No. ________

In the Supreme Court of the United States

JAMES HERON, PETITIONER

v.

NATIONSTAR MORTGAGE LLC, RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The False Claims Act allows qui tam relators to sue those who violate the Act, but its "public-disclosure bar" requires courts to dismiss qui tam lawsuits "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media."

31 U.S.C. § 3730(e)(4)(A). Petitioner James Heron has brought a qui tam action against Nationstar for using forged promissory notes in foreclosure proceedings. The court of appeals, however, dismissed Mr. Heron's qui tam lawsuit because it held that Mr. Heron's allegations had already been "publicly disclosed" in four separate sources. Mr. Heron denies that the sources on which the court of appeals relied disclose anything remotely approaching the fraud that he has alleged against Nationstar, and the courts of appeals have adopted divergent and incompatible standards for determining whether a qui tam relator's allegations or alleged transactions are "substantially the same" as those that have already been publicly disclosed. The issue presented is:

> What standard should courts use to determine whether a qui tam relator's allegations or alleged transactions are "substantially the same"

> as those that have already been publicly disclosed?

2. The "public-disclosure bar" provides an exception for *qui tam* relators who are an "original source of the information," and it defines "original source" to include:

> an individual . . . 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.

31 U.S.C. § 3730(e)(4)(B)(2). Mr. Heron alleges in his complaint that he has the "knowledge" required by section 3730(e)(4)(B)(2),[1] and his complaint provides detailed examples of his knowledge of Nationstar's fraud.[2] The courts of appeals, however, are divided on the test to apply when determining whether a qui tam relator qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B)(2). The issue presented is:

> What standard should courts use when determining whether a qui tam relator qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B)(2)?

1. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 7 (¶ 22) ("Relator has knowledge that is independent of and materially adds to any publicly disclosed information relating to the allegations herein.").

2. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 7–98.

PARTIES TO THE PROCEEDING

Petitioner James Heron was the plaintiff-appellant in the court of appeals.

Respondent Nationstar Mortgage LLC was the defendant-appellee in the court of appeals.

A corporate disclosure statement is not required because Mr. Heron is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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PETITION FOR WRIT OF CERTIORARI

The courts of appeals have adopted divergent interpretations of two provisions in the False Claims Act, which authorizes qui tam relators to sue those who violate the Act. One of these issues the interpretation of 31 U.S.C. § 3730(e)(4)(A), which requires courts to dismiss qui tam lawsuits "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." The other concern the standard that courts should use when determining whether a qui tam relator qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B)(2). The Court should grant the petition to resolve these disagreements among the courts of appeals.

OPINIONS BELOW

The opinion of the court of appeals is available at 2024 WL 3770843, and is reproduced at App. 1a–32a. The district court's opinion is available at 2021 WL 4197376 and is reproduced at App. 33a–54a.

JURISDICTION

The court of appeals issued its opinion on August 13, 2024. App. 1a. Mr. Heron timely filed this petition on November 11, 2024.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3730(e)(4)(A) provides:

> The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> > (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
> >
> > (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
> >
> > (iii) from the news media
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(B)(2) provides:

> For purposes of this paragraph, "original source" means an individual . . . (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.

STATEMENT

Plaintiff James Heron is suing Nationstar Mortgage LLC under the qui tam provisions of the False Claims Act. *See* 31 U.S.C. § 3729 *et seq.* Mr. Heron alleges that Nationstar defrauded the United States by submitting forged and fraudulent promissory notes in foreclosure proceedings, while simultaneously receiving federal funds that were designed to keep borrowers in their homes. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 26. Mr. Heron also alleges that Nationstar falsely certified to Fannie Mae that it had been complying with federal and state law, despite its fraud and forgery, which induced the government to make payments to Nationstar that it would not otherwise have made. *Id.* at 26–27.[1]

1. The statement of the case describes the facts as alleged in Mr. Heron's second amended complaint. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 23–123. Because Mr. Heron is appealing the district court's dismissal of his complaint, the allegations of his second amended complaint must be accepted as true for purposes of deciding this appeal. *See Manhattan Community Access Corp. v. Halleck*, 587

(continued…)

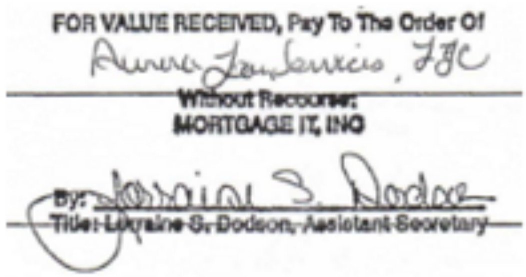
Mr. Heron uncovered Nationstar's forgeries and fraudulent behavior when he lost his home through foreclosure. At the time, Mr. Heron's loan was serviced by entities affiliated with Aurora Loan Services LLC.[2] Aurora made repeated attempts to foreclose on Mr. Heron's property from 2008 through 2011. And when it did so, it produced forged documents in an attempt to demonstrate ownership of Mr. Heron's loan. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 32–35.

On three separate occasions from 2008 to 2010, attorneys acting on behalf of Aurora produced copies of a promissory note that ostensibly proved the existence of Mr. Heron's debt.

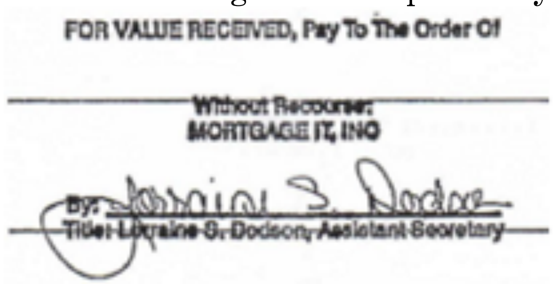
See Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 33–34. Each of these documents showed that Mr. Heron had borrowed and promised to repay $588,800.00. *See id.* at 127–131; *id.* at 135–139; *id.* at 143–147. And underneath Mr. Heron's signature on these documents was the handwritten signature of Aurora Loan Services LLC, which appeared as follows:

U.S. 802, 806 (2019) ("Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true.

2. These Aurora-affiliated entities include Aurora Loan Services LLC, Aurora Bank FSB, and Aurora Commercial Corp., as successor to Aurora Bank FSB. For simplicity and ease of exposition, we will refer to these entities collectively as "Aurora." Mr. Heron initially named the Aurora entities as defendants but eventually settled those claims and dismissed the Aurora defendants from the case. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 26 n.1.


FOR VALUE RECEIVED, Pay To The Order Of
Aurora Loan Services, LLC
Without Recourse:
MORTGAGE IT, INC
By:
Title: Lorraine S. Dodson, Assistant Secretary

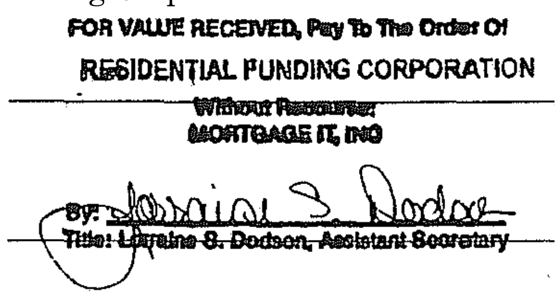
See Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 131, 139, and 147. But when Aurora made attempts to foreclose on Mr. Heron's property in March of 2011, its attorneys produced a copy of the promissory note that no longer contained the handwritten endorsement from Aurora, with a blank space where the handwritten signature had previously been:


FOR VALUE RECEIVED, Pay To The Order Of
Without Recourse:
MORTGAGE IT, INC
By:
Title: Lorraine S. Dodson, Assistant Secretary

See Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 34–35.

By this time Mr. Heron had grown suspicious of Aurora because they had been offering him "loan-modification plans" yet never followed through with their promises to modify his loan even after Mr. Heron had made the agreed-upon payments. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 35–36 & n.2. So Mr. Heron began researching the documentation of his loan and discovered the disappearing endorsement in later copies of the promissory notes that Aurora had produced. *See id.* at 35–36. Upon uncovering this discrepancy, Mr. Heron contested the authenticity of the promissory note in a 2012 foreclosure proceeding in Douglas County, Colorado. *See id.* at 36.

By this point Nationstar had purchased the rights to service Mr. Heron's loan from Aurora and was substituted as the plaintiff in the Douglas County proceeding. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 38. Mr. Heron demanded that Nationstar produce the original promissory note and explain the discrepancy between the "copies" that Aurora had produced. *See id.* Nationstar explained that Aurora had never owned Mr. Heron's loan but was merely the servicer of the loan—and then Nationstar produced a *third* rendition of Mr. Heron's promissory note that it claimed to be the authentic version. *See id.* at 36; *id.* at 234–242 (copy of the supposed "original note" produced by Nationstar). On this promissory note—unlike the versions produced by Aurora—the endorsement that appears below Mr. Heron's signature was made by an entity called "Residential Funding Corporation":



FOR VALUE RECEIVED, Pay To The Order Of
RESIDENTIAL FUNDING CORPORATION
Without Recourse
MORTGAGE IT, INC
By:
Title: Loraine S. Dodson, Assistant Secretary

See Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 37, 239. Mr. Heron alleges that this promissory note — like the previous "copies" produced by Aurora — is a forgery, and that Nationstar produced this fake document to cover up Aurora's forgeries and to support Nationstar's claim that a trust owns Mr. Heron's loan. *See id.* at 37. Mr. Heron also alleges that Aurora created a "dummy" promissory note that enabled Aurora (and anyone else) to forge its signature and falsely claim that it was entitled to foreclose on Mr. Heron's property. *See id.*

Mr. Heron also investigated the practices of Aurora and Nationstar in other foreclosure proceedings. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 52. He discovered that Aurora and Nationstar had produced forged promissory notes with the handwritten endorsement to "Aurora Loan Services, LLC"—as well forged promissory notes with the "blank" endorsement—in hundreds of other foreclosure cases. *See id.* His complaint describes in detail, with copious photographic evidence, how Aurora and Nationstar produced similar forgeries in foreclosure proceedings throughout the United States. *See id.* at 52–105.

Mr. Heron seeks relief under the *qui tam* provisions of the False Claims Act, alleging that Nationstar defrauded numerous federal programs by deploying these forged promissory notes. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 105–122. Specifically, Mr. Heron alleges that Nationstar defrauded the United States by certifying to Fannie Mae that it was complying with all applicable federal, state, and local laws — which it must do as a condition of receiving federal funds under federal programs designed to facilitate loan modification—when Nationstar knew full well that it was using forged promissory notes and presenting false documents in foreclosure proceedings. *See id.* at 109–112.

Mr. Heron's complaint identifies, locates, and compares the irreconcilable note endorsements and provides numerous other allegations based on non-public information, which include: paragraphs 33 and 34 (and exhibit C) (irreconcilable third note from Nationstar);[3] paragraph 37 (and exhibit D) (Santoro testimony, which was made public only by Mr. Heron);[4] paragraph 40 (and exhibit E) (Dodson affidavit);[5] paragraph 75 (Mr. Heron's experience, "non-public facts," "private call with Aurora");[6] paragraph 79 (relator's familiarity with internal collateral tracking and barcode system);[7] paragraph 94 (and exhibit K) (Decker testimony);[8] paragraph 122 (internal non-public servicing record);[9] paragraphs 136-38 (and exhibit Z) (allonge);[10] paragraph 136 and exhibit II (relator's knowledge of the barcode system as a result of his work as an approved wholesale broker);[11] paragraph 146 (and

3. *See* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 36.
4. *See id.* at 38.
5. *See id.* at 37.
6. *See id.* at 52–53.
7. *See id.* at 55.
8. *See id.* at 63–64.
9. *See id.* at 79.
10. *See id.* at 86–88.
11. *See id.* at 86–87.

exhibit D) and paragraph 149 (and exhibit JJ) (Nationstar's agreement with outside counsel).[12]

The district court, however, dismissed Mr. Heron's claims under the public-disclosure bar of the False Claims Act, which prohibits a *qui tam* relator from bringing claims based on allegations that were "publicly disclosed," unless the relator is "an original source" of that information:

> The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The district court held that Mr. Heron's allegations had been "publicly disclosed" in four

12. *See id.* at 94–95; *id.* at 96.

different sources that were described in Mr. Heron's complaint.[13]

The first of these sources was the government's prosecution of Lee Bentley Farkas, the former chairman of a private mortgage lending company called Taylor, Bean & Whitaker. Mr. Farkas had used fake promissory notes and false ownership claims as part of a long-running bank-fraud scheme. *See United States v. Farkas*, No. 1:10-cr-200-LMB (E.D. Va.); *see also* Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 55–56 (allegations in Heron's complaint describing Farkas prosecution); https://www.justice.gov/criminal-vns/case/farkasl (describing the charges brought against Farkas).

