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Data Mining for *qui tam* False Claims Act Suits: Business Opportunity for the Technology Age, or Doomed Goose Chase?

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I. INTRODUCTION

In March 2016, *WIRED* magazine ran a story about John Mininno, an enterprising New Jersey lawyer that used data mining of public Medicare data sets and analytics to recoup huge awards from the government for blowing the whistle on fraud against the government. Mininno is not alone—several other companies have sprouted up around the business model of turning data into lucrative whistleblower awards under the False Claims Act (FCA). Under the FCA, plaintiffs wear the hat of the government, bring suits challenging fraud perpetrated against government entities, and share in the awards.

When *WIRED*'s article was published, Mininno's business was funded by Wall Street and was working to turn mountains of health records into gold. Since that time, however, corporate whistleblowing's path to economic viability has been rocky, to say the least. Defendants and even the federal government itself (i.e., the very victims that these whistleblowers purport to protect) have challenged lawsuits by Mininno and other corporate whistleblowers, contending that the charges are meritless, and that the plaintiffs do not have standing to bring them. We now stand on a precipice that will decide the very livelihood of the business that Mininno and others have cultivated.

This Article discusses the recent trend of corporate whistleblower cases based on publicly available data, analyzes the background of the law these corporate whistleblowers rely on, discusses the critical response voiced against their business model, and reads tea leaves with respect to how the courts may ultimately rule. The government and the courts may never embrace whistleblowing for profit, but we may soon see whether they will give sufficient leeway to allow it.

II. BACKGROUND

A. A High Tech Business Opportunity

WIRED labeled Mininno a "bounty hunter" and "big-data entrepreneur" that had "a nose for mischief, a gift for persuasion, and the technical chops to identify nonobvious patterns in impenetrable thickets of diagnostic codes and billing data."[1] Earlier in his career, Mininno tried his hand at criminal defense,[2] slip and falls,[3] medical malpractice,[4] products liability,[5] and personal injury cases.[6] According to the *WIRED* article, Mininno's experience with medical negligence cases honed his ability to find evidence of fraud in medical billings.[7] Thus, when the Centers for Medicare and Medicaid Services (CMS) released bulk data on several thousand medical practices, Mininno saw "a massive business opportunity" to cash in under the government's whistleblower laws.[8] Mininno realized that "he could build a business around using data to find certain patterns, identify likely informants (usually former employees), and turn them into false-claims plaintiffs."[9] Based on this data, Mininno thought he could build whistleblower cases without the need to advertise to find informants, to spend time verifying informants' stories, or to investigate whether the alleged fraud was the type that might justify the time and expense of bringing a case.[10] "He could use analytics to troll for sketchy providers and insiders, transforming that rare, long-odds game into a quantitative, target-rich discovery process with gumshoe work on the back end."[11] Mininno pitched his idea to a Wall Street investor and created his company, the National Healthcare Analysis Group.[12]

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1. J.C. Herz, *Medicare Scammers Steal $60 Billion a Year. This Man Is Hunting Them*, WIRED (Mar. 7, 2016), http://www.wired.com/2016/03/john-mininno-medicare/.
2. *See* Sciulli v. United States, 142 F. App'x 64, 64 (3d Cir. 2005) (attorney for defendant).
3. *See* Traa v. Marriott Corp., No. 05-4290 (FLW), 2006 WL 2319182, at *1 (D.N.J. Aug. 9, 2006) (attorney for plaintiff).
4. *See* Glenn v. Lewis, No. 08-CV-2582, 2009 WL 140492, at *1 (D.N.J. Jan. 20, 2009) (attorney for plaintiff).
5. *See* Thomas v. CMI Terex Corp., No. 07-3597 (JBS/KMW), 2009 WL 3068242, at *7 (D.N.J. Sept. 21, 2009) (attorney for plaintiff).
6. *See* Miletta v. United States, No. 02-1349 (JBS), 2005 WL 1318867, at *1 (D.N.J. May 27, 2005) (attorney for plaintiff).
7. Herz, *supra* note 1.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

However, Mininno realized the CMS data alone would likely "churn up thousands of false positives."[13] Mininno therefore expanded his dataset by cross-linking databases to identify referral networks because "[i]f a practice has been investigated, it's worth knowing who sends them patients, or vice versa."[14] His algorithms combed data looking for suspicious trends (e.g., lack of randomness in billings), perpetually sick patients that never recovered, and billings that suspiciously clustered just above a payment threshold.[15] Mininno's developers also assembled a database of 70,000 healthcare workers, extracted from publicly available sources, to find witnesses of the fraud.[16] Mininno explained that the ideal informants were qualified nurses who worked at a suspicious clinic for only a few months because they may have witnessed something that made them leave.[17]

WIRED may have made Mininno and his business the face of corporate whistleblowing enterprises, but Mininno is not the only person using technology and large data sets to fish for monetary awards meant for whistleblowers. Another corporate data analytics whistleblower, Integra Med Analytics, LLC, crunches Medicare claims data to specifically target hospitals.[18] Unlike a typical whistleblower action, Integra does not have direct knowledge of any wrongdoing. Instead, the company uses algorithms and statistical data analysis to examine Medicare claims data and allege that the hospitals inflated reimbursement claims via improper procedure codes. Integra has filed federal whistleblower lawsuits, alleging upcoding of over $61 million in one case[19] and over $188 million in another.[20]

This method of mining public information to build whistleblower cases based on hints of fraudulent practices has been used in other industries.[21] For example, in *Customs Fraud Investigations, LLC v.*

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *See, e.g.*, United States *ex rel.* Integra Med Analytics, LLC v. Providence Health & Servs., No. 2:17-cv-01694, 2019 WL 6973547, at *1 (C.D. Cal. Oct. 8, 2019) (using comparative analysis of claims data received from CMS).
19. *See* United States *ex rel.* Integra Med Analytics, LLC v. Baylor Scott & White Health, No. 5:17-CV-886-DAE, 2019 WL 3713756, at *1 (W.D. Tex. Aug. 5, 2019).
20. *See* United States *ex rel.* Integra Med Analytics, LLC v. Providence Health & Servs., No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *1 (C.D. Cal. July 16, 2019).
21. *See* United States *ex rel.* Customs Fraud Investigations, LLC v. Victaulic Co., 839 F.3d 242, 256-57 (3d Cir. 2016).

Victaulic Co., the corporate whistleblower alleged a company was scamming the government by avoiding customs duties owed for its pipe-fittings.[22] The whistleblower based its claims not on things it observed while working with the allegedly shady pipe maker, but on data analysis of markings on pipe-fittings sold in the United States. The whistleblower derived its evidence through analytical cross-referencing of the defendant's shipping data with the country of origin markings in eBay listings for the defendant's products, and the Third Circuit permitted this approach.[23]

B. The False Claims Act

1. Past and Present

The law that gave rise to Mininno's whistleblowing business is the FCA, and its ins and outs deserve significant attention. Known as "Lincoln's Law,"[24] the FCA "was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts."[25] It was adopted after "a series of sensational congressional investigations" prompted hearings where witnesses "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war."[26] According to testimony uncovered through the investigations, purchases from unscrupulous vendors included the following:

- Ammunition shells that were "filled not with the proper explosive materials for use, but with saw-dust";[27]
- Muskets determined to be "defective";[28]
- "[R]otten and condemned blankets";[29]
- Coats that were "unfit for issue to the troops";[30]
- Horses that were dead, dying, or unfit for service;[31]

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22. *Id.*
23. *Id.*
24. Am. Bankers Mgmt. Co., Inc. v. Heryford, 885 F.3d 629, 634 (9th Cir. 2018).
25. S. REP. NO. 99-345, at 8 (1986).
26. United States v. McNinch, 356 U.S. 595, 599 (1958).
27. CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863).
28. H.R. REP. NO. 37-2, at 1, 7 (2d Sess. 1862).
29. *Id.* at L.
30. *Id.* at 1477.
31. *Id.* at L.

