Fraud Statistics-Overview” showing that, from October 1, 1986, to September 30, 2006, over \$11,062,851,302 has been recovered in total. *See also* BOESE, *supra* note 23, at 1-23 (stating that over \$8.5 billion has been paid out as of September 30, 2004).

[FN52]. See FRAUD STATISTICS, *supra* note 3, at 6.

[FN53]. See *id.* at 1, 6, for a chart entitled “Fraud Statistics- Overview,” showing that out of the \$11,062,851,302, \$10,665,243,139 comes from cases where the U.S. Government intervened, and a chart entitled “Fraud Statistics Qui Tam Intervention Decisions & Case Status,” showing that the U.S. Government intervened in 1,028 cases and declined intervention in 3,571, about 23 percent. Out of those rejected, nearly 85 percent were ultimately dismissed. *Id.* at 6.

[FN54]. See *id.*

[FN55]. See, e.g., *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006).

[FN56]. See *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 523 n.23 (3d Cir. 2007) (stating that “the FCA was most concerned with encouraging whistle-blowing by insiders with first-hand knowledge ...”); see also *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1034-35 (6th Cir. 1994) (stating that “Congress included a *qui tam* provision to encourage corporate whistleblowers”); *United States ex rel. Compton v. Midwest Specialties, Inc.*, No. 96-4374, 1998 WL 30811, at *8 (6th Cir. Jan. 22, 1998) (stating that “[t]he archetypal *qui tam* [False Claims Act] action is filed by an insider at a private company who discovers his employer has overcharged under a government contract”) (citing *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2550 (1996)).

[FN57]. See BOESE, *supra* note 23, at 1-24 (discussing the various proposed amendments to the FCA); see also Alan M. Grimaldi & Karen L. Manos, *Pretrial Motions Under the False Claims Act*, 29 PUB. CONT. L.J. 693, 694 (2000) (discussing the statutory language of the FCA and stating that it is “convoluted and poorly drafted”).

[FN58]. The act does allow a defendant to recover its “reasonable attorneys’ fees and expenses” if the plaintiff’s claim “was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.” 31 U.S.C. § 3730(d)(4) (2000). While this may allow a victorious contractor to recover some of the monies expended, more often than not, the *qui tam* plaintiff lacks the financial resources to pay such fees and expenses. Moreover, the monetary recovery of attorney fees months or years after one’s reputation is tarnished or ruined is of little consolation.

[FN59]. See *id.* § 3730.

[FN60]. *Id.* § 3730(b)-(c).

[FN61]. *Id.* § 3730(d).

[FN62]. See *supra* note 5 (stating that more than 73 percent of all concluded *qui tam* actions filed since 1986 have ended in dismissal).

[FN63]. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (stating that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”); see also *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (stating that the court “must accept as true all the factual allegations in the complaint, ... [and] indulge all reasonable inferences in favor of the non-movant”).

[FN64]. 31 U.S.C. § 3729(a) (2000). The elements of a False Claims Act case are “(1) a claim; (2) that is knowingly false or fraudulent; (3) presented to an officer or employee of the United States for payment or approval; and (4) that the false or fraudulent claim is material.” *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999).

[FN65]. The potential for a large damages verdict, however remote, may cause financial institutions to decline a government contractor's request for a business loan. Such a consequence may cause the contractor to slow the growth of his or her business while the suit continues or even cause the contractor to cease certain business operations as a result of not having sufficient financial resources to defend against the lawsuit and operate his or her business.

[FN66]. In addition to these grave consequences, defending such suits requires a tremendous expenditure of time and energy. Contractors must now turn their focus from their businesses to defending against allegations of fraud. Moreover, coping with these allegations is stressful and wears on the contractor. These suits occasionally become personal in light of the retaliation provisions under the FCA. *See* 31 U.S.C. § 3730(h). *See* Major Steven L. Schooner, *The FTCA Discretionary Function Exception Nullifies \$25 Million Malpractice Judgment Against the DCAA: A Sigh of Relief Concludes the DIVAD Contract Saga*, ARMY LAW., Mar. 1999, at 1-2, available at http://www.loc.gov/rr/frd/Military_Law/pdf/03-1999.pdf. (The author discusses litigation involving the Divisional Air Defense (DIVAD) gun system wherein the Government incorrectly alleged in criminal and civil FCA actions that General Dynamics mischarged the Government by approximately \$8 million. The article focuses on the events that followed the Government's decision to dismiss its suit because there was no basis for its allegations. Specifically, General Dynamics brought suit against the Government seeking to recover the \$29 million in costs and attorney fees it spent in defending against the allegations of fraud. Notably, and in addition to the significant costs sustained by General Dynamics, the Government's action damaged the reputations of several of General Dynamics' employees who were indicted.).