The second source was a consent order between Aurora and the Office of Thrift Supervision, which identified "unsafe or unsound practices" in Aurora's mortgage servicing and handling of foreclosure proceedings. This consent order found that Aurora had "filed or caused to be filed in state and federal courts . . . numerous affidavits or other mortgage-related documents that were not properly notarized." Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 118 n.15. It also found that Aurora had "litigated foreclosure

13. The district court treated the public-disclosure bar as an affirmative defense. But a court may consider facts alleged in the complaint when determining whether to dismiss a case based on an affirmative defense at the motion-to-dismiss stage. *See Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). The sources on which the district relied were all mentioned in Mr. Heron's complaint, and Mr. Heron did not object to the district court's consideration of them.

and bankruptcy proceedings and initiated non-judicial foreclosure proceedings without always ensuring that each promissory note and mortgage document were properly endorsed or assigned. . ." *Id.*

The third source was a consent order that Nationstar had entered into with the Massachusetts Division of Banks. Mr. Heron had alleged that Nationstar entered into this consent order in an effort to conceal its fraud and forgeries that might otherwise have been uncovered. Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 118 ¶ 200 ("Nationstar likely found much relief in agreeing to the liability imposed by the consent order it entered because it successfully concealed its outright fraud from the governmental authorities."). Mr. Heron insisted, however, that "Nationstar has yet to enter into a consent order that reveals or addresses the blatant fraud and forgeries that Relator's dealings with Nationstar and Aurora and his independent investigation have revealed." *Id.*

The fourth and final source was a mortgage-fraud notice that appeared on the FBI's website. The FBI no longer maintains this page on its website, but the archived version is available at https://bit.ly/3ra3Clt.[14] This FBI notice, however, makes no mention of Nationstar and makes

14. The link to the FBI notice provided in Mr. Heron's complaint (https://goo.gl/qaNWIX) directs the reader to a page that the FBI no longer maintains. Second Amended Complaint, ECF No. 136, No. 1:17-cv-03084-PAB-STV (D. Colo.) at 118 ¶ 204 n.17. The short link that appears in Mr. Heron's complaint, however, is tagged to https://www.fbi.gov/about-us/investigate/white_collar/mortgage-fraud/mortgagefraudwarning.pdf, and the archived version of this link can be found at https://bit.ly/3ra3Clt.

no "disclosure" of anything; it merely states that mortgage fraud is a crime and lists the federal statutes that are implicated by fraudulent mortgage practices. The full text of the notice says:

MORTGAGE FRAUD IS INVESTIGATED BY THE FBI

Mortgage Fraud is investigated by the Federal Bureau of Investigation and is punishable by up to 30 years in federal prison or $1,000,000 fine, or both. It is illegal for a person to make any false statement regarding income, assets, debt, or matters of identification, or to willfully overvalue any land or property, in a loan and credit application for the purpose of influencing in any way the action of a financial institution.

Some of the applicable Federal criminal statutes which may be charged in connection with Mortgage Fraud include:

18 U.S.C. § 1001 - Statements or entries generally

18 U.S.C. § 1010 - HUD and Federal Housing Administration Transactions
18 U.S.C. § 1014 - Loan and credit applications generally

18 U.S.C. § 1028 - Fraud and related activity in connection with identification documents

18 U.S.C. § 1341 - Frauds and swindles by Mail

18 U.S.C. § 1342 - Fictitious name or address

18 U.S.C. § 1343 - Fraud by wire

18 U.S.C. § 1344 - Bank Fraud

42 U.S.C. § 408(a) - False Social Security Number

https://bit.ly/3ra3Clt (italics in original). Yet the district court never viewed this FBI notice or considered its content, because it was unable to uncover the notice based on the link provided in Mr. Heron's complaint. App. 47a; *see also* note 14, *supra*.

Taken together, the district court held that these public disclosures "were sufficient to set the government on the trail" of Nationstar's use of forged promissory notes without any need for Mr. Heron's assistance, and that Mr. Heron's *qui tam* action was therefore precluded by the public-disclosure bar in 31 U.S.C. § 3730(e)(4)(A). App. 48a (citation and internal quotation marks omitted).

The district court also held that Mr. Heron could not be considered "an original source" of the information that he provided against Nationstar, despite the fact that Mr. Heron's complaint contains 45 pages of detailed evidence describing Nationstar's fraud and forgeries. App. 49a–54a; *see also* 31 U.S.C. § 3730(e)(4)(A) (allowing *qui tam* lawsuits to proceed, notwithstanding the public-disclosure bar, if the relator is "an original source of the information"); 31 U.S.C. § 3730(e)(4)(B) (defining "original source"). The district court reached this conclusion for three reasons. First, the district court claimed that the fraud that Mr. Heron discovered in other foreclosure proceedings was "public information," and that Mr. Heron was therefore not an original source of it. App. 51a. Second, the district court held that the non-public information that Mr. Heron provided from his own foreclosure is "not the type of information that is capable of 'influencing the behavior' of the government"[15] and is "simply details about his foreclosure within the fraudulent promissory note scheme that had been publicly disclosed." App. 52a. Finally, the district court observed that Mr. Heron's non-public evidence apart from his own foreclosure includes:

> his general familiarity with industry practices from working for a different mortgage company, an internal Aurora record that allegedly proves that Aurora paid an attorney to endorse a note several days before filing the forged handwritten note on Aurora's behalf, and an internal Nationstar agreement used to hold outside counsel accountable for taking and receiving original notes and allonges that defendant sent to counsel.

App. 52a. The district court, however, found that these disclosures from Mr. Heron "are not sufficiently significant to influence the behavior of the government," and that Mr. Heron therefore "is not an original source." *Id.* The district court therefore dismissed Mr. Heron's complaint and entered judgment for Nationstar. App. 54a.

The court of appeals affirmed. It held that the public-disclosure bar applied because Mr. Heron's complaint relied on sources that had already disclosed "'substantially

15. App. 52a (citation omitted).

the same allegations or transactions as alleged in"' his qui tam action. App. 17a (quoting 31 U.S.C. § 3730(e)(4)(A)). The court of appeals also reaffirmed its precedent that interprets 31 U.S.C. § 3730(e)(4)(A) to apply when "'substantial identity exists between the public[] [disclosures] . . . and the *qui tam* complaint.'" App. 16a (quoting *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996)); *see also* App. 16a–17a ("We have referred to this aspect of the public disclosure bar as the 'substantially-the-same standard.'" (citation omitted)).

The court of appeals also held that Mr. Heron failed to qualify as an "original source." App. 27a–32a. It explained that Mr. Heron had "grouped together public information collected from other foreclosure proceedings involving Nationstar," and that this "amalgamation of public information is precisely the 'secondhand knowledge' that will not qualify a relator as an original source under the Act." App. 31a. Under Tenth Circuit precedent, a qui tam relator who supplies "cumulative information" or "'merely adds background information or details about a known fraudulent scheme'" does not qualify as an "original source" under 31 U.S.C. § 3730(e)(4)(B)(2).

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the test to apply when determining whether a qui tam relator alleges "substantially the same allegations or transactions" as those that have been publicly disclosed. *See* 31 U.S.C. § 3730(e)(4)(A). The courts of appeals are also divided on the test to apply when determining whether a qui tam relator qualifies as an "original source" under 31 U.S.C. § 3730(e)(4)(B)(2). The Court should grant the petition and resolve each of these disagreements among the circuits.

I. THE COURTS OF APPEALS ARE DIVIDED ON THE TEST TO APPLY WHEN DETERMINING WHETHER A QUI TAM RELATOR ALLEGES "SUBSTANTIALLY THE SAME ALLEGATIONS OR TRANSACTIONS" AS THOSE THAT HAVE BEEN PUBLICLY DISCLOSED

The public-disclosure bar requires courts to dismiss qui tam lawsuits "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A). The courts of appeals have adopted divergent standards for determining whether the publicly disclosed allegations and trans-actions are "substantially the same" as those alleged in the qui tam relator's action or claim.

The D.C. Circuit adopts a formulaic test:

> *[Q]ui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction (the combination of X and Y), or the allegation of fraud (Z). When either of these conditions is satisfied, the government itself presumably can bring an action under the FCA and there is no place in the enforcement scheme for *qui tam* suits.

United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994).

The Tenth Circuit, however, has explicitly rejected this test from the D.C. Circuit. *See United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1050 (10th Cir. 2004)

("We have not adopted the mathematical formula espoused by the D.C. Circuit in *Springfield* and we decline to do so here."). Instead, the Tenth Circuit holds that "[i]n assessing the substantially-the-same standard, 'the operative question is whether the public disclosures were sufficient to set the government "on the trail of the alleged fraud without [the relator's] assistance."'" App. 18a (quoting *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 745 (10th Cir. 2019)).

Finally, the Eleventh Circuit has adopted a stricter test for the public-disclosure bar, which requires the defendant in the qui tam relator action to have to been "specifically identified in public disclosures." *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566 (11th Cir. 1994); *see also id.* ("[W]e consider it to be crucial whether BCBSF was mentioned by name or otherwise specifically identified in public disclosures"). The Court should grant review to resolve these disparate approaches to the public-disclosure bar in 31 U.S.C. § 3730(e)(4)(A).

II. THE COURTS OF APPEALS ARE DIVIDED ON THE TEST TO APPLY WHEN DETERMINING WHETHER A QUI TAM RELATOR QUALIFIES AS AN "ORIGINAL SOURCE" UNDER 31 U.S.C. § 3730(E)(4)(B)(2).

A qui tam relator can escape the public-disclosure bar if he qualifies as an "original source" as defined in 31 U.S.C. § 3730(e)(4)(B). Yet the courts of appeals are also divided on the test to apply when a qui tam relator claims to meet the definition of "original source" that appears in 31 U.S.C. § 3730(e)(4)(B)(2), which defines "original source" as an individual "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." 31 U.S.C. § 3730(e)(4)(B)(2).

The First and Tenth Circuits, for example, hold that "a relator who discloses new information that is sufficiently significant or important that it would be capable of 'influenc[ing] the behavior of the recipient'—*i.e.*, the government—ordinarily will satisfy the materially-adds standard." *United States ex rel. Reed v. KeyPoint Gov't Solutions*, 923 F.3d 729, 757 (10th Cir. 2019) (quoting *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016)). At the same time, the First and Tenth Circuits recognize that "a relator who merely adds background information or details about a known fraudulent scheme typically will be found not to have materially added to the publicly disclosed information." *Reed*, 923 F.3d at 757 (citing *Winkelman*, 827 F.3d at 211).

The Seventh Circuit takes a different approach. *See Reed*, 923 F.3d at 757 ("We recognize that the Seventh Circuit has taken a different path."). In the Seventh Circuit, "if a relator's 'allegations are substantially similar to those contained in the" public disclosures, then her allegations *cannot* " 'materially add[]' to the public disclosure[s].'" *Reed*, 923 F.3d at 757 (quoting *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267, 283 (7th Cir. 2016)); *see also id.* (noting that the Seventh Circuit's standard "has the effect of collapsing the materially-adds inquiry into the substantially-the-same inquiry. As such, we cannot embrace it."); *Cause of Action*, 815 F.3d at 281 ("[I]n order to avoid the public-disclosure bar, it is essential that a relator present 'genuinely new and material information' beyond what has been publicly disclosed.").

