PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1262

UNITED STATES ex rel. BENJAMIN CARTER,

Plaintiff-Appellant,

v.

HALLIBURTON CO.; KELLOGG BROWN & ROOT SERVICES, INC.; SERVICE EMPLOYEES INTERNATIONAL INC.; KBR, INC.,

Defendants-Appellees.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amicus Supporting Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:11-cv-00602-JCC-JFA)

Argued: March 22, 2017 Decided: July 31, 2017

Before AGEE, WYNN, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge Floyd wrote the opinion, in which Judge Agee and Judge Wynn joined. Judge Wynn wrote a separate concurring opinion.

ARGUED: David Smart Stone, STONE & MAGNANINI LLP, Berkeley Heights, New Jersey, for Appellant. John Patrick Elwood, VINSON & ELKINS LLP, Washington, D.C., for Appellees. **ON BRIEF:** David Ludwig, DUNLAP, BENNETT & LUDWIG, PLLC, Leesburg, Virginia; Robert A. Magnanini, STONE & MAGNANINI LLP, Berkeley Heights, New Jersey, for Appellant. Craig D. Margolis, Jeremy C. Marwell, Tirzah S. Lollar, Ralph C. Mayrell, VINSON & ELKINS LLP, Washington, D.C., for Appellees. Kate Comerford Todd, Steven P. Lehotsky, U.S. CHAMBER LITIGATION CENTER, Washington, D.C.; Jonathan S. Franklin, Mark Emery, NORTON ROSE FULBRIGHT US LLP, Washington, D.C., for Amicus Curiae.

FLOYD, Circuit Judge:

The False Claims Act (FCA) empowers private individuals acting on behalf of the government to bring civil actions against those that defraud the government. The FCA contains a provision, known as the "first-to-file" rule, which bars these private individuals, known as relators, from bringing actions under the FCA while a related action is pending. In this case, back before this Court for a third time, we consider whether the first-to-file rule mandates dismissal of a

relator's action that was brought while related actions were pending, even after the related actions have been dismissed and the relator's complaint has been amended, albeit without mention of the related actions. We conclude that it does.

I.

A.

The FCA imposes liability for knowingly presenting false or fraudulent claims to the government of the United States for payment or approval. 31 U.S.C. § 3729(a)(1). "In adopting the FCA, 'the objective of Congress was broadly to protect the funds and property of the government.'" *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (quoting *Rainwater v. United States*, 356 U.S. 590, 592 (1958)).

Liability under the FCA is no small matter. An FCA violator may be held responsible for treble damages in addition to civil penalties. *See* 31 U.S.C. § 3729(a)(1). The FCA's liability scheme is enforced through civil actions filed by the government, 31 U.S.C. § 3730(a), as well as through civil actions – known as *qui tam* actions – that are filed by private parties – known as relators – "in the name of the Government," 31 U.S.C. § 3730(b)(1).

In a *qui tam* action under the FCA, a relator files the complaint under seal, and serves a copy of the complaint and an evidentiary disclosure on the

government. 31 U.S.C. § 3730(b)(2). This procedure enables the government to investigate the matter, so that it may decide whether to take over the relator's action or to instead allow the relator to litigate the action in the government's place. *See Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015); 31 U.S.C. § 3730(b)(4). A relator who brings a meritorious *qui tam* action receives attorney's fees, court costs, and a percentage of recovered proceeds. *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2016); 31 U.S.C. § 3730(d).

"Although designed to incentivize whistleblowers, the FCA also seeks to prevent parasitic lawsuits based on previously disclosed fraud." *United States ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 39 (4th Cir. 2016). To that end, the FCA contains strict limits on its *qui tam* provisions, including a statutory "first-to-file" rule. Under that rule, "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). "If a court finds that the particular action before it is barred by the first-to-file rule, the court lacks subject matter jurisdiction over the later-filed matter," and dismissal is therefore required. *United States ex rel. Carson v. Manor Care, Inc.*, 851 F.3d 293, 303 (4th Cir. 2017).[1]

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[1] We note briefly that two of our sister circuits have held that a first-to-file defect bears only on the merits of a relator's action, rather than on a district court's jurisdiction over it. *See United States ex rel. Hayes v. Allstate Ins. Co.*, 853 F.3d 80, 85-86 (2d Cir.

B.

Appellees Halliburton Company; Kellogg Brown & Root Services, Inc.; KBR, Inc.; and Service Employees International, Inc. (collectively, "KBR"), are a group of defense contractors and related entities that provided logistical services to the United States military during the armed conflict in Iraq. From January to April 2005, Appellant Benjamin Carter worked for KBR at a water purification unit employed to provide clean water to American troops serving in Iraq.

In June 2011, Carter filed a *qui tam* complaint against KBR in the Eastern District of Virginia. *See United States ex rel. Carter v. Halliburton Co.* (the "Carter Action"), No. 11-cv-602 (E.D. Va. filed June 2, 2011). In his complaint, Carter alleged that KBR had violated the FCA by fraudulently billing the government in connection with its water purification services.[2]

At the time the Carter Action was brought, two allegedly related actions were already pending: *United States ex rel. Duprey*, No. 8:07-cv-1487 (D. Md. filed June 5, 2007) (the "Maryland Action"), and a sealed

2017); *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 119-21 (D.C. Cir. 2015). We have previously held otherwise, *see Carson*, 851 F.3d at 303, and we do not attempt to revisit this Circuit's rule here.

[2] The Carter Action was not Carter's first attempt to sue KBR under the FCA. For a discussion of unsuccessful, pre-Carter Action suits brought by Carter against KBR, see *United States ex rel. Carter v. Halliburton Co.* (*Carter II*), 710 F.3d 171, 174-76 (4th Cir. 2013).

action filed in Texas in 2007 (the "Texas Action"). However, the Maryland Action was dismissed in October 2011, and the Texas Action was dismissed in March 2012.

In November 2011, the district court ruled that the Maryland Action was related to the later-filed Carter Action, and that therefore the latter action was precluded by the first-to-file rule. The fact that the Maryland Action had been dismissed prior to the district court's ruling on the Carter Action gave the court no pause, because it believed that "whether a *qui tam* action is barred by [the first-to-file rule] is determined by looking at the facts as they existed when the action was brought." *United States ex rel. Carter v. Halliburton Co.* (*Carter I*), No. 1:11-cv-602, 2011 WL 6178878, at *8 (E.D. Va. Dec. 12, 2011) (citation omitted). Because the Maryland Action was pending on the date the Carter Action was brought, the Carter Action ran afoul of the district court's understanding of the first-to-file rule.[3]

Additionally, the district court held that all but one of the Carter Action's claims fell outside the applicable six-year statute of limitations on civil actions. The court added that all of the Carter Action's claims would fall outside the limitations period if Carter were to refile his action. Finally, the court explained that neither the Wartime Suspension and Limitations Act

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[3] Because it did not have to reach the issue, the district court reserved judgment on whether the Texas Action also precluded the Carter Action.

(WSLA) nor the principle of equitable tolling could toll the statute of limitations on the Carter Action's claims. *See id.* at *8-12 & n.11. As such, the district court dismissed the Carter Action with prejudice.

