IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

UNITED STATES OF AMERICA *ex rel.* RIBIK, Plaintiffs, v. HCR MANORCARE, INC., *et al.*, Defendants.	CIVIL ACTION NUMBER: 1:09-cv-0013 (CMH/TCB) (Lead Case)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO RELATOR RIBIK'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE PUBLIC DISCLOSURE BAR AND ORIGINAL SOURCE EXCEPTION

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I. INTRODUCTION[1]

Oddly, Relator Christine Ribik's ("Relator" or "Ribik") Motion for Partial Summary Judgment asks the Court to "determine her status as a qualifying relator" by declaring that the public disclosure bar of the False Claims Act ("FCA") does not apply to her, and that even if it does, she is an original source. Despite its title, Relator's pleading is really an opposition to a motion to dismiss that has never been filed. Regardless, her motion should be denied for the following reasons, (1) Relator never served her initial complaint or amended complaint on Defendants and in fact stated that she had no intention to do so (ECF No. 89, ¶ 5), and as such the only claims pending are those brought by the United States Department of Justice ("DOJ") in its Complaint in Intervention, (2) because Relator did not serve her Complaints there was no procedural mechanism by which Defendants could have moved to dismiss Relator's complaints based on the public disclosure bar (that is, there was no complaint to move against), (3) the Complaint in Intervention does not include Relator's claims, and (4) Relator has not met her burden to establish that the public disclosure bar does not apply and there are material facts in dispute as to that issue.

Relator worked as an occupational therapist on an as needed ("PRN") basis in three of skilled nursing facilities ("SNFs") in Northern Virginia ("the Virginia SNFs") owned by one or more of the Defendants for a total of six months in 2004, leaving almost 13 years ago. Shortly after ending her employment she raised concerns with the government. The government investigated those concerns at the time and found them to be without merit. Then, four years after the government rejected her concerns, based on the exact same alleged facts, Relator filed a *qui tam* complaint in 2009 alleging in very general terms that Defendants and three SNFs in the

[1] If the Court grants Defendants Motion for Summary Judgment (ECF No. 630), Relator's instant motion will be moot.

Northern Virginia region violated the False Claims Act ("FCA") by submitting claims to Medicare Part A for rehabilitation therapy services that were not reasonable and necessary. This filing came three years after a Medicare Contractor working for the Centers for Medicare & Medicaid Services ("CMS"), at least one United States Attorneys' Office and the Office of the Inspector General of the United States Department of Health & Human Services ("HHS-OIG") were already investigating the exact same allegations. Ultimately in 2015, after years of unilateral discovery, DOJ intervened in the case by filing its own Complaint in Intervention which covers only the time period October 2006 through May 2012, not 2004 when Ribik worked for Defendants.

II. PROCEDURAL HISTORY

On January 9, 2009, Relator filed under seal a *qui tam* complaint on behalf of the United States asserting claims under the FCA against HCR ManorCare, Inc. and Manor Care, Inc., as well as several HCRMC facilities. ECF No. 1; *see also* ECF No. 84 ("DOJ Compl." or "Compl.") ¶ 23. On April 20, 2011, Relator filed an amended complaint under seal, which added other related corporate entities and hundreds of individual SNFs as defendants, but offered no new factual allegations. ECF No. 23; Compl. ¶ 23. On August 17, 2010, another relator, Marie Slough, filed under seal a *qui tam* complaint in the United States District Court for the Eastern District of Michigan against HCR ManorCare, Inc. as well as one SNF and several individual employees. On September 28, 2011, a third relator, Patrick Carson, filed under seal a *qui tam* complaint in this Court on behalf of the United States asserting claims under the FCA against HCR ManorCare, Inc. and other related corporate entities. On June 13, 2012, this Court granted the government's request to consolidate Ribik's and Carson's actions. Compl. ¶ 24. On November 4, 2014, this Court granted the government's request to consolidate Slough's action with Ribik's and Carson's actions. Compl. ¶ 25.

On April 10, 2015, DOJ filed its Complaint in Intervention against the Defendants. ECF No. 84. On May 1, 2015, Ribik filed a Notice of Dismissal, dismissing the defendants named in her Amended Complaint that were not named in DOJ's Complaint in Intervention. ECF No. 89. In that Notice Ribik informed the Court that she would not serve her Amended Complaint on Defendants. *Id.* Ribik is not pursuing any claims against Defendants independent of DOJ's claims. *Id.*[2]

III. STATEMENT OF UNDISPUTED MATERIAL FACTS AND RESPONSE TO RELATOR'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

A. DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Between May and December 2004, Relator Christine Ribik worked as a PRN occupational therapist at the three Virginia SNFs. Ex. A, Ribik's Resp. to Defs.' RFA Nos. 4-5.

2. At some time in or about February or March 2005, after her employment with Defendants' SNFs ended, Ribik advised the HHS-OIG that in her opinion the three Virginia SNFs were providing therapy to Medicare patients that she believed was not reasonable and necessary.

3. On November 28, 2005, after conducting an investigation of Ribik's information, the HHS-OIG informed external counsel for HCRMC that there was no evidence to support Ribik's claim and the matter would be closed. Ex. B, Transcript of voicemail message from HHS-OIG Agent Bobby Hyland.

4. In 2006, Medicare Program Safeguard Contractor ("PSC") AdvanceMed commenced audits of two of Defendants' SNFs located in Perrysburg, Ohio and Grand Rapids,

[2] Slough has never appeared or participated in this case. The District Court dismissed Carson's FCA and retaliation claims. ECF Nos. 394 and 406.

Michigan. Ex. C, US-HCRMC-01844884, US-HCRMC-01845033, US-HCRMC-01848533, US-HCRMC-01848534.

5. On October 25, 2006, the HHS-OIG referred Defendants' rehabilitation organization to AdvanceMed for a corporate investigation to determine if Defendants' SNFs were providing therapy services to Medicare Part A beneficiaries that was not reasonable and necessary. *Id*. US-HCRMC-01848534.

6. On December 1, 2006, Senator Charles Grassley wrote a letter to CMS and HHS-OIG describing information provided to him by Ribik that several SNFs in Virginia, including three owned by Defendants, were allegedly filing fraudulent Medicare claims. Ex. D, CR-609.

7. On October 11, 2007, AdvanceMed employee Christina Jessee prepared a memo summarizing her review of claims from the Perrysburg facility. Ex. E, US-HCRMC-01745590. The memo alleges that therapy for certain patients was not subject to Medicare reimbursement because it was not reasonable and necessary.