Finally, the Third Circuit, using Fed. R. Civ. P. 9(b) as a guide, holds that "a relator materially adds to the publicly disclosed allegation or transaction of fraud when it contributes information—distinct from what was publicly disclosed—that adds in a significant way to the essential factual background: 'the who, what, when, where and how of the events at issue.'" *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016). The Tenth Circuit claims that its test for "original source" is narrower than the Third Circuit's standard:

> In our view, the materially-adds analysis must be firmly grounded in the facts and circumstances of a particular case. And those facts and circumstances will guide our determination of whether the who, what, when, where, or how actually should be considered sufficiently significant or important to affect the government's actions regarding the fraudulent scheme. For example, as discussed further below, when, as here, the publicly disclosed fraud exists within an industry with only a few players, a relator who identifies a particular industry actor engaged in the fraud (i.e., the "who") is unlikely to materially add to the information that the public disclosures had already given the government.

Reed, 923 F.3d 729.

The Third Circuit has not subsequently expanded upon its discussion in *Moore*, but a district court within the Third Circuit agrees that the Third Circuit uses a more expansive definition of "original source" than the approach used in the First and Tenth Circuits:

> Even though "material" as an element of fraud and "materially adds" as part of the original source analysis are two different concepts, the First Circuit in *Winkelman* applied *Universal Health*'s definition of material to the original source question. *See* 827 F.3d at 211. Not surprisingly, Medtronic contends that this court should follow the decision in *Winkelman. See* Medtronic's Suppl. Br. at ECF p. 9. To bolster its position, Medtronic highlights that *Universal Health* was decided after *Moore* and before *Winkelman. Winkelman* thus had the advantage of the decision in *Universal Health*, whereas *Moore* did not.
>
> Despite *Winkelman*'s temporal advantage, the court is not persuaded by it for the following reasons: First, the *Winkelman* panel did not have to apply the *Universal Health* definition of material. As explained above, the panel was not bound to follow *Universal Health*'s definition of material in the context of the original source exception. Second, the First Circuit did not provide a reason why it applied *Universal Health* to the original source exception. *See Winkelman*, 827 F.3d at 211. That lack of

> justification is particularly noticeable in light of the fact that the First Circuit did not have to apply *Universal Health*. And third (and most importantly), this court is bound by the Third Circuit's decision in *Moore. Moore* and *Winkelman* apply two different standards: *Moore* adopted a relatively broad definition of materiality, *see* 812 F.3d at 306, while *Winkelman* adopted the narrower definition from *Universal Health*, *see* 827 F.3d at 211. In the absence of controlling precedent compelling a contrary conclusion—and *Universal Health* does not compel a contrary conclusion here—the court is bound by the Third Circuit's decision in *Moore.*
>
> [T]he relevant standard is whether the relator "contributes information—distinct from what was publicly disclosed—that adds in a significant way to the essential factual background: the who, what, when, where and how of the events at issue. *Moore*, 812 F.3d at 306 (citation and internal quotation marks omitted). Relator Forney contends that the information she provided to the government added to the "who, what, when, where and how of the events at issue."

United States v. Medtronic, Inc., 327 F. Supp. 3d 831, 851 (E.D. Pa. 2018). The Court should step in to resolve these acknowledged disagreements among the circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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November 12, 2024

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

August 13, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. JAMES HERON, Plaintiff – Appellant, v. NATIONSTAR MORTGAGE, LLC, Defendant – Appellee.	No. 21-1362 (D.C. No. 1:17-CV-03084-PAB-STV) (D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **EID**, and **ROSSMAN**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

After James Heron lost his home through foreclosure, he sued Nationstar Mortgage LLC, Aurora Loan Services, LLC, Aurora Bank FSB, and Aurora Commercial Corporation in federal district court in Colorado under the False Claims Act, 31 U.S.C. § 3729 (FCA or Act).[1] The FCA permits individuals to sue on behalf of the United States—known as "*qui tam*" actions—alleging a third party defrauded the government by submitting fraudulent claims for payment. But the FCA's public disclosure bar requires federal courts to dismiss *qui tam* actions where the complaint's allegations closely match information publicly disclosed within the meaning of the statute unless the plaintiff is "an original source of the information." 31 U.S.C. § 3730(e)(4)(A). Mr. Heron alleged Nationstar and Aurora, while receiving federal funds, engaged in a scheme to submit fraudulent promissory notes in foreclosure proceedings. Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), invoking the public disclosure bar. The district court granted the motion, and Mr. Heron now appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I[2]

We first set out the underlying facts and procedural history. We then describe the legal standards that guide

1. Mr. Heron originally named several other defendants including individuals and law firms—all were dismissed without prejudice on October 10, 2019. App. I at 16. Aurora was dismissed with prejudice on July 6, 2020. App. I at 17. Nationstar is the only remaining defendant.

2. We take the facts recited here from the well-pleaded allegations in Mr. Heron's Second Amended Complaint.

our review and provide some background on the False Claims Act. Applying those principles, we then analyze Mr. Heron's appellate challenges.

A

In fall 2008, Congress passed the Emergency Economic Stabilization Act (EESA)[3] to steady housing and credit markets and to assist troubled homeowners in the midst of the U.S. financial crisis. The EESA authorized the U.S. Department of the Treasury to establish the Troubled Asset Relief Program (TARP), which funded programs intended to keep borrowers in their homes. The Home Affordable Modification Program (HAMP) provided mortgage servicers with incentive payments—known as TARP funds—to encourage servicers to permit delinquent borrowers to modify loan terms.

Nationstar and Aurora were two of the country's largest mortgage servicers. Nationstar purchased billions of dollars of loan servicing packages from other entities, including Aurora. On May 28, 2009, Nationstar contracted with Fannie Mae, a financial agent for the United States, to participate in HAMP by executing a Commitment to Purchase Financial Instrument and Servicer Participation Agreement (SPA). Nationstar accepted incentive payments from the government through TARP, HAMP, and other federal programs. Nationstar annually certified its compliance with applicable law, including requirements relating to foreclosure practices.

Nationstar and Aurora claimed they owned Mr. Heron's home loan (or the servicing rights associated with the loan). Mr. Heron defaulted on his mortgage loan

3. 12 U.S.C. § 5201.

payments. Between 2008 and 2011, Aurora initiated foreclosure proceedings against him in Colorado state court. To prove it owned Mr. Heron's loan, Aurora relied on handwritten endorsements to "Aurora Loan Services" made on various copies of a promissory note Mr. Heron executed when he originally purchased his house. Mr. Heron challenged the authenticity of the promissory note and claimed Aurora did not actually own his loan.

In 2012, Nationstar replaced Aurora as the plaintiff in Mr. Heron's state-court foreclosure proceeding. Nationstar produced a different version of a promissory note related to Mr. Heron's mortgage. Mr. Heron claimed Nationstar forged the promissory note and submitted it in state court to cover up Aurora's past forgeries about his mortgage. Mr. Heron eventually lost his home in foreclosure.

B

1

In December 2017, Mr. Heron filed a *qui tam* action in federal district court in Colorado against Nationstar, Aurora, and several other defendants, claiming they engaged in illegal foreclosure practices and submitted false claims for payment to the government under the TARP and HAMP programs. He filed his Second Amended Complaint—the operative pleading before us—in late 2020.

Nationstar "wrongfully obtained hundreds of millions of dollars in government incentive payments," Mr. Heron alleged, "by fraudulently submitting claims and inducing the United States to execute mortgage servicer incentives contracts to allow [it] to participate and recover incentives" in HAMP. App. I at 26, ¶ 2. Nationstar allegedly submitted "false Annual Certifications and misrepresentations of past, present[,] and future compliance with federal and state laws, regulations, rules[,] and requirements." App. I at 26, ¶ 3. He claimed "[e]ach and every certification submitted to the United States in exchange for incentive payments from the United States was knowingly false when made[] because . . . Nationstar . . . forged signatures and endorsements on thousands of borrowers' promissory notes[.]" App. I at 120, ¶ 205; 122, ¶ 211. And Mr. Heron asserted "the initial and annual SPA certifications and representations executed by Nationstar . . . were knowingly false[.]" App. I at 116, ¶ 195.

Mr. Heron independently investigated foreclosure proceedings involving Nationstar, including his own. According to Mr. Heron, Aurora and Nationstar foreclosed on hundreds of other borrowers throughout Colorado and across the United States, using "forged—indeed, often fakepromissory notes[.]" App. I at 32, ¶ 24. Nationstar allegedly "accepted incentive payments and otherwise benefitted from" federal programs. App. I at 108, ¶ 173.[4]

Mr. Heron attached documents to his Second Amended Complaint, including, publicly available mort-

4. Mr. Heron did not identify any specific request for incentive payments submitted to the government by Nationstar or paid to Nationstar for its participation in federal programs. But Mr. Heron claimed Nationstar "knowingly presented, or caused to be presented, false or fraudulent claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1)(A)" and "knowingly made, used or caused to be made or used a false record or statement material to a false or fraudulent claim that was material to the United States' decision to pay insurance claims for insured mortgages in violation of 31 U.S.C. § 3729(a)(1)(B)." App. I at 116, ¶ 195.

gage records and promissory notes, a transcript of Mr. Heron's call with an Aurora employee about his home loan, the SPA between Nationstar and Fannie Mae from 2009, and an amended version of the SPA from 2010. The complaint also referenced public information and documents purporting to show the pervasiveness and illegality of Nationstar's scheme. Mr. Heron asserted two causes of action: (1) failure to return government property, in violation of 31 U.S.C. § 3729(a)(1)(D); and (2) conspiracy to violate the FCA, in violation of 31 U.S.C. § 3729(a)(1)(C). App. I at 119–22, ¶¶ 202–13.

2

Nationstar moved to dismiss the Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).[5] Nationstar invoked the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), which generally prohibits FCA suits based on allegations already in the public domain. That section requires federal courts to dismiss a qui tam action "if substantially the same allegations or transactions as alleged in the action . . . were publicly

5. Nationstar also urged dismissal under Federal Rule of Civil Procedure 9(b). Nationstar contended, to satisfy Rule 9(b) in the *qui tam* context, a plaintiff must allege with particularity the actual false claim for payment submitted to the government. According to Nationstar, the Second Amended Complaint did not "identify any specific claims or certifications submitted to the government or the specific dates on which those were presented." Supp. App. at 33. The district court did not reach Nationstar's Rule 9(b) argument because it concluded the public disclosure bar applied. Nationstar reprises its Rule 9(b) argument on appeal. We also need not reach this alternative ground for affirmance because we conclude, as the district court did, the public disclosure bar applies.

disclosed." 31 U.S.C. § 3740(e)(4)(A). Mr. Heron's claims, Nationstar explained, were "substantially similar" to allegations or transactions in public disclosures relied on in the Second Amended Complaint. Nationstar specifically focused on allegations describing

- a consent order between Nationstar and the Massachusetts Division of Banks, for unsound servicing practices and the improper initiation and handling of foreclosure proceedings (the Massachusetts Consent Decree);
- the federal criminal prosecution of Lee Bentley Farkas for bank and TARP fraud schemes involving the sale of fake mortgages (the *Farkas* prosecution);
- a consent order between Aurora and the Office of Thrift Supervision for filing improperly notarized documents in foreclosure proceedings and initiating foreclosure without ensuring mortgage documents were properly indorsed (the OTS Consent Decree); and
- a mortgage fraud notice issued by the Federal Bureau of Investigation (FBI) and Mortgage Bankers Association (the FBI Notice).

Supp. App. at 26–28. Nationstar also maintained Mr. Heron could not rely on the "original source" exception in § 3730(e)(4)(B) because he lacked "knowledge that is independent of and materially adds to the publicly disclosed allegations." Supp. App. at 29. Mr. Heron's "personal investigation and summarization of public disclosures," Nationstar argued, "adds nothing independent of the information the government admittedly possessed." Supp. App. at 30.

