No. 18-1044

In The Supreme Court of the United States

PHARMERICA CORPORATION,

Petitioner,

v.

UNITED STATES ex rel. MARC SILVER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL R. MANTHEI
Counsel of Record
JEREMY M. STERNBERG
ROBERT M. SHAW
WILLIAM F. PEZZOLO
HOLLAND & KNIGHT LLP
10 St. James Avenue
Boston, MA 02116
(617) 523-2700
michael.manthei@hklaw.com
jeremy.sternberg@hklaw.com
robert.shaw@hklaw.com
william.pezzolo@hklaw.com

Counsel for Petitioner

JUDITH H. GERMANO
GWEN M. SCHOENFELD
GERMANO LAW LLC
jgermano@germanolaw.com
gwens@germanolaw.com

PETER J. KOCORAS
BRIAN K. STEINWASCHER
THOMPSON HINE LLP
peter.kocoras@thompsonhine.com
brian.steinwascher@thompsonhine.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

This Court has never addressed the standard to be applied under the False Claims Act's ("FCA's") Public Disclosure Bar in assessing whether an action is "based upon" or "substantially similar to" publicly disclosed "allegations or transactions." This case demonstrates the importance of that issue and why this Court needs to provide guidance to the lower courts. Relator is a complete stranger to PharMerica who flatly admitted at his deposition that he derived his complaint from public disclosures, yet the Third Circuit ruled that the Public Disclosure Bar did not apply. A.597-98.[1] Consistent with the well-recognized purpose and plain language of the Public Disclosure Bar, this relator, more than anyone, should have been made to show that he qualifies as an "original source." 31 U.S.C. § 3730(e)(4)(B).

The Third Circuit's decision also cements the divide between circuits that impose an increasingly abstracted standard, exemplified by the XYZ test, in which the court asks whether actual fraud can be inferred from public disclosures, and circuits that apply a textual standard that instead compares the allegations and transactions in the complaint to those in the public disclosures to determine whether they are substantially similar. This Court should resolve the conflict in favor of the latter standard.

[1] "A." refers to the joint appendix filed in the Third Circuit.

ARGUMENT

I. THE FIRST QUESTION WARRANTS REVIEW.

The first question presented is not, as relator would have it, whether his admission that he based his allegations on public disclosures should "doom his claim." The actual question is one of law: whether, having admitted that he derived his complaint from specifically identified public disclosures, relator should be made to show that he is an original source of the information in his complaint. Unlike every other circuit to consider the issue, the Third Circuit answered this question in the negative, holding that relator's multiple admissions of actual reliance were "irrelevant" to the public disclosure analysis.

Actual reliance on publicly disclosed allegations or transactions *always* has been sufficient, though not necessary, to trigger the Public Disclosure Bar. Pet. 17-19;[2] *Amicus* Br. 7-10.[3] The Third Circuit turned this premise on its head by reasoning that because actual reliance on public disclosures is not *required* to trigger the Bar, it must be irrelevant in all instances. App.

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[2] "Pet." refers to PharMerica's Petition for a Writ of Certiorari.

[3] "*Amicus* Br." refers to the *Amicus* brief filed on behalf of the Pharmaceutical Research and Manufacturers of America (PhRMA); the Biotechnology Innovation Organization (BIO); the American Health Care Association and the National Center for Assisted Living (AHCA/NCAL); the National Association of Chain Drug Stores (NACDS); the Senior Care Pharmacy Coalition (SCPC); and the National Defense Industrial Association (NDIA) on March 11, 2019.

28-31.[4] It therefore reached the astonishing conclusion that "it is improper to rely on what the relator says he relied on (*because whether or not he relied on the public information is irrelevant*). . . ." *Id.* at 29 (emphasis added). This Court should accept the first question to resolve the conflict that the Third Circuit's decision creates and make clear that actual reliance on public disclosures is sufficient on its own to trigger the Bar and to require a relator to prove he is an original source.