- Coffee that "seems to be a compound of roasted peas, of licorice, and a variety of other substances";[32] and
- Boats that were "utterly worthless for all purposes of making anything out of them."[33]

The FCA has grown from its Civil War roots. Recoveries in the modern area have been obtained from a wide range of areas, including health care, military supplies, and federal loan and grant programs.[34] Today, the FCA forbids "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" and "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim," where the claim is submitted to the federal government for payment.[35]

The elements of a FCA claim are generally: "(1) a false statement or fraudulent course of conduct, (2) made with the scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due."[36] FCA defendants face treble damages—i.e., three times the amount of damages the government has sustained—plus civil penalties of up to $21,916 per false claim.[37] In 2019 alone, the government recovered more than $3 billion under the FCA.[38]

2. The FCA's Impact on the Technology Industry

Naturally, the FCA significantly impacts the technology sector—including those that develop electronic health records software,[39] those in the information technology field,[40] and defense companies in the

32. *Id.*
33. *Id.* at 233.
34. *See* Press Release, U.S. Dep't of Def., Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), http://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.
35. 31 U.S.C. § 3729(a)(1) (2019).
36. United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 902 (9th Cir. 2017), *cert. denied sub nom.* Gilead Scis., Inc. v. United States *ex rel.* Campie, 139 S. Ct. 783 (2019) (citing United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1174 (9th Cir. 2006)).
37. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9) (2017) (adjusting penalties for inflation).
38. Press Release, *supra* note 34.
39. *See* Press Release, U.S. Dep't of Justice, Electronic Health Records Vendor to Pay $57.25 Million to Settle False Claims Act Allegations (Feb. 6, 2019), http://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-5725-million-settle-false-claims-act-allegations.
40. *See* Press Release, U.S. Dep't of Justice, U.S. Files False Claims Act Suit Against Mission Support Alliance LLC, Several Lockheed Affiliates, and Jorge Francisco Armijo for Inflated Information Technology Subcontract Costs (Feb. 8, 2019), http://www.justice.gov/opa/pr/united-states-files-false-claims-act-suit-against-mission-support-alliance-llc-several.

technology sector.[41] From a practical standpoint, this makes sense. Any contract, subcontract, or grant that is funded by the government has FCA implications. A major reason for this is that "[t]he U.S. government is the single largest purchaser of goods and services in the world."[42] In fact, the government devotes over $700 billion annually to Medicare spending alone[43] and over $580 billion annually to Medicaid spending.[44] Similarly, the Department of Defense's annual budget is over $686 billion.[45] The modern healthcare and military industries are heavily dependent on technology.[46] Interface between the FCA—meant to root out fraud in government spending—and the technology industry is therefore inevitable.

3. Whistleblower Enforcement Through *qui tam* Provisions

When Congress enacted the FCA in 1863, it followed a "long tradition . . . in England and the American Colonies" and authorized private persons to bring suit to recover damages suffered by the United States.[47] Thus, while the Attorney General may enforce these provisions, the FCA also allows private citizens to "bring civil actions in the Government's name."[48] When brought by a private party, an "enforcement action under the FCA is called a *qui tam* action, with the private party referred to as the 'relator.'"[49]

41. *See* Press Release, U.S. Dep't of Justice, U.S. Attorney Announces $110,000 Settlement with Tech Company and Its CEO to Resolve Allegations of False Claims on Defense Procurement Contract (Dec. 17, 2018), http://www.justice.gov/usao-co/pr/us-attorney-announces-110000-settlement-tech-company-and-its-ceo-resolve-allegations.

42. KL GATES, GOVERNMENT CONTRACTS AND PROCEDURE (2011), http://www.klgates.com/files/upload/Public_Policy_Govt_Contracts.pdf.

43. *NHE Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 5, 2019, 1:18 PM), http://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/national healthexpenddata/nhe-fact-sheet.html.

44. *Id.*

45. Press Release, U.S. Dep't of Defense, DoD Releases Fiscal Year 2019 Budget Proposal (Feb. 12, 2018), http://dod.defense.gov/News/News-Releases/News-Release-View/Article/1438798/dod-releases-fiscal-year-2019-budget-proposal/.

46. *See Technology's Vital Role in Healthcare and Society—National Health IT Week*, HEALTHCARE INFO & MGMT. SYSTEMS SOC'Y (Sept. 19. 2017), http://www.himss.org/news/technology-s-vital-role-healthcare-and-society-national-health-it-week; *see also* Noah Shachtman, *Taking Aim at Military Technology*, WIRED (Mar. 19, 2003, 2:00 AM), http://www.wired.com/2003/03/taking-aim-at-military-technology/.

47. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768, 772-74 (2000).

48. Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 404 (2011).

49. United States *ex rel.* Eisenstein v. City of N.Y., 556 U.S. 928, 932 (2009) (quoting *Vt. Agency of Nat. Res.*, 529 U.S. at 769).

When a private citizen files a *qui tam* complaint under the FCA, the complaint must remain under seal for at least sixty days.[50] During that time, the government must determine whether it will intervene in the lawsuit.[51] With a showing of good cause, the government may request extensions of the sixty-day period during which the suit remains under seal.[52] If the government chooses to intervene in the *qui tam* action, the relator is entitled to 15%-25% of the proceeds of the action or settlement.[53] If the government declines to intervene in the action, the relator may still proceed with the case on behalf of the United States and is entitled to 25%-30% of the proceeds of the action or settlement.[54] Once a relator proceeds with an action or settlement, they cannot later dismiss the lawsuit unless "the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[55] Of note, even if the Attorney General initially declines to intervene in the suit, the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause."[56]

4. Whistleblower Standing to Bring *qui tam* Actions

One might naturally think that a whistleblower that was not actually harmed by the alleged fraud might lack standing to bring a *qui tam* action. The Supreme Court addressed this standing concern in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[57] The *Stevens* case "questioned whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency)" under the FCA.[58] There, a relator brought a cause of action against the Vermont Agency of Natural Resources alleging that the Agency had submitted false claims to the Environmental Protection Agency in connection with federal grant programs.[59] The federal government declined to intervene in the action, and the Vermont Agency of Natural Resources moved to dismiss the case.[60]

50. 31 U.S.C. § 3730(b)(2) (2012).
51. *Id.* § 3730(b)(4).
52. *Id.* § 3730(b)(3).
53. *Id.* § 3730(d)(1).
54. *Id.* § 3730(d)(2).
55. *Id.* § 3730(b)(1).
56. *Id.* § 3730(c)(3).
57. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 765 (2000).
58. *Id.* at 768.
59. *Id.* at 770.
60. *Id.*

The Supreme Court acknowledged that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party."[61] But the complaining party in a *qui tam* suit under the FCA is a relator who has suffered no injury.[62] The only injury from a FCA violation is "injury to the United States—both the injury to its sovereignty arising from violation of its laws and the proprietary injury resulting from the alleged fraud."[63]

The Court nonetheless held that "a qui tam relator under the FCA has Article III standing."[64] The decision rested on "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor."[65] As the Supreme Court explained, "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim" from the United States to the relator.[66] It is only by virtue of that assignment that a relator has Article III standing to assert "the United States' injury in fact."[67] *Stevens* therefore makes clear that a relator's Article III standing depends fully on his or her status "as a partial assignee of the United States."[68]

C. Problems Presented by the Lure of qui tam *Awards and* qui tam *Limitations*

Qui tam provisions of the FCA were meant "to strengthen the Government's hand in fighting false claims" and "encourage more private enforcement suits."[69] Senator Grassley of Iowa described *qui tam* rewards as stemming "from a realization that the Government needs help—lots of help—to adequately protect taxpayer funds from growing and increasingly sophisticated fraud."[70] The *qui tam* provision has presented problems, however.

61. *Id.* at 771 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).
62. *Id.* at 772-73.
63. *Id.* at 771.
64. *Id.* at 778.
65. *Id.* at 773.
66. *Id.*
67. *Id.* at 774.
68. *Id.* at 773.
69. Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 298 (2010).
70. 132 CONG. REC. 28,580 (1986).