Carter appealed the dismissal of the Carter Action to this Court. Carter's appeal centered on first-to-file issues, as well as the possibility that the WSLA tolled the statute of limitations on his claims. Carter did not, however, contest the district court's decision to assess the first-to-file rule based on the facts as they existed at the time that the Carter Action was brought.

This Court rejected the district court's statute of limitations conclusion, reasoning that the WSLA applied to civil actions and suspended the time for filing the Carter Action. *See Carter II*, 710 F.3d at 177-81. Thus, we reversed the district court's holding that the claims in the Carter Action were time-barred.

We then addressed the first-to-file rule. We agreed with the district court that courts must "look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Id.* at 183. As such, we concluded that the Carter Action must be dismissed under the first-to-file rule, because the Maryland and Texas Actions were pending at the time the related Carter Action was brought. We clarified, however, that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." *Id.* Applying this logic, and finding no statute of limitations issue, we ruled that the district court's dismissal of the Carter Action

should have been without prejudice instead of with prejudice.

KBR subsequently petitioned the Supreme Court for certiorari. KBR's petition challenged this Court's holding in connection with the WSLA, as well as its holding that a relator could bring an FCA action after the dismissal of a related action. *See* Petition for a Writ of Certiorari at 1-4, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter* (*Carter III*), 135 S. Ct. 1970 (2015) (No. 12-1497), 2013 WL 3225969. Notably, KBR's petition never questioned this Court's holding that the first-to-file analysis depends on the set of facts in existence at the time an FCA action is filed.

Carter opposed certiorari, insisting that this Court "correctly decided that the district court's jurisdictional dismissal of the case should have been without prejudice." Brief in Opposition at 17, *Carter III*, 135 S. Ct. 1970 (No. 12-1497), 2013 WL 4541112. He, too, did not question this Court's decision to conduct its first-to-file analysis based on the facts in existence at the time that the Carter Action was brought.[4]

The Supreme Court granted certiorari, and then affirmed in part and reversed in part this Court's decision. *See Carter III*, 135 S. Ct. 1970. The Supreme

[4] In 2013, while the Supreme Court was still considering Carter's petition for certiorari, Carter refiled his complaint in the Eastern District of Virginia. The district court, however, dismissed Carter's 2013 complaint on first-to-file grounds, because it was brought while the Carter Action was still pending before the Supreme Court.

Court began by reversing this Court's conclusion that the WSLA's tolling provisions apply to civil actions like the Carter Action. *Id.* at 1975-78.

The Supreme Court acknowledged, however, that Carter had raised additional arguments that, if successful, could render at least one claim of his timely on remand. Accordingly, the Court proceeded to explore the potential application of the first-to-file rule. The Court held that the first-to-file rule does not keep later actions out of court in perpetuity, *id.* at 1978-79; rather, the rule only keeps later actions out of court if their earlier-filed counterparts are "pending," which the Court defined to mean "[r]emaining undecided," *id.* at 1979 (quoting *Pending*, *Black's Law Dictionary* 1314 (10th ed. 2014)). The Supreme Court, therefore, agreed with this Court's conclusion that dismissal with prejudice of any timely aspect of the Carter Action was improper. The Court then remanded this case for further proceedings.

On remand, this Court addressed an argument pressed by Carter that he could rely on the principle of equitable tolling to render the Carter Action timely. *See United States ex rel. Carter v. Halliburton Co.* (*Carter IV*), 612 F. App'x 180 (4th Cir. 2015) (per curiam). We held that Carter did not properly preserve the issue of equitable tolling, and so we summarily affirmed the district court's refusal to equitably toll the statute of limitations. *Id.* at 180.

We acknowledged, however, that the district court's judgment was not entirely error-free, because

dismissal with prejudice of the one claim Carter brought within the limitations period was not called for under the first-to-file rule. *Id.* at 181. We therefore remanded this case to the district court for further proceedings.

On remand, Carter objected to the applicability of the first-to-file rule. Carter argued that the dismissals of the related Maryland and Texas Actions cured any first-to-file defect in the Carter Action.

Carter also filed a motion to amend the Carter Action complaint under Federal Rule of Civil Procedure 15(a), and argued that an amendment would confirm the inapplicability of the first-to-file rule to the Carter Action. Carter's proposed amendments, however, did not address the dismissals of the Maryland and Texas Actions, but instead centered on elucidating his damages theories with information that was available prior to the filing of the Carter Action.

Despite Carter's objections, the district court on remand invoked the first-to-file rule and dismissed the Carter Action without prejudice. *United States ex rel. Carter v. Halliburton Co.* (*Carter V*), 144 F. Supp. 3d 869, 873 (E.D. Va. 2015). The court reiterated its view that the date that an action is brought is dispositive in a first-to-file analysis, and concluded that the fact that the Maryland and Texas Actions were both still pending on the date the complaint in the Carter Action was filed rendered the Carter Action precluded by the first-to-file rule. *Id.* at 877.

The district court also rejected Carter's efforts to sidestep the first-to-file rule through amendment. *Id.* at 883. The court explained that Carter's proposed amendment could not change the fact that the Carter Action was brought in violation of the first-to-file rule. Accordingly, the court denied Carter's motion for amendment on futility grounds.

Subsequently, Carter requested reconsideration of the district court's ruling pursuant to Federal Rule of Civil Procedure 59(e). For support, Carter cited *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015), an intervening First Circuit decision holding that an FCA relator could cure a first-to-file defect by supplementing his or her complaint – pursuant to Federal Rule of Civil Procedure 15(d) – with an allegation that the earlier-filed, related actions that gave rise to the first-to-file defect had been dismissed.

The district court denied Carter's motion for reconsideration, explaining that *Gadbois* did not constitute new controlling law justifying reconsideration because it was decided outside this Circuit. *United States ex rel. Carter v. Halliburton Co.* (*Carter VI*), 315 F.R.D. 56, 59 (E.D. Va. 2016). The court added that, in any event, it found *Gadbois* unpersuasive. *Id.* at 59-60.

Carter timely noticed an appeal of the district court's rulings dismissing the Carter Action, denying Carter's motion for amendment, and denying Carter's motion for reconsideration. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

II.

This Court "reviews a dismissal for lack of subject matter jurisdiction and questions of statutory interpretation de novo." *Carson*, 851 F.3d at 302. We review a denial of leave to amend a complaint for abuse of discretion. *Franks v. Ross*, 313 F.3d 184, 198 n.15 (4th Cir. 2002). We likewise review a denial of a motion for reconsideration under the deferential abuse of discretion standard. *United States v. Holland*, 214 F.3d 523, 527 (4th Cir. 2000). We may affirm on any ground apparent from the record before us. *United States v. Dozier*, 848 F.3d 180, 188 (4th Cir. 2017).

III.

Although the Carter Action was brought while related FCA actions – namely the Maryland and Texas Actions – were still pending, Carter argues that the intervening dismissals of the latter actions dictate that the dismissal of the Carter Action on first-to-file grounds was unwarranted. We disagree.

A.

1.