Mr. Heron opposed dismissal. He insisted his allegations were not "substantially the same" as the publicly available information described in his complaint and, even if the allegations closely matched information publicly disclosed, he claimed to be an original source. The district court dismissed Mr. Heron's complaint under the public disclosure bar. This timely appeal followed.

II

A

"We review de novo the district court's order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013). "To defeat a motion to dismiss, a complaint must plead facts sufficient to state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). We take "all facts alleged in the complaint . . . as true" and indulge "all reasonable inferences . . . in favor of the plaintiff[]." *GF Gaming Corp. v. City of Black Hawk*, 405 F.3d 876, 881 (10th Cir. 2005). But "the tenet that a court must accept" well-pleaded factual allegations as true "is inapplicable to legal conclusions," so we are not bound by the plaintiff's recital of legal principles supported by conclusory statements. *Iqbal*, 556 U.S. at 678. "Generally, the sufficiency of a complaint must rest on its contents alone." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). But we have acknowledged some limited "exceptions to this restriction on what the court can consider" including, as relevant here, documents that the complaint incorporates by reference.[6] *Id.*

Here, the district court treated the Act's public disclosure bar as an affirmative defense—an approach unchallenged by the parties on appeal and endorsed by all circuits to have considered the issue.[7] We have recognized the appropriateness of "dismiss[ing] a claim on the pleadings based on an affirmative defense. . . . only when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018); *see also Miller v. Shell Oil Co.*, 345 F.2d 891, 893 (10th Cir. 1965) ("If the defense appears

6. In the *qui tam* context, courts "routinely have considered undisputed documents provided by the parties in connection with Rule 12(b)(6) motions based on the public disclosure bar." *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 208 (1st Cir. 2016) (collecting cases).

7. Congress amended the FCA, effective March 23, 2010, and revised several parts of the public disclosure bar. Among other changes, the revised statute removed jurisdictional language. In *United States ex rel. Reed v. KeyPoint Government Solutions*, we observed courts having considered the issue unanimously interpreted the post-amendment public disclosure bar as an affirmative defense—not a jurisdiction-removing provision. *See* 923 F.3d 729, 737 n.1 (10th Cir. 2019) (collecting cases). Here, the district court, relying on *Reed*, treated the public disclosure bar as an affirmative defense. The parties endorse that conclusion on appeal. In his reply brief, Mr. Heron stated "[t]he public-disclosure bar is an affirmative defense." Reply Br. at 12. At oral argument, in response to questioning, Nationstar's counsel likewise acknowledged the public disclosure bar is an affirmative defense. Under these circumstances, we will assume for purposes of this case the public disclosure bar is an affirmative defense. *See Reed*, 923 F.3d at 737 n.1 (citing *McQueen ex rel. McQueen v. Colorado Springs Sch. Dist.*, 488 F.3d 868, 873 (10th Cir. 2007)).

plainly on the face of the complaint itself, the motion [to dismiss for failure to state a claim] may be disposed of under [Rule 12(b)(6)].").

B

The False Claims Act imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the United States or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." *See* 31 U.S.C. 3729(a)(1)(A), (B). The FCA "covers all fraudulent attempts to cause the government to pay out sums of money." *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 737 (10th Cir. 2019) (quoting *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008), *abrogated in part on other grounds by Universal Health Servs., Inc. v. United States*, 579 U.S. 176 (2016)); *see also United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968) (explaining Congress enacted the FCA to "protect the funds and property of the Government from fraudulent claims" (quoting *Rainwater v. United States*, 356 U.S. 590, 592 (1958)). But the FCA is not some "all-purpose antifraud statute . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs.*, 579 U.S. at 194 (quoting *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)). Instead, it was enacted to stem "massive frauds perpetrated by large contractors." *United States ex rel. Sorenson v. Wadsworth Bros. Constr. Co., Inc.*, 48 F.4th 1146, 1157 (10th Cir. 2022) (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)).

The FCA's *qui tam* provisions allow a private individual—known as a "relator"—to bring a civil action on behalf of the government against the alleged false claimant. 31 U.S.C. § 3730(b). The FCA "imposes significant penalties on those who defraud the [g]overnment." *Universal Health Servs., Inc.*, 579 U.S. at 180. "As a bounty for identifying and prosecuting fraud," relators get to keep a portion "of any recovery they obtain." *United States ex rel. Boothe v. Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1172 (10th Cir. 2007) (citing 31 U.S.C. § 3730(d)).

One barrier to bringing a *qui tam* action under the FCA is the "public disclosure bar." It provides

> The court shall dismiss an action or claims under this section, unless opposed by the [g]overnment, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the [g]overnment or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). As the statutory text makes plain, courts must dismiss *qui tam* actions if there is substantial similarity between the allegations in the

complaint and information publicly disclosed in statutorily-qualifying disclosures *unless* the relator is an "original source" of that information. *Id.* An "original source" has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." *Id.* § 3730(e)(4)(B)(2). The public disclosure bar thus attempts to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 295 (2010).

III

Mr. Heron urges reversal on three grounds. First, he claims the district court impermissibly relied on sources that do not qualify as public disclosures under the Act. Second, he insists his lawsuit is not about allegations or transactions already in the public domain. And third, he seeks to avoid the public disclosure bar by claiming to be an "original source." Mr. Heron has waived his first argument and his remaining contentions are unavailing.

A

The public disclosure bar requires federal courts to dismiss *qui tam* suits where the complaint's allegations closely match information publicly disclosed in any of the following specified channels: "(i) in a Federal criminal, civil or administrative hearing in which the [g]overnment or its agent is a party," "(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation," or "(iii) from the news media." 31 U.S.C. § 3730(e)(4)(A). The district court, agreeing with Nationstar on the issue, determined that Mr. Heron's allegations were based on information already in the public domain. In reaching this conclusion, the district court discussed four public disclosures referenced in the Second Amended Complaint—namely, the Massachusetts Consent Decree, the Farkas prosecution, the OTS Consent Decree, and the FBI Fraud Notice (the "Four Sources").

On appeal, Mr. Heron admits the Four Sources "on which the district court relied were all mentioned in [his] complaint" and that he "did not object to the district court's consideration of them." Opening Br. at 10 n.15. However, he now says the district court mistakenly relied on the Four Sources because they are not qualifying public disclosures under § 3730(e)(4)(A). Nationstar insists Mr. Heron waived this argument. We agree.

Generally, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The circumstances surrounding a party's failure to advance an argument in the district court impacts whether we exercise our discretion to reach it for the first time on appeal. "If the theory was intentionally relinquished or abandoned in the district court we usually deem it waived and refuse to consider it." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011). But if a "theory simply wasn't raised before the district court, we usually hold it forfeited." *Id.* at 1128.

Mr. Heron's strategy in the district court was to litigate the merits of the substantially-the-same standard and failing that, to urge the district court to exempt his complaint from dismissal under the original-source exception. Mr. Heron *never* argued the Four Sources were not statutorily permissible disclosures under § 3730(e)(4)(A). Just the opposite. Mr. Heron's arguments opposing dismissal—the arguments the district court actually considered and resolved—proceeded from the premise that the Four Sources were statutorily enumerated public disclosures. In its order granting Nationstar's motion to dismiss, the district court confirmed as much, observing Mr. Heron "does not dispute that the alleged public disclosures came from a source listed in the FCA or that they were made public within the meaning of the FCA." App. VII at 1805. Mr. Heron never contested the district court's stated understanding.

We must conclude Mr. Heron waived, rather than forfeited, his argument that the Four Sources are not qualifying public disclosures within the meaning of the Act. Mr. Heron appears to acknowledge the waiver. In his reply brief, Mr. Heron explains his "district-court briefing did not develop the separate point that the alleged public disclosures do not qualify as permissible sources under the text of section 3730(e)(4)(A)" and, instead, it "focused . . . on denying that the alleged public disclosures were 'substantially the same' as the allegations and transactions in his complaint." Reply Br. at 1.

Instead, Mr. Heron makes two arguments to excuse the waiver. Neither is availing.

First, Mr. Heron appears to suggest the permissible-sources issue is preserved because he challenged *other* aspects of the public disclosure bar in the district court. This argument misunderstands the law. It is well settled "a party may not lose . . . on one theory of the case, and then prevail on appeal on a different theory." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993).

Second, Mr. Heron insists federal courts must correctly interpret and apply a federal statute notwithstanding a party's failure to make a particular argument. Mr. Heron argues "[a] court's duty to identify and apply the proper construction of governing law trumps a litigant's forfeiture objections," meaning this court "must enforce the text of section 3730(e)(4)(A) regardless of whether Mr. Heron addressed the issue in his district-court-brief—and even if Mr. Heron had omitted the issue from his briefing in *this* Court." Reply Br. at 2. In support, Mr. Heron relies on *Kamen v. Kemper Financial Services*, 500 U.S. 90 (1991), but that case does not help him.

In Kamen, the Supreme Court held, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.* at 99. But the Supreme Court noted: "We do not mean to suggest that a court of appeals should not treat an unasserted claim as waived[.]" *Id.* at 100 n.5. As we have explained, Mr. Heron's particular appellate claim—that the Four Sources fall outside the statute's enumerated categories of qualifying public disclosures—was unasserted in the district court. Mr. Heron actually urged the opposite position in the district court.[8]

Kamen reaffirmed federal courts always maintain the authority to correctly construe the law. But courts are not "self-directed boards of legal inquiry and research." *State v. U.S. Env't Prot. Agency*, 989 F.3d 874,

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8. The invited-error doctrine typically bars appellate review in such circumstances. *See United States v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005) ("[T]he invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt."). While we ultimately do not rely on the invited-error rule to resolve the issue here, it is a close call.

885 (10th Cir. 2021) (quoting *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10 (2011)). Contrary to Mr. Heron's suggestion, *Kamen* does not obviate a litigant's obligation to preserve arguments for appeal and offers no antidote to the waiver in this case.

B

We now turn to the merits of Mr. Heron's preserved appellate claims. Mr. Heron contends the district court erred by concluding, first, that substantially the same fraud as alleged in his lawsuit was publicly disclosed, and second, that Mr. Heron had not plausibly alleged he was an "original source" under the Act. We reject each argument—largely for the same reasons as the district court.

1

The public disclosure bar applies only "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A); *see also Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408 (2011) ("The phrase 'allegations or transactions' in § 3730(e)(4)(A) . . . suggests a wide-reaching public disclosure bar. Congress covered not only the disclosure of 'allegations' but also 'transactions,' a term that courts have recognized as having a broad meaning."). On this score, we have held "[t]he test is whether substantial identity exists between the public[] [disclosures] . . . and the qui tam complaint." *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996). We have referred to this aspect of the public disclosure bar as the "substantially-the-same standard." *See Reed*, 923 F.3d at 750.[9]

The district court concluded Mr. Heron's complaint relied on the Four Sources, which disclosed "substantially the same allegations or transactions as alleged in" his qui tam action. 31 U.S.C. § 3730(e)(4)(A). The district court ruled

> (1) the government was aware of the use of forged and fraudulent promissory notes in furtherance of foreclosures (FBI notice); (2) Aurora (defendant's predecessor) entered into a consent decree due to litigating foreclosures without ensuring the promissory note and mortgage document were properly endorsed or assigned (Aurora consent decree with OTS); (3) defendant entered into a consent decree similar to Aurora's with the [Massachusetts] Division of Banks (defendant's consent decree); and (4) the use of fake promissory notes to secure a loan when the promissory note had al-

9. Before 2010, the public disclosure bar was triggered if the qui tam action was "based upon" a qualifying public disclosure; but the amended provision of the FCA states a qui tam action is barred if "substantially the same allegations or transactions" were publicly disclosed. *Compare* 31 U.S.C. § 3730(e)(4)(A) (2006) *with id.* § 3730(e)(4)(A)(2010); *see also Reed*, 923 F.3d at 737 n.1 (explaining the changes to the public disclosure bar made in the 2010 amendment of the statute). We have recognized "our pre-2010-amendment cases guide our substantially-the-same inquiry"—even after the 2010 amendments—because the amended statute adopts a standard "resembl[ing] the standard we already used" when analyzing the connection needed between a relator's claims and public disclosures. *See Reed*, 923 F.3d at 743–44.