8. On March 31, 2008, AdvanceMed employee Gerri Harris, prepared a memo summarizing the results of her medical review of the claims submitted by Grand Rapids. Ex. F, US-HCRMC-01844903. The memo alleges that therapy for certain patients was not subject to Medicare reimbursement because it was not reasonable and necessary.

9. On May 15, 2008—more than six months before Ribik filed her complaint—AdvanceMed made a Case Referral to HHS-OIG for further investigation regarding alleged questionable billing practices. Ex. G, US-HCRMC-01745585; US-HCRMC-01844916.

10. On July 30, 2008, HHS-OIG Special Agent Fairbanks wrote to AdvanceMed indicating that the Heartland of Perrysburg referral has been accepted for investigation by HHS-OIG's Cleveland office. Ex. H, US-HCRMC-01742586.

11. On August 19, 2008, HHS-OIG advised AdvanceMed that the United States Attorney's Office in the Northern District of Ohio had opened a case on the Perrysburg SNF. Ex. I, US-HCRMC-01742589.

12. On September 10, 2008, HHS-OIG advised AdvanceMed that the Grand Rapids SNF would be further investigated by HHS-OIG. Ex. J, US-HCRMC-01742809.

B. DEFENDANTS' RESPONSE TO RELATOR'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Defendants do not dispute that Relator worked as an occupational therapist in three of Defendants' facilities, ManorCare of Alexandria, ManorCare – Fair Oaks of Fairfax, and ManorCare of Arlington. Additionally Defendants state that Relator worked as a PRN employee and only from May 2004 through December 2004. Defendants' SUMF ¶ 1. Defendants dispute that Relator was an employee of "HCR ManorCare Inc" as Relator suggests.

2-3. This information was first disclosed to Defendants after discovery closed in Relator's affidavit dated October 16, 2017. Defendants have no knowledge of and as such dispute these alleged facts. However, these disputed alleged facts are not material to the issues before the Court.

4. Relator's initial complaint is part of the record and speaks for itself. The fact that Relator alleges these things does not make them true and Defendants dispute the substance of the allegations.

5. Defendants do not dispute that Relator reported concerns to the HHS-OIG and Senator Grassley's office. Defendants have no knowledge of any disclosure to the FBI and, as such dispute that alleged fact.

6-10. This information was first disclosed to Defendants after discovery closed in Relator's affidavit dated October 16, 2017. Defendants have no knowledge of and as such dispute these alleged facts.

11. Defendants dispute these alleged facts. These alleged facts are supported only by Relator's affidavit, but Relator has no personal knowledge of the asserted facts related to the government's use and preparation of the referenced document, and so these facts cannot be presented in a form that would be admissible in evidence.

12-14. Defendants dispute these alleged facts. In discovery, Defendants requested the production of Relator's pre-filing disclosures to the government. Ex. K, Defendant HCRMC's First RFPs to Ribik Nos. 2 and 6. Relator responded that her pre-filing disclosures were protected under the work product doctrine and "government investigative privilege" and therefore not discoverable. Ex. L, Ribik's Resp. to Defs.' RFP Nos. 2 and 6 and Privilege Log at 1-2. As a result, Relator completely withheld the requested pre-filing disclosures in discovery. Now, in support of her Motion, Relator affirmatively relies upon and attaches as Exhibit 7 a redacted copy of one of these pre-filing disclosures. Ribik Memo Ex. 7 at 2, 4, 11, 13. Relator cannot rely in summary judgment on a document she refused to produce in discovery, nor can she selectively waive privilege as to portions of the document. As such, these alleged facts cannot be presented in a form that would be admissible in evidence.[3]

[3] Relator cannot rely in summary judgment on a document withheld from a specific discovery request. *See In re Edmond*, 934 F.2d 1304, 1308–09 (4th Cir. 1991) (holding that privilege cannot be invoked as a shield to oppose discovery while discarding it for the limited purpose of making statements to support a summary judgment motion); *Galaxy Computer Servs., Inc. v. Baker*, 325 B.R. 544, 558-59 (E.D. Va. 2005) (precluding witness from testifying at trial on issues that the witness refused to answer at deposition on privilege grounds). Further, Relator cannot selectively waive a purported privilege in order to reveal certain facts she deems useful while attempting to maintain privilege over other portions of the document she does not want disclosed. *MeadWestvaco Corp. v. Rexam, PLC*, No. 1:10CV511 GBL/TRJ, 2011 WL 2938456,

15-17. Relator's initial complaint is part of the record and speaks for itself. Defendants do not dispute that Relator's complaint contains the quoted statements. The fact that Relator made these allegations in her complaint does not make them true and Defendants dispute the substance of the allegations.

18. Defendants dispute these alleged facts based on (a) the reasons set forth in ¶¶12-14 above and (b) Relator's pre-filing disclosures and initial complaint were, at a minimum, based in part on the 2005 Slater article. Ribik Aff. ¶ 23.

19. Defendants dispute that Relator did not rely on any public disclosures prior to filing her complaint. Relator, at a minimum, relied, at a minimum, in part on the 2005 Slater article. Ribik Aff. ¶ 23.

20. Defendants dispute this alleged fact because it is not supported by the cited paragraphs in Relator's affidavit and Relator has no personal knowledge of it.

19b.[4] Defendants dispute that Relator did not rely on any public information prior to filing her Amended Complaint. Ribik Aff. ¶ 23.

20b. Defendants do not dispute that the amended complaint alleged the same type of alleged fraud as the initial complaint and that the amended complaint named as defendants individual SNFs operating throughout the country. Defendants dispute that the amended complaint made any specific factual allegations as to the individual SNFs. ECF No. 23.

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at *5–6 (E.D. Va. July 18, 2011) ("An 'attempt to make testimonial use of the work product[,]' waives the privilege and lifts the materials into the realm of discoverability.") (citing *Chase v. City of Portsmouth*, 236 F.R.D. 263, 269 (E.D.Va.2006)); *In re Edmond*, 934 F.2d at 1308 (a privilege like the Fifth Amendment is "not a 'positive invitation to mutilate the truth a party offers to tell'") (citing *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir. 1988)); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Selective disclosure for tactical purposes waives the attorney-client privilege.").

[4] Relator's Memorandum contains two paragraphs labeled 19 and 20. For purposes of responding to these paragraphs, Defendants have renumbered the second paragraph 19 as 19b and the second paragraph 20 as 20b.

21. Defendants dispute this alleged fact because the government was conducting an expansive investigation of Defendants prior to Relator filing her amended complaint. Defendants' SUMF ¶¶ 2-12. This alleged fact is supported only by Relator's affidavit, but Relator has no personal knowledge of the alleged fact, and so it cannot be presented in a form that would be admissible in evidence.

