IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

In Re:	)	
	)	
NATURAL GAS ROYALTIES	)	99-MD-1293-D
QUI TAM LITIGATION	)	

ORDER ON REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

This matter comes before the Court on the Report and Recommendations of Special Master on: (A) Coordinated Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction; (B) Arco's, Unocal's and Dauphin's Motion and Brief on Jurisdiction; (C) Moving 1997 Defendants' Memorandum to Dismiss Relator's Complaints for Lack of Subject Matter Jurisdiction; and (D) Relator's Cross Motion for Summary Judgment with Authority Pursuant to Fed. R. Civ. P. 56, on Issue of Public Disclosure Under 31 U.S.C. § 3729 et seq. The Court, having considered the briefs and materials in support of the Special Master's recommendations and the objections thereto, having heard oral argument of counsel, and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

As set forth in the Special Master's Report, the subject motions are directed at 73 cases filed under the *qui tam* provisions of the False Claims Act by Relator Jack J. Grynberg, in which he accuses over 300 gas pipelines and other gas measurers of mismeasuring gas produced from federal and/or Indian lands ("the 1997 *qui tam* cases"). Beginning in June of 1997, Relator commenced filing the instant *qui tam* suits in Federal District Courts in Colorado, Wyoming, Oklahoma, Louisiana, Texas, Michigan, California, and New Mexico. In October of 1999, the

Judicial Panel on Multidistrict Litigation transferred 66 cases to this Court for coordinated or consolidated pretrial proceedings. Subsequently, additional cases were transferred, bringing the total now pending to 73. The complaints in each of these cases asserts that all of the Defendants named therein employ a series of mismeasurement techniques that allows them to knowingly underreport or cause others to underreport the heating content and volume of gas, and that this conduct has resulted in an underpayment of federal royalties over a 10-year period. Relator's complaints are brought under the "reverse false claim" provision contained in 31 U.S.C. § 3729(a)(7).

In April of 1995, Relator filed a *qui tam* action in the United States District Court for the District of Columbia against forty-four defendants, alleging that they had defrauded the federal government by underpaying royalties on gas purchased from federally owned or Indian lands. Relator asserted that the underpayments were the result of mismeasurement of gas volume and improper analysis of gas heating content. The 1995 *Qui Tam* Complaint identified a number of mismeasurement techniques, and asserted that each of the defendants employed one or more of them.

Relator amended the 1995 *Qui Tam* Complaint to add defendants and mismeasurement techniques. An Amended Complaint filed on December 7, 1995, and a Second Amended Complaint, filed on May 13, 1996, each named several new defendants, ultimately bringing the total number of defendants sued in the 1995 action to 70. On March 27, 1997, United States District Judge Thomas F. Hogan dismissed the 1995 *qui tam* action without prejudice for failure to plead fraud with particularity and for improper joinder of parties. There were 63 defendants in the 1995 *qui tam* action at the time the order of dismissal was entered.

The bulk of the allegations in the *qui tam* actions currently pending before this Court accuse the named Defendants in each case of knowingly utilizing specifically identified techniques to measure gas volume and analyze gas heating content in a manner that produces an artificially low wellhead price. Because federal royalties are based on the wellhead price, the use of these mismeasurement techniques also allegedly results in an underpayment of royalties to the United States. The Special Master found that twenty of the alleged mismeasurement techniques are common to all 73 cases, while other mismeasurement practices are case specific. Each Complaint asserts that each of the named Defendants utilized each of the mismeasurement techniques identified therein. A few of the cases name only one Defendant. The rest identify multiple Defendants that are alleged to be affiliated companies acting in concert through the same employees and personnel.

Following a massive and complex discovery process limited to jurisdictional issues, the parties filed the instant motions, accompanied by hundreds of pages of briefs and thousands of pages of exhibits. The Special Master heard two full days of oral argument. The Defendants' motions to dismiss contend that Relator has failed to comply with the *qui tam* jurisdictional provisions contained in 31 U.S.C. § 3730(e)(4). Specifically, Defendants argue that Relator's 1997 *Qui Tam* Complaints are based upon public disclosures of allegations or transactions from one of the sources listed in § 3730(e)(4)(A), and that he is not an original source, as that term is defined in 31 U.S.C. § 3730(e)(4)(B). Additionally, the Defendants assert that Relator has failed to comply with and/or violated the disclosure and seal provisions of 31 U.S.C. § 3730(b)(2). Relator's cross-motion contends that there are no material issues of fact in dispute and that Relator has met the requirements of § 3730(e)(4) as a matter of law.

Section 3730(e)(4) of the False Claims Act provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Special Master's Findings Regarding Public Disclosure

The Special Master reviewed the various categories of documents proffered by Defendants as constituting public disclosures. He first determined that numerous documents from the technical literature on gas measurement were not public disclosures within the statute's meaning. Though the articles did indicate that commonly employed methods of measurement were not the most accurate, the Special Master rejected them as qualifying public disclosures because the documents did not place anyone's conduct "in a questioning light" and/or did not "disclose any transaction in which the representations of any particular gas measurer were different than the true facts." (Report at 13.) Similarly, he declined to accept as public disclosures the documents related to a 1988-89 investigation by the United States Senate into gas mismeasurement on federal and Indian lands because they named only "Koch Oil" (Report at 16), a company already dismissed from these proceedings. "The fact that these documents, while noting widespread fraud, specifically identify only one company" was "central" to his conclusion. *Id*. After reviewing case law from various circuits, the Special Master determined

that, "generally speaking, public disclosure of widespread wrongdoing in an industry does not trigger the statutory public disclosure bar as to every industry member." (Report at 24.)

The Special Master then turned to whether documents from Relator's 1995 *qui tam* litigation ("1995 *Qui Tam* Action Documents")[1] met the statutory requirements for public disclosures. He determined that these documents do qualify as public disclosures from one of the listed sources, rejecting Relator's assertion that such a finding would undermine the policies underlying the FCA. The Special Master further found that the nature of the dismissal of Relator's 1995 *qui tam* case has no bearing upon the question of whether the pleadings and orders entered therein constitute public disclosures of allegations or transactions under § 3730(e)(4)(A).

Having determined that the 1995 *Qui Tam* Action Documents are public disclosures of allegations or transactions from one of the sources listed in the FCA, the Special Master next addressed the question of whether and to what extent Relator's 1997 *qui tam* cases are based upon those public disclosures. He found that "if the gist of the fraudulent scheme has been publicly disclosed in a source listed in § 3730(e)(4)(A), a subsequent *qui tam* action alleging a substantially identical fraudulent scheme against the same or related defendants is barred unless the relator qualifies as an original source." (Report at 33.) The Special Master concluded that, at least as to the 56 "Overlapping Defendants," the 1997 *qui tam* cases are based upon the 1995 *Qui Tam* Action Documents.

The more difficult question for the Special Master relates to the impact of the 1995 *Qui*

[1] These documents include Relator's Complaints and various pleadings from the 1995 action, Judge Hogan's Order dismissing the case, and several newspaper and media accounts of the litigation.

Tam Action Documents on the Defendants in the 1997 *qui tam* cases which were not expressly named in the 1995 action ("Unnamed Defendants"). The Special Master determined that the publicly disclosed allegations against the defendants in the 1995 *Qui Tam* Action Documents also constitute public disclosures of allegations as to affiliated corporations named as Defendants in the 1997 *qui tam* cases. His finding is based on Relator Grynberg's having specifically asserted in his 1995 *Qui Tam* Complaint that the defendants' affiliates were participants in the fraud; accordingly, the prior public disclosure undoubtedly placed the government on the trail of the alleged fraud. (Report at 37-40.)