II. THIS CASE IS AN APPROPRIATE VEHICLE TO INTERPRET THE PUBLIC DISCLOSURE BAR.

While it may be uncommon for relators to testify under oath that they derived their allegations from public disclosures, that does not mean that this case does not warrant review. To the contrary, it means that this case presents an ideal vehicle for providing definitive and needed guidance to the lower courts because there is an unusually clear record on which relator concedes that he relied on public disclosures in preparing his complaint. There is no ambiguity about this testimony, and it does not require this Court to review any factual findings by the Third Circuit.

Though the FCA has been amended, as relator points out, the portions relevant to the questions presented have not changed. Pre-PPACA, actions "based

[4] "App." refers to the appendix filed with PharMerica's Petition for a Writ of Certiorari.

upon" publicly disclosed allegations or transactions were barred. All circuits other than the Fourth interpreted "based upon" to mean "substantially similar to." *Amicus* Br. 7-8; *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009) (collecting cases).

The PPACA amendments codified this interpretation by amending the statute to require dismissal of an action if "substantially the same allegations or transactions" were publicly disclosed in enumerated sources. App. 7-9 n.6; *Amicus* Br. 10; *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 569 n.7 (9th Cir. 2016) (recognizing that the court's "analysis of the issue of substantial similarity would be the same under either" the pre or post PPACA version of the Public Disclosure Bar). The questions that PharMerica raises therefore remain as relevant under the newer version of the statute as they are under the preceding version.

III. THE SECOND QUESTION WARRANTS REVIEW.

On its plain terms, the Public Disclosure Bar asks whether the action is "based upon" or "substantially similar to" publicly disclosed "allegations or transactions," period. 31 U.S.C. § 3730(e)(4). In the absence of actual reliance, this language requires a comparison of the allegations or transactions described in the complaint with those appearing in the public disclosures. The specificity of the information in the complaint determines the specificity required in the public disclosures to trigger the Bar and to put a relator to the

original source test. *United States ex rel. Jamison v. McKesson Corp*., 649 F.3d 322, 330-31 (5th Cir. 2011).

Misdirected by the XYZ test, the Third Circuit incorrectly framed the fundamental question as whether allegations or transactions "of fraud" had been disclosed. Surveying the disclosures, the Third Circuit concluded that they "[did] not point to any *specific fraudulent transactions* directly attributable to PharMerica." App. 14 (emphasis added). Specifically, "none of the documents indicate that PharMerica was *actually engaging in swapping*, as opposed simply to operating in an environment that makes swapping attractive." *Id.* at 28 (emphasis added). Because the Third Circuit did not find specific allegations or transactions *of fraud* running to PharMerica, it reasoned that relator must have had some non-public per-diem pricing information that allowed him to infer that PharMerica was "swapping." *Id.* at 18-21.

Had the Third Circuit adhered to the statutory language, it would have seen that relator's original complaint did not include any non-public pricing information related to PharMerica.[5] The original complaint shows that relator is a stranger to PharMerica, having never worked for or done business with the

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[5] Relator's initial complaint controls the analysis, not his subsequent pleadings. *United States ex rel. Jamison v. McKesson Corp*., 649 F.3d 322, 327-28 (5th Cir. 2011) (Pre-PPACA case holding that "amendment process cannot 'be used to create jurisdiction retroactively where it did not previously exist' "); *United States ex rel. Beauchamp v. Academi Training Ctr*., 816 F.3d 37, 44-46 (4th Cir. 2016) (Post-PPACA case holding that the analysis is controlled by the "pleading that first alleged the fraud").

company. The original complaint quotes directly from a litany of public disclosures in the form of government reports documenting so-called "swapping" in the nursing home industry and in particular between nursing homes and clinical laboratories, DME suppliers, and ambulance providers. App. 94-102 (¶¶ 51-58), 115-121 (¶¶ 89-90, 94, 97). Relator asserts that the same logic can be applied to long term care pharmacies and goes on to describe how changes to the reimbursement system for nursing homes created the conditions for swapping. *Id.* at 115-118, 121 (¶¶ 89-93, 95-96, 98). The bulk of the remaining allegations document relator's own business dealings and do not mention PharMerica. *Id.* at 106-114 (¶¶ 64-87).