22. Defendants dispute this alleged fact because prior to Relator's filing of her Amended Complaint, the government issued two subpoenas to Defendants' SNFs. Ex. M, subpoena to ManorCare of Fair Oaks and subpoena to Heartland of Perrysburg. This purported undisputed fact is supported only by Relator's affidavit, but Relator has no personal knowledge of the asserted fact, and so it cannot be presented in a form that would be admissible in evidence.

23-24. Defendants do not dispute these alleged facts.

25. Defendants dispute this alleged fact because (a) the government's damages model is inadmissible, and (b) the government's damages model does not contain claims from the time period Relator worked at the Virginia SNFs. *See* Defendants' Memo. in Support of Their Motion *In Limine* to Exclude the Reports and Testimony of Marna Bogan and Donald Edwards. Dkt. 481.

26. Defendants dispute this alleged fact because it is a legal conclusion.

27. The government's Complaint in Intervention and Relator's complaints are part of the record and speak for themselves and it is improper for Relator to re-characterize these complaints by citing to her affidavit. Defendants specifically dispute the alleged fact that in Relator's initial complaint Relator alleged that the entire company was engaged in an alleged scheme. Relator worked at three SNFs in Northern Virginia on a PRN basis and had no non-public basis for knowledge about any other SNFs owned by Defendants. The fact that the

government and Relator alleged these things does not make them true and Defendants dispute the substance of these allegations.

28. The government's Complaint in Intervention is part of the record and speaks for itself. The fact that the government alleged these things does not make them true and Defendants dispute the substance of these allegations.

29. Defendants dispute these alleged facts. Relator had no non-public basis for any information about any SNF owned by Defendants other than the three Virginia SNFs. Nor did Relator have any non-public basis for any information about any SNF owned by Defendants after mid-December 2004. Further, Defendants dispute these alleged facts for the reasons stated in ¶¶12-14 above that the Relator's pre-filing disclosure was not produced in discovery, an un-redacted version has not been produced, and as such the Court may not rely on these facts in deciding summary judgment.

30. Relator's initial complaint is part of the record and speaks for itself. The fact that the Relator alleged these things does not make them true and Defendants dispute the substance of these allegations. Defendants dispute Relator's characterization of the document attached as Exhibit 3 to her Memorandum, and that the document is admissible evidence. Relator has not established the authenticity of the document and she concedes she purloined this document from one of the Virginia SNFs.

31. The government's Complaint in Intervention and Relator's complaints are part of the record and speak for themselves. It is not proper for Relator to re-characterize these complaints by citing to her affidavit. The fact that the government and Relator alleged these things does not make them true and Defendants dispute the substance of these allegations.

32. The government's Complaint in Intervention is part of the record and speaks for itself. The fact that the government alleged these things does not make them true and Defendants dispute the substance of these allegations.

33. Defendants dispute these alleged facts for the reasons stated in ¶¶12-14 above that the Relator's pre-filing disclosure was not produced in discovery, an un-redacted version has not been produced, and as such the Court may not rely on these facts in deciding summary judgment.

34. Relator's initial complaint is part of the record speaks for itself. The fact that Relator alleges these things in her complaint does not make them true and Defendants dispute the substance of these allegations.

35. Defendants dispute Relator's characterization of this document and that the document is admissible evidence. Relator has not established the authenticity of the document and she concedes she purloined this document from one of the Virginia SNFs.

38.[5] The government's Complaint in Intervention and Relator's complaints are part of the record and speak for themselves. It is not proper for Relator to re-characterize these documents by citing to her affidavit. The fact that the government and Relator alleged these things in their complaints does not make them true and Defendants dispute the substance of these allegations.

39. The government's Complaint in Intervention is part of the record and speaks for itself. The fact that the government alleged these things in its Complaint does not make them true and Defendants dispute the substance of these allegations.

[5] There are no paragraphs labeled 36 or 37 in Relator's Memo.

40. Defendants dispute these alleged facts for the reasons stated in ¶¶12-14 above that the Relator's pre-filing disclosure was not produced in discovery, an un-redacted version has not been produced, and as such the Court may not rely on these facts in deciding summary judgment.

41. Relator's initial complaint is part of the record speaks for itself. The fact that Relator alleges these things in her complaint does not make them true and Defendants dispute the substance of these allegations. Defendants object to Relator's characterization of the document attached as Exhibit 9 to her Memorandum and that the document is admissible evidence. Relator has not established the authenticity of the document and she concedes she purloined this document from one of the Virginia SNFs.

42. The government's Complaint in Intervention and Relator's complaints are part of the record and speak for themselves. It is not proper for Relator to re-characterize these documents by citing to her affidavit. The fact that the government and Relator alleged these things in their complaints does not make them true and Defendants dispute the substance of these allegations.

43. The government's Complaint in Intervention is part of the record and speaks for itself. The fact that the government alleged these things in its Complaint does not make them true and Defendants dispute the substance of these allegations.

44. Defendants dispute these alleged facts for the reasons stated in ¶¶12-14 above that the Relator's pre-filing disclosure was not produced in discovery, an un-redacted version has not been produced, and as such the Court may not rely on these facts in deciding summary judgment.

45. Relator's initial complaint is part of the record speaks for itself. The fact that Relator alleges these things in her complaint does not make them true and Defendants dispute the substance of these allegations. Defendants specifically dispute the characterization of the

allegations in Relator's complaint. For example, Relator contends that in her initial complaint "[s]he alleged billing for time that was not appropriately skilled, i.e. peg boards" and cites to ¶ 49(k) in her initial complaint. That paragraph of her initial complaint does not make any allegations regarding "skilled" or "unskilled" services. Relator also cites to "Ex. 3, p. 9," but Exhibit 3 to her Memo does not contain a page 9.[6]

46. The government's Complaint in Intervention and Relator's complaints are part of the record and speak for themselves. It is not proper for Relator to re-characterize these documents by citing to her affidavit. The fact that the government and Relator alleged these things in their complaints does not make them true and Defendants dispute the substance of these allegations. Defendants specifically dispute Relator's characterization of her complaint, which contains no allegations regarding the monitoring or enforcement of productivity goals through various company metrics. ECF No. 1, 23.

47. The government's Complaint in Intervention is part of the record and speaks for itself. The fact that the government alleged these things in its Complaint does not make them true and Defendants dispute the substance of these allegations.

48. Defendants dispute these alleged facts for the reasons stated in ¶¶12-14 above that the Relator's pre-filing disclosure was not produced in discovery, an un-redacted version has not been produced, and as such the Court may not rely on these facts in deciding summary judgment.