In general, FCA litigation demands "a tremendous expenditure of time and energy."[71] And FCA suits brought by relators are generally less meritorious than those pursued by the government. As the Supreme Court noted, *qui tam* relators in general are "less likely than is the Government to forgo an action involving a technical violation but no harm to the public fisc."[72] Indeed, only about 5% of the *qui tam* cases that the government has refused to join have resulted in recoveries.[73] The number of new *qui tam* actions, and the proportion of FCA cases brought by relators under the *qui tam* provisions, has increased dramatically in recent years.[74] In 1987, just thirty *qui tam* suits were filed; since 2011, the number of *qui tam* suits filed annually is in the 600s and 700s.[75]

Defendants also suffer significant reputational hardship from having a FCA action filed against them. The "mere presence of allegations of fraud may cause [government] agencies to question the contractor's business practices."[76] As the Department of Justice (DOJ) has recognized, these financial and reputational risks could lead some businesses to exit the government program altogether.[77]

These issues are arguably magnified when the relator's knowledge does not come from insider knowledge, but from research and data analysis. As one amicus brief stated:

> An expansion of the class of relators to persons with no personal knowledge of fraud, including persons who are merely recruited by their attorneys, would divert even more time and capital away from healthcare companies' research and development efforts. The added expenses could significantly increase the already substantial costs of developing and marketing new treatments that treat, cure, or prevent so many debilitating and life-threatening diseases and conditions. And whatever recoveries that ultimately result will serve not as a reward to a whistleblower who risked her job and

71. Todd Canni, *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 Knowledge*, 37 PUB. CONT. L.J. 1, 11 (2007).

72. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997).

73. *See* Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 767 (5th Cir. 2001) (Smith, J., dissenting) ("Of the 1,966 [of all qui tam] cases that the government has refused to join, only 100 have resulted in recoveries (5%) . . . .").

74. *Fraud Statistics—Overview October 1, 1986—September 30, 2018*, U.S. DEP'T JUST., CIV. DIVISION, http://www.justice.gov/civil/page/file/1080696/download (last visited Mar. 9, 2020).

75. *Id.*

76. Canni, *supra* note 71.

77. Michael D. Granston, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, U.S. DEP'T JUSTICE (Jan. 10, 2018), http://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

> reputation to expose fraud among her coworkers, but as a windfall to a stranger no better situated to sue than any member of the public.[78]

Congress, the DOJ, and the courts have recognized the risks in recent years and have instituted significant bulwarks against the concern of opportunistic *qui tam* relators.

1. Dismissal Power of the DOJ

a. The Government's Authority to Dismiss a Relator's *qui tam* Action

The government retains broad authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss *qui tam* actions brought in its name. This dismissal power persists even when the government has opted not to intervene.[79] Yet there is an emerging split among courts over what the government must show to warrant dismissal: some require the government to establish a rational reason for dismissal while others simply give the government unfettered discretion to dismiss any *qui tam* action.

United States v. Academy Mortgage Corp. is illuminative of the first standard.[80] The relator there claimed that the defendant defrauded the government by falsely certifying loans for government insurance.[81] The relator's initial complaint limited the alleged misconduct to a one-and-a-half-year period at the branch where the relator worked.[82] The government declined to intervene and after the relator filed an amended complaint, the government moved to dismiss under § 3730(c), alleging that the lawsuit would not provide sufficient benefit to justify the expenditure of government resources that allowing the case to proceed would entail.[83] To resolve the government's motion, the District Court for the Northern District of California turned to the Ninth Circuit's decision in *United States*

78. Motion for Leave to File Brief & Brief for the Pharmaceutical Research & Manufacturers of America, Biotechnology Innovation Organization, American Health Care Association & National Center for Assisted Living, National Association of Chain Drug Stores, Senior Care Pharmacy Coalition, & National Defense Industrial Association as Amici Curiae in Support of Petitioner, PharMerica Corp. v. United States *ex rel.* Marc Silver, No. 18-1044, 2019 WL 1200756, at *15-16 (S. Ct. Mar. 11, 2019).

79. United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 753 (9th Cir. 1993) (citing Juliano v. Fed. Asset Disposition Ass'n, 736 F. Supp. 348 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992)).

80. United States v. Acad. Mortgage Corp., No. 16-cv-02120-EMC, 2018 WL 3208157, at *1 (N.D. Cal. June 29, 2018).

81. *Id.*

82. *Id.*

83. *Id.*

ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.[84] Under *Sequoia*, the government is first required to identify "a valid government purpose" and demonstrate "a rational relation between dismissal and accomplishment of the purpose."[85] After the government establishes this element, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal."[86] Citing *Sequoia*, the *Academy* court explained that the government failed "to conduct a minimally adequate investigation" because it only reviewed one-and-a-half years of the alleged misconduct, even though the allegations in the amended complaint spanned a period of six years.[87] The court also noted that even if the government had met the first element of the *Sequoia* burden-shifting approach, the relator had met her burden by showing that the government's failure to fully investigate the claim resulted in the motion to dismiss being "fraudulent, arbitrary and capricious, or illegal."[88]

On the other hand, *United States ex rel. Maldonado v. Ball Homes, LLC* reflects the second standard.[89] There the relator's *qui tam* lawsuit asserted that the defendants took part in a fraudulent scheme by submitting falsified documents to obtain loans issued by the Federal Housing Administration.[90] The government declined to intervene and moved to dismiss months later.[91] The *Maldonado* court noted that "courts have developed two differing standards for evaluating government requests to dismiss qui tam actions," and cited to *Sequoia* and *Swift v. United States*.[92] The court explained that *Sequoia* requires the government to show a valid government purpose that is rationally related to dismissal, while *Swift* held that the government does not need to make such a showing; instead it has an "unfettered right" to dismiss a *qui tam* action.[93] The court granted the government's motion to dismiss after it adopted the stance articulated in *Swift* and held that the government "has virtually unfettered discretion to dismiss a qui tam action."[94]

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84. *Id.*
85. United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998).
86. *Id.*
87. *Acad. Mortgage Corp.*, 2018 WL 3208157, at *1, *3.
88. *Id.*
89. *See* United States *ex rel.* Maldonado v. Ball Homes, LLC, No. 5:17-379-DCR, 2018 WL 3213614 (E.D. Ky. June 29, 2018).
90. *Id.* at *1.
91. *Id.*
92. *Id.* at *3.
93. *Id.*
94. *Id.*

b. The Granston Memo

A leaked January 10, 2018, DOJ memo issued by Michael Granston—then Director of the Department's Commercial Litigation Branch—to attorneys in its Civil Fraud Section put the government's authority to dismiss a relator's *qui tam* action into sharp focus.[95] The Granston Memo first recognized the "record increases" in *qui tam* actions filed under the FCA and noted that despite the substantial increase in filings, the rate of government intervention had remained static.[96] The Granston Memo expressed apprehension over the significant resources required to monitor these cases, and the potential that meritless cases could lead to adverse decisions that hinder the government's ability to pursue cases in the future.[97] Thus, in a significant policy shift, the Granston Memo stated that DOJ lawyers should consider dismissal under 31 U.S.C. § 3730(c)(2)(A) an "important tool" to advance governmental interests, preserve government resources, and avoid negative precedent.[98]

The Granston Memo listed seven factors DOJ prosecutors should use to evaluate whether to exercise dismissal powers: (1) whether the complaint is facially lacking in merit—either because the relator's legal theory is inherently defective, or because the relator's factual allegations are frivolous; (2) whether the lawsuit duplicates a preexisting government investigation and adds no useful information; (3) whether an agency has determined the *qui tam* action threatens to interfere with an agency's policies or the administration of its programs and has recommended dismissal to avoid those effects; (4) whether dismissal is necessary to protect the DOJ's litigation prerogatives; (5) whether dismissal will potentially safeguard classified information; (6) whether expected costs are likely to exceed any expected gain; and (7) whether there are problems with the relator's action that frustrate the government's effort to conduct a proper investigation.[99]

In a speech to the Federal Bar Association, Deputy Assistant Attorney General Stephen Cox further clarified the DOJ's stance in relation to the Granston Memo.[100] Cox clarified that *qui tam* actions will