[FN67]. *See* FRAUD STATISTICS, *supra* note 3. While the statistics show that 1,096 cases have ended in settlement or the entry of judgment, the statistic does not indicate how many actually had merit. Presumably, a portion of the settled suits were done for nuisance reasons rather than because the suit had merit. If this assumption is correct, that would mean that even more than 73 percent of all actions filed lacked merit.

[FN68]. 31 U.S.C. § 3730(e)(4)(A) (2000). Although one might think that the bar applies to all publicly disclosed information, it is limited to the public disclosure of information 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.” *Id.*

[FN69]. *Id.* § 3730(e)(4)(B) (emphasis added). It also requires that the plaintiff has “voluntarily provided the information to the Government before filing an action under this section which is based on the information.” *Id.*

[FN70]. BOESE, *supra* note 23, at 4-93 through 4-94; *see also* *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 519 n.20 (3d Cir. 2007) (stating that “Congress sought a middle-ground between a restrictive approach that essentially eliminated the FCA's relator provisions and a free-for-all of parasitic suits based on publicly available information”).

[FN71]. *See* BOESE, *supra* note 23, at 4-98 through 4-100. *See, e.g.,* *Minn. Nurses Ass'n v. Allina Health Sys.*, 276 F.3d 1032, 1048 (8th Cir. 2002).

[FN72]. BOESE, *supra* note 23, at 4-98. Some courts have defined “direct” knowledge in a more technical, confusing manner. *See id.* for the statement that “[d]irect knowledge” has been defined as knowledge that is marked by absence of any intervening agency, instrumentality, or influence.” *See also* *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 799 (10th Cir. 2002).

[FN73]. *See, e.g.,* *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992) (stating that the *qui tam* plaintiff had direct knowledge because “he saw

[it] with his own eyes”).

[FN74]. *See, e.g., United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 333 (6th Cir. 1998).

[FN75]. *See, e.g., United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (stating that “a person who learns secondhand of the allegations of fraud does not have ‘direct’ knowledge”); *Hays v. Hoffman*, 325 F.3d 982, 990 (8th Cir. 2003) (finding that the *qui tam* plaintiff who obtained the information secondhand was not an original source).

[FN76]. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1410 (2007) (stating that “Stone did not have direct and independent knowledge of the information upon which his allegations were based”). Notably, only a few months after the Supreme Court's ruling, on July 25, 2007, a legislative proposal to overturn the *Rockwell* decision was introduced. *See* H.R. 3180 (referencing the decision and proposing to amend the FCA to “make it clear that ‘whistleblowers’ need only have direct knowledge of the public disclosure ... and not of the precise way in which the wrongdoing occurs”).

[FN77]. *Rockwell*, 127 S. Ct. at 1410 (stating that “[b]ecause Stone was no longer employed by Rockwell at the time, he did not know that the pondcrete was insolid; he did not know that pondcrete storage was insolid; he did not know that pondcrete storage was even subject to RCRA; he did not know that Rockwell would fail to remedy the defect; he did not know the insolid pondcrete leaked while being stored onsite; and, of course, he did not know that Rockwell made false statements to the Government regarding pondcrete storage”).

[FN78]. *See* Mark Troy, *The Supreme Court's Rockwell Decision Bars Qui Tam Relators From Piggybacking Onto the Government's Allegations*, ANDREWS GOV'T CONT. LITIG. REP., Apr. 9, 2007, at 1 (stating that “Stone did not qualify as an original source because the relevant events occurred long after his employment with Rockwell ended ... In this regard the court dealt a severe blow to qui tam relators whose allegations concern conduct that post-dates their employment with the defendant.”).