Defendants argued that these materials trigger the public disclosure bar not only with regard to the defendants named in the 1995 *qui tam* action and their affiliated companies, but also with regard to all companies sued in the 1997 *qui tam* cases. The Special Master disagreed, rejecting Defendants' assertion that Relator's 1995 *Qui Tam* Action Documents clearly alleged *universal* fraud by all purchasers of gas from federal and Indian properties. Even so, the Special Master found no case in which allegations against specifically identified wrongdoers, accompanied by averments of universal fraud directed at such a large and multifaceted group as "gas purchasers," have been held to trigger the public disclosure bar against all group members. (Report at 44.) He determined that cases dealing with similar, but not identical, generalized allegations of fraud against large industry groups have concluded that such allegations constitute public disclosures *only* as to those industry members specifically identified in the allegations. (Report at 44-45) (citing, *e.g.*, *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994); *United States ex re. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516 (9th Cir. 1999); and *Friedman v. Rite Aid Corp*, 152 F.Supp.2d 766 (E.D. Pa. 2001)). The Special

Master determined that "[t]hose few cases that extend the public disclosure bar to companies not expressly identified in the public disclosure itself involve very small groups of alleged wrongdoers and/or entities performing services at government owned and controlled facilities." (Report at 45) (citing, *e.g.*, *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997); and *United States ex rel. Harshman v. Alcan Elec. and Eng'g, Inc.*, 197 F.3d 1014 (9th Cir. 1999)). The Special Master ultimately concluded that although the allegations in Relator's 1995 *Qui Tam* Action Documents trigger the public disclosure bar of 31 U.S.C. § 3730(e)(4)(A) as to all Defendants named therein, as well as affiliated companies acting in concert with them, its reach does not extend to all unnamed purchasers of gas from federal and Indian lands throughout the United States. (Report at 47.)

Finally, the Special Master turned to other categories of public disclosure. In the main, he found that many of these categories qualified as public disclosures of allegations or transactions, but only named defendants already identified through Relator's 1995 *qui tam* litigation. Others qualified, but identified companies not sued by Grynberg and were deemed by the Special Master to be irrelevant. Some public disclosures did raise the bar as to some companies not also identified by the 1995 litigation. The remainder of the documents, nearly all of which identified particular companies, were rejected by the Special Master on one or more grounds: (1) insufficient proof that the documents had been disclosed to the public; (2) Grynberg's allegations were different than what the documents alleged; (3) no evidence that various litigation documents had actually been filed in court; (4) the given document did not put a defendant's conduct in a questioning light; and (5) the disclosure did not come from a source

listed in § 3730(e)(4), particularly a report on Grynberg's allegations by an agency of the State of Alabama.

Special Master's Findings Regarding Original Source Status

Having found the public disclosure bar triggered as to some of the 1997 *qui tam* cases before this Court, Relator can survive Defendants' § 3730(e)(4) motions as to those cases only if he demonstrates that he is an original source of the information underlying his allegations or there are at least triable issues of material fact regarding his status as an original source. The Special Master found two primary factors controlling the "direct and independent knowledge" requirement for original source status. The first of these factors is the source of the Relator's knowledge regarding the information supporting his allegations. Application of this factor is more difficult where, as here, a relator claims original source status based upon information derived from an independent investigation, rather than from information obtained as a whistle-blowing insider. The second factor is the extent to which the information supporting Relator's allegations was already in the public domain. "In the context of an independent investigation, the public information factor assures that the relator brings something of real value to the table." (Report at 97.)

In sum, the Special Master determined that "in order to demonstrate original source status based upon an independent investigation, a relator must show that: (a) a substantial amount of the knowledge of the key information underlying the allegations in the complaint is first-hand, and not derived from the knowledge or labors of others; and (b) he or she was the first to uncover a material element of the fraud (*i.e.*, either the true state of facts or the misrepresented

facts) that had not previously been in the public domain." (Report at 100-01.) The Special Master further found a relationship between the direct and independent knowledge and the voluntary disclosure requirements of § 3730(e)(4)(B). "[I]n assessing whether a relator has 'direct and independent knowledge of the information' on which his allegations are based, the 'information' to be considered is that which was voluntarily provided to the government prior to the filing of the *qui tam* case." (Report at 102.)

The Special Master found that "from a quantitative standpoint, a majority of Relator's knowledge of the information on which he relies to support the allegations in his 1997 *Qui Tam* Complaints is second-hand or comes from publicly available sources." (Report at 125.) However, he agreed with Relator that the quality of his discovery and investigation is more significant, *i.e.*, "the extent to which a relator's first-hand knowledge, possibly aided to some degree by deductions drawn from innocuous public information, was instrumental in allowing him or her to uncover the material elements of the alleged fraud and to complete the fraud equation." *Id*. After a thorough analysis of the components of the alleged "fraud equation," the Special Master concluded that the combination of speculation, information derived from publicly available materials, and second-hand knowledge compiled from third party interviews is not sufficiently "direct and independent" under the Tenth Circuit case law to qualify Relator as an original source. (Report at 134.)

The Special Master separately analyzed Relator's original source status with respect to the *qui tam* cases against the Transwestern, Questar, and KN groups, finding Relator's claim of such status to be stronger against these Defendants. (Report at 138.) "The key question is whether Relator's direct and independent knowledge of how these Defendant groups measure

gas [is] sufficient to complete, or at least significantly assist in completing the equation of fraud that Relator has posited in his Complaints against them." *Id*. The Special Master recognized that Relator's allegations against these Defendant groups are based, at least in part, upon Relator's own testing and analysis and/or personal business records. With little guidance from case law, the Special Master determined that if Relator's contribution in terms of direct and independent knowledge was substantial, then portions of the fraud equation may be completed with information derived from innocuous public sources. (Report at 143.) Ultimately, he concluded that Relator has not met his burden of demonstrating that he is an original source of the allegations in his Complaints against these Defendant groups.

Special Master's Findings Regarding Disclosure and Seal Requirements

Section 3730(b)(2) of the False Claims Act states:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

The Special Master first addressed the parties' dispute as to whether these written disclosure and seal requirements are "jurisdictional" or "procedural." (Report at 148.) Having determined that there is no controlling Tenth Circuit precedent on the issue, the Special Master concurred with "a substantial body of federal case law from other Circuits" which has "uniformly rejected attempts to read § 3730(b)(2) as implicating a court's subject matter jurisdiction," the import being that violation of those requirements does not mandate dismissal.

(Report at 151-53.) The Special Master further found that the criteria qualifying a disclosure for consideration in assessing compliance with 31 U.S.C. § 3730(b)(2) are two-fold: (a) the disclosure must be in writing; and (b) it must be served in accordance with Fed. R. Civ. P. 4. (Report at 157.) He concluded that only certain documents offered by Relator meet this two-fold test ("the A series of exhibits"). *Id*.

Having identified the types of materials properly considered under § 3730(b)(2), the Special Master addressed whether there was a violation of the disclosure requirement in this case. He determined that while a relator's § 3730(b)(2) disclosure should include much of what he will rely upon to support his contentions and allegations, the plain language of the statute does not contemplate an evaluation of the evidentiary quality of a relator's disclosure. (Report at 160.) Noting an apparent lack of precedent, the Special Master rejected the assertion that the disclosure requirement is a mechanism for Defendants to challenge a relator's disclosure on qualitative grounds. The Special Master analyzed the plain language of the statute and the purpose sought to be achieved by Congress in requiring such disclosure. He concluded,

> At least where the government itself is not seeking dismissal under 31 U.S.C. § 3730(c)(2)(A), . . . a relator complies with his duty to provide a copy of the complaint and written disclosure of "substantially all of the material evidence and information in his possession if: (a) the complaint and written disclosures contains substantially all of the evidence and information that the relator relies upon to support the *qui tam* claim; and (b) the government is able effectively to exercise its right of intervention.

(Report at 167.) Applying this standard to the cases at issue here, the Special Master found that no prejudice to the government has been demonstrated and that Relator made a meaningful effort to disclose a substantial portion of the evidence and information on which he was relying. (Report at 169.)

Finally, the Special Master addressed whether Relator Grynberg violated the seal requirement and, if so, whether dismissal is an appropriate remedy. The Defendants argue that Relator violated the seal requirement by discussing the existence and substance of his 1997 *Qui Tam* Complaints with various potential victims and attorneys during the seal period. The Special Master found evidence in the record to support the Defendants' allegations, but agreed with Relator that the sanction of dismissal is unwarranted. Because the Defendants had been "tipped off" by Relator's 1995 *Qui Tam* Complaint, he concluded that Relator Grynberg's various efforts to "shop" his claims to other alleged victims did not frustrate the purpose of the seal provision or impede the government's investigation.