The first-to-file rule provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Our first decision in this case held that courts must "look at the facts as they

existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Carter II*, 710 F.3d at 183. We reaffirm this holding today.

The basis for the above-described holding was the relevant statutory text, which imposes a restriction on the "bring[ing]" of an "action." 31 U.S.C. § 3730(b)(5). In ordinary parlance, one "bring[s] an action" by "institut[ing] legal proceedings." *Bring an Action*, *Black's Law Dictionary* 231 (10th ed. 2014). Put another way, "[o]ne 'brings' an action by commencing suit." *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 362 (7th Cir. 2010); *see also Goldenberg v. Murphy*, 108 U.S. 162, 163 (1883) ("A suit is brought when in law it is commenced."); *Harris v. Garner*, 216 F.3d 970, 974 (11th Cir. 2000) (en banc) ("'[B]rought' and 'bring' refer to the filing or commencement of a lawsuit, not to its continuation."); *Chandler v. D.C. Dep't of Corr.*, 145 F.3d 1355, 1359 (D.C. Cir. 1998) ("[T]he phrase 'bring a civil action' means to initiate a suit.").

Accordingly, the appropriate reference point for a first-to-file analysis is the set of facts in existence at the time that the FCA action under review is commenced. Facts that may arise after the commencement of a relator's action, such as the dismissals of earlier-filed, related actions pending at the time the relator brought his or her action, do not factor into this analysis.

2.

Carter asserts that our prior holding that a first-to-file analysis turns on the set of facts existing at the time an FCA action was commenced has been undermined by the Supreme Court's intervening decision in this case. *See Carter III*, 135 S. Ct. 1970. We disagree.

As explained above, in our original decision in this case, we reversed the district court's dismissal of the Carter Action with prejudice, and remanded with instructions to have the Carter Action dismissed without prejudice. The basis for our decision to dismiss was our view that Carter had violated the first-to-file rule by bringing the Carter Action while related FCA actions were still pending; the basis for our decision to dismiss *without prejudice* was our view that Carter could refile his case following the dismissals of earlier-filed, related FCA actions. *See Carter II*, 710 F.3d at 183.

Carter then petitioned for certiorari, and the Supreme Court granted that petition. *See Carter III*, 135 S. Ct. at 1975. As relevant here, the Court in *Carter III* stated that it was "consider[ing] whether [Carter's] claims must be dismissed with prejudice under the first-to-file rule." *Id.* at 1978. The answer to this question turned on how a court should read the first-to-file rule's prohibition on the bringing of an FCA action while a related action is "pending." 31 U.S.C. § 3730(b)(5). The Supreme Court held that, in accordance with the "ordinary meaning" of the term "pending," a "*qui tam* suit under the FCA ceases to be 'pending' once it is dismissed." *Carter III*, 135 S. Ct. at

1978-79. The Supreme Court concluded, "[w]e therefore agree with the Fourth Circuit that the dismissal with prejudice of [Carter's] one live claim was error." *Id.* at 1979.

The Supreme Court in *Carter III* did not reject, or even comment on, this Court's holding that a court must "look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Carter II*, 710 F.3d at 183. As such, we conclude that *Carter III* left the above-described holding intact.

Carter resists this conclusion, based on unreasonable readings of certain statements from *Carter III*. Carter first relies on the Supreme Court's statement that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed." *Carter III*, 135 S. Ct. at 1978. Carter, in effect, reads the Court's statement to mean that "an earlier suit bars *the continuation of* a later suit while the earlier suit remains undecided but ceases to bar *the continuation of* that suit once it is dismissed." This reading would empower courts conducting a first-to-file analysis to take into account the dismissals of an action giving rise to a relator's first-to-file problems.

We cannot support Carter's reading. Instead, we read the above-described statement as simply providing that "an earlier suit bars *the bringing of* a later suit while the earlier suit remains undecided but ceases to bar *the bringing of* that suit once it is dismissed." When read in this manner, this Court's holding regarding the

temporal dynamics of the first-to-file rule is left undisturbed.

Our reading respects the statutory text underlying the first-to-file rule. That text does not purport to restrict the continuation of an FCA action while a related action is pending; rather, it restricts the "bring[ing]" of an FCA action while a related action is pending. 31 U.S.C. § 3730(b)(5). Presumably, the Supreme Court was aware of this textual detail in making the pronouncements that it did in *Carter III*.

In contrast, we cannot presume that the Supreme Court intended, with one ambiguous statement, to overrule this Court's conclusion as to the proper temporal reference point for a first-to-file inquiry.[5] This conclusion was never contested in the parties' briefing, and the Supreme Court did not present it as an issue before it in its opinion. The Supreme Court, moreover, expressed agreement with this Court's rejection of dismissal with prejudice in this case, and it did not qualify this expression of agreement with the significant caveat that it disagreed with this Court's instruction of dismissal without prejudice. For these reasons, we do not agree with Carter that the above-described

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[5] This conclusion, we add, was consistent with the conclusions of widespread, pre-*Carter III* circuit case law. *See, e.g.*, *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 n.5 (6th Cir. 2005); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001).

statement in any way undermined this Court's initial first-to-file analysis.

Next, Carter tries to rely on the Supreme Court's statement that it "agree[s] with the Fourth Circuit that the dismissal with prejudice of [Carter's] one live claim was error." *Carter III*, 135 S. Ct. at 1979. Carter urges that the Supreme Court's decision to describe one of Carter's claims as "live" was a manner of signaling that that claim is unaffected by the first-to-file rule. We disagree. The lead-up to Carter's second-quoted statement confirms that the Court was only using the description "live" to mean "not time-barred." *See id.* at 1978 (explaining that because "at least one claim [may be] timely on remand," the Court must "consider whether [Carter's] claims must be dismissed with prejudice under the first-to-file rule"). The statement itself belies the notion that "live" means not in violation of the first-to-file rule: The statement expresses unqualified agreement with this Court, which had just issued a decision that both applied the first-to-file rule to the Carter Action and called for dismissal without prejudice in lieu of dismissal with prejudice. *See Carter II*, 710 F.3d at 183.

Accordingly, the Supreme Court's decision in *Carter III* does not disturb our initial holding that the reference point for a first-to-file analysis is the set of facts in existence at the time that the action under review is commenced.

B.

Having discussed how this Court decides whether the first-to-file rule has been violated, we now turn to analyzing the sanction for a first-to-file violation. Our precedent on this issue is clear: The first-to-file rule is designed to restrict the bringing of certain types of suits, so when a relator brings an FCA action to court in violation of the first-to-file rule, "the court must dismiss the action." *Carson*, 851 F.3d at 302.

A court's lack of discretion when it comes to sanctioning first-to-file violations was underscored in a recent Supreme Court decision. *See Rigsby*, 137 S. Ct. 436. In *Rigsby*, the Supreme Court considered whether a violation of the FCA provision mandating that relators file their complaints under seal could only be sanctioned with dismissal. *Id.* at 439-40. The Court held that the appropriate response to a seal violation was left to the discretion of the district court, in light of Congressional silence on the issue of how to sanction a seal violation. *Id.* at 442-444. In the course of reaching this holding, however, the Court contrasted the seal requirement with the first-to-file rule, which the Court described as one of "a number of [FCA] provisions that do require, in express terms, the dismissal of a relator's action." *Id.* at 442-43 (citing 31 U.S.C. § 3730(b)(5)). This reasoning by the Supreme Court confirms that the only appropriate response for a first-to-file rule violation is dismissal.