49. Relator's initial complaint is part of the record speaks for itself. The fact that Relator alleges these things in her complaint does not make them true and Defendants dispute the substance of these allegations.

[6] This is a common problem throughout Relator's Memo; she often cites to incorrect or non-existent documents and the citations do not support the assertions she has made.

50. Defendants do not dispute that Relator produced in discovery the documents referenced, but dispute their admissibility and authenticity. Defendants also dispute that these statements allege monitoring or enforcement of productivity goals as Relator suggests. Defendants also dispute the statements contained in this paragraph that are unsupported by the record. Relator concedes that she purloined these documents from one or more of the Virginia SNFs.

51. The government's Complaint in Intervention and Relator's complaints are part of the record and speak for themselves. It is not proper for Relator to re-characterize these documents by citing to her affidavit. The fact that the government and Relator alleged these things in their complaints does not make them true and Defendants dispute the substance of these allegations. Defendants specifically dispute Relator's characterization of the government's Complaint in Intervention because it contains no allegations regarding providing incentives or bonuses to staff. Dkt. 84.

52. Relator's initial complaint is part of the record speaks for itself. The fact that Relator alleges these things in her complaint does not make them true and Defendants dispute the substance of these allegations.

53. Defendants dispute this alleged fact. Relator's allegations were, at a minimum, based in part on the 2005 Slater article. Ribik Aff. ¶ 23.

54. Defendants dispute this alleged fact. Relator's allegations were, at a minimum, based in part on the 2005 Slater article. Ribik Aff. ¶ 23.

55-60. This information was first disclosed to Defendants after discovery closed in Relator's affidavit dated October 16, 2017. Defendants have no knowledge of and as such

dispute these alleged facts. However, these disputed alleged facts are not material to the issues before the Court.

61. Defendants dispute the alleged fact that all of the documents containing the prefix CR are accurate and authentic documents that were contemporaneously created by ManorCare staff. Several of the documents with the prefix CR plainly are not documents created by Defendants or their employees. *See e.g.,* Relator's Memo Ex. 2, CR-001-6 (Ribik resume), Ex. 5, CR-0009. Furthermore, several of the documents appear to contain Ribik's own handwritten notes, calling into question the authenticity and accuracy of the copy. *See, e.g.,* Ex. 3, CR-0530; Ex. 9, CR-0415 and CR-0424; *see also* Relator's SMFND ¶ 41 (acknowledging that the handwriting on CR-0424 is hers).

IV. LEGAL STANDARD

A. SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(a) provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks and citation omitted). Summary judgment is inappropriate if factual issues "'may reasonably be resolved in favor of either party.'" *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "Generally speaking, evidence must be admissible at trial in order to be considered on summary judgment." *Davis v. Nationwide Mut. Fire Ins. Co.*, 811 F. Supp. 2d 1240, 1249 (E.D.

Va. 2011) (citation omitted). "Supporting and opposing affidavits must be based on personal knowledge and must set forth facts that would be admissible in evidence." *Todd Marine Enters., Inc. v. Carter Machinery Co., Inc*., 898 F. Supp. 341, 344 (E.D. Va. 1995) (citing Fed. R. Civ. P. 56(e)).

B. FCA PUBLIC DISCLOSURE BAR AND ORIGINAL SOURCE EXCEPTION

The district courts of the United States are courts of limited subject matter jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). They possess only the jurisdiction authorized them by the United States Constitution and by federal statute. *Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider."). Thus, when a district court lacks subject matter jurisdiction over an action, the action must be dismissed. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006). "Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). As a matter of course, "[t]he plaintiff has the burden of proving that subject matter jurisdiction exists." *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999).

Before its amendment in 2010, the public disclosure bar set forth a jurisdictional barrier.[7] *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468-69 (2007) (explaining that § 3730(e)(4) is a "jurisdiction-removing provision"); *see also U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 349-50 (4th Cir. 2009) ("The jurisdictional requirements of the FCA involve assessing whether the allegations and transactions constituting the bases of the claims were

[7] As explained below, Congress amended the public disclosure bar on March 23, 2010. *See* Patient Protection & Affordable Care Act, Pub.L. 111-148, § 10104(j)(2), 124 Stat. 119, 901-02. The relevant time period in this litigation is 2006 to 2012, which spans the 2010 amendment, and thus both versions of the public disclosure bar are relevant here. The pre-amendment version of the public disclosure bar is unquestionably jurisdictional. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468-69 (2007).

publicly disclosed ….") (citations omitted). Accordingly, a relator bears the burden of showing that the public disclosure bar does not preclude her claims. *See Vuyyuru*, 555 F.3d at 348 ("Relator Vuyyuru first bore the burden of proving that the allegations underpinning his FCA claims were not 'based upon' the Virginia Times articles.").

V. ARGUMENT

A. RELATOR'S MOTION IS PROCEDURALLY FLAWED

Rule 56 is not the proper vehicle for seeking a ruling regarding Ribik's "status as a qualifying relator." Relator's Memo at 1. Ribik's improperly-styled motion does not seek summary judgment; rather, it seeks a declaratory judgment that is procedurally improper.

The Declaratory Judgment Act provides that: "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *See* 28 U.S.C. § 2201(a) (emphasis added). This is exactly what Relator seeks: a declaration from this Court that she is a proper relator in this litigation.

By its own terms, however, the Declaratory Judgment Act requires a party to demand relief by "filing . . . an appropriate pleading." *Id.* The federal rules distinguish between "Pleadings" and "Motions and Other Papers." Fed. R. Civ. P. 7(a), (b). Rule 7(a) defines pleadings as: complaints; answers; answers to a counterclaim designated as a counterclaim; answers to a crossclaim; third-party complaints or answers to them; or, if ordered by a court, replies to an answer. Fed. R. Civ. P. 7(a). Relator has not styled her request for relief as any of these, and as such it is procedurally improper. *See McIntyre-Handy v. APAC Customer Servs.*, Inc., No. 4:05cv124, 2006 WL 1771048, at *4 (E.D. Va. June 23, 2006) (declining to consider a "motion for declaratory relief"), *aff'd* 259 F. App'x 585 (4th Cir. 2007) (per curiam); *see also*

Centrifugal Acquisition Corp., Inc. v. Moon, No. 09-C-327, 2010 WL 152074, at *1 (E.D. Wisc. Jan. 14, 2010) (denying a motion seeking declaratory relief as procedurally improper "because there is no such thing as a motion for declaratory relief"). Because declaratory judgment actions are nothing more than "'ordinary civil action[s]' subject to the Federal Rules," a motion for summary judgment is not the appropriate vehicle for the relief Relator seeks. *See Grano v. Weese*, No. 17-cv-0287, 2017 WL 4162258, at *2-3 (D.N.M. Sept. 18, 2017) (quoting *Int'l Bhd. of Teamsters v. E. Conference of Teamsters*, 160 F.R.D. 452, 455-56 (S.D.N.Y. 1995)).