The Special Master's findings and conclusions resulted in the recommendation for dismissal of just over half of the cases pending before the Court in this multi-district litigation.

STANDARD OF REVIEW

Rule 53 of the Federal Rules of Civil Procedure governs this Court's review of the Special Master's Report and Recommendations. The Court must afford the parties an opportunity to be heard and may adopt or affirm, modify, or wholly or partly reject the Master's Report and Recommendations, or may resubmit the matter to the Master with instructions. FED. R. CIV. P. 53(g)(1). The Court must decide *de novo* all objections to the Master's findings of fact and conclusions of law. FED. R. CIV. P. 53(g)(3)&(4).

DISCUSSION

With respect to the Report and Recommendations related to the requirements of §

3730(e)(4), the Coordinated Defendants assert three reasons for the Court to modify the Special Master's determination that the public disclosure bar had not been raised as to ninety-nine of the Defendants: (1) the Report did not consider that gas measurement facilities are extensively regulated by the federal government, and that both producers and pipelines have direct contractual relationships with the Department of the Interior; (2) allegations of gas mismeasurement were so widespread and identified so many companies that the government was taken to the trailhead of the alleged fraud; and (3) the Report overlooked that Grynberg's complaints could be "based upon" public disclosures through reports of "transactions," even if those reports do not place a defendant's conduct in a questioning light.

Relator contends that the Special Master erred in the following respects: (1) in concluding that private litigation involving common law claims as to a very small number of natural gas mismeasurement techniques and a limited number of companies constitutes a public disclosure of all Relator's numerous *qui tam* claims against all of those companies and all of their affiliates; (2) in concluding the "1995 *Qui Tam* Action Documents" constitute a public disclosure as to all of the Defendants named in that 1995 case and all of those Defendants' affiliates; (3) by inappropriately making factual determinations on the issue of original source in the course of resolving the pending motions for summary judgment; and (4) in establishing a new legal standard for determining whether a relator qualifies as an original source, contrary to *United States ex rel. Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004) and other prevailing False Claims Act authority.

Public Disclosure

Relator Grynberg contends that the Special Master erred in finding that certain documents from private litigation constitute public disclosure of his current *qui tam* claims against those certain Defendants. Specifically, Relator argues that a *qui tam* action is not based upon an earlier public dissemination unless the public disclosure identified the same facts that give rise to the clear inference of fraud, identified the same defendants, and expressly alleged that the fraud was perpetrated upon the Federal Government. However, the Court finds that Tenth Circuit authority does not support Relator's position.

"Based upon," in 31 U.S.C. § 3730(e)(4)(A), means "supported by." *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996). "It refers to the degree of similarity between the allegations or transactions that are set out in the *qui tam* complaint and the allegations or transactions that have been publicly disclosed." (Report at 32.) The nexus necessary to fulfill the "based upon" requirement is "substantial identity" between a relator's allegations and a public disclosure. *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271, 1279 (10th Cir. 2001). Under this test, even *qui tam* actions only partially based upon publicly disclosed allegations or transactions may be barred. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004). Furthermore, the fact that a relator's *qui tam* complaint incorporates additional or somewhat different details does not defeat the public disclosure bar. *See, e.g., MK-Ferguson*, 99 F.3d at 1546-47. The Tenth Circuit has explained that this "based upon" test is designed to operate as a "quick trigger" for the more exacting original source inquiry. *Id*. at 1545. The Court agrees with the Special Master that Relator's suggested approach is inconsistent with the "quick trigger" concept.

A *qui tam* action is based upon a public disclosure if the allegations in the disclosure

have already set the government squarely on the trail of the alleged fraud. *See United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995). The Court agrees that "[a]n allegation that a named purchaser of gas at the wellhead is underpaying because it intentionally mismeasures volume and heating content is sufficient to alert anyone with a financial stake in gas acquired by the same purchaser that their interests are in jeopardy." (Report at 53.) As this Court has previously determined, it is the alleged filing of reports of undermeasured gas that is the gravamen of Relator's present allegations, not the use of any particular measurement technique. Admittedly, there are differences between the allegations in Grynberg's private litigation and the averments in the 1997 *Qui Tam* Complaints. However, these private lawsuits also accused the opposing parties of stealing gas by mismeasuring volume and/or heating content through use of one or more of the same mismeasurement techniques at issue in the 1997 *qui tam* cases now before this Court. Accordingly, the Special Master correctly concluded that to the extent that the Grynberg Private Litigation Documents constitute public disclosures of allegations or transactions from a statutory listed source, they trigger the original source inquiry only as to those specific companies.[2] Likewise, because the testimony found in Document 133[3] questioned the propriety of Exxon's gas measurement practices, and pointed out that Exxon's

[2] The Special Master found that the 1997 *qui tam* actions against these specific Defendants and their respective affiliated companies were based upon the publicly disclosed allegations in the 1995 *Qui Tam* Action Documents. (*See* Report at 52.) This Court, *infra*, agrees with the Special Master regarding the effect of the 1995 *Qui Tam* Documents. As a result, the question of whether the Grynberg Private Litigation Documents also trigger the public disclosure bar as to these entities and their affiliates is of little or no consequence.

[3] Document 133 is a transcript of trial testimony in *Studley Resources v. Exxon Corp. and Beothos* concerning a field audit of Exxon wells, during which the auditors observed, among other things, nicked and pitted orifice plates and improper orifice plate sizes. The witness indicated that he also observed the same deficiencies, as well as dirty orifice plates and improperly calibrated meters, all of which could cause under-measurement of gas.

practices could result in an under-measurement of gas volume, it would place the government on the trail of the similar, but expanded allegations of gas mismeasurement against Exxon in 99 MD 1621. Therefore, the Special Master correctly concluded that 99 MD 1621 is at least based in part upon the publicly disclosed allegations and transactions in Document 133 and thus triggers the public disclosure bar.

Relator further disputes that his 1995 *Qui Tam* Action Documents constitute public disclosures of any of the allegations or transactions on which his 1997 *qui tam* cases are based. First, Relator argues that the judge presiding over his 1995 *qui tam* action made a binding determination that the contents of the 1995 *Qui Tam* Complaint and amendments thereto were too vague and imprecise to be deemed disclosures of "allegations or transactions" of fraud, within the meaning of § 3730(e)(4)(A). Thus, Relator contends, the principle of issue preclusion prevents this Court from finding otherwise. Second, Relator argues that the 1995 *Qui Tam* Action Documents do not constitute a public disclosure because they fail to link any of the defendants with a particular mismeasurement technique.

The Court disagrees with both contentions. Relator cites no authority which equates Fed. R. Civ. P. 9(b)'s technical requirements for pleading fraud with particularity to that which constitutes an "allegation or transaction" under § 3730(e)(4)(A). Relator's assumption is at odds with the different purposes underlying Rule 9(b) and the public disclosure bar of the FCA. "The primary purpose of Rule 9(b) is to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based." *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th Cir. 1992) (citation omitted). In contrast, the purpose of the public disclosure bar is to prevent parasitic suits when information in the public domain is sufficient to set the government

on the trail of fraud. More importantly, as stated previously, it is not the identification of each specific technique of mismeasurement, but rather the allegation that Defendants underpay royalties to the federal government by intentionally mismeasuring gas volume and heating content which operates as a "quick trigger" of the public disclosure bar.[4]

Relator Grynberg also objects to the Special Master's ruling that the public disclosure bar was raised as to defendants not specifically named in the 1995 *qui tam* action. In *Sandia*, *supra*, the Tenth Circuit Court of Appeals rejected the relator's argument that his complaint was not based upon the public disclosures at issue because the disclosures did not specifically identify defendant Sandia as a wrongdoer. The appellate court pointed out that the disclosures in the General Accounting Office report and Congressional hearing detailed the mechanics of the allegedly wrongful practice, revealed that at least two of Sandia's eight sister laboratories were employing it, and indicated the United States Department of Energy's acquiescence. Under these circumstances, concluded the court, the public disclosures sufficiently alerted the government to the likelihood that Sandia would also engage in the alleged fraud. *Sandia*, 70 F.3d at 571. *Sandia* demonstrates that there is no *per se* rule in the Tenth Circuit that the public disclosure must name the later *qui tam* defendant.