Like the relator in *McKesson*, relator here merely cribbed the details of a scheme from public documents and simply slapped PharMerica's name on it. Because the complaint, like the public disclosures relator relied on, contained only general allegations describing an environment that was conducive to swapping, the complaint is "based upon," i.e., "substantially similar to" the public disclosures.[6]

This case clearly shows the violence that the XYZ test does to Public Disclosure Bar. The essential purpose of the Public Disclosure Bar is to differentiate

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[6] Even if it could be argued that the proper comparison is to the Third Amended Complaint ("TAC"), the conclusion is the same. The allegations in TAC are as general as those in the original complaint, with the addition of two contracts attached as exhibits. The first contract is an unsigned draft. A.527-53. The second contract is not a PharMerica contract. A.555-71.

between bona fide whistleblowers who provide valuable, non-public information to the government and mere profiteers. *E.g.*, *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010). There can be no clearer example of a profiteer than relator in this case. If the Bar is to function as intended, then this Court must reject the XYZ test and make clear that the text of the statute demands only a simple comparison between the allegations and the public disclosures, with the detail of the complaint dictating the level of detail required of the public disclosures to trigger the original source analysis.[7]

IV. PHARMERICA HAS NOT "CONCEDED" USE OF THE XYZ TEST.

PharMerica has not waived any arguments related to the Public Disclosure Bar. "[The] traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (applying the same rule

[7] The Third Circuit never reached the original source question. App. 33.

to defenses). Because PharMerica raised the Public Disclosure Bar defense below, it can formulate any arguments to support that defense here.

In *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), this Court rejected a similar challenge by the respondent that the petitioner had waived a contract claim by failing to argue it fully below. This Court explained that the petitioner had raised the core claim before the Federal Circuit, and the fact that the petitioner did not thoroughly brief the argument did not demonstrate waiver, but "merely reflect[ed] counsel's sound assessment that the argument would be futile" given that the panel below could not overrule controlling precedent. *Id.* at 125. Similarly here, the Third Circuit previously had adopted the XYZ formula and that cumbrous test was and currently remains binding precedent in the Third Circuit. *E.g.*, *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 236 (3d Cir. 2013).

V. THE THIRD QUESTION WARRANTS REVIEW.

While it articulated the "inference of fraud" standard, the Third Circuit actually applied a stricter test when assessing the public disclosures. Relator incorrectly states that the Third Circuit, at most, "misapplied" the inference of fraud standard. Opp. Br. 32. Instead, the Third Circuit improperly linked the "based upon" standard to the heightened pleading standard of Rule 9(b). This is very different from a

mere misapplication of the "inference of fraud" standard.

CONCLUSION

We respectfully submit that the Court should grant the petition for certiorari.

Respectfully submitted,

MICHAEL MANTHEI
Counsel of Record
JEREMY M. STERNBERG
ROBERT M. SHAW
WILLIAM F. PEZZOLO
HOLLAND & KNIGHT LLP
10 St. James Avenue
Boston, MA 02116
(617) 523-2700
michael.manthei@hklaw.com
jeremy.sternberg@hklaw.com
robert.shaw@hklaw.com
william.pezzolo@hklaw.com

JUDITH H. GERMANO
GWEN M. SCHOENFELD
GERMANO LAW LLC
460 Bloomfield Avenue, Suite 200
Montclair, New Jersey 07042
(201) 247-7970
jgermano@germanolaw.com
gwens@germanolaw.com

PETER J. KOCORAS
BRIAN K. STEINWASCHER
THOMPSON HINE LLP
20 North Clark Street
Suite 800
Chicago, IL 60602
(312) 998-4241
peter.kocoras@thompsonhine.com
brian.steinwascher@thompsonhine.com

Counsel for Petitioner
PharMerica Corporation

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