> ready been sold was an issue that had been litigated (*United States v. Farkas*).

App. VII at 1809. On appeal, Mr. Heron contends reversal is required because the Four Sources did not name Nationstar specifically, did not involve the same fraudulent conduct alleged in his complaint, or both. We are not persuaded for two main reasons.

First, Mr. Heron's argument proceeds from a hyper-specific interpretation of the public disclosure bar—an approach our court has previously rejected. In assessing the substantially-the-same standard, "the operative question is whether the public disclosures were sufficient to set the government 'on the trail of the alleged fraud without [the relator's] assistance.'" *Reed*, 923 F.3d at 745 (quoting *U.S. ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995)). But the "substantially-the-same standard does not demand that the disclosures identify the defendant by name as the wrongdoer." *Id.* at 751 (rejecting an argument that public disclosure bar cannot apply where a complaint alleged claims against a different entity than the one accused of wrongdoing in public disclosures); *see also id.* at 748 n.12 (rejecting relator's "hyper-specific reading" of the FCA which invited the court to require "near-complete identity of allegations" between earlier public disclosures and later FCA claims). Indeed, "we must recognize that the government's nose for fraud may be sensitive enough to pick up the scent even if the public disclosures did not 'identify any specific compan[y].'" *Id.* at 745 (quoting *In re Nat. Gas Royalties*, 562 F.3d 1032, 1039, 1042 (10th Cir. 2009)). And there need not be "a complete identity of allegations, even as to time, place, and manner" to implicate the bar. *Id.* (quoting *Boothe*, 496 F.3d at 1174). Instead, the qualifying public disclosures "need only disclose the 'material elements' of the fraudulent transaction." Id. (quoting *Fine*, 70 F.3d at 572). The substantially-the-same standard can be satisfied where public disclosures allege industry-wide fraud and provide enough information to link the defendant to the scheme. *See id.* at 745.

Second, a review of the allegations in Mr. Heron's complaint leaves little doubt the information supporting his action was publicly disclosed. In reaching the same conclusion, the district court focused on the Four Sources relied on in the Second Amended Complaint. We likewise take that approach.

The Massachusetts Consent Order

Mr. Heron alleged Nationstar entered into the Massachusetts Consent Order over improper use of promissory notes in foreclosure litigation. The Massachusetts Consent Order discloses Nationstar's alleged noncompliance with state and federal law applicable to its business as a mortgage lender. Nationstar's alleged noncompliance is the material element of the purported fraud at the heart of Mr. Heron's allegations in this case—that Nationstar's use of promissory notes failed to comply "with all applicable laws, rules, regulations, requirements and guidelines." *See e.g.*, App. I at 120, ¶ 205.

As Nationstar correctly points out, Mr. Heron "does not dispute the significant overlap between the conduct disclosed in the Massachusetts Division of Banks Consent order and the conduct he discloses in the complaint." Aplee. Br. at 22.[10] Mr. Heron raised no substantial-similarity argument about the Massachusetts Consent Order in his opening brief. In his reply brief, Mr. Heron disagreed the Massachusetts Consent Order publicly disclosed information that could trigger the bar. Under the circumstances, we conclude Mr. Heron has waived any argument challenging the district court's reliance on the Massachusetts Consent Order in dismissing his complaint. *See, e.g.*, *Tran v. Trs. Of State Coll. In Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (quoting *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997), *abrogated in part on other grounds by Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020))); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief.").

The Farkas prosecution

Mr. Heron's complaint discussed the prosecution of Lee Farkas. App. I at 55, ¶ 76. The government in *United States v. Farkas* prosecuted executives of a mortgage lender, Mr. Heron alleged, for making "false ownership claims on fake promissory notes . . . in connection with one of the largest and longest-running bank fraud and TARP fraud schemes," and the "double- and triple-

10. Mr. Heron's only appellate argument about the Massachusetts Consent Order in the opening brief focused on whether that source was a qualifying public disclosure under the Act—an argument we have concluded was intentionally relinquished in the district court.

selling [of] mortgage loans." App. I at 55, ¶ 76. The district court determined the *Farkas* prosecution disclosed a federal criminal action about "the use of fake promissory notes to secure a loan when the promissory note had already been sold." App. VII at 1809. According to the district court, the disclosure in *Farkas* about using "fake promissory notes to secure a loan" when the note already had been sold was substantially similar to the allegations in Mr. Heron's complaint of Nationstar's scheme to "use[] fraudulent promissory notes to effectuate foreclosures." App. VII at 1806, 1809. The district court acknowledged the "purpose" for which the promissory notes in *Farkas* were used was "different" than the purpose of Nationstar's alleged fraudulent scheme here. App. VII at 1807. But, the district court reasoned, the "allegation of the use of fake notes [was] the same in *Farkas* and this case" such that the *Farkas* disclosure was substantially similar to Mr. Heron's allegations. App. VII at 1807.

Mr. Heron contends the *Farkas* prosecution does not support the district court's substantially-the-same conclusion because the scheme in *Farkas* is unlike the conduct challenged in his *qui tam* action. According to Mr. Heron, Nationstar used fake promissory notes to effectuate foreclosures and thus fraudulently obtain TARP benefits. But the scheme in *Farkas*, he explains, was different because it involved "fake notes" and "dummy loans." *Id.* at 56, ¶ 77.

While we acknowledge the differences Mr. Heron identifies, our precedent interpreting the public disclosure bar does not demand complete identity between an earlier public disclosure and allegations in a later *qui tam* action — even as to the "manner" of fraud. *Reed*, 923

F.3d at 745 (quoting *Boothe*, 496 F.3d at 1174). We also reject Mr. Heron's argument that the *Farkas* prosecution does not support the district court's substantially-the-same determination because Nationstar was not a named defendant. As we explained, a public disclosure need not identify a particular defendant to meet the substantially-the-same standard. *Id.* at 744.

Reviewing *de novo*, we agree with the district court that Mr. Heron's allegations about the *Farkas* prosecution demonstrate the government's awareness of fake promissory notes in mortgage fraud schemes perpetuated by recipients of federal TARP funds. Mr. Heron offers no persuasive reason to disturb the district court's conclusion that the essential nature of his claims against Nationstar was already in the public domain. *Cf. Boothe*, 496 F.3d at 1174 (explaining it is enough if "the essence of" the relator's allegations was "derived from a prior public disclosure" (internal quotation marks omitted)); *Reed*, 923 F.3d at 745 (explaining public disclosures "need only disclose the material elements of the fraudulent transaction" to trigger the public disclosure bar (quoting *Fine*, 70 F.3d at 571)).

The OTS Consent Order

Mr. Heron's complaint alleges Aurora's consent order with OTS concerned Aurora's "unsafe or unsound" practices in foreclosure proceedings. App. I at 117–18, ¶ 199. According to the complaint, the consent order addressed Aurora's practice of filing affidavits and other mortgage related documents without proper notarization and litigating foreclosure proceedings without always ensuring promissory notes and mortgage documents had been endorsed or assigned. The district court found the OTS order disclosed "Aurora (defendant's predecessor) entered into a consent decree due to litigating foreclosures without ensuring the promissory note and mortgage document were properly endorsed or assigned." App. VII at 1809. The OTS consent order, the district court ruled, "set the government on the trail" of Nationstar's alleged fraud without Mr. Heron's assistance. See App. VII at 1809.

Mr. Heron contends the OTS order does not specifically mention fraud or forgery and only publicly discloses misconduct by *Aurora*, not Nationstar. According to Mr. Heron, the district court failed to explain how a public disclosure of Aurora's negligence would set the government on the trail of Nationstar's criminal forgeries. We are not persuaded.

Mr. Heron alleged Nationstar's purchase of loan servicing rights from Aurora included purported rights to service his loan. Nationstar was Aurora's "successor" that "often [took] over foreclosure proceedings initiated by or on behalf of Aurora," and Nationstar continued Aurora's practice of using forged or fraudulent promissory notes in foreclosure proceedings against borrowers. App. I at 64, ¶ 90; 33, ¶ 25; 42–48. Even if the consent order between Aurora and the OTS did not name Nationstar directly, we have explained complete identity is unnecessary to trigger the public disclosure bar. Reed, 923 F.3d at 744–45. This is especially so when "the government has already identified the problem and has an easily identifiable group of probable offenders." *Fine*, 70 F.3d at 572.

The government would not need to look far from Aurora's identified wrongdoing to investigate whether Nationstar also used improperly endorsed promissory notes in foreclosure proceedings—particularly in proceedings involving servicing rights it acquired from Aurora. The OTS consent order thus reflects the "essence," *Boothe*, 496 F.3d at 1174, and "material elements," *Reed*, 923 F.3d at 745, of the fraudulent conduct allegedly committed by Nationstar.

The FBI Fraud Notice

Mr. Heron's complaint alleged, "[a]ccording to a mortgage fraud notice prepared jointly by the Federal Bureau of Investigation and the Mortgage Bankers Association," Nationstar's "submission of forged and otherwise fraudulent promissory notes in furtherance of foreclosure violates at least eight federal criminal statutes." App. I at 119, ¶ 204; 121, ¶ 210. In its motion to dismiss, Nationstar emphasized "[t]he FBI mortgage fraud notice goes as far as stating Nationstar 'forged and submitted fraudulent promissory notes' in violation of federal law." Supp. App. at 29. Mr. Heron, in opposing dismissal under the public disclosure bar, insisted his complaint never alleged the FBI Fraud Notice actually identified Nationstar; rather, he maintained the notice generally warned mortgage fraud is illegal. He argued

> The "mortgage fraud notice" prepared jointly by the FBI and the Mortgage Bankers Association that generically listed "eight criminal statutes" is not alleged to actually identify Nationstar (Motion at 7-8, misleadingly characterizing this notice) but rather simply a warning of the applicable criminal statutes under which anyone engaged in mortgage f[r]aud may be held liable—a generic warning Nationstar has failed to heed and nothing more.

Supp. App. at 44.

The district court acknowledged, but did not resolve, the parties' disagreement about whether the FBI Fraud Notice actually named Nationstar. The court explained Mr. Heron's complaint included a non-working hyperlink,[11] which left the court "unable to determine whether the [FBI] notice identifies [Nationstar] or not." App. VII at 1808.[12] Still, the district court determined, based on the complaint's allegations about the FBI notice, "the government was aware of the use of forged and fraudulent promissory notes in furtherance of foreclosures (FBI notice)." App. VII at 1809.

On appeal, Mr. Heron says the district court erroneously relied on the FBI Fraud Notice in applying the public disclosure bar. He appears to make two arguments supporting reversal, but neither is successful.

First, Mr. Heron contends the district court erred by making findings about the FBI Fraud Notice when it admitted it had not reviewed the document. This point is well taken as a general matter, but it is not particularly relevant here. When deciding a Rule 12(b)(6) motion, a district court must accept as true all well-pleaded factual allegations. *See, e.g.*, *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997). To be sure, a district court may not accept as true "factual al-

11. The court observed "[t]he link relator provides for the notice goes to 'page not found' on the FBI website, *see Page not found*, Fed. Bureau of Investigation, https://goo.gl/qaNWIX (last visited Sept. 15, 2021, 10:47 a.m.) . . . ." App. VII at 1808.

12. Mr. Heron does not challenge this component of the district court's ruling. In any event, a public disclosure need not specifically name an entity for later *qui tam* claims to trigger the public disclosure bar with respect to that entity. *See Reed*, 923 F.3d at 744–45.

legations that *contradict* . . . a properly considered document[.]" *Id.* (emphasis added). Mr. Heron's complaint did not attach the FBI Fraud Notice, and as discussed, the link provided in the complaint was inoperable. Under the circumstances, the district court understandably relied on the complaint's allegations about the Notice.