[FN79]. *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020-21 (E.D. Va. 1995) (recognizing that if relators were permitted to base their suits on information derived from public sources, “the putative relator is not sounding the alarm, but echoing it, and he does nothing to further the Government's efforts to ferret out fraud”).

[FN80]. *United States ex rel. Goldstein v. Fabricare Draperies, Inc.*, 236 F. Supp. 2d 506, 508 (D. Md. 2002), *aff'd*, 84 Fed. App. 341 (4th Cir. 2004), *cert. denied*, 542 U.S. 904 (2004) (stating that “[a]s the basis for his knowledge of the alleged deception, plaintiff claims that ‘[b]y virtue of his positions and experience in the industry, ... [plaintiff] has personal knowledge of ... [defendants'] operations”).

[FN81]. *See* BOESE, *supra* note 23, at 4-53 (stating that “[t]heoretically, a court may not deny jurisdiction over actions based upon ‘disclosures’ other than those specified in Section 3730(e)(4)(A)”). While some courts have interpreted public disclosures broadly, it is not so clear from the text.

[FN82]. *See id.* at 4-34 (stating that there have been cases where the relators have filed complaints based off of their own computer analysis of publicly available information or based on a general knowledge of the industry). In some of these cases, significant settlements have been obtained.

[FN83]. *See Detrick*, 909 F. Supp. at 1018-19; *see also* Grimaldi, *supra* note 57, at 701 (recognizing the unique analysis employed by the *Detrick* court in assessing the relator's “direct” knowledge).

[FN84]. *Detrick*, 909 F. Supp. at 1020.

[FN85]. *Id.* at 1019.

[FN86]. *Id.* at 1020.

[FN87]. 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (recognizing that a “public disclosure” only occurs “if the information forming the basis of the action was acquired in the circumstances described in 31 U.S.C. § 3730(e)(4)(A),” and stating that the public disclosure bar “does not prevent government employees from bringing *qui tam* actions based on information acquired during the course of their employment but not as the result of a government hearing, investigation or audit or through the news media.” After seemingly finding that no disclosure occurred and rejecting the district court’s analysis for “three reasons,” the court went on to find that plaintiff “was not someone with ‘independent knowledge of the information’ as required by the statute.”).

[FN88]. 730 F. Supp. 1031, 1036 (D. Colo. 1990) (emphasis added).

[FN89]. *See* BOESE, *supra* note 23, at 4-49 (stating that decisions requiring the relator to be the “original source” absent a public disclosure are “simply incorrect”). Most courts have determined that absent a public disclosure, knowledge is not required by the statute. *See id.* at 4-49 n.190 (citing cases for this proposition).

[FN90]. Notably, the Private Securities Litigation Reform Act (PSLRA) of 1995 requires that claims under section 10(b) of the Securities Exchange Act of 1934 must “state with particularity facts giving rise to a strong inference of scienter.” 15 U.S.C. § 78u-4(b)(2); *see also* Greebel v. FTP Software, Inc., 194 F.3d 185, 193 (1st Cir. 1999) (stating that the PSLRA was designed “to embody in the act itself at least the standards of Rule 9(b)”).

[FN91]. *See* BOESE, *supra* note 23, at 5-44 (citing cases from each circuit applying Rule 9(b) in the FCA context); *see, e.g.,* United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 227 (1st Cir. 2004) (stating that “[t]he legislative history of the 1986 FCA Amendments and the Supreme Court’s interpretations of the statute further support the conclusion that FCA claims involve ‘averments of fraud’ that must be pled with particularity under Rule 9(b)”).

[FN92]. As has been recognized, particularity is “not expressly required by the statutory language, [but] we have previously held that a complaint alleging violations of the False Claims Act must allege the circumstances surrounding the fraud with particularity as required by Rule 9(b).” Walburn v. Lockheed Martin Corp., 431 F.3d 966, 972 (6th Cir. 2006).

[FN93]. FED. R. CIV. P. 9(b).

[FN94]. United States *ex rel.* Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1308 (11th Cir. 2002).

[FN95]. *See id.* at 1309.