Even if Relator's motion is construed as one actually seeking summary judgment, it remains improper. The ruling she seeks is nothing more than an improper advisory opinion on a question of law (the public disclosure bar) that has not been raised by any party other than Relator. As such, the Court should reject a jurisdictional challenge that has not yet been raised. *See Shenandoah Valley Network v. Capka*, 669 F.3d 194, 201-02 (4th Cir. 2012) (recognizing that absent an actual dispute between the parties, the court was precluded from issuing an advisory opinion). A ruling on a defense not raised is an advisory opinion that federal courts cannot dispense. *See, e.g., Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (finding no Article III jurisdiction to issue "an advance ruling on an affirmative defense"); *Velvet Underground v. Andy Warhol Foundation for the Visual Arts, Inc.*, 890 F. Supp. 2d 398, 407 (S.D.N.Y. 2012) (holding that "an anticipated defense 'can involve no justiciable question unless and until' the [defendant] actually asserts it; until then, there is no concrete controversy to resolve, and [plaintiff] is merely seeking 'an advisory opinion as to the validity of the defense'") (citations omitted); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 476 (4th Cir. 2007) (Williams, C.J., concurring in part) (discussing an unwillingness to offer an opinion on the relation-back doctrine based upon a "hypothetical

factual underpinning"). For this reason, Relator's motion should be denied as procedurally improper.

B. RELATOR HAS NOT SATISFIED HER BURDEN TO ESTABLISH THAT THE PUBLIC DISCLOSURE BAR DOES NOT APPLY AND THERE ARE FACTS IN DISPUTE AS TO THAT ISSUE

1. Public Disclosure Bar Elements

The public disclosure bar in effect at the time Ribik filed suit precludes jurisdiction over FCA actions that are "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 person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A) (2006). Claims are "based upon the public disclosure" if they are "even partly" derived from public disclosures. *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 351 (4th Cir. 2009); *see also U.S. ex rel. Ribik v. HCR ManorCare, Inc.*, No. 1:09-CV-00013, 2017 WL 3471426, at *2 (E.D. Va. Aug. 10, 2017) ("[T]he public disclosure bar compels dismissal for lack of jurisdiction of a claim that is partly derived from a public source.").

A public disclosure "must merely be sufficient to put the government on notice of the likelihood of related fraudulent activity." *U.S. ex rel. Lopez v. Strayer Educ., Inc.*, 698 F. Supp. 2d 633, 641 (E.D. Va. 2010). This rule prevents suits by relators "when the government already has enough information to investigate the case and to make a decision whether to prosecute or where the information could at least have alerted law-enforcement authorities to the likelihood of wrongdoing." *U.S. ex rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 472 (D.C. Cir. 2016) (citation omitted). There is no requirement that a disclosure specifically name the defendant to implicate the public disclosure bar. *Lopez*, 698 F. Supp. 2d at 641; *see also United States v. Emergency Med. Assocs. of Illinois, Inc.*, 436 F.3d 726, 729 (7th Cir. 2006). In addition, "[t]he

fact that the information comes from different disclosures is irrelevant. All that is required is that public disclosures put the government on notice to the possibility of fraud." *Dingle v. Bioport Corp.*, 388 F.3d 209, 214 (6th Cir. 2004); *see also United States v. CSL Behring, L.L.C.*, 855 F.3d 935, 944 (8th Cir. 2017) (holding that it is proper to consider "public disclosures contained in different sources as a whole to determine whether they collectively provide information that leads to a conclusion of fraud") (citation and internal quotation marks omitted).

A relator bears the burden of proving by a preponderance of the evidence that the public disclosure bar does not apply. *U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268, 274-75 (4th Cir. 2014) (citing *Vuyyuru*, 555 F.3d at 348); *Ribik*, 2017 WL 3471426, at *2. "[A] mere denial of knowledge of public disclosures does not satisfy the burden[.]" *U.S. ex rel. Jones v. Collegiate Funding Servs., Inc.*, 469 F. App'x 244, 255-56 (4th Cir. 2012) (citing *Vuyyuru*, 555 F.3d at 350-51).

Congress amended the public disclosure bar on March 23, 2010. *See* Patient Protection & Affordable Care Act, Pub.L. 111-148, § 10104(j)(2), 124 Stat. 119, 901-02. The relevant time period in this litigation is 2006 to 2012, which spans the 2010 amendment. Because the amendment does not apply retroactively to conduct prior to March 23, 2010, *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 915 (4th Cir. 2013), both versions of the public disclosure bar are relevant here, although the result is the same under either one.

The post-amendment public disclosure bar applicable to claims submitted after March 23, 2010 includes changes that are only marginally relevant here. The post-amendment public disclosure bar provides that: "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[.]" 31 U.S.C. § 3730(e)(4)(A) (emphasis added).

Accordingly, while the pre-amendment public disclosure bar encompassed disclosures in federal *and* state trials, hearings, reports, audits, and investigations, the post-amendment bar is limited to disclosures in federal trials, hearings, reports, audits, and investigations (in addition to disclosures in news media). Also, under the pre-amendment bar, an action is precluded if it is "based upon" a qualifying public disclosure. As amended, however, the public-disclosure bar no longer requires actual reliance upon the public disclosure, but instead applies "if substantially the same" allegations or transactions were publicly disclosed. *See May*, 737 F.3d at 917.