95. Granston, *supra* note 77.
96. *Id.* at 1.
97. *Id.*
98. *Id.* at 2.
99. *Id.*
100. Press Release, U.S. Dep't of Justice, Deputy Associate Attorney General Stephen Cox Delivers Remarks at the Federal Bar Association Qui Tam Conference (Feb. 28, 2018), http://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association.

continue to play a significant role in FCA enforcement,[101] and that the DOJ will not actively oppose whistleblower cases unless "the underlying factual or legal theories clearly lack merit."[102] Cox explained that "monitoring meritless cases is not a good use of Department resources; litigating these cases is not a good use of judicial resources; and forcing defendants to defend these cases is not in the interests of justice."[103] He also added that dismissal may be appropriate even if a claim is false where it did not materially harm the government or impact payments made by the government.[104]

The Granston Memo has not escaped criticism. Senator Grassley, for example, criticized the seventh factor—"preserving government resources"—as problematic by virtue of its inherent vagueness.[105] Grassley observed that dismissing *qui tam* cases under the guise of "preserving government resources" is "pretty darn vague . . . . Just think of all the mischief those three words can bring."[106] Grassley asserted that there are "reasons to be suspicious" with respect to the "various suspicious ways that people who are faceless bureaucrats can undermine" the FCA.[107]

2. The Public Disclosure Bar

The public disclosure bar is another statutory response to problems with whistleblower suits. Congress enacted the public disclosure bar "to prevent 'parasitic' *qui tam* actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of government fraud."[108] The public disclosure bar prohibits a relator from bringing a FCA lawsuit based on a fraud that has already been disclosed through public channels, unless the relator is an "original source" of the information.[109] Specifically, the public disclosure bar is triggered when: "(1) the disclosure at issue occurred through one of the channels specified in the statute;[110] (2) the disclosure was 'public'; and

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Attorney General Confirmation Hearing, Day 1*, C-SPAN (Jan. 15, 2019), http://www.c-span.org/video/?456626-1/attorney-general-nominee-william-barr-confirmation-hearing.
106. *Id.*
107. *Id.*
108. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347 (4th Cir. 1994).
109. 31 U.S.C. § 3730(e)(4)(A) (2012).
110. The channels of public disclosure are generally those made in reports, hearings, audits or investigations of the federal government, and the news media. *Id.*

(3) the relator's action is 'based upon' the allegations or transactions publicly disclosed."[111] It therefore serves to "weed out FCA claims not based on genuine whistleblower information."[112] Without this bar, relators with no special insight into corporate practices "have a strong dollar stake in alleging fraud whether or not it exists."[113] An original source who can bring a lawsuit based on publicly disclosed allegations is 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" suit.[114]

In *Schindler Elevator Corp. v. United States ex rel. Kirk*, the Supreme Court explained that the "report" listed in the public disclosure bar should be interpreted broadly.[115] It therefore held that the Department of Labor's responses to Freedom of Information Act (FOIA) requests issued by the relator were "reports" under the FOIA because each "was an 'official or formal statement' that '[gave] information' and 'notif[ied]' Mrs. Kirk [the relator] of the agency's resolution of her FOIA request."[116] Courts have relied on this same reasoning to find that CMS data files are "reports" for public disclosure purposes because they are "something that gives information."[117] Courts have also held that information gleaned from

111. United States *ex rel.* Solis v. Millennium Pharm., Inc., 885 F.3d 623, 626 (9th Cir. 2018) (quoting United States *ex rel.* Mateski v. Raytheon Co., 816 F.3d 565, 570 (9th Cir. 2016)).

112. United States *ex rel.* Hong v. Newport Sensors, Inc., 728 F. App'x 660, 662 (9th Cir. 2018).

113. *Constitutionality of the Qui Tam Provisions of the False Claims Act*, U.S. DEP'T JUST., OFF. LEGAL COUNS. (July 18, 1989), http://www.justice.gov/file/24271/download.

114. 31 U.S.C. § 3730(e)(4)(B).

115. Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 408 (2011).

116. *Id.* at 411; *see also id.* at 407-09 (providing several definitions of "report" based on different dictionaries).

117. United States *ex rel.* Conrad v. Abbott Labs., Inc., No. 02-11738-RWZ, 2013 WL 682740, at *4-5 (D. Mass. Feb. 25, 2013) (finding data files on the CMS website fell within *Schindler's* definition of "report"); *see, e.g.*, United States *ex rel.* Ibanez v. Bristol-Myers Squibb Co., No. 1:11-cv-029 (WOB), 2015 WL 12991207, at *4 (S.D. Ohio Sept. 24, 2015) (finding that Medicare Provider Utilization and Payment Data from CMS qualified as a "report" since "the aggregate data are an official statement of facts"); *see also* United States *ex rel.* Ambrosecchia v. Paddock Labs., LLC, No. 4:12CV2164 RLW, 2015 WL 5605281, at *5-6 (E.D. Mo. Sept. 23, 2015) (finding that the public disclosure bar applied, in part, because the relator relied on the same government reports, including public data files, as the relator in *Conrad*). *But cf.* United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., No. CV 08-1885-GHK (AGRx), 2012 WL 11977661, at *3 (C.D. Cal. 2012), *rev'd on other grounds*, United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121 (9th Cir. 2015); United States *ex rel.* Davis v. Prince, 753 F. Supp. 2d 569, 588 (E.D. Va. 2011) ("There can be little doubt that the 2005 OIG Audit Report is a qualifying public disclosure.").

Internet sources qualifies under the "news media" public channel listed in the public disclosure bar.[118]

"[F]or a relator's allegations to be 'based upon' a prior public disclosure"[119]—and therefore trigger that element of the public disclosure bar—"the publicly disclosed facts need not be identical with, but only substantially similar to, the relator's allegations."[120] Thus, "the phrase 'based upon' in § 3730(e)(4)(A) means 'substantially similar to,' not 'derived from.'"[121] A relator's allegations are substantially similar to prior public disclosures where the "essential elements" of the purported fraudulent transaction were publicly disclosed.[122] This includes cases where the relator infers a fraudulent transaction from facts revealed in public disclosures.[123] The public disclosure bar does not dictate that a

118. *See, e.g.*, United States *ex rel.* Beauchamp v. Academi Training Ctr., LLC, 816 F.3d 37, 43 n.6 (4th Cir. 2016) ("Courts have unanimously construed the term 'public disclosure' to include websites and online articles."); United States *ex rel.* Osheroff v. Humana, Inc., 776 F.3d 805, 813 (11th Cir. 2015) (concluding that "news media" included medical clinics' publicly available websites because the term "has a broad sweep" and the clinics' websites were "intended to disseminate information about the clinics' programs"); United States *ex rel.* Hong v. Newport Sensors, Inc., No. SACV 13-1164-JLS (JPRx), 2016 WL 8929246, at *5 (C.D. Cal. May 19, 2016) ("Information publicly available on the Internet generally qualifies as 'news media.'"), *aff'd*, 728 F. App'x 660 (9th Cir. 2018); United States *ex rel.* Carter v. Bridgepoint Educ., Inc., No. 10-CV-1401 JLS (WVG), 2015 WL 4892259, at *6 (S.D. Cal. Aug. 17, 2015) (holding that online commentary on the San Diego Reader website qualified as news media); United States *ex rel.* Green v. Serv. Contract Educ. & Training Tr. Fund, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) (explaining courts have construed "news media" to include "readily accessible websites"); United States *ex rel.* Brown v. Walt Disney World Co., No. 6:06-cv-1943-Orl-22KRS, 2008 WL 2561975, at *4 (M.D. Fla. June 24, 2008) (finding Wikipedia qualified as "news media"); United States *ex rel.* Unite Here v. Cintas Corp., No. C 06-2413 PJH, 2007 WL 4557788, at *14 (N.D. Cal. Dec. 21, 2007) (finding the facts of the case were publicly disclosed in the news media because "that information was available on the Internet").

119. United States *ex rel.* Mateski v. Raytheon Co., 816 F.3d 565, 573 (9th Cir. 2016) (quoting United States *ex rel*. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1199 (9th Cir. 2009), overruled by United States *ex rel*. Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121 (9th Cir. 2015)).