[FN96]. *See, e.g.,* Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999).

[FN97]. Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 877 (6th Cir. 2006) (quoting United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997) (citation omitted)); *see also* United States *ex rel.* Joshi v. St. Luke’s Hosp., Inc., 441 F.3d 552, 556 (8th Cir. 2006) (same); Corsello v. Lincare, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005) (same); United States *ex rel.* Detrick v. Daniel F. Young, Inc., 909 F. Supp. 1010, 1022 (E.D. Va. 1995) (same) (citations omitted).

[FN98]. Sanderson, 447 F.3d at 877 (citing Clausen, 290 F.3d at 1310); *see also* Joshi, 441 F.3d at 556 (stating that “the complaint must plead such facts as the time, place, and content of the defendant’s false representations, as well as the de-

tails of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result"); *Harrison*, 176 F.3d at 784 (stating that an FCA plaintiff must allege the following with particularity: "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby") (citations omitted).

[FN99]. *Clausen*, 290 F.3d at 1311 (stating that the "submission of a claim is thus not, as Clausen argued, a ministerial act, but the sine qua non of a False Claims Act violation") (internal quotations omitted); see also *United States ex rel. King v. Alcon Lab., Inc.*, 232 F.R.D. 568, 572 (N.D. Tex. 2005) (holding that the relator failed to satisfy the particularity requirement for pleading fraud because "King fails to identify any actual false claim submitted to the Government pursuant to one of these contracts") (citations omitted). While logic suggests that a plaintiff should not be able to rifle off a host of allegations without identifying at least one, actual false claim, many plaintiffs attempt to do so under the notion that defendant has engaged in a continuous scheme to defraud the Government and, thus, all claims submitted are fraudulent. See *Harrison*, 176 F.3d at 786, for the proposition that all claims submitted under a fraudulently obtained contract are tainted. While it may seem illogical to allow an FCA complaint to survive a motion to dismiss where it fails to identify even a single false claim, the *Harrison* ruling provides support for such a notion. Without identifying a single claim, a plaintiff can potentially survive a motion to dismiss by alleging that defendant committed fraud in the inducement by making a false certification in its Federal Supply Schedule application. Presumably, a single allegation with little particularity may enable plaintiff to gain a ticket to the discovery process because all claims submitted under the contract are tainted by the initial fraud.

[FN100]. *Sanderson*, 447 F.3d at 876.

[FN101]. *Id.*

[FN102]. *Id.*

[FN103]. *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 227 (1st Cir. 2004).

[FN104]. *Id.* (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (stating that "'Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions.' ... [O]ne such exception is Rule 9(b), which 'provides for greater particularity in all averments of fraud or mistake.'")).

[FN105]. *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002); *Corsello v. Lin-care, Inc.*, 428 F.3d 1008, 1013-14 (11th Cir. 2005) (same); *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (affirming the district court's dismissal for failure to satisfy Rule 9(b), stating that plaintiff's allegation "lacked sufficient 'indicia of reliability'") (citations omitted).

[FN106]. *Clausen*, 290 F.3d at 1310-11 ("(1) precisely what statements were made in what documents or oral representation or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the [government], and (4) what the defendants obtained as a consequence of the fraud.").

[FN107]. *Id.* at 1311 (emphasis omitted).

[FN108]. *Id.* at 1312.

[FN109]. See BOESE, *supra* note 23, at 5-65 n.247 (stating that "[r]arely, some courts will grant *qui tam* relators 'additional leeway' under Rule 9(b) when information is exclusively in the hands of the defendant") (citations omitted).

While some courts have allowed this relaxed approach in this limited context, several courts have declined to relax the pleading requirements, further demonstrating the lack of consistency in the treatment of *qui tam* actions. *Id.* at 5-66 (citing decisions from the Fifth and Eighth Circuits).

[FN110]. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1296 (3d ed. 2004) (stating that “there are legitimate issues as to the utility and evenhandedness in the application of the pleading requirement. For example, since Rule 9(b) provides no explicit standard for determining the amount of detail of the circumstances of the alleged fraud that must be pleaded, it can lead to disparate dismissal standards”).