Nevertheless, after reviewing case law from various circuits, the Special Master determined that *Sandia* established an exception to the general rule that public disclosure of

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[4] In support of his argument that the 1995 *Qui Tam* Action Documents are not a public disclosure as to mismeasurement techniques not identified in the 1995 Complaint, Relator cites to the district court opinion in *United States ex rel. Fine v. MK-Ferguson*, 861 F.Supp. 1544 (D.N.M. 1994), where the court determined that because one of Fine's claims had not been addressed in any publicly disclosed document, the jurisdictional bar did not apply to that claim. *Id*. at 1553. This Court finds, however, that a completely different type of fraud is distinguishable from a different mismeasurement technique resulting in the same type of fraud on the government, *i.e*. the underpayment of royalties owed.

widespread wrongdoing in an industry does not trigger the statutory public disclosure bar as to every industry member. (Report at 17-25.) Similarly, the identification of one or a few defrauders in an industry does not operate as a public disclosure of unlawful conduct by other, unrelated companies. Exceptions to this general rule appear to be limited to situations where the proposed public disclosure asserts fraud by a small group of businesses who are easily identifiable through information in the public domain and/or widespread fraud by a narrow or discrete group of companies having unique contractual relationships with the federal government that allow for substantial government oversight. As the *Sandia* court observed in distinguishing *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), a case relied on by Relator Grynberg: "When attempting to identify individual actors, little similarity exists between combing through the private insurance industry in search of fraud and examining the operating procedures of nine, easily identifiable, DOE-controlled, and government-owned laboratories." *Sandia*, 70 F.3d at 572.

Thus, the Special Master recognized authority for the principle that the public disclosure bar can be raised as to defendants not named in a prior public disclosure where the allegations in the publicly disclosed documents allow for easy identification of unnamed wrongdoers by the federal government. This principle is consistent with the axiom that a *qui tam* action is based upon the allegations in a prior public disclosure if the disclosure squarely places the government on the trail of the alleged fraud. (Report at 37.) The Special Master concluded that, because Relator Grynberg's 1995 *qui tam* action and 1997 *qui tam* cases both specifically allege concerted action among affiliated companies, and because the affiliates of the defendants named in the 1995 *qui tam* action represent a relatively small group of companies readily identifiable

from easily accessible information, the publicly disclosed allegations against the defendants in the 1995 *Qui Tam* Action Documents also constitute public disclosures of allegations as to affiliated corporations named as Defendants in the 1997 *qui tam* cases. The Special Master declined to extend the public disclosure bar to all unnamed purchasers of gas from federal and Indian lands throughout the United States, however, finding that the purpose of the FCA is best served by applying the public disclosure bar only to those wrongdoers expressly identified in the publicly disclosed allegations, affiliates acting in concert with expressly identified wrongdoers, and groups of alleged wrongdoers who, although not individually named in the public disclosure, are quickly and easily identified because of the group's small size and/or the group's close connection to government owned and controlled facilities.

Contrary to Relator's argument, Defendants contend that the public disclosure bar has been raised as to *all* Defendants in Grynberg's 1997 *qui tam* cases. Defendants argue, first, that all of Relator's cases fall within the exception to the general rule recognized by the Special Master. In support, Defendants assert the following: the ninety-nine remaining Defendants have been sued for mismeasuring natural gas from federal and Indian lands, that the measurements occur at government controlled and approved facilities called "facility measurement points" or "points of royalty settlement," and that these points are located on federally or tribally owned lands; at these measurement facilities, "Gas Measurers" have direct contractual relationships with the federal government (they are either federal or Indian lessees or pipelines holding federally-issued rights-of-way); and both legislative branch and executive branch inspectors had actually inspected, as a part of an investigation or required routine regulatory inspections, the measurement equipment at the very meters which are the subject of Grynberg's allegations.

Under these circumstances, the Court agrees with Defendants that the public disclosures would apply to all of the 1997 *qui tam* Defendants because the allegations concerned "widespread fraud by a group of companies having unique and direct contractual relationships with the federal government that allow for substantial government oversight." (Report at 25.) The activities of Relator's "Gas Measurers" have long been subject to close oversight by the Interior Department. Although this group potentially involved hundreds, if not thousands of companies, all potential wrong-doers were readily identifiable by the government without the assistance of Mr. Grynberg. Mr. Grynberg has not assisted the government in narrowing this large group by providing "significant independent information that is not already in the public domain." *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682 (D.C. Cir. 1997). Rather, Relator Grynberg has simply sued nearly all "Gas Measurers" in the industry, speculating that the fraud is widespread, if not universal. Relator adds no value to the government by researching the publicly available names of the industry's members.

As set forth previously, the Tenth Circuit test for determining whether a relator's complaint is "based upon" publicly disclosed "allegations or transactions" is whether "substantial identity" exists between the publicly disclosed allegations and the *qui tam* complaint. *MK-Ferguson*, 99 F.3d at 1545. "The False Claims Act can thus bar a *qui tam* action that is only partly based upon publicly disclosed allegations or transactions. Moreover, this 'based upon' analysis is a threshold inquiry 'intended as a quick trigger' to reach the 'original source' analysis." *Id.* (citing *Precision*, 971 F.2d at 552). The Court disagrees with the Special Master's application of this test to the ninety-nine remaining Defendants which were not named in the 1995 *Qui Tam* Action Documents or the Senate Committee Documents, or affiliated with a

named Defendant. Instead, the Court finds that the principles set forth in *United States ex rel. Fine v. Sandia Corp.* lead to the conclusion that Relator's 1997 *Qui Tam* Complaints are based upon these prior public disclosures as to *all* Defendants named therein.

In *Sandia*, the United States General Accounting Office (GAO) issued a report examining the research and development (R & D) activities at three out of nine multiprogram laboratories, including Sandia National Laboratory, owned by the United States government and operated by private or university contractors under the Department of Energy's (DOE) administrative oversight. 70 F.3d at 569. The report included a section which focused on the "taxing" of nuclear waste funds by two of the laboratories during fiscal years 1988 and 1989. Concluding that those funds should be used only for research involving the storage and disposal of radioactive waste, the report noted that the Los Alamos and Lawrence Livermore Laboratories had taxed the waste fund for their discretionary R & D projects in 1989. The report further indicated that the DOE knew some of its laboratories were "taxing" nuclear waste funds for use in discretionary research and did not condemn the practice. *Id*. A subsequent congressional hearing "shed further light on the national laboratories' practice," although the hearing did not specify that Sandia was "taxing" nuclear waste funds. *Id*. at 570.

At the time of the GAO report and congressional hearing, Mr. Fine was employed by the DOE's Office of Inspector General, where his duties included auditing Sandia. He continued to investigate the activities of Sandia and other government contractors following his retirement in 1991. In 1992, Mr. Fine filed a *qui tam* action alleging that Sandia improperly taxed the nuclear waste funds during fiscal years 1991 and 1992 and used the diverted funds in generic, discretionary R & D activities. The district court concluded that it lacked jurisdiction over Mr.

Fine's complaint, holding that "the general allegations regarding the laboratories' 'taxing' of nuclear waste funds contained in the 1990 GAO report and the 1991 congressional hearing were sufficient to constitute 'public disclosures' of the practice." *Id.* On appeal, the relator insisted that his complaint was not based upon the public disclosures at issue because the disclosures merely described the Energy Department's nine national laboratories' general practice of improperly using money from a "nuclear waste fund," whereas his complaint specifically identified Sandia as engaging in the practice. *Id*. at 571.