C.

Carter takes issue with the policy implications of holding (i) that the first-to-file rule is violated when an FCA action is brought while a related action is pending (regardless of the eventual outcome of the latter action), and (ii) that a first-to-file violation must be sanctioned with dismissal. Carter asserts that these holdings would compel a court, sitting after the FCA's limitations period has run, to dismiss a relator's timely FCA action brought during the pendency of a then-pending, but since-dismissed, related action, and thereby expose the relator (if he or she sought to file a new complaint) to statute of limitations problems that the relator otherwise would not face. This arrangement, Carter contends, conflicts with the Supreme Court's apparent policy preference for interpretations of the FCA that facilitate government recoveries. *See Carter III*, 135 S. Ct. at 1979 (asking rhetorically, "Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?").

This policy argument offers no basis for disregarding the first-to-file rule's unambiguous statutory text. "Our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute." *Baker Botts LLP. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) (internal quotation marks omitted). The first-to-file rule's statutory text, as explained above, plainly bars the bringing of actions while related actions are pending, and affords courts no flexibility to accommodate an improperly-filed action when its

earlier-filed counterpart ceases to be pending. We follow this text today, and decline to manufacture such flexibility, even if it may raise statute of limitations problems for certain FCA relators. *See Carter III*, 135 S. Ct. at 1979 ("The False Claims Act's *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine.").

We hasten to add that although our holding may reduce the number of duplicative actions that can survive the FCA's limitations, this reduction should have no material effect on the Act's objective of ensuring that the government is put on notice of fraud. Such notice is already principally provided by first-filed actions. *See Carson*, 851 F.3d at 302-03 ("A belated 'relator who merely adds details to a previously exposed fraud does not help reduce fraud or return funds to the federal fisc, because once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.' " (quoting *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009))).

Finally, we note that KBR is not without policy arguments of its own. Were we to hold that a statutorily-barred action (i.e., an action brought while a related action is pending) could be revived by an event occurring outside the FCA's limitations period (i.e., dismissal of the related action), we would be undermining an FCA defendant's interest in repose and avoiding stale claims outside the limitations period. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (describing the

interests of defendants that are advanced by statutes of limitations). Congress could certainly have enacted a revival mechanism in the first-to-file rule statute notwithstanding repose and staleness concerns, but it has not done so, and we are not at liberty to create one.

D.

With this understanding in mind, we reiterate the conclusion of our initial decision in this case. *See Carter II*, 710 F.3d at 183. Because Carter commenced the Carter Action while the Maryland and Texas Actions were still pending, he clearly "br[ought]" an "action" while factually related litigation remained pending, 31 U.S.C. § 3730(b)(5), and therefore violated the first-to-file rule. The subsequent dismissals of the Maryland and Texas Actions do not alter the fact that Carter brought the Carter Action while factually related litigation remained pending, and those dismissals therefore do not cure the Carter Action's first-to-file defect.

Because the Carter Action violated the first-to-file rule, and because the only remedy for such a violation is dismissal, the district court was correct to dismiss the Carter Action.

IV.

Carter argues that even if the dismissals of the Maryland and Texas Actions did not automatically cure the Carter Action's first-to-file defect, his

subsequent, Rule 15(a)-based proposed amendment to his Carter Action complaint would have done so. The district court rejected this argument, and consequently denied Carter's proposed amendment. We affirm.

Rather than address any matters potentially relevant to the first-to-file rule, such as the dismissals of the Maryland and Texas Actions, the proposed amendment simply adds detail to Carter's damages theories.[6] As such, we see no reason why that proposal would have cured the first-to-file defect in the Carter Action. Therefore, Carter's proposed amendment was properly denied.[7]

V.

Finally, Carter contests the district court's denial of his Rule 59(e)-based motion for reconsideration. Finding no error in the district court's denial, we affirm.

"Rule 59(e) motions can be successful in only three situations: (1) to accommodate an intervening change

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[6] Although Carter and his counsel referenced the dismissals of the Maryland and Texas Actions in their briefing and during oral arguments, these references do not rise to the level of proposed revisions to a complaint. *See S. Walk at Broadlands Homeowners Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) ("It is well-established that parties cannot amend their complaint through briefing or oral advocacy.").

[7] Because we need not do so, we decline to comment on the other reasons the district court identified as justifying its rejection of Carter's effort to circumvent dismissal through amendment.

in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir. 2007) (internal quotation marks omitted). Carter contends that the first and third bases for reconsideration are implicated in this case. This contention does not withstand scrutiny.

With respect to the first basis for reconsideration, Carter claims that the 2015 *Gadbois* decision – where the First Circuit held that an FCA action's first-to-file defect can be cured by a Rule 15(d) supplement clarifying that an earlier-filed, related action that gave rise to the defect has been dismissed – constitutes an intervening change in controlling law. *See Gadbois*, 809 F.3d at 4-6. We disagree for two reasons.

First, as an out-of-circuit decision, *Gadbois* cannot constitute controlling law in this Circuit. *See McBurney v. Young*, 667 F.3d 454, 465 (4th Cir. 2012).

Second, *Gadbois* is factually distinguishable. *Gadbois* only addressed a situation where the relator sought to revise an FCA complaint with information pertaining to the related action that gave rise to the first-to-file defect. Carter's situation is different, because his proposed revision makes no mention of the related Maryland and Texas Actions. Thus, assuming for the sake of argument that *Gadbois* was correctly decided,[8] it provides Carter no support.

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[8] *But see United States v. Medco Health Solutions, Inc.*, No. 11-684-RGA, 2017 WL 63006, at *12 (D. Del. Jan. 5, 2017)

With respect to the third basis for reconsideration, Carter argues that the district court's decision to dismiss the Carter Action and to deny his proposed amendment was clearly erroneous and manifestly unjust. Having concluded that the above-described decision was correct, we cannot agree with Carter's argument.

Simply put, Carter was ineligible for relief on a motion for reconsideration, and thus the district court did not err in denying him such relief.

VI.

This Court fully supports the FCA's noble goal of protecting the government's funds and property against fraud. At the same time, we must adhere to the statutory provisions and limitations that Congress put into place in pursuit of that goal. We do so in this case by holding that because the Carter Action violated the FCA's first-to-file rule in a manner not cured by subsequent developments, the action must be dismissed. The district court's judgments comport with this holding, and they are therefore

AFFIRMED.

(arguing that *Gadbois* "failed to 'give sufficient weight to the plain language' of the first-to-file bar") (quoting *Carter VI*, 315 F.R.D. at 60); *United States ex rel. Soodavar v. Unisys Corp.*, 178 F. Supp. 3d 358, 373-74 (E.D. Va. 2016) (arguing that *Gadbois* conflicts with the first-to-file rule's purpose of foreclosing duplicative *qui tam* actions).