[FN111]. *Id.*

[FN112]. *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 228 (1st Cir. 2004) (stating that “every circuit court that has addressed this issue has concluded that the heightened pleading requirements of Rule 9(b) apply to claims brought under the FCA”) (citations omitted).

[FN113]. *See supra* Section II (discussing how Congress amended the FCA in 1943 to decrease the number of parasitic *qui tam* suits and then again in 1986 to increase the number of lawsuits by adding the “original source” exception); *see also Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006) (the “Act has been repeatedly amended, representing ‘a long history of repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior’”) (quoting *Karvelas*, 360 F.3d at 225).

[FN114]. *See* FRAUD STATISTICS, *supra* note 3, at 1 (displaying a chart entitled “Fraud Statistics-Overview” showing that 382 *qui tam* actions were filed in 2006); *see also* BOESE, *supra* note 23, at 1-24 (stating that 394 cases were filed in 2005).

[FN115]. While there is some inconsistency in the application of the particularity requirement by the courts, in large part, the courts are effectively playing the role of gatekeeper. Thus, this article merely seeks to codify a well-established trend in the courts. This will give the courts greater confidence in applying the particularity requirements to FCA actions and possibly encourage a greater consistency in application because it is mandated by statute. In an effort to preserve much of the developed case law around the country, this article does not propose a specific test to be employed by the courts in assessing particularity. Rather, and in conjunction with each circuit's specific “particularity” test, this article proposes the additional requirement of “direct knowledge.”

[FN116]. To accommodate these proposed amendments, the sections following those proposed need only be renumbered. In recognition of the significant body of case law dealing with the public disclosure provision, the article does not propose any amendment to the public disclosure and original source provisions with the exception that Congress incorporate the particularity requirement proposed herein. While it may make more sense for Congress to amend the “original source” provisions to remove the jurisdictional bar and simply make the “original source” requirements elements of an FCA claim where there has been a public disclosure, this is a topic for another article.

[FN117]. If Congress was in favor of adopting a particularity test to encourage greater consistency, the analysis employed by the Eleventh Circuit in *Clausen* appears to be most thorough in attempting to ensure the sufficiency of a *qui tam* plaintiff's allegations. *See United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002).

[FN118]. In current practice, there are many *qui tam* plaintiff law shops that specialize in bringing these actions. *See* BOESE, *supra* note 23, at 1-5 (stating that the *qui tam* provisions of the FCA are attracting “a wide array of plaintiffs,

lawyers, interest groups, and industries to the arcane world of ‘false claims’). Because they are very familiar with the practice, it is not a significant undertaking to put together a *qui tam* complaint. In fact, standard or formlike pleadings are not uncommon to initiate such an action. Many of these attorneys are not heavily concerned with whether these actions will ultimately prevail. They know that if they file a certain number of them, at least one will result in some recovery. And even if they do not prevail, nuisance value settlements are always a possibility. If the act itself required that the plaintiff must have “direct” knowledge of the information underlying his allegations, and required that the plaintiff state the basis of his allegations with particularity, these individuals may reconsider.

[FN119]. This benefit would be even more significant if Congress adopts a specific particularity test.

[FN120]. See BOESE, *supra* note 23, at 5-45 through 5-46 (stating that Rule 9(b) has five primary purposes) (citations omitted); see also *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (stating that “[f]irst, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of ... Second, Rule 9(b) exists to protect defendants from frivolous suits ... A third reason for the rule is to eliminate fraud actions in which all of the facts are learned after discovery ... Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.”).

[FN121]. While some may argue that these requirements will result in increased litigation, this is unlikely. As it currently stands, many defendants challenge such *qui tam* actions for failure to state a claim under Rules 9(b) and 12(b)(6). While the statutory requirements will allow defendants to challenge *qui tam* complaints on the additional ground of “direct” knowledge, such arguments will likely be combined in a single motion as these concepts are related. Moreover, and even to the extent motions practice increases, the number of *qui tam* cases that advance past this stage will likely decrease, which may expedite the handling of cases that advance. In addition, the requirements may have the effect of decreasing the number of suits filed, at least those based on speculation and hearsay. Therefore, the negative consequences of the proposed amendments are few, if any.

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