Second, Mr. Heron argued the FBI Fraud Notice, properly construed, does not trigger the public disclosure bar. In his opening brief, Mr. Heron includes an image of what he claims is the FBI Fraud Notice actually described in his complaint, along with an updated hyperlink. Opening Br. at 12–13, 19. Mr. Heron maintains this FBI Notice does not mention forgery, promissory notes, or foreclosures, so it could not show—as the district court found—the government was aware of forged and fraudulent promissory notes in foreclosure proceedings.

Nationstar insists the Notice depicted in Mr. Heron's opening brief cannot be the same one referenced in his complaint. The complaint alleged the FBI and the Mortgage Bankers Association prepared the Notice, Nationstar explains, but the image in Mr. Heron's opening brief "does not mention the Mortgage Bankers Association at all and simply explains it is illegal for a 'person' to make false statements in a loan or credit application to a 'financial institution.'" Aplee. Br. at 21.

Even if we assume, as Mr. Heron insists, the FBI Notice he references on appeal is the one actually discussed in his complaint, we still see no reason to reverse. Mr. Heron acknowledged the FBI Notice referenced in his complaint, like the one in his opening brief, shows the government's awareness of fraud in the mortgage industry generally. And the district court's application of the public disclosure bar did not rest *solely* on allegations about the FBI Fraud Notice. Rather, the district court concluded the Four Sources, taken together, met the Act's substantially-the-same standard. At minimum, the FBI Fraud Notice, if interpreted in the manner urged by Mr. Heron on appeal, does not disturb the district court's ultimate conclusion that the bar was triggered here.

Accordingly, we affirm the district court's determination that Mr. Heron's *qui tam* action involved substantially the same allegations as those already in the public domain, thereby triggering the public disclosure bar under § 3730(e)(4)(A).

2

We next consider Mr. Heron's argument that he is an original source of the information supporting his claims. Even where prior disclosures trigger the public disclosure bar, a claim can nonetheless avoid dismissal if the relator qualifies as an original source. *See* 31 U.S.C. § 3730(e)(4)(A). Before considering Mr. Heron's arguments, it is instructive to further consider precisely what the original source exception requires.

An original source "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." *Id.* § 3730(e)(4)(B)(2).[13] The "in-

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13. The Act provides two definitions for "original source." *See id.* § 3730(e)(4)(B). An original source:

> means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the [g]overnment 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

(continued…)

dependent knowledge" required under § 3730(e)(4)(B)(2) means "knowledge which is not secondhand knowledge." *MK-Ferguson Co.*, 99 F.3d at 1547. The "materially adds" requirement will ordinarily be satisfied by a "relator who discloses new information that is sufficiently significant or important that it would be capable of influenc[ing] the behavior" of the government. *Reed*, 923 F.3d at 757 (quoting *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016)). As we have explained, a relator who "merely adds background information or details about a known fraudulent scheme" does not materially add to the publicly disclosed allegations or transactions under § 3730(e)(4)(B)(2). *Id.* A source supplying cumulative information is not an "original source" under the Act.

In his complaint, Mr. Heron alleged he "has knowledge that is independent of and materially adds to any publicly disclosed information relating to the allegations herein." Opening Br. at 35. Mr. Heron contends he qualified as an original source under § 3730(e)(4)(B)(2) because the allegations in his complaint included 45 pages of material evidence of Nationstar's fraud in filings from Nationstar's foreclosure proceedings against other borrowers. Mr. Heron also claimed personal knowledge of material non-public information about Nationstar's alleged fraud.

In considering whether Mr. Heron satisfied the original source exception, the district court specifically evaluated eight allegations in the complaint which arguably

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to the [g]overnment before filing an action under this section."

Id. Only the second definition is at issue here.

could demonstrate Mr. Heron's independent knowledge of non-public information:

> (1) a private call with an Aurora "Executive Communications" employee where the employee disclosed that Aurora did not own relator's loan and never intended to modify the loan because the investor was not accepting modifications;
>
> (2) that Aurora and defendant produced three contradictory versions of plaintiff's promissory note in foreclosure proceedings that were each allegedly endorsed by Lorraine Dodson;
>
> (3) the existence of a third version of relator's promissory note that had never been filed in public records or filed with the court;
>
> (4) the exposure of defendant's argument that it had no records or knowledge of any forgeries or how the endorsements came into existence;
>
> (5) an affidavit obtained by relator from Lorraine Dodson, the endorser on relator's original loan documents, stating that she did not endorse the note to "Aurora Loan Services" or "Residential Funding Corporation";
>
> (6) relator's experience in the mortgage industry;
>
> (7) an internal nonpublic record obtained by relator that showed that Aurora paid to endorse a note several days before filing a forged handwritten endorsed note on Aurora's behalf; and

> (8) an internal Nationstar agreement used to hold outside counsel accountable for taking and receiving original notes and allonges that defendant sent to counsel.

App. VII at 1811.

The district court concluded the complaint showed Mr. Heron aggregated already-public information about Nationstar's use of promissory notes in foreclosure proceedings. Mr. Heron's knowledge about his own foreclosure proceeding, the district court reasoned, was not capable of influencing the government's behavior. The district court reached the same conclusion about allegations describing Mr. Heron's general familiarity with industry practices, an internal Aurora record about an attorney endorsing a promissory note, and an internal Nationstar document about procedures relating to outside counsel. The district court determined Mr. Heron did not qualify as an original source under the Act because "a relator who merely adds background information or details about a known fraudulent scheme will typically be found not to have materially added to the publicly disclosed information." App. VII at 1813 (quoting *Reed*, 923 F.3d at 757).

Mr. Heron challenges the district court's conclusion on two grounds, but neither is availing.

According to Mr. Heron, he "needs only to *allege* that he has the knowledge required by section 3730(e)(4)(B)(2)" and the "mere allegation of knowledge is all that is needed to survive a Rule 12(b)(6) motion." Opening Br. at 37–38. We disagree. Mr. Heron advances no authority, nor are we aware of any, requiring a district court to accept the truth of his conclusory legal assertion. *See United States ex rel. Hafter v. Spectrum*

Emergency Care, Inc., 190 F.3d 1156, 1162 (10th Cir. 1999) (explaining, at the motion to dismiss stage, a *qui tam* plaintiff "must allege specific facts—as opposed to mere conclusions" supporting their original source status); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining courts are not bound to accept as true a legal conclusion couched as a factual allegation when assessing a motion to dismiss under Rule 12(b)(6)).

Next, Mr. Heron insists the complaint's factual allegations show he has the requisite knowledge to qualify as an original source. Reviewing *de novo*, we perceive no error in the district court's analysis or its conclusion that the complaint fails to plausibly allege Mr. Heron had knowledge "that is independent of and materially adds to the publicly disclosed allegations or transactions," as required by the Act's original source provision. 31 U.S.C. § 3730(e)(4)(B)(2).

The complaint demonstrates Mr. Heron grouped together public information collected from other foreclosure proceedings involving Nationstar. This amalgamation of public information is precisely the "secondhand knowledge" that will not qualify a relator as an original source under the Act. *See MK-Ferguson Co.*, 99 F.3d at 1547; *see also In re Nat. Gas Royalties*, 562 F.3d at 1045 (explaining the original source provision's independent knowledge requirement is satisfied where a relator's knowledge is unmediated by anything but their own efforts). Mr. Heron can identify no allegations—other than pointing to his collection of public records—showing his independent knowledge of "new information that is sufficiently significant or important that it would be capable of influenc[ing]" the government's behavior regarding Nationstar. *Reed*, 923 F.3d at 757 (quoting *Win-*

kelman, 827 F.3d at 211). And Mr. Heron's appellate briefing does not address the district court's thorough analysis of the eight non-public facts alleged in the complaint about which Mr. Heron claims to have independent knowledge.

Accordingly, we conclude, as the district court did, the FCA's original source provision does not save Mr. Heron's *qui tam* complaint from dismissal.

IV

We **AFFIRM** the district court's dismissal of the Second Amended Complaint.

Entered for the Court

Veronica S. Rossman
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 17-cv-03084-PAB-STV

UNITED STATES OF AMERICA, ex rel. JAMES HERON,

Plaintiff,

v.

NATIONSTAR MORTGAGE LLC,[1]

Defendant.

ORDER

This matter comes before the Court on Nationstar Mortgage LLC's Motion to Dismiss [Docket No. 137]. Relator responded [Docket No. 141], and defendant replied [Docket No. 144]. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

1. The second amended complaint additionally lists as defendants Aurora Loan Services, LLC; Aurora Bank FSB; Aurora Commercial Corp., as successor to Aurora Bank FSB; Medved Dale Decker & Deere, LLC; Dale & Decker, LLC; Toni Marie Owan; Holly Ryan; Jennifer L. Reynolds; Penny Dietrich-Smith; and Jamie G. Siler. See Docket No. 136 at 1. However, plaintiff states that he dismissed these defendants earlier in the case and is only bringing claims against Nationstar Mortgage LLC ("Nationstar") at this time. *Id.* at 4 n.1. Accordingly, the Court lists Nationstar as the only remaining defendant.

I. BACKGROUND[2]

Relator brings a *qui tam* action pursuant to the False Claims Act ("FCA") to recover damages and civil penalties from defendant on behalf of the United States. Docket No. 136 at 4, ¶ 1. Relator alleges a scheme by defendant to submit forged and fraudulent promissory notes in foreclosure proceedings while receiving federal funds designed to keep borrowers in their homes. *Id.* at 4–5, ¶¶ 2, 5.

Relator lost his home through foreclosure due to the illegal acts of defendant and Aurora Loan Services, LLC, Aurora Banks FSB, and Aurora Commercial Corp., as successor to Aurora Bank FSB (collectively, "Aurora"). *Id.* at 4, 9, ¶¶ 1, 16, n.1. Defendant purchased billions of dollars of loan servicing packages from entities like Aurora, often taking over foreclosure proceedings initiated by or on behalf of Aurora, its predecessor. *Id.* at 11, 42, ¶¶ 25, 90. Between 2008 and March 2011, Aurora attempted to foreclose on relator's home a number of times. *Id.* at 11–13, ¶¶ 26–32. Aurora, by itself and through law firms, claimed to own relator's loan in eleven different documents, purporting to prove such ownership though handwritten endorsements to "Aurora Loan Services" on various copies of the promissory note. *Id.* at 11, ¶ 26. Relator became suspicious of Aurora's and the law firm's dealings with his foreclosure and contested the authenticity of the promissory note and Aurora's ownership of the loan in the District Court for Douglas County, Colorado in 2012; defendant Nationstar was later substi-

2. The following facts are from relator's second amended complaint [Docket No. 136]. The Court presumes them to be true for the purpose of ruling on defendant's motion to dismiss.

tuted in for Aurora as plaintiff in the proceeding. *Id.* at 13–14, ¶ 32. In the proceeding, Nationstar, after Aurora produced two other versions of the promissory note, produced a third version of the promissory note and Nationstar's witness testified that Nationstar and Aurora only serviced the mortgage loan. *Id.* at 14, ¶ 33. Relator alleges that the third version of the promissory note was a forgery used to cover up previous forgeries. *Id.*

Relator alleges that Aurora and Nationstar use similar forged, handwritten endorsements to foreclose on hundreds of other borrowers in Colorado. *Id.* at 10, ¶ 24. Relator outlines the following illegal scheme by defendant. Defendant owns billions of dollars of loan servicing rights. *Id.* at 5, ¶ 6. Defendant represents to courts that it has all necessary loan records and documents required to legally foreclose on the homes it initiates foreclosure proceedings on, and that the documents are genuine. *Id.* However, this is false. *Id.* Instead, many of the loan documents are deficient. *Id.* In order to cover up these deficiencies, defendant submits forged promissory notes to foreclosure proceedings. *Id.* at 6, ¶ 7. These forgeries take the form of promissory notes filed by defendant for the same property in multiple foreclosure proceedings that are irreconcilable with promissory notes previously filed by defendant. *Id.* Defendant has forged the promissory notes so that it has the requisite endorsement to certify to the courts that the promissory note being used in the foreclosure proceeding is the "true and correct" copy. *Id.* Relator conducted an independent investigation of defendant and Aurora's foreclosure proceedings and uncovered hundreds of fraudulent endorsements in Aurora's foreclosures, *id.* at 37, ¶ 83; relator provides specific photographic examples of the fraud. *Id.* at 39–54, ¶¶ 86–114.