2. Public Disclosures Identified HCRMC's Purported Fraud Before Ribik Filed Her Complaint

Prior to Relator filing her complaint, there were numerous federal government reports alleging that SNFs generally billed Medicare for unreasonable and unnecessary rehabilitation therapy. For example, in August 1999, HHS-OIG issued a report titled "Physical and Occupational Therapy in Nursing Homes – Costs of Improper Billings to Medicare." Ex. N, CR-0556-0576.[8] That report concluded that "Medicare reimbursed [SNFs] for improperly billed therapy primarily because the therapy was not medically necessary and therapy was provided by staff who did not have appropriate skill for the patient's medical condition." *Id*. at CR-0559. The report went on to note that "[t]herapy was not necessary because, among other reasons, therapy was not based on the patient's medical condition" and "not tailored to [the] patients' medical needs," such as where the patients already achieved the treatment goals, the treatment goals were unattainable, therapy was not discontinued at the appropriate time, and therapists

[8] Available at https://oig.hhs.gov/oei/reports/oei-09-97-00122.pdf.

billed routine maintenance services as skilled therapy. *Id*. at CR-0567. A companion report issued at the same time, titled "Physical and Occupational Therapy in Nursing Homes – Medical Necessity and Quality of Care," concluded that while most SNF patients were appropriate candidates for physical and occupational therapy, and benefited from therapy, "almost 13 percent of therapy was improperly billed to Medicare." Ex. O at 2, 12-13.[9] The report also noted that patients received therapy from staff with inappropriate skill or experience, and in particular physical therapist assistants and occupational therapy assistants working beyond the scope of their license and contrary to guidelines. *Id.* Relater later echoed these allegations in her complaint. *See* ECF No. 1 ¶¶ 45-49.

Further, in August 2002, the U.S. General Accounting Office ("GAO") issued a report titled "Skilled Nursing Facilities: Providers Have Responded to Medicare Payment System By Changing Practices" ("2002 GAO Report"). Ex. P.[10] The 2002 GAO Report alleged that an increased number of Medicare patients were being classified into high and medium RUGs, which was "consistent with the industry's assertions that the high and medium categories have more favorable payments, relative to their costs, than other categories." *Id*. at 12. Relator later stated the same thing in her complaint, alleging that all of Defendants' SNFs improperly placed patients into more lucrative RUGs. *See* ECF No. 1 ¶¶ 45-49.

Also, in February 2006, the HHS-OIG issued a report titled "A Review of Nursing Facility Resource Utilization Groups" ("2006 HHS Report") describing an investigation, the objective of which was "[t]o determine the extent to which Resource Utilization Groups (RUGs) on claims submitted by nursing facilities are different from those generated based on evidence in

[9] Available at https://oig.hhs.gov/oei/reports/oei-09-97-00121.pdf.

[10] Available at http://www.gao.gov/products/GAO-02-841.

the medical record." Ex. Q at 1.[11] HHS-OIG found that "[t]wenty-six percent of [RUGs] on claims were different from the ones generated based on evidence in the medical record." *Id.* at 7. This conclusion of increased billing nationwide that was not supported by medical records was a precursor to Relator's original and amended complaints alleging the same. *See* ECF No. 1 ¶¶ 45-49; ECF No. 23 ¶¶ 75-83.

Additionally, on October 17, 2005, an article by Deborah Slater was published in OT Practice titled "Ethics in Practice: Whose Responsibility" ("Slater article"), which explained that "some facilities and contract staffing companies have mandated productivity requirements, documentation guidelines, and general rules about clinical management of clients that appear to be based primarily on administrative decisions to meet designated financial goals" and stated that "[t]hese requirements often do not rely on the clinical judgment of therapists or take into account the individual needs or capabilities of the client." Ex. R, CR – 0540. According to the article, these allegedly questionable practices include:

- Admitting clients who are independent, then requiring therapists to 'be creative' in developing goals and treatment plans.
- Admitting clients for rehabilitation who are very acute or unstable, placing them in "high" or "ultra-high" categories to maximize reimbursement, then mandating that therapists provide the hours of therapy that these categories require. This may happen in spite of the client's inability to tolerate extensive therapy and, according to some reports, therapists are asked to record rest periods as minutes of treatment.
- Having nonclinical administrators or clinical directors in other disciplines dictate the frequency or length of treatment without input from the evaluating or treating occupational therapist.
- Not permitting clinicians to discharge clients when their goals have been met unless the discharge is "approved" by an administrator (extending length of stay and reimbursement).

[11] Available at https://oig.hhs.gov/oei/reports/oei-02-02-00830.pdf.

- Requiring excessive group treatment and calling it 'concurrent treatment' when it is not appropriate to meet the client's goals.

- Therapists and clients feeling like 'failures' for their inability to achieve the proscribed minutes of therapy and having to provide explanations for the shortfall

Id. at CR – 0540-41. Relator specifically relied on the Slater article when providing information to Senator Grassley's office. *See* Relator's Memo Ex. 1, Relator's Aff. ¶¶ 21, 23 and Relator's Memo Ex. 6 at CR – 611.

In addition to these public reports disclosed before Relator filed her initial complaint, there was continued reporting on the underlying allegations that preceded the filing of her Amended Complaint. On March 29, 2010, the Washington Post reported that HCR ManorCare was one of several skilled nursing facility operators under examination by the HHS-OIG for allegedly increasing patient therapy levels beyond medical need. *See* Scott Higham and Dan Keating, *Review Heightens Concerns Over Medicare Billing at Nursing Homes*, Wash. Post, Mar. 29, 2010.[12] This article described industry-wide allegations that skilled nursing facilities therapists were billing for unnecessary therapy. *Id.* It further highlighted testimony given to Congress indicating that "[f]acilities are paid for providing therapy even when a patient's need for and benefit from it has not been demonstrated." *Id.* The article then tied these allegations specifically to the Defendants (among various other entities' facilities), reporting for example that "two nursing homes owned by HCR ManorCare put their residents in the most expensive billing category at nearly five times the national average . . . ." *Id.* As this Court held in analyzing the public disclosure bar with respect to Relator Carson's claim, the Washington Post article "provided public disclosure of the alleged false claims at skilled nursing facilities, including Defendants' skilled nursing facilities." *Ribik*, 2017 WL 3471426, at *2.

[12] http://www.washingtonpost.com/wp-dyn/content/article/2010/03/28/AR2010032802764.html.

Approximately one month after the article was published, Relator filed her amended complaint, adding all HCR facilities nationwide as defendants.

Relator wrongly argues to the Court that "[t]he Fourth Circuit also determined that any public disclosure occurred in this case when the Washington Post Article [sic] appeared on March 29, 2010," suggesting that no earlier public disclosure could possibly exist. Relator's Memo at 1. There is no citation for this assertion because the Fourth Circuit made no such finding. In its opinion affirming dismissal of certain claims made by Relator Patrick Carson based on the first-to-file bar, the Fourth Circuit specifically "express[ed] no view" as to the merits of the public disclosure bar defense. *U.S. ex rel. Carson v. Manor Care, Inc*., 851 F.3d 293, 307 (4th Cir. 2017). Further, the fact that Defendants referred to the Washington Post article in their briefing to support their motion to dismiss Carson's complaint does not foreclose the possibility that other, earlier disclosures, can serve as the basis of the public disclosure bar as to Relator.[13]

All of the publicly-available documents described above are examples of a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," 31 U.S.C. § 3730(e)(4)(A) (2006), and thus fall squarely within the pre-amendment public disclosure bar. And, because all of the government reports are "Federal" in nature or "news media," the disclosures fall squarely within the post-amendment public disclosure bar as well.