WYNN, Circuit Judge, concurring:

The False Claims Act's "first-to-file" bar provides that "[w]hen a person brings an action under [the False Claims Act], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The district court dismissed relator Benjamin Carter's ("Relator") False Claims Act complaint against Defendant Halliburton Co., and several of its subsidiaries, on grounds that at least two "related" actions were "pending" at the time Relator filed his original complaint. Following dismissal of all earlier-filed, related actions, Relator sought leave to amend his complaint to avoid preclusion under the first-to-file bar. Relator's proposed amendment, however, did not reference, in any way, the first-to-file bar or the dismissal of the two earlier-filed, related actions. The district court denied Relator leave to amend on grounds of futility, holding *as a matter of law* that a relator cannot cure a first-to-file defect by amending or supplementing his complaint after dismissal of all earlier-filed, related actions.

I agree with the majority opinion's conclusion that the dismissal of all earlier-filed, related actions does not, by operation of law, lift the first-to-file bar on a later-filed action. The majority opinion further concludes that the district court did not abuse its discretion in denying Relator leave to amend. I write separately to emphasize the narrow scope of that conclusion. In particular, the majority opinion finds that the district court did not reversibly err in denying

Relator leave to amend *solely* on grounds that his proposed amendment did not "address any matters potentially relevant to the first-to-file rule, such as the dismissals of the [earlier-filed, related actions]." *Ante* at 20. To that end, the majority opinion does not address, much less adopt, the district court's reasoning that an amendment or supplement to a complaint cannot, as a matter of law, cure a first-to-file defect, *id.* at 21 n.8 – a question that has divided district courts in this circuit and around the country, *see United States ex rel. Wood v. Allergan, Inc.*, No. 10-CV-5645, 2017 WL 1233991, at *10 (S.D.N.Y. Mar. 31, 2017) (collecting cases). Likewise, the majority opinion does not address whether the district court's rule categorically barring a relator from supplementing a complaint to cure a first-to-file defect is consistent with this Court's decision in *Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339, 347 (4th Cir. 2014), which held that "even when [a] District Court lacks jurisdiction over a claim at the time of its original filing, a supplemental complaint may cure the defect by alleging the subsequent fact which eliminates the jurisdictional bar." Rather than resolving those questions, the majority opinion simply holds that a proposed amendment or supplement to a complaint cannot cure a first-to-file defect when the amendment or supplement does not reference the dismissal of publicly disclosed, earlier-filed related actions.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
v.	)	1:11-cv-0602 (JCC/JFA)
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

(Filed Feb. 17, 2016)

This matter came before the Court on Relator Benjamin Carter's ("Relator") Motion for Reconsideration of this Court's November 12, 2015 Memorandum Opinion ("November 12 Opinion"). [Dkt. 129.] Relator argues that an intervening change in law indicates that the False Claims Act's first-to-file bar would not apply to his amended complaint. Additionally, Relator seeks clarification on whether the Court would deny leave to amend based on three arguments that were raised, but not addressed, in the November 12 Opinion. As described below, those alternative arguments would not preclude amendment, but the first-to-file bar continues to make amendment futile.

I. Background

The Court's many prior opinions describe the facts and procedural history of this case in full. That background is presumed known and repeated here only to the extent necessary to resolve the current motion.

On October 15, 2015, this Court held a hearing on how this case should proceed on remand from the Court of Appeals for the Fourth Circuit and the United States Supreme Court. Defendants moved to dismiss the case with prejudice, arguing that the False Claims Act's first-to-file bar requires dismissal and the statutes of limitations and repose would prevent the filing of a new lawsuit. Relator, by contrast, sought to amend his complaint in the belief that, according to the Supreme Court's decision in this case, amendment would clear away the first-to-file bar attached to the Original Complaint. *See Kellogg Brown & Root Servs., Inc. v. United States* ex rel. *Carter*, 135 S. Ct. 1970 (2015) [hereinafter *Kellogg*]. The Court agreed with Defendants and issued its November 12 Opinion concluding that the first-to-file bar renders amendment futile. Because this was a dispositive ground for denying leave to amend, the Court did not address Defendants' alternative arguments that the statute of limitations, the statute of repose, and the prejudice of delay should also preclude amendment.

Relator motioned for the Court to reconsider its denial of leave to amend,[1] or in the alternative, to decide whether Defendants' alternative arguments have merit. Relator contends that such a clarification would promote judicial economy by presenting a complete record and reduce the need for additional motions practice if he successfully appeals to the Fourth Circuit. Defendants oppose this motion, arguing that Relator seeks an advisory opinion that does not satisfy any of the Rule 59(e) grounds for reconsideration. For the following reasons, the Court agrees with Relator that a clarification of the November 12 Opinion is necessary to prevent manifest injustice.

II. Standard of Review

Amending a judgment "is an extraordinary remedy that should be applied sparingly." *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012). A court may amend a judgment under Rule 59(e) "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Merely attempting to "reargue the facts and law originally argued in the parties' briefs," however, is not a proper use of Rule 59(e). *Projects Mgmt. Co. v. DynCorp Int'l, LLC*, 17 F. Supp. 3d 539, 541 (E.D. Va.

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[1] Relator supplemented the motion to reconsider on December 18, 2015, based on the First Circuit's opinion in *United States* ex rel. *Gadbois v. Pharmerica Corp.*, 809 F.3d 1 (1st Cir. 2015).

2014) (quoting *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 977 (E.D. Va. 1997)).

With those principles in mind, the Court turns now to Relator's arguments that a change in law and the need to prevent manifest injustice support reconsideration in this case.

III. Analysis

A. Intervening Change in Law

The Court first addresses Relator's argument that the First Circuit opinion in *United States* ex rel. *Gadbois v. Pharmerica Corp.*, 809 F.3d 1 (1st Cir. 2015), is an intervening change in controlling law justifying reconsideration. For several reasons, *Gadbois* does not convince the Court to reconsider its judgement that the first-to-file bar renders amendment futile.

As an initial and dispositive point, *Gadbois* is not "controlling law" for this Court. Rule 59(e)'s "controlling law" prong "refers specifically to binding precedent only." *McNamara v. Royal Bank of Scotland Grp, PLC*, No. 11-cv-2137, 2013 WL 1942187, at *3 (S.D. Cal. May 9, 2013). Although the Court may consider non-binding opinions as persuasive authority, they certainly do not "control" this Court's decisions. Thus, *Gadbois* does not justify reconsideration under Rule 59(e). *See Local 703 v. Regions Fin. Corp.*, No. CV 10-2847-IPJ, 2011 WL 4431154, at *1 (N.D. Ala. Sept. 7, 2011) ("[A] decision by the Second Circuit Court of Appeals is not binding on this Court, and therefore, is not

an intervening change in controlling law."); *D&D Assocs., Inc. v. Bd. of Educ. of N. Plainfield*, No. 03-1026, 2009 WL 904054, at *2 (D.N.J. Mar. 31, 2009) ("[A] decision that is not controlling precedent is not an intervening change in the controlling law for purposes of a motion for reconsideration.").