The government instituted a number of measures to stabilize the housing and credit markets and assist troubled borrowers after the onset of the 2008 housing crisis. *Id.* at 83, ¶ 161. As relevant to this case, the government established (1) the Troubled Asset Relief Program ("TARP") to, inter alia, promote mortgage loan modification programs; (2) the Home Affordable Modification Program ("HAMP"), to use TARP funds to provide incentives for mortgage servicers to modify eligible first-lien mortgages; and (3) various other programs to further stabilize the housing market by facilitating secondlien mortgage loan modifications and extinguishment, by encouraging foreclosure alternatives, and by making other foreclosure prevention services available to the marketplace. *Id.* at 84, ¶¶ 162–65.

On May 28, 2009, defendant entered into a Commitment to Purchase Financial Instrument and Service Participation Agreement ("SPA") with Fannie Mae, which stated that defendant would participate in the HAMP program on the terms and conditions of the SPA. *Id.* at 86, ¶ 175. In the SPA, defendant stated that it was in compliance with "all applicable Federal, state and local laws, regulations, regulatory guidance, statutes, ordinances, codes and requirements . . . designed to prevent unfair, discriminatory or predatory lending practices . . . ." *Id.* at 87, ¶ 179(a). Defendant further acknowledged that "the provision of false or misleading information to Fannie Mae or Freddie Mac in connection with the [HAMP] Program may constitute a violation of . . . the civil False Claims Act[,]" and covenanted to disclose "any credible evidence, in connection with the Services, that a management official, employee, or contractor of Servicer has committed, or may have committed, a violation of the referenced statutes." *Id.* at 88, ¶ 180. In order to continue to participate in the HAMP program, defendant executed annual certifications to the same effect. *Id.* at 89, ¶ 182. However, the certifications that defendant made with respect to the HAMP program were false at the time of making and continued to be false because defendant was conducting foreclosures that were commenced though the submission of fraudulent and forged promissory notes. *Id.* at 89–90, ¶ 184.

Relator also alleges that defendant failed to meet the loss mitigation requirements of the Federal Housing Administration ("FHA") and defendant failed to implement a quality control program required by the FHA, thus making defendant's assertion in the SPA that it was in compliance with all federal laws and regulations false and resulting in insurance payments from the FHA to defendant that were made based on fraudulent inducements. *Id.* at 90–94, ¶ 185–95. Additionally, defendant failed to notify the government of both its own violations and those made by Aurora and certain law firms, in contravention of the requirements of the SPA. *Id.* at 95, ¶ 197.

Relator brings two claims: (1) violation of the FCA, 31 U.S.C. § 3729(a)(1)(D), by engaging in illegal foreclosure practices and submitting false claims for payment under TARP and HAMP programs, and (2) violation of the FCA, 31 U.S.C. § 3729(a)(1)(C), by conspiracy to violate the FCA. *Id.* at 97–100, ¶¶ 202–213.

On November 19, 2020, defendant filed a motion to dismiss both claims pursuant to Fed. R. Civ. P. 12(b)(6). Docket No. 137. Defendant argues that relator's claims

(1) are prohibited by the public disclosure bar; (2) are not plead with the particularity required by Fed. R. Civ. P. 9(b); and (3) fail to plead the elements of an FCA conversion and conspiracy claim. *Id.* at 5. Relator responded, Docket No. 141, and defendant replied. Docket No. 144.

II. LEGAL STANDARD

The Court's function on a Rule 12(b)(6) motion for failure to state a claim is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim. Fed. R. Civ. P. 12(b)(6); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations omitted). A court must accept all the well-pleaded allegations of the complaint as true and must construe them in a light most favorable to the plaintiff. *See Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege enough factual matter that, taken as true, makes the plaintiff's "claim to relief . . . plausible on its face." *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (internal quotation marks and alteration marks omitted). Thus, even though modern rules of pleading are somewhat forgiving, "a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Bryson*, 534 F.3d at 1286 (alteration marks omitted).

III. ANALYSIS

Defendant argues that this case should be dismissed because (1) the public disclosure bar applies, (2) relator's complaint fails to plead the particularity required by Fed. R. Civ. P. 9(b), and (3) relator did not sufficiently plead the elements of an FCA conversion or conspiracy claim. Docket No. 137 at 5.

The FCA "covers all fraudulent attempts to cause the government to pay out sums of money." *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 736 (10th Cir. 2019) (quoting *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008)). An action can either be brought by the government itself or "'a private person (the relator) may bring a qui tam' suit on behalf of the government and also for herself alleging that a third party made fraudulent claims for payment to the government." *Id.* (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000)). Relators are entitled to a portion of the recovery they obtain. *Id.*

The FCA states in relevant part that

> any person who—
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
>
> (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

> (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
>
> . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3729(a)(1). Relator alleges that defendant violated §§ 3729(a)(1)(C) and (D). Docket No. 136 at 94–95.

The Court first addresses defendant's argument that relator's claims are prohibited by the public disclosure bar. The FCA limits the rights of a relator to bring an action in certain circumstances:

> [t]he court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
>> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>>
>> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). This is known as the "public disclosure bar." *Reed*, 923 F.3d at 736–37. The public disclosure bar "aims to strike 'the golden mean between' encouraging 'whistle-blowing insiders with genuinely valuable information' to come forward while discouraging 'opportunistic plaintiffs who have no significant information to contribute of their own.'" *Id.* at 738 (quoting *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995)). To determine if the public disclosure bar applies, a court considers "(1) whether the alleged public disclosure contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made public within the meaning of the FCA; and (3) whether the relator's complaint is based upon this public disclosure." *In re Nat. Gas Royalties*, 562 F.3d 1032, 1039 (10th Cir. 2009) (internal quotation marks and alteration omitted).

A. Motion to Dismiss Versus Motion for Summary Judgment

Prior to 2010, the public disclosure bar was jurisdictional. *See United States ex rel. Booth v. Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1173 (10th Cir. 2007) (noting that, as of 2007, the public disclosure bar was jurisdictional). Therefore, where the parties relied on evidentiary materials outside the complaint, the Tenth Circuit instructed courts to convert the motion into one for summary judgment. *United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1159

(10th Cir. 1999) ("Jurisdictional challenges brought under [31 U.S.C. § 3730(e)(4)] arise out of the same statute creating the cause of action (i.e., the False Claims Act) and are thus necessarily intertwined with the merits of the case. . . . As such, the court's jurisdictional inquiry should be resolved under Federal Rule of Civil Procedure 12(b)(6) or, after proper conversion into a motion for summary judgment, under Rule 56." (internal citation omitted)).

In 2010, Congress amended the statute and removed the reference to jurisdiction; the "federal courts of appeals that have confronted the issue have unanimously held that the 2010 'amendments transformed the public disclosure bar from a jurisdictional bar to an affirmative defense.'" *Reed*, 923 F.3d at 737 n.1 (quoting *United States ex rel. Prather v. AT&T, Inc.*, 847 F.3d 1097, 1102 (9th Cir. 2017)). Dismissal of a complaint based on an affirmative defense "is only [proper] when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). In *Reed*, the Tenth Circuit declined to determine whether the public disclosure bar was jurisdictional or an affirmative defense because, *inter alia*, the appellee had properly raised it as a defense in its motion to dismiss. *Reed*, 923 F.3d at 737 n.1. The district court in *Reed* converted the portion of appellee's motion to dismiss regarding the public disclosure bar to a motion for summary judgment and permitted the appellant to file additional evidence. *Id.* at 741. Whether the bar was jurisdictional or an affirmative defense was immaterial in *Reed*. *Id.* at 737 n.1.

Ordinarily, when a district court relies on material outside the complaint to resolve a Rule 12(b)(6) motion, it must convert it into one for summary judgment. *Id.* at 753. However, courts may consider not only the challenged complaint itself, but also attached exhibits and documents incorporated into the complaint by reference. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). The "outside materials" that defendant argues warrant the application of the public disclosure bar are (1) the consent order Aurora entered into with the Office of Thrift Supervision ("OTS"); (2) consent orders defendant entered into with the Division of Banks; (3) *United States v. Farkas*, a criminal case against an individual for running a bank and TARP fraud scheme; and (4) a mortgage fraud notice provided by the Federal Bureau of Investigation ("FBI") and the Mortgage Bankers Association. Docket No. 137 at 6–7. The complaint provides (1) a link to the consent order defendant entered into with the Division of Banks, Docket No. 136 at 96 n.16; (2) a citation to *United States v. Farkas*, excerpts from the trial transcript, and a link to a press release about the case, *id.* at 33–34, ¶¶ 76–77; and (3) a link to the FBI mortgage fraud notice. *Id.* at 97 n.17. Relator does not object to the Court considering these materials. *See* Docket No. 141 at 6–9. Therefore, the Court will consider these materials without converting defendant's motion to dismiss into one for summary judgment. *Cf. Alvarado*, 493 F.3d at 1215 ("[T]he district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." (internal quotation omitted)).

B. "Substantially the Same" Allegations

Defendant argues that the public disclosure bar prohibits this action because substantially the same allegations have been publicly disclosed. Docket No. 137 at 5. Specifically, defendant argues that the public disclosures were (1) the consent order Aurora entered into with the OTS; (2) consent orders defendant entered into with the Division of Banks; (3) *United States v. Farkas*, a criminal case against an individual for running a bank and TARP fraud scheme; and (4) a mortgage fraud notice provided by the FBI and the Mortgage Bankers Association. *Id.* at 7. Relator argues that none of these public disclosures identified the scheme he alleges: forged and fraudulent promissory notes for the purposes of litigating foreclosures. Docket No. 141 at 6–8.

Relator does not dispute that the alleged public disclosures came from a source listed in the FCA or that they were made public within the meaning of the FCA. *See id.* at 6–9. The issue then is "whether the relator's complaint is based upon this public disclosure." *In re Nat. Gas Royalties*, 562 F.3d at 1039 (internal quotation marks and citation omitted). This prong asks "whether the *qui tam* complaint was based upon, meaning supported by, the publicly disclosed allegations or transactions." *Id.* at 1040 (internal quotation marks and citation omitted); *see also Reed*, 923 F.3d at 745 (finding that pre-2010 Tenth Circuit precedent for determining substantially-the-same inquiry applies after 2010 amendment to FCA). The test is whether there is "substantial identity" between the public disclosure and the *qui tam* complaint. *In re Nat. Gas Royalties*, 562 F.3d at 1040. "[T]he operative question is whether the public disclosures were sufficient to set the government 'on the trail of the alleged fraud without [the relator's] assistance.'" *Reed*, 923 F.3d at 744 (quoting *Fine*, 70 F.3d at 571). A public disclosure need not identify a defendant by name in order for there to be substantial identity. *Id.* at 745 ("[T]he government's nose for fraud may be sensitive enough to pick up the scent even if the public disclosures did not identify any specific company." (internal quotation marks and alteration omitted)). The public disclosure bar applies if "the essence of the relator's allegations was derived from a prior public disclosure." *Id.* (internal quotation marks omitted). Additionally, a complaint can be substantially the same even when only based in part on public disclosures. *Fine*, 70 F.3d at 572 ("In Precision, however, we construed the 'based upon' test broadly . . . and concluded that section 3730(e)(4)(A) bars even those qui tam complaints which are based only *in part* upon public disclosures."). The Court will consider each public disclosure.