The Tenth Circuit disagreed. "Because these disclosures detailed the mechanics of the practice, revealed that at least two of Sandia's eight sister laboratories were engaged in it, and indicated the DOE's acquiescence, we conclude that they sufficiently alerted the government to the likelihood that Sandia would also 'tax' nuclear waste funds in the future." *Id.* In reaching this conclusion, the Court of Appeals considered the goal of the FCA's jurisdictional scheme to find "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Id*. (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

> We analyze Mr. Fine's claim in the context of Congress' twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own. . . . Because the GAO report and the congressional hearing *set the government squarely on the trail of the alleged fraud* without Mr. Fine's assistance, we believe it would be contrary to the purposes of the FCA to exercise jurisdiction over his claim.

Id. (internal quotations and citations omitted) (emphasis added).

Thus, in determining whether the government has been set on the trail of fraud in the face of detailed allegations of widespread fraud in an industry, the issue is not whether a public

disclosure names names; instead, the issue is whether, once alerted by the public disclosure to the nature of the wrongdoing, the federal government can identify the wrongdoers through whatever means are at its disposal. *United States ex rel. Gear v. Emergency Med. Assoc. of Illinois, Inc.*, 436 F.3d 726, 729 (7th Cir. 2006) ("Industry-wide public disclosures bar *qui tam* actions against any defendant who is directly identifiable from the public disclosures.").[5]

Like the GAO report in *Sandia*, the Senate investigation, hearing, and report,[6] and

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[5] The *Gear* court determined, "We are unpersuaded by an argument that for there to be public disclosure, the specific defendants named in the lawsuit must have been identified in the public records. The disclosures at issue here were of industry-wide abuses and investigations. . . . Where a public disclosure has occurred, the government is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose." *Gear*, 436 F.3d at 729 (internal quotations and citations omitted).

[6] The Senate Committee Documents arising from the 1988-89 investigation disclosed the industry-wide practice of mismeasurement of natural gas produced from federal and Indian lands. The investigation and resulting report was conducted by the Senate Select Committee on Indian Affairs and the investigation focused on the "underpayment of mineral royalties and other items on Indian lands . . . ." (JDPD1-4 at 2.) While the Senate Committee reported on alleged fraud committed on various Indian Tribes, it also referred to a number of past investigations on federal lands.

After commencing its investigation, the Senate Committee reported on its inquiry into "alleg[ations] that the [Interior] Department has . . . failed to safeguard Indian oil and gas properties against wholesale theft and against gross under-reporting of production volume by industry[.]" (JDPD 141-159 at 150). During further hearings on the investigations, the Senate Committee disclosed a "vast opportunity . . . for theft and mismeasurement in the natural gas area," publicly warning that these techniques were "the type of scheme that can be used on Federal or Indian land at any time . . . ." (JDPD 161-188 at 166 and 174.)

While the Senate Committee's work highlighted the conduct of one corporation in particular, it made clear that the focus of the investigation was industry-wide. The Senate Committee reported:

> • "[T]hat this [investigation of Koch] is taken as an example of what is happening in this whole issue. . . . We believe the same kind of practice is going on – it is just that this particular case was taken to highlight the problem so that we can address the issue legislatively. . . . [Koch] is one of a number of companies that we had information about . . . ." (JDPD 161-188 at 165.)
>
> • "We've found that these problems were not confined simply to one company or even one particular method of theft." (JDPD 428-479 at 430.)
>
> • "[The results of the investigation are] representative of the types of activities that occur

certainly Relator's 1995 *Qui Tam* Action Documents, put the government on notice of "widespread theft through mismeasurement of oil and gas by purchasers of gas" from wells on federal and Indian lands. (Report at 15.) These public disclosures "identified various mismeasurement practices" and a "vast opportunity for theft." *Id*. Because the Senate disclosures indicated that information concerning other unnamed companies had been turned over to the Department of Justice, the Court can presume that any further investigation would have looked at any company measuring gas from federal or Indian lands. While, admittedly, this group of "Gas Measurers" is much larger than the group of laboratories at issue in *Sandia*, these companies are readily identifiable by the government. The Court finds that Relator Grynberg is an "opportunistic plaintiff" who has little or no significant information to contribute of his own. Rather, Mr. Grynberg merely speculates that the fraud is occurring industry-wide, naming nearly the entire industry in this action and hoping that discovery will reveal the necessary evidence to support his vast claims. His present *qui tam* complaints are clearly "based upon" the prior public disclosures of widespread fraud.

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throughout Indian producing lands." (JDPD 161-188 at 166.)

After months of investigation and inspections, the Committee reported that:

> Theft is by no means limited to oil. Natural gas, in fact, is more easily stolen through fraudulent mismeasurement than crude oil. The Committee uncovered evidence to indicate that some companies were stealing natural gas by similar sophisticated mismeasurement techniques. Indeed, on the Southern Ute Indian Reservation, 76 percent of the gas meters independently tested for the Committee were calibrated to allow mismeasurement, whether by negligence of by theft. Moreover, internal data of one of the largest natural gas producers in the United States, with substantial Indian production, shows that in 1987, through mismeasurement, natural gas purchasers received at least $9.5 million worth of natural gas they never paid for.

(JDPD 189-426 at 305.) The Senate Report and investigation culminating in such Report clearly informed the public and the government of the mismeasurement allegations resonating throughout the natural gas industry on federal and Indian lands.

The holding in *United States ex rel. Findley v. FPC-Boron Employees' Club, supra,* further supports this Court's findings. In *Findley*, the relator sued "all employees' clubs of the [Bureau of Prisons] and the United States Department of Justice that earn revenue from the provision of vending services on federal property." 105 F.3d at 678. The relator specifically named one club of employees who worked at the prison camp in Boron, California, alleging that its members were unlawfully retaining money from vending machines in employee and visitor rooms at the prison, money he alleged should have been paid into the Treasury. The court found that the relator's complaint was based upon three public disclosures. The first was a forty-year-old government report disclosing that it was doubtful that federal employees clubs could lawfully retain the profits received from vending machines on government premises. The report mentioned only the clubs of the United States Postal Service and the Federal Bureau of Investigation. *Id*. at 685. The second was a 1974 Senate report regarding amendments to the Randolph-Sheppard Act which noted that federal employee welfare and recreation groups had long retained money from vending machines on federal property, despite suggestions that the practice was unlawful. The third was a decision of the Court of Appeals for the Federal Circuit which referenced these two documents. *Id*. at 686. None of these disclosures specifically mentioned either the club at FPC-Boron or even the more general class of clubs at Bureau of Prisons facilities.

To determine the meaning of "based upon," the *Findley* court took guidance from the Tenth Circuit's opinion in *United States ex rel. Precision Co. v. Koch Indus., Inc.* wherein the court explained that "[a]s a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.'" *Findley*, 105 F.3d at 682 (quoting *Precision*, 971 F.2d at

552). The D.C. Circuit further noted, "[T]he Tenth Circuit reasoned that its limited interpretation of who could sue under the statute protected the incentive for private citizens with first-hand knowledge to expose fraud, but also prohibited civil actions brought by opportunists who do not contribute anything significant to the exposure of the fraud." *Id*. Upon review of the language, structure, history and purpose of the FCA, the *Findley* court concluded that "Congress sought to limit *qui tam* actions 'to those in which the relator has contributed significant independent information [that is not already in the public domain].'" *Id*. (quoting *Springfield Terminal Ry.*, 14 F.3d at 653).