120. *Meyer*, 565 F.3d at 1199.

121. Malhotra v. Steinberg, 770 F.3d 853, 858 (9th Cir. 2014) (first quoting United States *ex rel.* Meyer v. Horizon Health Corp., 565 F.3d 1195, 199 (9th Cir. 2009); and then quoting United States *ex rel.* Biddle v. Bd. of Trs. of the Leland Stanford Junior Univ., 161 F.3d 533, 539-40 (9th Cir. 1998)).

122. United States *ex rel.* Kirk v. Schindler Elevator Corp., 437 F. App'x 13, 17 (2d Cir. 2011).

123. United States *ex rel.* Lissack v. Sakura Glob. Capital Mkts., Inc., No. 95 Civ. 1363 (BSJ), 2003 WL 21998968, at *10 (S.D.N.Y. Aug. 21, 2003), *aff'd*, United States *ex rel.* Lissack v. Sakura Glob. Capital Mkts., Inc., 377 F.3d 145 (2d Cir. 2004); *see also* United States *ex rel.* Winkelman v. CVS Caremark Corp., 827 F.3d 201, 208 (1st Cir. 2016) ("As a general matter, a 'public disclosure occurs when the essential elements exposing the particular transaction as fraudulent find their way into the public domain'" meaning that the publicly available facts "'lead

relator must "possess direct and independent knowledge of all of the vital ingredients to a fraudulent transaction."[124] Instead, "direct and independent knowledge of any essential element of the underlying fraud transaction" is sufficient to give the relator original-source status.[125] The Court of Appeals for the D.C. Circuit in *Springfield Terminal Railway v. Quinn* set forth the following criteria to evaluate whether a public disclosure bars a lawsuit:

> [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed. . . . [I]f the elements of the fraudulent transaction (X + Y) are already public, plaintiff's additional information, even if nonpublic, cannot suffice to surmount the jurisdictional hurdles. Thus, a qui tam action cannot be sustained where all of the material elements of the fraudulent transaction are already in the public domain and the qui tam relator comes forward with additional evidence incriminating the defendant.[126]

Other courts, including the Ninth Circuit, have adopted the same articulation of the standard.[127]

To overcome the public disclosure bar where substantially the same allegations in the case have been publicly disclosed, a relator must show that it is an "original source of the information."[128] An "original source" is someone who "(1) prior to a public disclosure . . . has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section."[129] Independent knowledge is "knowledge that preceded the public disclosure,"[130] and to "materially add" to a public disclosure, a relator's knowledge must "provide essential

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to a plausible inference of fraud' when combined." (quoting United States *ex rel*. Ondis v. City of Woonsocket, 587 F.3d 49, 54 (1st Cir. 2009))).

124. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 656-57 (D.C. Cir. 1994).

125. *Id.* at 657.

126. *Id.* at 654-55.

127. *See* United States *ex rel.* Mateski v. Raytheon Co., 816 F.3d 565, 571 (9th Cir. 2016).

128. 31 U.S.C. § 3730(e)(4)(A) (2012).

129. *Id.* § 3730(e)(4)(B).

130. Malhotra v. Steinberg, 770 F.3d 853, 860 (9th Cir. 2014).

elements of the fraudulent scheme which were missing from the prior disclosures."[131]

3. Limitations Recently Imposed by the Supreme Court

The Supreme Court has also shown a keen interest in the FCA, specifically in the materiality and scienter elements. On June 16, 2016, the Court in *Universal Health Services, Inc., v. United States & Massachusetts ex rel. Julio Escobar* unanimously upheld the implied certification theory of FCA liability.[132] There, the Court held that FCA liability could be available where the defendant submits a claim to the government that "does not merely request payment, but also makes specific representations about the goods or services provided," and "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths."[133]

The Supreme Court's analysis in *Escobar* significantly impacted the FCA's materiality requirement. The Court described the materiality standard as "the likely or actual behavior" of the government agency that made the payment decision.[134] The Court therefore rejected the DOJ's stance—previously adopted by some lower courts—that a defect was material in any case where the agency had the legal authority to deny payment based on the alleged defect.[135] To be material, *Escobar* explained, the misrepresentation must go to the essence of the bargain and not be "minor or insubstantial."[136] The Court noted that materiality can be determined based on several factors, none necessarily dispositive, and held that a court's decision, although fact-specific, could nonetheless lead to dismissal at the motion to dismiss or summary judgment stage.[137]

131. United States *ex rel.* Osheroff v. Humana, Inc., 776 F.3d 805, 815 (11th Cir. 2015) (finding that the relator did not "materially add to the public disclosures" because the public disclosures "were already sufficient to give rise to an inference that the clinics were providing illegal remuneration to patients"); United States *ex rel.* Hagerty v. Cyberonics, Inc., 95 F. Supp. 3d 240, 261 (D. Mass. 2015), *aff'd sub nom.* Hagerty *ex rel.* United States v. Cyberonics, Inc., 844 F.3d 26 (1st Cir. 2016).

132. Universal Health Servs., Inc. v. United States & Massachusetts *ex rel.* Julio Escobar, 136 S. Ct. 1989, 2001 (2016).

133. *Id.*

134. *Id.* at 2002.

135. *Id.* at 2004; *see also* United States v. President & Fellows of Harvard Coll., 323 F. Supp. 2d 151, 186 (D. Mass. 2004) ("Evidence of the government's actual conduct is less useful for FCA purposes than evidence of the government's legal rights.").

136. *Escobar*, 136 S. Ct. at 2003.

137. *Id.* at 2004 n.6.

As one court put it, "*Escobar* rejects a system of government traps, zaps, and zingers that permits the government to retain the benefit of a substantially conforming good or service but to recover the price entirely—multiplied by three—because of some immaterial contractual or regulatory non-compliance."[138] Thus, "[a] principal mechanism to ensure fairness and to avoid traps, zaps, and zingers is a rigorous standard of materiality and scienter."[139] As a result, under *Escobar*, "the government's payment to a vendor despite knowledge of a defect 'very strongly' evidences the defect's immateriality."[140]

Escobar is also significant for its holding regarding scienter. The Supreme Court made clear that "concerns about fair notice and open-ended liability" should be "addressed through strict enforcement of the [FCA's] materiality *and scienter* requirements."[141] On this point, the Court held that liability may lie only when "the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."[142] *United States ex rel. Ruckh v. Salus Rehabilitation, LLC* also offered insight into *Escobar's* focus on the scienter element, finding it relevant that there was no evidence offered in trial "that the defendants submitted claims for payment despite the defendants' knowing that the governments would refuse to pay the claims if either or both governments had known about the disputed practices."[143] The Court emphasized that the government had been "aware of the defendants' disputed practices, aware of this action, aware of the allegations, aware of the evidence, and aware of the judgments [against the defendants]," but had not "ceased to pay or even threatened to stop paying the defendants for the services."[144]

III. IS THERE A FUTURE IN DATA ANALYSIS WHISTLEBLOWING?

There is currently a fight brewing over whether the future will have a place for corporate *qui tam* plaintiffs engaged in data analysis whistleblowing, and Mininno is in the center of it. Opponents of the practice are relying on the principles discussed above—the government's

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138. United States *ex rel.* Ruckh v. Salus Rehab., LLC, 304 F. Supp. 3d 1258, 1263 (M.D. Fla. 2018) (disclaimer: the author of this Article participated in the defense of this FCA lawsuit).

139. *Id.*

140. *Id.* (quoting *Escobar*, 136 S. Ct. at 2003).

141. *Escobar*, 136 S. Ct. at 2002 (emphasis added).

142. *Id.* at 1996.

143. *Ruckh*, 304 F. Supp. 3d at 1260.

144. *Id.*

authority to dismiss cases, the public disclosure bar, and the heightened materiality standard—to fight it.