[13] As noted above, Defendants did not affirmatively move to dismiss Relator's complaint under the public disclosure bar because she never served it.

3. Relator's Action is "Based Upon" and "Substantially the Same" as the Allegations and Transactions Identified in the Public Disclosures

Once public disclosures are identified, Relator has the burden of showing that her allegations are not "even partly" derived from public disclosures. *Vuyyuru*, 555 F.3d at 351; *Ribik*, 2017 WL 3471426, at *2. A "mere denial" of knowledge of public disclosures does not satisfy the burden. *Jones*, 469 F. App'x at 255-56 (citing *Vuyyuru*, 555 F.3d at 350-51). Relator fails to show that her allegations are not derived from the public disclosures, for multiple reasons.

First, Relator's allegations mirror the allegations in the public disclosures. For example, Relator alleges that Defendants "classified various patients in high and ultra high RUG classifications, even when their physical condition did not warrant the need for such extensive services." ECF No. 1 ¶ 45. Relator further alleges Defendants "submitted billing to Medicare for patients who simply did not require skilled physical or occupational therapy," such as where a patient had met all of his goals. *Id.* ¶¶ 47-48. Relator then presents a laundry list of "practices" such as co-treating patients, billing time when patients were not engaged in treatment, over-reporting the number of minutes, providing group therapy and billing it as individual therapy, allowing non-licensed individuals to treat patients and bill for treatment time, and billing for services that were not medically necessary or appropriate. *Id.* ¶ 49.

The public disclosures already put these precise allegations in the public domain. The August 1999 HHS-OIG Report disclosed that SNFs billed Medicare for therapy where the patients had already achieved their treatment goals. Ex. N at CR-0567. This report plainly was publicly disclosed and available to Relator; in fact, Relator had in her possession and produced in discovery. *Id*. (labeled with CR- prefix indicating it was produced by Relator in discovery). In addition, the 2002 GAO Report publicly disclosed that Medicare patients were being classified

into high and medium RUGs and that this was consistent with the industry's assertions that the high and medium categories have more favorable payments, relative to their costs, than other categories. Ex. P at 12. And the Slater article disclosed the same practices Relator subsequently alleged, such as admitting patients who were independent but providing therapy anyway, not permitting clinicians to discharge patients when goals have been met, and requiring excessive group treatment and calling it concurrent treatment. Ex. R at CR-0540-41. Relator clearly relied upon the Slater article, as she referenced it in her 2005 discussions with Senator Grassley's staff. Relator's Memo Ex. 6. Further, the allegations she made bear an uncanny resemblance to the laundry list of questionable practices set forth in the article. *Compare* ECF No. 1 ¶¶ 45-49 *with* Ex. R at CR-0540-41.

Second, Relator provides no facts to establish that her allegations are not derived from the public disclosures. Relator only denies knowledge of the internal government investigation that was revealed in discovery, but she completely ignores the government and media reports that actually disclosed her allegations. Relator asserts only vague conclusions about relying on "direct, independent, and personal knowledge" of the fraud. Relator's SMFND ¶ 18; Relator's Memo Ex. 1, Relator's Aff. ¶ 34. Relator's statement of facts is very carefully worded to indicate that, at the time Relator filed her initial complaint, "she was not aware of any *audits* conducted by anyone that related to ManorCare." Relator's SMFND ¶ 19 (emphasis added). Relator mentions nothing about her reliance on other public disclosures, including the federal reports and the Slater article. Given the number of reports in the public record as detailed above, and the fact that Relator admittedly undertook "searches to find such information," Relator's SMFND ¶ 19, it is difficult to believe that Relator did not read, review, or rely on any public disclosures and Relator offers no evidence other than a general denial.

Third, the limited temporal and geographic circumstances of Relator's employment raise at least a dispute of fact as to Relator's knowledge about Defendants' policies during the relevant time frame. Although Relator claims that her complaint was based on her own knowledge "developed during her employment," Relator ceased working for the Virginia SNFs in December 2004, Relator's SMFND ¶ 1, nearly two years prior to the time period of DOJ's claims from October 2006 to May 2012. The contention that Relator would have direct, independent, and personal knowledge about HCRMC's policies, even after she left HCRMC's employment is baseless. Relator asserts that even after her employment, "she continued to develop direct and independent knowledge of Defendants' continuing fraudulent practices," Relator's SMFND ¶¶ 55-59, but each example she provides took place after she filed her initial complaint, so could not possibly provide the basis for her knowledge of ongoing practices alleged at the time she filed her lawsuit.

The absence of evidence to meet Relator's burden does not end there. Relator's amended complaint named as defendants all HCRMC facilities across the country, despite the fact that, by her own admission, Relator worked briefly at only three facilities in Northern Virginia. *See* Defendants' SUMF ¶ 2. Relator submits no evidence showing how she could have obtained direct, independent, and personal knowledge of alleged fraud at HCRMC facilities in which she did not work. As was the case with Relator Carson, Relator Ribik cannot be held to be a qualifying relator under these facts. *See Ribik*, 2017 WL 3471426, at *2 ("Carson only worked at the skilled nursing facility in Pennsylvania, however, so his claims under the False Claims Act laws of the sixteen states named in his Amended Complaint, which notably does not include Pennsylvania, must be based on the public disclosures of alleged fraud at facilities in those states.").

Relatedly, it is telling that Relator does not explicitly disclaim that she read, reviewed, or relied on the Washington Post article before filing her amended complaint. Relator's amended complaint added as defendants all of HCRMC's facilities nationwide only after the Washington Post reported allegations of such a nationwide practice. Without any evidence to the contrary, Relator does not even approach her burden of showing that her amended complaint was not "even partly" derived from the Washington Post article.

In light of the evidence of the public disclosures and no reasonable alternative for how Relator acquired the information for her complaint, Relator fails to show that her allegations are not "even partly" derived from public disclosures. *See Jones*, 469 F. App'x at 256 ("Faced with evidence of public disclosures and no reasonably inferable sources . . . , the district court did not clearly err in concluding that the Relators failed to establish that Counts 1–6 of the Amended Complaint were not actually based, in whole or in part, on public disclosures."); *U.S. ex rel. Dugan v. ADT Sec. Servs., Inc.*, No. CIV.A.DKC 20033485, 2009 WL 3232080, at *7 (D. Md. Sept. 29, 2009) (holding that public disclosure bar precluded a relator's claims because the defendant "catalogued numerous examples of similarities" between the public disclosures and the relator's complaint and the relator could only argue without further evidence "that all of her allegations are not based upon publicly disclosed material").