The relator in *Findley* argued that allowing the public disclosure bar to be raised by generic allegations of wrongdoing by employees' clubs would "frustrate the purpose of the *qui tam* provisions by foreclosing suits by whistleblowers who have identified specific instances of fraudulent conduct." *Id.* at 686. The D.C. Circuit, however, found this concern untenable. "When the publicly disclosed transaction is sufficient to raise the inference of fraud . . . ., there is little need for *qui tam* actions, which tend to be suits that the government presumably has chosen not to pursue or which might decrease the government's recovery in suits it has chosen to pursue." *Id*. at 687. "The disclosures recognize that the practice occurs throughout the federal government, thus their relevance cannot be confined to specific agencies." *Id*. Those disclosures "specifically identify the nature of the fraud – illegal retention of monies owed to the government and unauthorized administrative approval of the practice – as well as the federal employee actors engaged in the allegedly fraudulent activity." *Id*. The court found that Findley's complaint substantially repeated what the public already knew and "add[ed] only the identity of particular employees' clubs engaged in the questionable and previously documented

generic practice" from the universe of "easily identifiable federal employee organizations that provide vending services on federal property." *Id.*

The Court finds that the consolidated cases before it are more closely akin to *Findley* than to *Cooper*, a case on which the Special Master relied in concluding that the public disclosure bar had not been raised as to previously unnamed Defendants. Like *Findley*, with its disclosures regarding generically labeled "federal employee welfare and recreation groups" on federal property – a class numbering in the hundreds – these cases are presaged by public disclosures alleging gas mismeasurement on federal and Indian lands, both by many identified companies and by more generically described groups such as "gas measurers," "gas pipelines," or the "natural gas industry." Like *Findley*, the complaints here alleged that a class of defendants engaged in identical fraud. And the Defendants here are "easily identifiable" actors in gas measurement on federal and Indian lands because of their contracts with and/or oversight by the Department of the Interior. The Court concludes, therefore, that because Relator Grynberg's 1997 *Qui Tam* Complaints merely echo publicly disclosed, allegedly fraudulent conduct that "already enables the government to adequately investigate the case and to make a decision whether to prosecute," the public disclosure bar applies to all Defendants. *Id*. at 688.

Cooper stands in contrast. There the relator had repeatedly seen his claims for insurance reimbursement denied by Blue Cross Blue Shield of Florida ("BCBSF"), which always asserted it was an insurer secondary to Medicare. *Cooper*, 19 F.3d at 564. After researching his benefits and the law governing payment of his claims, he learned that this conduct might be occurring at other insurance companies. Other public disclosures discussed widespread Medicare Secondary Payer ("MSP") fraud and named certain insurance companies, but none named BCBSF. The

court ruled that the public disclosure bar had not been raised by these disclosures, reasoning that to require "allegations specific to a particular defendant be publically disclosed before finding the action potentially barred encourages private citizen involvement and increases the chances that every instance of fraud will be revealed." *Id*. at 566.

Unlike Mr. Grynberg and the relators in *Findley*, Mr. Cooper did not begin with an assertion of widespread fraud, then go in search of defendants. Cooper sued only one defendant with allegations arising out of years of direct dealings with the company. Unlike *Findley* and the present cases, BCBSF was not operating on federal property, subject to routine government inspections, and in a direct contractual relationship with the government. No evidence in *Cooper* showed the government could know (without the help of a public disclosure) which entity was supposed to be acting as Cooper's primary insurer; the evidence in the present cases shows that the government knew exactly who was measuring gas produced from federal and Indian lands. Relator Grynberg's 1997 *qui tam* cases against hundreds of "Gas Measurers" on federal and Indian lands are clearly based upon the public disclosures of widespread fraud, not on significant independent information regarding specific companies.

Having determined that the 1995 *Qui Tam* Action Documents and the Senate Select Committee Documents raise the public disclosure bar as to all Defendants named in Relator's 1997 *qui tam* cases, the Court need not address whether other documents the Special Master rejected as qualifying public disclosures also raise the bar. However, it should be noted that the Court agrees with Defendants' argument that a particular disclosure on its own does not have to place a defendant's conduct in a questioning light. "[T]he public disclosure of the material elements of the fraudulent transaction bars *qui tam* actions even if the disclosure itself does not

allege any wrongdoing." *Sandia*, 70 F.3d at 572. More recently, the Tenth Circuit has held that the public disclosure bar is raised where "[a]ll of the material elements of the fraudulent *transaction* were already in the public domain." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004) (emphasis added).

> The relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation. If a relator merely uses his or her unique expertise or training to conclude that the material elements already in the public domain constitute a false claim, then a *qui tam* action cannot proceed.

Findley, 105 F.3d at 688 (internal quotations and citations omitted).

The Court also notes its disagreement with the Special Master's rejection as a public disclosure of an administrative report of an audit and investigation by the State of Alabama ("the Evaluation Report") naming certain companies, including Mobil Oil Exploration & Producing Southeast, Inc., Shell, Exxon, Offshore Group, Inc., Callon Petroleum, Legacy Resources Co., Scana Petroleum Resources, Mobile Gas Company, and Transcontinental Gas Pipeline. The Special Master found that the Evaluation Report, in addition to an explanation of the measurement techniques employed by these companies, also discusses many of the gas measurement issues raised in Relator's 1997 *Qui Tam* Complaints. (Report at 78.) The Special Master further found that, although the Report does not contain allegations of wrongdoing, it arguably discloses "transactions" from which wrongdoing can be inferred, particularly when combined with other public disclosures. Nevertheless, the Special Master concluded that the Evaluation Report did not qualify as a statutory source under § 3730(e)(4)(A) because it had not been issued by an agency of the federal government. (Report at 80.)

The Special Master was persuaded by the reasoning of *United States ex rel. Dunleavy v.*

County of Delaware, 123 F.3d 734 (3rd Cir. 1997), which held that state administrative reports and investigations do not qualify as public disclosures from any of the statutory listed sources. *Id*. at 745. Focusing on the statutory phrase "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," the Special Master concluded that because the word "administrative" appeared in between two entities that are clearly federal – Congress and the GAO – the term must be understood to refer to only *federal* administrative investigations and reports, and not state reports. He added that his conclusion was supported by policy. Seeing the goal of public disclosure as one of putting the federal government on notice of fraud, the Special Master determined that "[r]eports generated by the myriad of state, county, and local administrative agencies *that do not relate to joint state-federal programs* are unlikely candidates to fulfill the notice function." (Report at 80) (emphasis added).

The Shell, Exxon and Mobil Defendants separately objected to the Special Master's findings on this issue, arguing that the Evaluation Report constitutes a public disclosure even under the Special Master's reading of the limited precedent, and that the Special Master's reading of the statute was overly restrictive. In *United States ex rel. Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), the Eighth Circuit concluded that the *Dunleavy* court ruled more broadly than necessary in stating that a state agency disclosure may never qualify as an "administrative . . . report, hearing, audit, or investigation" for purposes of § 3730(e)(4)(A). *Id*. at 989. Rather, the *Hays* court rejected the Third Circuit's textual approach and concluded "that Medicaid compliance audits and audit reports conducted and prepared by the state agency authorized to administer this cooperative federal/state program are public disclosures within the meaning of § 3730(e)(4)(A)." *Id*. at 988.

These Defendants contend that, because the Alabama Evaluation Report related to a joint state/federal program, it should likewise qualify as a public disclosure. Defendants argue that the Special Master failed to consider applicable federal regulations and certain relevant facts contained in the Evaluation Report which indicate the Report was the product of a cooperative program. The Report clearly addresses the measurement of gas production in an area of cooperative federal and state offshore development. The Report's Introduction states, "[I]t is imperative that all the hydrocarbon production from offshore state waters and certain federal blocks are accurately measured and that payments are received in full for all such production." The Court finds that this state-generated report that investigates gas measurement of gas streams, including those from federal leases, would likely place the federal government on notice of fraudulent activities impacting the federal fisc.

Furthermore, the Court finds that limiting the word "administrative" to only federal administrative reports, audits and investigations is inconsistent with the plain language of the phrase at issue as well as the language and interpretation of the remaining portions of § 3730(e)(4)(A).[7] The immediately preceding phrase in that statutory section provides that public disclosures include any "criminal, civil, or administrative hearing," and courts have consistently interpreted that phrase to include both *state* and *federal* litigation and administrative hearings. *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000); *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004); *United States ex rel. O'Keeffe v. Sverdrup Corp.*, 131 F.Supp.2d 87, 91-92 (D. Mass. 2001). Likewise,

[7] Although the Tenth Circuit Court of Appeals has not addressed this issue, it has recognized, as a "potential argument," that a state administrative audit may not qualify as a public disclosure because it is not made by Congress, a federal administrative agency, or the Government Accounting Office. *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996).

this section of the FCA also gives public disclosure status to "the news media" regardless of whether that media is national, state, or local. There is no reason to conclude that Congress intended to limit administrative reports, audits, and investigations to *federal* actions, while simultaneously allowing all *state* and *local* civil litigation, *state* and *local* administrative hearings, and *state* and *local* news media to be treated as public disclosures. To interpret the statute so narrowly would have the anomalous result of allowing public disclosure status to the most obscure local news report and the most obscure state and local civil lawsuit or administrative hearing, but denying public disclosure status to a formal public report of a state government agency, such as the Alabama Evaluation Report.