Furthermore, even considering *Gadbois*, the Court would have denied Relator's motion to amend due to the first-to-file bar. In *Gadbois*, the First Circuit found that an FCA relator could avoid the first-to-file bar by supplementing his complaint to note that an earlier related case was dismissed. *Gadbois*, 809 F.3d at 3. The court reasoned that Federal Rule of Civil Procedure 15(d)[2] permits supplements to a complaint, even to correct jurisdictional deficiencies. *Id.* at 5. Additionally, the court noted that the "familiar rule that jurisdiction is determined by the facts existing at the time of filing of an original complaint" primarily governs in diversity jurisdiction cases. *Id*. And, because *Kellogg* and the dismissal of the earlier-filed action "dissolved the jurisdictional bar that the court below found dispositive," dismissal and refiling would be a "pointless formality." *Id.* at 6. Therefore, the court concluded that the first-to-file bar does not preclude supplementing the complaint.

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[2] Federal Rule of Civil Procedure 15(d) permits "a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Additionally, "[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed. R. Civ. P. 15(d).

Despite its virtues, the *Gadbois* decision does not directly address many of the concerns that influenced this Court's interpretation of the first-to-file bar. First, *Gadbois* referred to *Kellogg* as part of a shifting of "tectonic plates" regarding the first-to-file bar. *Id.* at 3. The court's assessment of *Kellogg*, however, was very brief and failed to consider the context of the Supreme Court's analysis. By contrast, this Court's November 12 Opinion relied upon the nature of the circuit split motivating the *Kellogg* decision, the Supreme Court's statement of the issues before it, and the law of this case and this circuit. Second, *Gadbois* did not give sufficient weight to the plain language of 31 U.S.C. § 3730(b)(5), which the Fourth Circuit has emphasized and this Court considered dispositive. *Compare Gadbois*, 809 F.3d at 4-5 (noting this argument but not addressing it at length), *with United States* ex rel. *Carter v. Halliburton*, 710 F.3d 171, 183 (4th Cir. 2013) ("Following the plain language of the first-to-file bar, [relator's] action will be barred by *Duprey* or the Texas action if either case was pending when Carter filed suit."), *United States* ex rel. *Shea v. Verizon Commc'ns, Inc.*, No. 09-1050, 2015 WL 7769624, at *10 (D.D.C. Oct. 6, 2015) ("[T]he language of § 3730(b)(5) itself, nevertheless, requires the Court to look to the moment when Plaintiff filed his initial Complaint. . . ."), *and United States* ex rel. *Branch Consultants, L.L.C. v. Allstate Inc. Co.*, 782 F. Supp. 2d 248, 259 (E.D. La. 2011) ("The first-to-file bar . . . refer[s] specifically to jurisdictional facts that must exist when an 'action,' not a complaint, is filed."). Third, the *Gadbois* court believed it to be a "pointless formality" to require dismissal and refiling.

Gadbois, 809 F.3d at 6. In the present case, however, dismissal and refiling could implicate significant statute of limitations and repose problems. This posture made the Court mindful of developing an administrable rule. Accordingly, *Gadbois* would not persuade this Court to grant Relator's motion to amend or deny Defendants' motion to dismiss.

B. Manifest Injustice

Relator also argues that failing to address Defendants' alternative arguments for denying amendment results in a manifest injustice and justifies reconsideration or clarification. Specifically, Relator contends that leaving these alternative arguments unresolved would provoke additional motions practice on remand if he successfully appeals to the Fourth Circuit. For reasons that are unique to this case, the Court agrees and will take this opportunity to clarify its November 12 Opinion.

Before discussing Defendants' alternative arguments for denying amendment, the Court must explain why it is taking this extraordinary step. First, the Court notes that it is regular and proper to leave alternative arguments unresolved after a court finds a dispositive basis for resolving an issue. *See, e.g.*, *Mueller v. AT&T Techs., Inc.*, No. 87-1545, 1987 WL 44601, at *2 (4th Cir. Aug. 21, 1987) ("We hold that the district court correctly granted summary judgment on the latter ground, and we need not consider the former ground."); *Sheppard v. Geren*, No. 1:07cv1279, 2008 WL

4919460, at *1 n.4 (E.D. Va.), *aff'd*, 282 F. App'x 232 (4th Cir. 2008) ("As the Court concludes that the instant complaint should be dismissed for lack of jurisdiction, it is unnecessary to address whether plaintiff has failed to state a claim upon which relief can be granted."). It is also common, however, for courts to reach alternative grounds for dismissal, even after concluding that jurisdictional deficiencies exist. *See, e.g.*, *Settlers Crossing, L.L.C. v. U.S. Home Corp.*, 383 F. App'x 286, 288 (4th Cir. 2010) (affirming district court's finding of lack of subject matter jurisdiction and alternative dismissal on the merits); *Foxworth v. United States*, No. 3:13-cv-291, 2013 WL 5652496, at *4-6 (E.D. Va. Oct. 16, 2013) ("Accordingly, even if the Court found jurisdiction to be proper, Foxworth's Complaint fails to state a claim upon which relief can be granted."). Thus, either course is proper, and a court's decision not to reach alternative grounds is not a recognized basis for reconsideration. The circumstances of this case, however, are *sui generis*.

In March 2010, this case had completed discovery and was poised for trial when the Government informed the Court of an earlier pending case similar to Relator's case. Thus, after proceeding through two motions to dismiss, two amended complaints, and a contentious and protracted discovery period, the Court granted Defendants' third motion to dismiss. That dismissal occurred on May 10, 2010. Since that time, the case has undergone what the Supreme Court described as "a remarkable sequence of dismissals and filings." *Kellogg*, 135 S. Ct. at 1974. In short, this case has

consumed an immense amount of resources from the parties and the many courts that have sought to resolve the disputes between these parties. To the extent a clarification of the November 12 Opinion will provide a more direct route to finality in this case, it would be a manifest injustice to deny that clarification.

The Court also notes that resolving the alternative arguments for denying amendment does not prejudice either party. The issues analyzed below were orally argued and fully briefed in the memoranda on Defendants' motion to dismiss and Relator's motion to amend. Therefore, the Court will now clarify its November 12 Opinion by addressing Defendants' alternative arguments for denying leave to amend.

C. Amendment Under Rule 15(a)(2)

Federal Rule of Civil Procedure 15(a)(2) requires courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). In light of that policy, courts should deny leave to amend in only three circumstances: (1) bad faith on the part of the moving party; (2) prejudice to the opposing party; or (3) futility. *Johnson v. Oroweat Foods Co.*, 785 F.2d 504, 510 (4th Cir. 1986) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Defendants argue that prejudice and futility prevent amendment in this case. The Court agrees that

the first-to-file bar renders amendment futile. The Court's November 12 Opinion, however, did not address whether the statutes of limitations and repose also make amendment futile. The Court also did not address whether the amendment is prejudicial. The Court turns to those issues now.