A. *Mininno's Fight with the Department of Justice*

1. The Government Seeks Dismissal

Mininno's company—Venari Partners, LLC, dba National Health Care Analysis Group—through several limited liability companies, brought eleven *qui tam* complaints against thirty-eight different defendants.[145] The government described Venari as "a limited liability corporation that is itself comprised of member limited liability companies formed by investors and former Wall Street investment bankers."[146] Its legal team, which included luminaries like Kenneth Starr, Samuel Baxter, Mark Lanier, and Marc Mukasey, brought the following whistleblower cases:

- *U.S. ex rel. SMSPF, LLC, et al. v. EMD Serono, Inc., et al.*, 2:16-cv-5594 (E.D. Pa.)
- *U.S. ex rel. SAPF, LLC, et al. v. Amgen, Inc., et al.*, 16-cv-5203 (E.D. Pa.)
- *U.S. ex rel. NHCA-TEV, LLC v. Teva Pharm., et al.*, 17-cv-2040 (E.D. Pa.)
- *U.S. ex rel. SMSF, LLC, et al. v. Biogen Inc., et al.*, 1:16-cv-11379 (D. Mass.)
- *U.S. ex rel. SCEF, LLC v. Astra Zeneca PLC, et al.*, 17-cv-1328 (W.D. Wash.)
- *U.S. ex rel. Miller, et al. v. AbbVie, Inc.*, 3:16-cv-2111 (N.D. Tex.)
- *U.S. ex rel. Carle, et al. v. Otsuka Holdings Co., et al.*, 17-cv-966 (N.D. Ill.)
- *U.S. ex rel. CIMZNHCA v. UCB, Inc., et al.*, 3:17-cv-765 (S.D. Ill.)
- *U.S. ex rel. Health Choice Group, LLC. v. Bayer Corp., et al.*, 5:17-cv-126 (E.D. Tex.)
- *U.S. ex rel. Health Choice Alliance, LLC v. Eli Lilly & Co., et al.*, 5:17-cv-123 (E.D. Tex.)
- *U.S. ex rel. Health Choice Advocates, LLC v. Gilead, et al.*, No. 5:17-cv-121 (E.D. Tex.)[147]

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145. Memorandum of Law in Support of the United States' Motion to Dismiss, United States *ex rel.* SMSPF, LLC v. EMD Serono, Inc., No. 16-5594, 2018 WL 7202244, at *2 (E.D. Pa. Dec. 17, 2018).
146. *Id.*
147. *Id.* at *2-3.

The lawsuits all present essentially the same theory: that defendants made illegal kickbacks when they deployed "nurse educators" who were in reality acting as undercover sales representatives to push certain drugs.[148] The lawsuits identified three practices that the defendants allegedly used to steer physicians' treatment decisions: (1) offering free reimbursement support services to physicians; (2) "white coat marketing"—i.e., hiring nurses to hawk products under the guise of offering objective advice; and (3) offering free nurse services to physicians, providing subtle reimbursement for prescribing certain medications.[149] The DOJ moved to end Mininno's cases under its dismissal power shortly after the cases were unsealed.[150]

The DOJ's dismissal motion described the cases as using "the same model or template, repeating certain allegations from one complaint to the next," and including allegations in the complaints that the DOJ described as "seemingly particularized."[151] The motion also charged Mininno with misleading prospective witnesses by (1) contacting them "under the guise of conducting a 'qualitative research study' of the pharmaceutical industry"; (2) omitting any mention of its role in *qui tam* cases from its website, instead "holding itself out to the public as a 'healthcare research company that engages in qualitative research of pharmaceutical and other healthcare-related industries'"; and (3) despite "the basis of its profit model," representing that "it has 'no particular bias one way or the other about the industry.'"[152]

While the DOJ advocated for the "unfettered discretion" standard articulated in *Swift*, which it described as "more recent" and "better comport[ing] with the FCA's statutory text and framework," it urged that dismissal was appropriate under either standard.[153] The DOJ reported that its Civil Fraud Section had "spent more than 1,500 hours" in an "extensive investigation of the various complaints" filed by the corporate relators, and had ultimately "concluded that the relators' allegations lack sufficient factual and legal support."[154] Additionally, because of the wide breadth of the misconduct alleged involving nationwide misconduct by thirty-eight

148. *Id.* at *3.
149. *Id.*
150. *Id.* at *17.
151. *Id.* at *3.
152. *Id.* at *6-7 (first quoting McCabe Decl., ¶ 5, Exhibits C-1 to C-3 (exemplar interview transcript excerpts); and then quoting NAT'L HEALTHCARE ANALYSIS GROUP, http://www.nhcagroup.com (last visited Nov. 30, 2018)).
153. *Id.* at *10-13.
154. *Id.* at *14-15.

companies over a span of six years, the government predicted that it would "incur substantial costs in monitoring the litigation and responding to discovery requests," collecting, reviewing, processing, and producing numerous documents (including privileged ones), preparing witnesses for deposition, and filing statements of interest.[155]

Finally, the DOJ asserted that the government had "a strong interest in ensuring that, after a physician has appropriately prescribed a medication, patients have access to basic product support relating to their medication such as access to a toll-free patient-assistance line or instructions on how to properly inject or store their medication."[156] And, it contended, allowing relators to proceed with their theory that the educational information and instruction at issue in the case amounted to actionable fraud would defeat that interest.[157] Thus, the DOJ concluded, "the relators' sweeping allegations lack adequate support and are unlikely to yield any recovery sufficient to justify the significant costs and burdens that the government will incur if the cases proceed and the resulting diversion of the government's limited resources away from other more meritorious matters."[158]

2. Mininno Fights Back

Mininno refused to take the government's dismissal motion lying down. He accused the DOJ of being averse to competition from the private sector in the business of fraud discovery, contending that his company had aided the government in recovering millions of dollars before it learned of his business model.[159] He also criticized the government for dooming cases after his company had made a "significant investment" in litigating, and endangering the likelihood of a return on the investment.[160]

The opposition briefs struck a similar tone.[161] The relators derided the dismissal brief as including irrelevant personal attacks against relators and "conclusory language" about purported concerns with the merits of the

155. *Id.* at *15-16.
156. *Id.* at *16.
157. *Id.*
158. *Id.*
159. Alison Frankel, *DOJ Doubles Down in Brief to Discredit 'Wall Street-Backed' False Claims Act Whistleblower*, REUTERS (Feb. 25, 2019), http://www.reuters.com/article/us-otc-fca/doj-doubles-down-in-brief-to-discredit-wall-street-backed-false-claims-act-whistleblower-idUSKCN1QE2IX.
160. *Id.*
161. *See* Relators' Response in Opposition to the United States' Motion to Dismiss Relators' Complaint, United States *ex rel.* SMSPF, LLC v. EMD Serono, Inc., No. 2:16-cv-05594-TJS (E.D. Pa. Jan. 22, 2019).

claims.[162] They defended their investigation techniques as "standard practice" meant to "prevent respondents from giving the answer that they think the interviewer wants to hear."[163] They also argued that there was no support for the government's contention that it had engaged in a sufficient investigation and labeled the argument premature, since the government had no discovery obligations at the time, and the relators had offered to stay several of the cases while allowing pilot suits to proceed.[164] Touting the relator company's prior recoveries through the same techniques, the relators argued that the government could not demonstrate a legitimate governmental interest in dismissing potentially lucrative cases, asserting that the government had "never offered any explanation of why or how the Complaint lacks sufficient merit."[165] And, taking issue with the government's contention that the availability of educational material after a physician has appropriately prescribed a medication is in the public interest, the briefs accused the government of "missing" the point that a "drug prescribed because the drug manufacturer has made it more profitable for the physician to prescribe that drug by virtue of remuneration, is not appropriately prescribed."[166] Thus, the relators contended, the tens of millions of dollars in free services meant to induce medical decisions were a far cry from the government's analogy to making a toll-free number available, especially considering that the cost of the services are necessarily built into the price of the product.[167]

Thus, the relators requested a hearing and asked that the courts order the government to show that "(i) the motion to dismiss was preceded by an actual investigation, as the Government has represented; (ii) the Government grasps Relator's allegations; and (iii) speculative concerns outlined in the Motion are in fact legitimate and not pre-textual."[168]