The public disclosure bar is designed to limit *qui tam* jurisdiction "to those cases in which the relator played a role in exposing a fraud of which the public was previously unaware." *Findley*, 105 F.3d at 678. If all state administrative reports, audits, or investigations were automatically excluded as public disclosures because they do not originate from the federal government, a primary purpose of the statute would be undermined in that relators would be empowered to copy the results of widely disseminated audits or investigations regarding fraud and nonetheless be permitted to proceed with their parasitic *qui tam* action merely because the federal government had not issued the report. Therefore, this Court rejects the Special Master's findings with respect to the Alabama Evaluation Report.

Finally, Relator Grynberg contends that he is being denied equal protection because he now must meet the "more exacting" original source standard in this re-filed *qui tam* action than he would have needed to satisfy in his 1995 *qui tam* case. "If a law neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification

so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). "*Qui tam* relators" are not a suspect class, and no one has a fundamental right to sue on the government's behalf. Thus, the rational basis test applies.

"Under the rational basis test, the court upholds the policy if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Copelin-Brown v. New Mexico State Personnel Office*, 399 F.3d 1248, 1255 (10th Cir. 2005) (internal quotations and citation omitted). The policy behind the public disclosure bar provides the rational basis. "[W]here public disclosure of the fraud has already occurred, no incentive for a private *qui tam* suit is needed." *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996). The public disclosure bar, as construed by the Special Master and this Court, is rationally related to Congress' purpose in limiting *qui tam* actions.

Original Source

In objecting to the Special Master's findings on the original source issue, Relator first contends that the Special Master improperly resolved disputed material facts regarding his lack of direct knowledge of the information upon which he based his complaints. The Court finds that the Special Master viewed the record in the light most favorable to Relator. (Report at 103.) Accepting Relator Grynberg's portrayal of his investigation as true, the Special Master categorized Relator's knowledge of the information on which his allegations are based as either "direct and independent" or "second-hand." *Id*. at 123. Knowledge that the Special Master determined to be "second-hand," or from publicly available sources, was rejected as legally insufficient to meet the original source standard. The Special Master then determined whether

Grynberg possessed sufficient direct and independent knowledge to qualify as an original source.

Summary judgment may be entered "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The statutory provisions of 31 U.S.C. § 3730(e)(4) implicate this Court's subject matter jurisdiction. Since federal courts are courts of limited jurisdiction, the Court presumes no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction. *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999). Since Defendants have challenged the Court's jurisdiction, the burden is on Relator to show that jurisdiction exists. *United States ex rel. Stone v. Rockwell Intern. Corp.*, 282 F.3d 787, 797 (10th Cir. 2002). "[Relator] must therefore sustain the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof. Mere conclusory allegations of jurisdiction are not enough." *Id*. (internal quotations and citations omitted). The Special Master did not improperly weigh the evidence; rather, he concluded that Relator's knowledge of the information on which his allegations are based is not sufficiently "direct and independent" as a matter of law to qualify Relator as an original source.

Part and parcel of the original source analysis is the statutory mandate that prior to filing suit, a *qui tam* relator must have voluntarily provided the information on which the allegations are based to the government. *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001). Thus, to avoid the jurisdictional bar, "a relator must have direct and independent knowledge of the information on which the *qui tam* allegations are based and must have provided the *same* information to the government prior to filing the *qui tam*

action." *Id.* (emphasis added). As with other statutes conferring jurisdiction on federal courts, § 3730(e)(4)(B) must be strictly construed, with doubts resolved against federal jurisdiction. *Id.* Relator Grynberg contends that the Special Master erred in limiting the "information" that may be considered in assessing whether a relator has "direct and independent knowledge of the information" on which his allegations are based to only that "information" which Relator voluntarily provided to the government prior to filing the *qui tam* action. Relator argues that in doing so, the Special Master failed to consider "very significant portions of Relator's evidence." (Relator's App. of Objections ¶ 16.) The Court disagrees.

The Tenth Circuit has clearly stated that "before filing the *qui tam* action, a relator must voluntarily provide the Government with the essential elements or information on which the *qui tam* allegations are based." *King*, 264 F.3d at 1280. A relator may utilize all information voluntarily disclosed to the government before filing suit in order to demonstrate direct and independent knowledge of the information on which the allegations in the *qui tam* complaint are based.[8] *See United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F.Supp. 1010, 1017 (E.D. Va. 1995). Conversely, however, a relator is precluded from attempting to establish that he or she is an original source by proffering information that was not submitted to the government in accordance with § 3730(e)(4)(B). The withholding of significant portions of evidence "deprives the government of key facts necessary in its efforts to confirm, substantiate or evaluate the fraud

[8] Relator argues that the Special Master improperly discounted certain proffered evidence of Relator's voluntary disclosure to the government because it lacked specificity or contained other evidentiary flaws. As noted previously, it is Relator who bears the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof. The Court finds that the Special Master correctly concluded there is insufficient evidence in the record to support consideration of either Relator's oral communications with government employees or documents that may have been copied by government representatives during their reviews of Relator's files. (Report at 113.)

allegations." *King*, 264 F.3d at 1281. If Relator Grynberg had significant information on which his *qui tam* allegations are based that he did not voluntarily provide to the government, then Grynberg failed to meet the jurisdictional requirements of an original source. *Id.*

Relator Grynberg further faults the Special Master for failing to consider the 1995 *Qui Tam* Complaint and "significant supporting documentation" in the original source analysis as information Relator voluntarily provided to the government. (Relator's App. of Objections ¶ 30.) However, the 1995 Complaint merely contains "allegations" not "information" upon which his 1997 allegations are based. As for the "significant supporting documentation" Grynberg references, it is apparent that the Special Master did consider such information in detail, despite some uncertainty as to whether all of the proffered documents were actually given to the government before filing suit. (Report at 114.)

Relator also contends that the Special Master incorrectly employed a "substantial first-hand knowledge" test in determining whether Relator qualifies as an original source. Relator argues that such a test is inconsistent with Tenth Circuit and other leading authorities. Relying on *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), Relator maintains that he merely needs direct and independent knowledge of "*any* essential element" of the alleged fraud without regard to the *quantity* of information he has added to the equation. The Special Master recognized that Relator Grynberg has direct and independent knowledge of some of the information upon which some of his allegations are based. However, the Master found that "from a quantitative standpoint, a majority of Relator's knowledge of the information on which he relies to support the allegations in his 1997 *Qui Tam* Complaints is second-hand or comes from publicly available sources." (Report at 125.) Ultimately, the

Special Master concluded that Relator's "combination of speculation, information derived from publicly available materials, and second-hand knowledge compiled from third party interviews is not sufficiently 'direct and independent' under the Tenth Circuit case law to qualify Relator as an original source."[9] *Id*. at 134.

The FCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). Under Tenth Circuit authority, knowledge is "direct and independent" if it is "marked by the absence of an intervening agency," and "unmediated by anything but the relator's own labor." *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996). Independent knowledge is knowledge which is not secondhand; rather, a relator must demonstrate that he discovered the information on which the allegations are based through his own efforts and not by the labors of others, and that the information was not derivative of the information of others. *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999). "To establish original source status knowledge, a *qui tam* plaintiff must allege specific facts – as opposed to mere conclusions – showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with

[9] The Special Master separately analyzed Grynberg's claim of original source status with respect to the *qui tam* cases against the Transwestern, Questar, and KN groups of defendants, finding that, in each of these cases, Grynberg is not only the originator of a few of the general theories of mismeasurement, but he also has direct and independent knowledge that each Defendant group measures gas and, more importantly, direct and independent knowledge of at least some of the group's measurement practices. (Report at 138.) However, as with the other defendants, the Special Master concluded that Relator's mismeasurement allegations against these defendants are based largely upon the knowledge of others, speculation, or both. *Id*. at 146.

competent proof." *Id*. Secondhand information, speculation, background information or collateral research do not satisfy a relator's burden of establishing the requisite knowledge. *Id.* at 1162-63; *see also United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) (a relator's background information or unique expertise allowing him to understand the significance of publicly disclosed allegations and transactions is insufficient to establish original source).