1. Prejudice

Although Relator substantially delayed in bringing this motion, the prejudice from that delay does not justify denying leave to amend. If this case's age is marked by the months and years that have passed since the filing of the original complaint, then the motion indeed comes late in this case's life. Over four and a half years ticked away before Relator motioned to amend. But the passage of time seems a poor indicator of the prejudice caused by permitting an amendment. *Cf. Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 117-18 (4th Cir. 2013) (finding no prejudice in amended complaint filed "over three years" after original complaint); *A Helping Hand v. Baltimore Cty., Md.*, No. CCB-02-2568, 2009 WL 5219725, at *1 (D. Md. Dec. 3, 2009) (permitting amendment "years after" the original complaint was filed). The better measure of delay appears to be the time remaining between the amendment and a resolution of the case on the merits. This point of reference provides more insight into the defendant's ability to properly defend against the amended complaint. Viewed from this perspective, the present case has undergone substantial motions practice, but remains far from mature in terms of

resolution. Defendants face no looming deadline of trial that might prevent them from adequately responding to the amended complaint. Thus, although substantial time and opportunity for amendment has passed, the Court finds no improper prejudice from this delay.

Furthermore, the substance of Relator's amendments should not surprise Defendants or undermine the many judicial opinions shaping the scope of this case. The amendments provide details about award fee presentations Defendants allegedly made in March and July 2005 and corresponding award payments of $55,846,736 and $21,168,998 received in April and August 2005, respectively. (Am. Compl. ¶¶ 144-49, 161-79.) These presentations allegedly incorporated information about Defendants' "excellent work purifying water at the bases in Ar Ramdi and Al Asad." (*Id.* ¶ 145.) Similar allegations of award fees related to these water purification tasks are plainly present in the Original Complaint, where Relator described the award fee process at length, (Compl. ¶¶ 140-49), noted that fraudulent time recording can inflate the fee award, (*id.* ¶ 154), alleged that Defendants' fraudulent claims resulted in "an enhanced award fee under the contract," (*id.* ¶ 167(e)), and even claimed that Defendants "received $120 million in LogCAP award fees" in 2006 alone, (*id.* ¶ 148). In a prior opinion, this Court interpreted the Original Complaint to allege a connection between Defendants' false claims and the award fees cited in the Amended Complaint. *See Carter*, No. 1:08cv1162, 2009 WL 2240331, at *7 ("[A] further

result of these allegedly false time cards and invoices, the government also paid Defendants greater indirect costs, a higher base fee, *and a higher award fee*." (emphasis added)) Thus, the similarity between the Original Complaint and the amendments further persuade the Court of the absence of prejudice. *See Matrix Cap. Mgmt. Fund, v. BearingPoint, Inc.*, 576 F.3d 172, 195 (4th Cir. 2009) (finding no prejudice where "Plaintiffs simply seek to add specificity to scienter allegations in a situation where defendants are aware of the circumstances giving rise to the action"); *Laber*, 438 F.3d at 427 ("An amendment is not prejudicial . . . if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery has occurred."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980) ("Because defendant was from the outset made fully aware of the events giving rise to the action, an allowance of the amendment could not in any way prejudice the preparation of the defendant's case.").

2. Futility

Turning to futility, Defendants argue that the Amended Complaint is time barred by the statute of limitations and will not relate back to the Original Complaint. Additionally, Defendants contend that the FCA's ten-year statute of repose bars the Amended Complaint and statutes of repose are categorically not subject to relation back under Rule 15(c). For the

following reasons, the Court finds that these arguments do not render amendment futile.

a) Relation Back of Statute of Limitations

A claim barred by the applicable statute of limitations is futile, and an untimely amendment can be denied on that basis. *See United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000). Federal Rule of Civil Procedure 15(c), however, allows an amended complaint to relate back to the date the original complaint was filed when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(2).[3] "In this circuit, it is well-settled that Rule 15 is chiefly concerned with ensuring (i) that there is a factual nexus between the amendments and the prior pleading, and (ii) that a defendant had sufficient notice of these new claims such that he will not suffer prejudice if the amendments are found to relate back." *Vitullo v. Mancini*, 684 F. Supp. 2d 747, 754 (E.D. Va. 2010). In this case, the Original Complaint satisfies both of these requirements. Therefore, relation back is proper.

As described above, the amendments have a strong factual nexus to the Original Complaint. It is well recognized that "amendments that do no more than restate the original claim with greater

[3] The additional circumstances for relation back in Rule 15(c) are not applicable to this case.

particularly or amplify the details of the transaction alleged in the proceeding fall within Rule 15(c)(1)(B)." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1497 (3d ed. 2015). Although Relator's amendments might do slightly more than add particularly, the facts in the Amended Complaint are directly referenced or clearly alluded to in the Original Complaint.

Additionally, Defendants were on notice that Relator would include portions of the award fees within its claims for damages. The Original Complaint stated explicitly that Defendants' "fraudulent claims resulted in . . . an enhanced award fee under the contract." (Compl. ¶ 167(e).) In 2009, this Court interpreted these allegations to mean that as "a further result of these allegedly false time cards and invoices, the government also paid Defendants greater indirect costs, a higher base fee, *and a higher award fee*." *Carter*, 2009 WL 2240331, at *7 (emphasis added). Thus, even the Court understood the Original Complaint to potentially implicate the allegedly inflated fee awards Defendants received based on their timecard and billing practices among Ar Ramadi and Al Asad ROWPU employees. Accordingly, Defendants were sufficiently on notice of the new facts alleged. Thus, the Amended Complaint would relate back to the time of filing of the Original Complaint.

The relation-back doctrine, however, is not without limitations. Relation back may only save a claim that would have been timely raised within the original complaint. *See Williams v. Lampe*, 399 F.3d 867, 870

(7th Cir. 2005) ("In order to benefit from Fed. R. Civ. P. 15(c)'s 'relation back' doctrine, the original complaint must have been timely filed."). Some of Relator's amendments allege acts occurring more than six years before the Original Complaint was filed. Absent equitable tolling, these claims would be untimely. Because the Court has reserved its ruling on the application of equitable tolling to this remanded case, however, the better practice at this stage is to permit amendment and allow Defendants to raise statute of limitations as an affirmative defense in a motion to dismiss.

b) Effect of the Statute of Repose

Defendants next argue that amendment is futile because relation back cannot apply to the FCA's ten-year statute of repose. Defendants cite several cases supporting their interpretation of Rule 15(c).[4] Despite these persuasive authorities to the contrary, the Court finds that the statute of repose does not prevent relation back.