3. Split Judicial Response

Judge Timothy J. Savage of the Eastern District of Pennsylvania issued the first ruling on the DOJ's authority to dismiss the Mininno lawsuits in *United States ex rel. SMSPF, LLC v. EMD Serono, Inc*.[169] He

162. *Id.* at *3.
163. *Id.* at *2.
164. *Id.* at *4, *12-13.
165. *Id.* at *10, *12.
166. *Id.* at *14.
167. *Id.* at *14, *19.
168. *Id.* at *5.
169. United States *ex rel.* SMSPF, LLC v. EMD Serono, Inc., 370 F. Supp. 3d 483, 485 (E.D. Pa. Apr. 3, 2019).

rejected the government's argument that it had "unfettered discretion" to toss *qui tam* suits, explaining that there instead must be a valid purpose for dismissal.[170] He reasoned that the FCA authorized the court to hold a hearing when whistleblowers object to dismissal, and that the statutory provision would be meaningless if the court had to rubber-stamp the government's dismissal motions. "If the government's right to dismiss is 'unfettered,' as the District of Columbia Circuit has held, a hearing would be superfluous, rendering the requirement of a hearing a nullity."[171] Judge Savage ultimately concluded, however, that the DOJ reasonably concluded that any possible financial recovery from the suit would not justify the burden on the government in monitoring and assisting with the litigation.[172] "Like any other plaintiff in a civil case, the government has the option to end litigation it determines is too expensive or not beneficial," he explained, and "[p]reserving litigation costs is a valid interest even where the claims may have merit."[173]

In the second decision that has considered the DOJ's dismissal request in this group of cases, Judge Staci Yandle in the Southern District of Illinois reached a different conclusion in *United States ex rel. CIMZNHCA v. UCB, Inc*.[174] Unlike Judge Savage, Judge Yandle, criticized the government for not submitting a cost-benefit analysis to support its arguments, accused the government of harboring animus toward the relator, and concluded that the government's reason for seeking dismissal was not sufficient to end the suit.[175] She explained that the government acknowledged that the relators' allegations asserted a "classic" kickback allegation and described the government's conclusion that the allegations "conflict with important policy and enforcement prerogatives of the Government's healthcare programs" as "curious at best."[176] She further criticized the government's stance at oral argument that disapproval of professional relators was a valid purpose for seeking dismissal of a *qui tam* suit.[177] The DOJ moved for reconsideration of Judge Yandle's decision, arguing that it spent "considerable time" investigating the claims, and that

170. *Id.* at 489-90; Memorandum of Law in Support of the United States' Motion to Dismiss, *supra* note 145, at *13.
171. *SMSPF,* 370 F. Supp. 3d at 488 (quoting Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 632 (2018)).
172. *See id.* at 490-91.
173. *Id.* at 490.
174. United States *ex rel.* CIMZNHCA, LLC v. UCB, Inc., No. 17-CV-765-SMY-MAB, 2019 WL 1598109, at *4 (S.D. Ill. Apr. 15, 2019).
175. *Id.* at *3-4.
176. *Id.* at *4.
177. *Id.*

its dismissal request arose not out of animus, but instead its evaluation of the factual merits of the claims.[178] It also contended in its motion that Judge Yandle also erred by intruding into the function of the executive branch by substituting her views on the basis for dismissal for those of the government.[179] Judge Yandle again rejected this challenge.[180]

CIMZNHCA, however, stands alone in allowing these cases to proceed. In the months that followed the *CIMZNHCA* decision, courts have uniformly granted the government's motions to dismiss the relators' cases, each adopting a version of Judge Savage's conclusion that, even under the higher burden required under *Sequoia*, the government's costs associated with the case, and the interest in conserving resources, warranted dismissal.[181] The other cases were voluntarily dismissed.[182]

4. The Appeals

The relators appealed the Eastern District of Texas rulings against them, and the government appealed Judge Yandle's decision in *CIMZNHCA*.[183]

The relators' Fifth Circuit brief touted the same things they did in the district court—their robust investigation techniques, their prior recoveries, and the problems posed by the reimbursement scheme they challenged.[184] They also criticized the government's lack of an investigation, inconsistent

178. United States' Motion to Alter & Amend Order Denying the United States' Motion to Dismiss this Action, United States *ex rel.* CIMZNHCA, LLC v. UCB, Inc., No. 3:17-cv-00765-SMY-DGW, at *16, *20 (S.D. Ill. Apr. 29, 2019).

179. *Id.* at *3, *6-7.

180. United States *ex rel.* CIMZNHCA, LLC v. UCB, Inc., No. 17-cv-765-SMY-MAB, 2019 WL 2409576, at *4 (S.D. Ill. June 7, 2019).

181. United States *ex rel.* NHCA-TEV, LLC v. Teva Pharm., No. 17-2040, 2019 WL 6327207, at *6 (E.D. Pa. Nov. 26, 2019); United States *ex rel.* SCEF, LLC v. Astra Zeneca PLC, No. 2:17-CV-1328-RSL, 2019 WL 5725182, at *4 (W.D. Wash. Nov. 5, 2019); Health Choice Grp., LLC. v. Bayer Corp., No. 5:17-CV-00126-RWS-CMC, 2018 WL 3637381, at *1 (E.D. Tex. June 29, 2018); United States *ex rel.* Health Choice All., LLC v. Eli Lilly & Co., Inc., No. 5:17-CV-00123-RWS-CMC, 2019 WL 4727422, at *1, *8 (E.D. Tex. Sept. 27, 2019).

182. Health Choice Advocates, LLC v. Gilead, No. 5:18-cv-00095 (E.D. Tex. July 26, 2018); *see also* United States *ex rel.* Carle v. Otsuka Holdings Co., No. 17-cv966 (N.D. Ill. Jan. 29, 2019) (granting motion for voluntary dismissal, filed after government had filed motion to dismiss); United States *ex rel.* SAPF, LLC v. Amgen, Inc., No. 16-cv-5203 (E.D. Pa. Feb. 11, 2019); United States *ex rel.* Miller v. AbbVie, Inc., No. 3:16-cv-2111 (N.D. Tex. May 9, 2019); United States *ex rel.* SMSF, LLC v. Biogen, Inc., No. 1:16-cv-11379 (D. Mass. Dec. 26, 2018) (agreeing not to seek reconsideration of court's order dismissing complaint for failure to timely reply to motion to dismiss).

183. *See* Brief of Appellants, United States *ex rel.* Health Choice All., LLC v. Eli Lilly & Co., Inc., No. 19-40906, 2020 WL 231331 (5th Cir. Jan. 7, 2020); *CIMZNHCA*, 2019 WL 1598109, at *4.

184. *See* Brief of Appellants, *supra* note 183.

stance on the relators' business, delay in moving to dismiss until the case was well into the discovery stage, and failure to account for the potential proceeds from the suits.[185] Tracking Judge Yandle's logic, according to the relators, these problems made clear that the government's decision to seek dismissal was arbitrary and capricious.[186]

The government's appeal of the *CIMZNHCA*, too, tracked much of the argument it had presented in the district court; according to the government, the Seventh Circuit *should* adopt *Swift* and conclude that the government's decision to dismiss the FCA action is presumptively unreviewable.[187] But even if the court were to adopt *Sequoia*, the government argued, its reasons were rationally related to its request for dismissal.[188] However, because the government sought appeal of a denial of a dismissal motion, it had the additional burden of establishing that the court of appeals should not wait until after the litigation was completed to take up the case, which the relator hotly contested.[189]

B. *Integra's Fight with Defendants*

The whistleblower cases brought by data analytics firm Integra Med Analytics, LLC met similar resistance. There, Integra sued Providence Health (now Providence St. Joseph Health), alleging that they violated the FCA by upcoding Medicare claims by $188.1 million.[190] In *United States ex rel. Integra Med Analytics, LLC v. Providence Health & Services*, Integra alleged that Providence and its consultant, J.A. Thomas & Associates, encouraged doctors to add bogus secondary diagnoses on medical claims to increase Medicare payments.[191] The company alleged that it uncovered the scheme by analyzing Medicare claims data, sites operated by defendants and industry groups, and an online message board, and it alleged that the data revealed that Providence hospitals used secondary codes for complications more often than other hospitals.[192]

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185. *Id.* at *38-39, *41, *43.
186. *Id.* at *37.
187. *CIMZNHCA*, 2019 WL 1598109, at *2.
188. *Id.* at *4.
189. *Id.*
190. United States *ex rel.* Integra Med Analytics, LLC v. Providence Health & Servs., No: CV-17-1694 PSG (SSx), 2019 WL 3282619, at *1-2 (C.D. Cal. July 16, 2019); Second Amended Complaint [Redacted], United States *ex rel.* Integra Med Analytics, LLC v. Providence Health & Servs., No. 2:17-cv-01694-PSG-SS, at *92 (C.D. Cal. Aug. 10, 2018).
191. *Integra Med Analytics, LLC*, 2019 WL 3282619, at *1.
192. *Id.* at *2, *10.