Relator Grynberg insists that, when comparing the "character of the discovery and investigation" undertaken by the relators in *Kennard v. Comstock Res.*, 363 F.3d 1039 (10th Cir. 2004), who were found to be original sources, with the "character of the discovery and investigation" by Grynberg, he clearly qualifies as an original source. *Id*. at 1045-46. Relators Kennard and Wright conducted their own research and investigation into the alleged fraud on the Government, part of which included a review of public records. The Tenth Circuit declined to adopt any bright-line rule disqualifying a relator as an original source when he examines public records as part of an independent investigation. Instead, the *Kennard* court gave consideration to the availability of the information and the amount of labor and deduction required to construct the claim. *Id*. at 1046. Because Relators Kennard and Wright relied on personal royalty records and "relatively obscure public documents" in "ferreting out" the alleged fraud, the Court of Appeals found that they qualified as an original source. *Id*.

Nevertheless, a relator's knowledge must still be direct, not secondhand, and a *qui tam* action cannot be sustained where all of the material elements of the fraudulent transaction are already in the public domain and the *qui tam* relator simply comes forward with additional evidence. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1054 (10th Cir. 2004);

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 655 (D.C. Cir. 1994). To be an original source, a relator must do more than assemble information. The Tenth Circuit has consistently recognized that "[a] relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed." *Praxair*, 389 F.3d at 1053 (quoting *Findley*, 105 F.3d at 688); *Kennard*, 363 F.3d at 1045 (same).

In *Hafter*, the court compared the detail and scope of the allegations with the relator's direct knowledge and determined that the information provided by relator was "relatively minor and insignificant," the "core information" having come from a third party's independent research and investigation. 190 F.3d at 1163-64. In *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), the relator's "independent information" was "weak, informal and strikingly redundant" when compared to the information obtained secondhand. *Id*. at 554. In *MK-Ferguson*, where the information was derived from a publicly disclosed audit report, the court determined the relator contributed "no significant information of his own." 99 F.3d at 1548. And in *Praxair*, the court compared Grynberg's purported "independent" knowledge with information already in the public domain, and concluded that the character of Grynberg's discovery and investigation was insufficient to qualify him as an original source. 389 F.3d at 1054.

Grynberg contends that through his independent investigation and research he obtained direct and independent knowledge of information which provides an essential element of his claims. However, the Special Master determined that any direct knowledge Grynberg possessed did not make a significant contribution given the nature and scope of his allegations, the amount

of information in the public domain, and Grynberg's heavy reliance on second-hand information and speculation. This Court agrees. A review of the character of Grynberg's discovery and investigation in this case reveals that most of Grynberg's knowledge was secondhand, public, or based on speculation, and that what little he knew about a few practices of a few Defendants was insubstantial when compared to the breadth and scope of the allegations in his complaints. Relator Grynberg complains of the irony that had he focused his *qui tam* suit on those few defendants for which he had some direct and independent knowledge as to a few of the alleged mismeasurement techniques, then he might have faired better in the original source analysis. However, as the Court sees it, this "ironic twist" results not from an incorrect interpretation of the law, but from Relator's own overreaching. Grynberg deliberately chose to make sweeping allegations of fraud against nearly the entire industry, based in large part on rank speculation. By employing such odious tactics he now becomes the instrument of his own undoing.

CONCLUSION

Relator Grynberg's *qui tam* cases before the Court are based upon the public disclosures of industry-wide natural gas measurement abuses on federal and/or Indian land. Furthermore, Relator Grynberg has not satisfied his burden of showing he qualifies as an original source. Accordingly, pursuant to the provisions of 31 U.S.C. § 3730(e)(4), the Court lacks subject matter jurisdiction over Relator's 1997 *qui tam* cases.

The Court finds that the Special Master's Report and Recommendations should be **MODIFIED** to the extent set forth above, and adopted in all other respects not specifically

addressed herein.[10] THEREFORE, it is hereby

ORDERED that the Coordinated Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Arco's, Unocal's and Dauphin's Motion and Brief on Jurisdiction, and Moving 1997 Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction are **GRANTED**; it is further

ORDERED that Relator's Cross Motion for Summary Judgment on Issue of Public Disclosure is **DENIED**; it is further

ORDERED that the following cases are **DISMISSED** for lack of subject matter jurisdiction: 99-MD-1601; 99-MD-1602; 99-MD-1603; 99-MD-1604; 99-MD-1605; 99-MD-1607; 99-MD-1608; 99-MD-1609; 99-MD-1610; 99-MD-1611; 99-MD-1612; 99-MD-1613; 99-MD-1614; 99-MD-1615; 99-MD-1616; 99-MD-1617; 99-MD-1618 (except as to claims pertaining to the royalty value of carbon dioxide (CO_2) against Defendant Mobil Exploration & Producing U.S., Inc.);[11] 99-MD-1619; 99-MD-1621 (except as to claims pertaining to the royalty value of carbon dioxide (CO_2) against Defendant Exxon Co., U.S.A.); 99-MD-1622; 99-MD-1623; 99-MD-1624; 99-MD-1625; 99-MD-1626; 99-MD-1627; 99-MD-1628; 99-MD-1629 (except as to claims pertaining to the royalty value of carbon dioxide (CO_2) against Defendants Shell Land and Energy Co. and Shell Western E&P, Inc.); 99-MD-1630; 99-MD-1631; 99-MD-

[10] Because the Court's findings with respect to the jurisdictional provisions of § 3730(e)(4) are dispositive with respect to all Defendants in Relator's 1997 *qui tam* cases, it is unnecessary for the Court to address the separately-filed, individual objections of certain Defendants and the Special Master's Report and Recommendations related to the requirements of 31 U.S.C. § 3730(b)(2).

[11] Several of Relator's currently operative Complaints contain CO_2 *valuation* claims against certain Defendants. By separate order, this Court will address the Special Master's Report and Recommendation on those Defendants' Motion to Dismiss CO_2 Royalty Claims Based on First-To-File Rule.

1637; 99-MD-1638; 99-MD-1639; 99-MD-1640; 99-MD-1641;99-MD-1642; 99-MD-1643; 99-MD-1644; 99-MD-1645; 99-MD-1646; 99-MD-1647; 99-MD-1648; 99-MD-1649; 99-MD-1650; 99-MD-1651; 99-MD-1652; 99-MD-1653; 99-MD-1654; 99-MD-1655; 99-MD-1656; 99-MD-1657; 99-MD-1658; 99-MD-1659; 99-MD-1660 (except as to claims pertaining to the royalty value of carbon dioxide (CO_2) against Defendant Amerada Hess Corp.); 99-MD-1661; 99-MD-1662; 99-MD-1663; 99-MD-1664; 99-MD-1665 (except as to claims pertaining to the royalty value of carbon dioxide (CO_2) against Defendants ARCO Oil & Gas Co. and ARCO Permian, d/b/a Atlantic Richfield Co.); 99-MD-1666; 99-MD-1667; 99-MD-1668 (except as to claims pertaining to the royalty value of carbon dioxide (CO_2) against Defendants Oxy-USA); 99-MD-1669; 99-MD-1670; 99-MD-1671; 99-MD-1672 (except as to claims pertaining to the royalty value of carbon dioxide (CO_2) against Defendant Cross Timbers Operating Company); 99-MD-1673; 00-MD-1632; 00-MD-1633; 00-MD-1634; 00-MD-1635; 00-MD-1636; 02-MD-1682; 04-MD-1684.

DATED this 20th day of October, 2006.

/s/ William F. Downes
United States District Judge