United States v. Farkas. In *Farkas*, the government prosecuted executives of a mortgage lender for a fraudulent TARP scheme that used fake promissory notes to double- and triple-sell mortgage loans. Docket No. 136 at 33–34, ¶¶ 76–77. The complaint alleges that Farkas used "fake promissory notes" in order to commit bank and TARP fraud. *Id.* The complaint also alleges that Farkas used fake promissory notes to secure loans when the promissory notes had in fact been sold to someone else.[3]

3. Relator argues in his response to defendant's motion to dismiss that the complaint references *United States v. Farkas* to provide an example of how the court in *Farkas* rejected a defendant's argument the fake promissory notes were irrelevant. Docket No. 141 at 7. The purpose relator had for placing these (continued…)

Id. In this case, plaintiff alleges that defendant used fraudulent promissory notes to effectuate foreclosures. *Id.* at 5, ¶ 5. While the purpose of the fake promissory notes was different in *Farkas*, the allegation of the use of fake notes is the same in *Farkas* and this case.

Consent Orders. The complaint alleges that Aurora entered into a consent order with OTS due to "unsafe or unsound practices" in, *inter alia*, Aurora's handling of foreclosure proceedings. *Id.* at 95–96, ¶ 199. The alleged practices included filing affidavits and other "mortgage related documents" that were not properly notarized and "litigat[ing] foreclosure and bankruptcy proceedings and initiat[ing] non-judicial foreclosure proceedings without always ensuring that each promissory note and mortgage document were properly endorsed or assigned . . ." *Id.* at 96 n.15. Relator argues that defendant distanced itself from Aurora's wrongdoing and that the consent order did not deal with the same allegations in this case: fake promissory notes used for the purpose of litigation. *See* Docket No. 141 at 7–8. Relator alleges that defendant is Aurora's successor. Docket No. 136 at 42, ¶ 90. The consent order clearly concerned foreclosure litigation and improper promissory notes.

Relator further alleges that defendant "avoided a similar Consent Order with OTS, but entered into one or more similar consent orders with various state attorneys general[,]" and that defendant "likely found much relief in agreeing to the liability imposed by the consent order it entered because it successfully concealed its outright fraud from the governmental authorities." *Id.* at 96,

allegations in the complaint are immaterial to the Court; the Court is not bound by relator's interpretation of his allegations.

¶¶ 199–200. Relator alleges that defendant entered into a consent order because of its improper use of promissory notes in foreclosure litigation.[4]

FBI mortgage fraud notice. Relator alleges that the FBI and Mortgage Bankers Association jointly prepared a mortgage fraud notice which states that the submission of forged and fraudulent promissory notes in furtherance of a foreclosure violates at least eight federal statutes. *Id.* at 97, ¶ 204. Defendant argues that this was a substantially similar public disclosure that actually identifies defendant, Docket No. 137 at 8, while relator argues that the notice was a generic warning of the criminal statutes that apply to mortgage fraud, and the notice does not actually identify defendant. Docket No. 141 at 8. The link relator provides for the notice goes to "page not found" on the FBI website, *see Page not found*, Fed. Bureau of Investigation, https://goo.gl/qaNWIX (last visited Sept. 15, 2021, 10:47 A.M.), and the Court is therefore unable to determine whether the notice identifies defendant or not.

The question in this case is whether the public disclosures are sufficiently specific for the public disclosure bar to apply. At a minimum, the Court finds that the public disclosures discussed above were adequate to put the government on notice of fraud in the mortgage industry. However, in *Reed*, the Tenth Circuit expressed hesitancy at analyzing the plaintiff's allegations at their

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4. As with the description of *United States v. Farkas*, relator argues that defendant mischaracterizes the purpose for which these allegations are in the complaint and that they are there to show how defendant's actions went beyond "robo-signing." Docket No. 141 at 7–9. However, it is a determination for the Court of whether the allegations in the complaint are substantially similar to the public disclosures.

most general level. *Reed*, 923 F.3d at 748 n.12. The court looked to the plain meaning of "substantially the same" and held that it "connotes a standard that requires only the *essentials* of the relator's allegations to be identical to or of an identical type as those disclosed publicly." *Id.* The court declined to "put a finer point on this issue" because only a "hyper-specific reading that requires near complete identity of allegations" would support the reading put forth by the relator in an attempt to avoid substantial similarity, and precedent foreclosed a hyper-specific reading. *Id.*

Considering the information from these public disclosures, the Court finds that the disclosures were sufficient to "set the government on the trail" of defendant's alleged fraud without relator's assistance.[5] *See id.* at 749. Relator in this case argues for a "hyper-specific reading" that precedent prohibits. The public disclosures showed that (1) the government was aware of the use of forged and fraudulent promissory notes in furtherance of foreclosures (FBI notice); (2) Aurora (defendant's predecessor) entered into a consent decree due to litigating fore-

5. In its reply, defendant identifies other public disclosures that it alleges are substantially the same as relator's allegations. *See* Docket No. 144 at 3–4. However, these public disclosures are not referenced in the complaint, and defendant makes no argument regarding how the Court could consider them at the motion to dismiss stage without converting the motion into one for summary judgment. *See id.* Accordingly, the Court declines to consider these additional public disclosures which were neither raised in the motion to dismiss nor the complaint. *Cf. Prager v. LaFaver*, 180 F.3d 1185, 1189 (10th Cir. 1999) ("[I]f a defendant attaches to a 12(b)(6) motion materials referred to by the plaintiff and central to his claim, the court has *discretion* to consider such materials." (emphasis added)).

closures without ensuring the promissory note and mortgage document were properly endorsed or assigned (Aurora consent decree with OTS); (3) defendant entered into a consent decree similar to Aurora's with the Division of Banks (defendant's consent decree); and (4) the use of fake promissory notes to secure a loan when the promissory note had already been sold was an issue that had been litigated (*United States v. Farkas*). These disclosures are substantially the same as the allegations relator makes in the complaint.

C. Original Source

The FCA instructs courts to dismiss a *qui tam* action that is substantially similar to public disclosures "*unless* . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added). An original source

> means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), 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.

Id. § 3730(e)(4)(B); *see also Reed*, 923 F.3d at 756–58 (noting that the "materially adds" inquiry must remain conceptually distinct from "substantially-the-same" inquiry or else the original source exception would be rendered meaningless). Defendant argues that relator is not an original source because the consent decrees entered into by Aurora and defendant were publicly disclosed before this action and because relator's personal investigation of public disclosures adds nothing to the information the government already possessed. Docket No. 137 at 8–9. Relator responds that he qualifies as both types of original sources because there has been no public disclosure of defendant's fabrication of promissory notes and his investigation materially adds to any publicly disclosed allegations. Docket No. 141 at 10.

"[A] relator who discloses new information that is sufficiently significant or important that it would be capable of 'influenc[ing] the behavior of the recipient'—*i.e.*, the government—ordinarily will satisfy the materially-adds standard." *Reed*, 923 F.3d at 757 (quoting *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016)). However, the addition of "background information or details about a known fraudulent scheme" typically will not meet the standard. *Id.* The analysis of whether a relator materially adds to the publicly disclosed transactions or allegations "must be firmly grounded in the facts and circumstances of a particular case. And those facts and circumstances will guide our determination of whether the who, what, when, where, or how actually should be considered sufficiently significant or important to affect the government's actions regarding the fraudulent scheme." *Id.* at 758.

Relator argues that he is an original source because the complaint contains 45 pages worth of evidence of defendant's fraud. Docket No. 141 at 10. The non-public facts that relator alleges are (1) a private call with an Aurora "Executive Communications" employee where the employee disclosed that Aurora did not own relator's loan and never intended to modify the loan because the investor was not accepting modifications; (2) that Aurora and defendant produced three contradictory versions of plaintiff's promissory note in foreclosure proceedings that were each allegedly endorsed by Lorraine Dodson; (3) the existence of a third version of relator's promissory note that had never been filed in public records or filed with the court; (4) the exposure of defendant's argument that it had no records or knowledge of any forgeries or how the endorsements came into existence; (5) an affidavit obtained by relator from Lorraine Dodson, the endorser on relator's original loan documents, stating that she did not endorse the note to "Aurora Loan Services" or "Residential Funding Corporation"; (6) relator's experience in the mortgage industry; (7) an internal nonpublic record obtained by relator that showed that Aurora paid to endorse a note several days before filing a forged handwritten endorsed note on Aurora's behalf; and (8) an internal Nationstar agreement used to hold outside counsel accountable for taking and receiving original notes and allonges that defendant sent to counsel. *See* Docket No. 141 at 8–9 n.4; Docket No. 136 at 32–33, ¶ 75. Relator argues that his 45 pages of "graphic images and actual copies of the multiple versions of the notes and endorsements that were filed in different courts relating to the *same* borrowers' notes in various foreclosure proceedings initiated by Nationstar" make him an original source under the public disclosure bar. *See* Docket No. 141 at 10.

First, the Court finds that the information relator amalgamated from other foreclosure proceedings was public information that relator simply grouped together, and he is therefore not an original source of it. *See Unit-*

ed States ex rel. Kuriyan v. Health Care Servs. Corp., 2020 WL 8079811, at *11 (D.N.M. Sept. 9, 2020) ("Relator is barred if his claim was derived solely from second-hand knowledge."). Second, the Court finds that the non-public information that relator provides concerning his own foreclosure is not the type of information that is capable of "influencing the behavior" of the government, and is simply details about his foreclosure within the fraudulent promissory note scheme that had been publicly disclosed. *See Reed*, 923 F.3d at 757 (quoting *Winkelman*, 827 F.3d at 211). Third, the non-public evidence that is not solely related to relator's foreclosure is his general familiarity with industry practices from working for a different mortgage company, an internal Aurora record that allegedly proves that Aurora paid an attorney to endorse a note several days before filing the forged handwritten note on Aurora's behalf, and an internal Nationstar agreement used to hold outside counsel accountable for taking and receiving original notes and allonges that defendant sent to counsel. The Court finds that these disclosures are not sufficiently significant to influence the behavior of the government, and therefore that relator is not an original source.

Relator argues that the government would be

> influenced by the knowledge that it gave hundreds of millions of dollars to Nationstar in exchange for its certifications that it has been, is presently and will continue to service residential mortgage loans in compliance with all applicable laws, rules, regulations, requirements and guidelines (SAC ¶ 201) when Nationstar was, and is, foreclosing on borrowers' homes with false, forged and fraudulent notes in bla-

> tant disregard for the associated borrowers, the government, the courts and all applicable laws.

Docket No. 141 at 12. However, this argument misses the mark because the issue is not whether the government would be influenced by knowledge of the scheme as a whole, the issue is whether relator has knowledge that is independent of and materially adds to the public disclosures. The Court has found that the existence of the fraudulent scheme was publicly disclosed. Relator's knowledge that is independent of the public disclosures does not materially add to it because "a relator who merely adds background information or details about a known fraudulent scheme typically will be found not to have materially added to the publicly disclosed information."[6] *Reed*, 923 F.3d at 757.

The Court finds that the allegations in the complaint are substantially similar to public disclosures and relator is not an original source of the information. Accordingly, relator's claims for violation of the FCA, claim one for violating 31 U.S.C. § 3729(a)(1)(D) and claim two for violating 31 U.S.C. § 3729(a)(1)(C), are prohibited by the

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6. Relator also argues that he is an original source under 31 U.S.C. § 3730(e)(4)(B)(i), which states that a person is an original source who, "prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based." Docket No. 141 at 10. However, the Court has found that the consent decrees are substantially similar and that the complaint is based on them, and thus rejects relator's argument that he is an original source under this prong.

public disclosure bar and the Court will grant defendant's motion to dismiss.[7]

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that Nationstar Mortgage LLC's Motion to Dismiss [Docket No. 137] is **GRANTED**. It is further

ORDERED that the second amended complaint [Docket No. 136] is DISMISSED. It is further

ORDERED that this case is closed.

DATED September 15, 2021.

BY THE COURT:

/s/ Philip A. Brimmer
PHILIP A. BRIMMER
Chief United States District Judge

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7. Because the Court finds that the public disclosure bar applies, the Court does not address defendant's arguments that the second amended complaint fails under Fed. R. Civ. P. 9(b) and fails to plead all the elements of an FCA violation.