Given Relator's failure to satisfy her burden under the pre-amendment's "based upon" standard, she is even further afield on the post-amendment's "substantially the same" standard. Accordingly, Relator's action is "based upon" and "substantially the same" the allegations and transactions identified in the public disclosures, and both the pre- and post-amendment public disclosure bars preclude Relator's claims.

4. Relator Does Not Qualify as an Original Source

The FCA provides a public disclosure bar exception for an "original source," which 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[.]" 31 U.S.C. § 3730(e)(4) (2006). Under controlling case law, a "relator's knowledge is 'direct' if [she] acquired it through [her] own efforts, without an intervening agency, and it is 'independent' if the knowledge is not dependent on public disclosure." *Ahumada*, 756 F.3d at 276 (quoting *Grayson v. Adv. Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000)). To establish that her knowledge meets this standard, a relator must "allege specific facts—as opposed to mere conclusions—showing exactly how and when" she obtained it. *Id.* (quoting *U.S. ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999)). "'A mere assertion of direct and independent knowledge, without adequate basis in fact and unsupported by competent proof,' will not establish jurisdiction." *Id.* (quoting *Hafter*, 190 F.3d at 1162) (alterations omitted).

Here, Relator asserts that she has direct and independent knowledge of Defendants' corporate conduct during the relevant time period, 2006 to 2012. Relator offers no competent proof as how she obtained such knowledge.[14] She stopped working for Defendants in 2004 and even in 2004, she only worked at the three Virginia SNFs. Defendants' SUMF ¶ 1. Under these facts, Relator's assertion that she is an original source must fail. As specifically addressed by the Supreme Court, a relator's mere assertion of direct and independent knowledge of an employer's

[14] As explained above, Relator asserts that even after her employment, "she continued to develop direct and independent knowledge of Defendants' continuing fraudulent practices," Relator's SMFND ¶¶ 55-59, but each example she provides took place after she filed her initial complaint, so could not possibly provide the basis of direct and independent knowledge of ongoing practices alleged at the time she filed her lawsuit. In any event, any information she learned from others would not constitute Relator's "direct" knowledge.

fraud will not carry the day if the facts show the relator was no longer employed during the relevant time period. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 475 (2007) (holding that relator's knowledge fell short of satisfying the original source standard, reasoning that "[b]ecause Stone was no longer employed by Rockwell at the time, . . . he did not know that Rockwell made false statements to the Government regarding pondcrete storage"); *see also Ribik*, 2017 WL 3471426, at *2 (holding that Relator Carson "cannot plausibly allege that he was an original source" because he did not even work at the facilities where the alleged fraud occurred).[15]

Relator's Memorandum includes a section titled "Relators Who Have Acquired Fraud Information Through Their Employment Have Consistently been found to Qualify as Original Sources." Relator's Memo at 36-38. Each of the cases that Relator cites, however, involves a situation where the relator in question was an employee of the defendant at some point during the time period at issue in the case. *See id.* (citing *U.S. ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694 (4th Cir. 2014); *U.S. ex rel. Long v. SCS Bus. & Tech. Inst.*, 999 F. Supp. 78 (D.D.C. 1998); *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818 (7th Cir. 2013); *U.S. ex rel. Hutcheson v. Blackstone Med., Inc.*, 694 F. Supp. 2d 48 (D. Mass. 2010); *U.S. ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F. Supp. 2d 1201 (M.D. Fla. 1999); *Hagood v. Sonoma Cty. Water*

[15] Relator argues that DOJ's Complaint specifically references one of the SNFs in which she worked, and that two of the SNFs at which she worked were included in DOJ's damages model, suggesting that this was a result of her information. Relator's SMFND ¶¶ 24-25. But the allegation regarding the Arlington, Virginia SNF in DOJ's Complaint is included in a long list of specific facilities across the country and is based on information Defendants produced to DOJ during its investigation. It did not come from Relator. As to DOJ's damages model, DOJ selected which facilities would be included based on the percentage of billings at a certain level, again not because of information provided by Relator. *See* United States' Memo. in Opposition to Defendants' Motion *in Limine* to Exclude the Reports and Testimony of Marna Bogan and Donald Edwards, Dkt. 557, at 7 (explaining that the sample includes patients from Defendants' facilities that billed an average of 65% or more rehab days at the RU level).

Agency, 81 F.3d 1465 (9th Cir. 1996)). Unlike these cases, Relator was not employed by Defendants during the relevant time period, and thus, under *Rockwell*, she lacks direct and independent knowledge of the information on which the government's claims are based. Further, while Relator's initial complaint broadly alleged that the conduct was "ongoing," ECF No. 1 ¶ 4, given the fact that her employment ended more than four years earlier, it is clear she had no direct or independent knowledge of ongoing practices when she filed. Relator thus fails to satisfy the original source exception under the pre-amendment statute.

In 2010, along with the public disclosure bar, Congress amended the original source exception. Relator argues that she need only provide information that "materially add[s]" to what was already publicly disclosed to satisfy the amended original source exception. Relator's Memo at 27. The undisputed fact that HHS-OIG investigated Relator's allegations in 2005 and concluded that there was no merit to them and closed its investigation in November 2005—more than three years before Ribik filed her complaint—suggests that her information did not materially add anything to what was already publicly disclosed or already known to the government. Defendants' SUMF ¶¶ 2-13. Further, the amended original source exception still requires knowledge that is "independent" of the publicly disclosed allegations and transactions. 31 U.S.C. § 3730(e)(4)(B). The undisputed facts—including the limited temporal and geographic circumstances of Relator's employment—provide no basis for the Court to conclude that Relator had any independent knowledge that could have materially added to the information already known to the government about claims submitted after March 23, 2010, and Relator fails to come forth with any facts to the contrary. Thus, Relator fails to qualify as an original source under both the pre- and post-amendment versions of the statute.

VI. CONCLUSION

As set forth above, Relator's motion is procedurally improper and should be denied on that basis. However, should the Court decide to rule on the merits, Relator has not satisfied her burden to obtain partial summary judgment as to the public disclosure because there are material facts in dispute on that issue. Therefore, Defendants respectfully request that the Court deny Relator's motion.

Dated: November 2, 2017

Respectfully submitted,

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I hereby certify that on this 2nd day of November 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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