Before diving into this issue, the Court will briefly note the differences between a statute of limitations and a statute of repose. The Fourth Circuit has described statutes of limitations as "primarily instruments of public policy and of court management," and

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[4] Defendants cite the following cases: *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013); *Bensinger v. Denbury Res. Inc.*, 31 F. Supp. 3d 503, 510 (E.D.N.Y. 2014); *In re Lehman Bros. Sec. & Erisa Litig.*, 800 F. Supp. 2d 477, 483 & n.27 (S.D.N.Y. 2011); *Resolution Tr. Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991).

aimed at the "prevention of stale claims." *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987). As such, statutes of limitations "do not confer upon defendants any right to be free from liability, although this may be their effect." *Id.* Statutes of repose, by contrast, "make the filing of suit within a specified time a substantive part of plaintiff's cause of action." *Id.* The purpose of a statute of repose is then "primarily to relieve potential defendants from anxiety over liability for acts committed long ago." *Id.*

The Court finds little guidance from federal courts of appeals as to whether a statute of repose may be avoided through relation back. Neither the parties nor the Court identified a Fourth Circuit opinion considering the application of Rule 15(c) to a statute of repose. Defendants located a Second Circuit opinion implying that Rule 15(c) could not apply to a statute of repose without violating the Rules Enabling Act, 28 U.S.C. § 2972(b). *See Police & Fire Retirement Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013). The Second Circuit, however, expressly declined to determine whether Rule 15(c) was categorically inapplicable to statutes of repose. *See id.* at 110 n.18 ("[W]e need not address this issue, or whether Rule 15(c) allows 'relation back' of claims otherwise barred by a statute of repose. . . ."). Thus, *Police & Fire* does not advance the Court's analysis of Rule 15(c) very far.

Left to consider the issue as a matter of first instance, district courts have reached conflicting opinions about the application of Rule 15(c) to a statute of repose. *See Acierno v. New Castle County*, No. C.A.

92-385, 2000 WL 718346, at *9 (D. Del. May 23, 2000) ("[T]here is disagreement over whether relation back under Rule 15(c) is permissible when a statute of repose otherwise prevents assertion of the claim.").[5] Some district courts have even applied relation back to a statute of repose without any apparent concern that this use of Rule 15(c) might be improper. *See, e.g.*, *Jenkins v. Novartis Pharm. Corp.*, No. 3:11-cv-342, 2013 WL 1760762, at *3 (E.D. Tenn. Apr. 24, 2013); *Reddick v. Bloomingdale Police Officers*, No. 96 C 1109, 2001 WL 630965, at *5 (N.D. Ill. May 29, 2001). After careful consideration, the Court concludes that the statute of repose does not prevent relation back in this case.

Starting with the text of Rule 15(c), the rule makes no distinction between statutes of limitations and statutes of repose. The Rule merely states that an "amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in

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[5] *Compare Jenkins v. Novartis Pharm. Corp.*, No. 3:11-cv-342, 2013 WL 1760762, at *3 (E.D. Tenn. Apr. 24, 2013) (permitting relation back of statute of repose), *Reddick v. Bloomingdale Police Officers*, No. 96 C 1109, 2001 WL 630965, at *5 (N.D. Ill. May 29, 2001) (same), *Chumney v. U.S. Repeating Arms Co., Inc.*, 196 F.R.D. 419, 428 (M.D. Ala. 2000) (same), *and In re Sharps Run Assocs., L.P.*, 157 B.R. 766, 784 (D.N.J. 1993) (same), *with Bensinger v. Denbury Res. Inc.*, 31 F. Supp. 3d 503, 510 (E.D.N.Y. 2014) (declining to apply relation back to avoid statute of repose), *In re Lehman Bros. Sec. & Erisa Litig.*, 800 F. Supp. 2d 477, 483 & N.27 (S.D.N.Y. 2011) (citing cases concluding that Rule 15(c) does not apply to statute of repose), *and Resolution Tr. Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991).

the original pleading." Fed. R. Civ. P. 15(c)(1)(B). As other courts have found, the absence of limiting language within Rule 15(c) indicates that it applies to statutes of limitations and repose alike. *See Chumney*, 196 F.R.D. at 428 ("[T]he language of Federal Rule 15(c) indicates that it applies to both statutes of creation and statutes of limitations. . . ."); *In re Sharps Run Assocs., L.P.*, 157 B.R. at 784 ("We also do not accept the assertion that calling a statute one of repose rather than limitations automatically proscribes relation back. Certainly nothing in the language of either Rule 15(c) or R. 4:9-3 suggests such a rule.").

Furthermore, Defendants' strict interpretation of Rule 15(c) would have anomalous results. Under Defendants' interpretation, an expired statute of repose would preclude *all* amendments, regardless of the substance of the amendment. Thus, an amendment that does nothing more than add specificity or clarify a complaint would not relate back. Similarly, an amendment that removed a cause of action would not relate back to the original complaint. These results strike the Court as illogical and contrary to Rule 15(c)'s liberal policy of resolving issues on the merits. *See Acierno*, 2000 WL 718346, at *9 ("The court shall permit the amended complaint to relate back under Rule 15(c)(2) because doing so will further the federal goal of deciding controversies on their merits."); *Chumney*, 196 F.R.D. at 428 (permitting relation back, in part, because "the policy behind Federal Rule 15(c) is not hindered by applying it to statutes of creation").

Lastly, the application of Rule 15(c) in this case does not violate the Rules Enabling Act's prohibition on rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rules that "incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules." *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 (1987). The effect on Defendants' substantive rights appear incidental here, as Relator does little more than clarify and add specificity to his Original Complaint and the substantive right of repose is fairly critiqued as minimal in this case. *See Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1074 (4th Cir. 1992) (treating statute of repose "the same as statutes of limitations" despite the "substantive" nature of a statute of repose). Additionally, relation back appears reasonably necessary to promote the "spirit of the Federal Rules of Civil Procedure for decisions on the merits." *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Thus, even if relation back would affect Defendants' substantive rights, that effect would not violate the Rules Enabling Act.

In summary, the Court finds no basis to reconsider its November 12, 2015 holding that the first-to-file bar applies to Relator's current Complaint and would continue to apply to Relator's Amended Complaint. Therefore, amendment is denied as futile and Relator's case is dismissed without prejudice. Despite that holding, the Court finds it would cause a manifest injustice to leave unresolved the alternative grounds for denying amendment. Accordingly, the foregoing discussion

modifies the Court's November 12 Opinion to clarify that neither prejudice, the statute of limitations, nor the statute of repose defeat Relator's motion to amend. Therefore, if the first-to-file bar did not to apply, Relator could amend.[6]

IV. Conclusion

For the foregoing reasons, the Court will deny Relator's request for reconsideration. But, the Court modifies its November 12 Opinion as described above. Relator's case remains dismissed without prejudice.

An appropriate order will issue.

/s/
James C. Cacheris
UNITED STATES
DISTRICT COURT JUDGE

February 17, 2016
Alexandria, Virginia

[6] Nothing herein should be read to prevent Defendants from motioning to dismiss the Amended Complaint for reasons not inconsistent with this Opinion, should the Fourth Circuit remand with instructions to amend.

FILED: August 28, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1262
(1: 11-cv-00602-JCC-JFA)

UNITED STATES EX REL.
BENJAMIN CARTER

Plaintiff-Appellant

v.

HALLIBURTON CO.; KELLOGG
BROWN & ROOT SERVICES, INC.;
SERVICE EMPLOYEES
INTERNATIONAL INC.; KBR, INC.

Defendants-Appellees

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

Amicus Supporting Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

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31 U.S.C. § 3730. Civil actions for false claims

(b) ACTIONS BY PRIVATE PERSONS. –

* * *

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

* * *