According to Integra, adding a secondary code can increase a claim by $1000 to $10,000, while adding a major complication can increase the claim's overall value by up to $25,000.[193] The lawsuit alleged, for example, that Providence added secondary codes for encephalopathy on 12% of its claims for femoral neck fracture, whereas other hospitals only did so for 4.5% of its claims.[194] Integra pointed to physician tip sheets created by Providence's consultant and alleged that the sheets urged doctors to document certain secondary diagnoses and downplay others that would not result in a high financial return.[195] For example, one tip sheet urged "doctors to '[d]ocument severe malnutrition—it not only adds severity as an MCC [Major Complication or Comorbidity], it will likely prolong the post-op course thereby aligning the illness severity with length of stay.'"[196] Another tip urged the use of acute respiratory failure codes, but discouraged coding respiratory distress "since it yielded 'little credit.'"[197] According to the complaint, the secondary codes Providence hospitals added with the most frequency were encephalopathy, respiratory failure, and malnutrition.[198]

The defendants moved to dismiss.[199] They argued that Integra's allegations fail under the public disclosure bar, because the CMS data the complaint relied on qualified as a "federal report."[200] They emphasized that Integra is "a third-party data analytics firm," that it "has no independent knowledge of its allegations is readily apparent," and that its data analysis was of no aid to the government.[201] They contended that Integra's allegations were "too speculative" because they only indicated that the hospitals used three codes "more frequently than other hospitals, and that the higher occasion of coding is not explained by various statistical factors Relator analyzed," and the more frequent uses of codes did not amount to an objective falsehood, but instead only that the hospital "was at the high end of a distribution curve."[202] They argued that Integra could not connect the dots to show that the coding impacted payment—i.e., that it was material.[203] Moreover, the defendants argued that Integra's

193. *Id.* at *1.
194. *Id.* at *2 (quoting Second Amended Complaint, *supra* note 190).
195. *Id.* at *3.
196. *Id.*
197. *Id.*; Second Amended Complaint, *supra* note 190, at *9.
198. *Integra Med Analytics, LLC*, 2019 WL 3282619, at *17.
199. *Id.* at *3.
200. *Id.* at *5.
201. *Id.* at *6.
202. *Id.*
203. *Id.* at *20.

data analysis did not identify any specific claim that was upcoded but instead merely applied "hedge-fund-performance metrics" to identify higher rates of particular diagnoses.[204] Integra, in turn, touted the nonpublic aspects of its case and that its analysis of public data added value.[205]

The court's order on the motion turned on the difficult question of what qualifies as "news media" under the public disclosure bar.[206] The judge outlined five guideposts to answer that question.[207] First is whether the information concerns "recent events or other information that would commonly be found in a newspaper, news broadcast, or other news source."[208] Second is the extent of editorial independence of the publishers, including whether the publisher "curates [the] information" or "simply publishes information about itself."[209] Third is whether the source intends to disseminate its information widely.[210] Fourth is whether the source functions like "traditional news outlets like newspapers and radio and television stations."[211] And the fifth factor is "whether it could reasonably be described as 'news media' as at least some people would use that term in everyday speech."[212]

Turning to the facts of the case, the court concluded that "statistics alone are likely not enough to state a viable fraud claim."[213] The relator's evidence, however, included more than just numbers: the complaint alleged facts, taken from the defendants' own business practice information, "that explain why the high coding rates . . . are plausibly attributable to fraud, as opposed to some other cause."[214] The court denied the defendants' motions to dismiss because it could not determine from the record whether this additional information—above and beyond the Department of Health and Human Services data alone—was "news

204. *Id.* at *21.
205. *Id.* at *2.
206. *Id.* at *1.
207. *Id.* at *9, *14-15.
208. *Id.* at *14.
209. *Id.*
210. *Id.*
211. *Id.* at *15.
212. *Id.*
213. *Id.* at *17.
214. *Id.*

media" under the public disclosure bar.[215] The defendants appealed this ruling.[216]

IV. TAKEAWAYS AND WHAT THE FUTURE LIKELY HOLDS FOR DATA-DRIVEN *QUI TAM* SUITS

With the increase in the amount of data available at one's fingertips, it stands to reason that the future will likely hold more and more data-driven relators. In some ways, the ability to spot outliers through data is a positive development for rooting out fraud. However, there is peril in basing wide-reaching allegations on data.

The cases noted above reflect the high bar a complete outsider will likely face in bringing a FCA claim based solely, or even majorly, on analysis of public data. Indeed, even though the analysis brings value, the government, courts, and certainly defendants will likely view it with suspicion. For generations, the FCA has been used as a tool to turn insiders that were percipient witnesses to fraud into whistleblowers that could relate the observations to the government. And the whistleblower as the white knight do-gooder accordingly has been ensconced in the plaintiff's book of FCA trial themes.

The difference between the outcomes in the cases is illustrative of what strategies might work if relators and their counsel would like to base their case on analysis of data that can be accessed through a publicly available means.

As an initial matter, relators should attempt to verify conclusions derived from data by verifying it through a nonpublic source, preferably a person. It is no doubt valuable to know whether a certain market participant bills the government more or less than its competitors or utilizes a particular procedure with more frequency. But as even Mininno acknowledged, that data is only a small portion of the story, and is highly susceptible to false positives. As a result, the role of data analysis can properly be viewed with suspicion, because the trends might provide false inferences of fraud, might reveal a trend that is not actually material (i.e., does not result in higher payment), or might reveal billing that is not false at all. Thus, any inferences that can be drawn from the data could potentially best be used to drive leads and to confirm witness testimony.

215. *Id.* at *18.

216. Integra Med Analytics, LLC v. Providence Health & Servs., No. 19-56367 (9th Cir. Nov. 22, 2019).

Even if the relator cannot check inferences drawn from trends in data by confirming it with a person that has knowledge of the company, that may not be fatal. As *Integra* demonstrates, not all publicly available information will trigger the public disclosure bar. As *Integra* described, while a blog may be "news media," more obscure sources—like documents stashed in a webpage's folder—may not be.[217] This analysis would seem to encourage the overlapping confirmation of data points through increasingly obscure sources.

Finally, relators should consider the resources the investigation of their allegations might pose for the government. The government's main argument in seeking the dismissal of Mininno's cases was that they would require too much governmental oversight to justify any likely financial rewards.[218] This concern would be tempered in a case where the relator brings a single suit with a narrowly defined charge. And that would especially be true if the allegations are likely to be easily verifiable through discovery or a government investigation. Indeed, one could argue that a pivotal difference between Mininno's cases and Integra's is the sweep of the allegations: Mininno made allegations of broad, industry-wide fraud in eleven lawsuits against thirty-eight defendants. Integra focused on a single fraud and brought a single suit against two actors. The *Integra* allegations were clearly less burdensome to investigate, and the *Integra* suit would clearly take less resources to monitor. In light of the deference given to governmental motions to dismiss, even under the higher *Sequoia* standard, it seems sound strategy to avoid the government's ire. And, at least in the era of the Granston Memo, that means taking the potential drain on government resources into account.

217. *Integra Med Analytics, LLC*, 2019 WL 3282619, at *16.

218. *See, e.g.*, Memorandum of Law in Support of the United States' Motion to Dismiss, *supra* note 145, at *16.