LEVESKI AND THE WEAKENING INDUSTRY-WIDE PUBLIC DISCLOSURE BAR IN QUI TAM LITIGATION

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ABSTRACT

In July of 2013, the Seventh Circuit decided Leveski v. ITT Educational Services, Inc. *On its face, it was a fairly innocuous outcome couched in the minutia of the for-profit education industry and illicit recruiter payment systems. Viewed within the larger fabric of the False Claims Act and its qui tam provisions, however, the case handled with unique clarity an issue that has divided and befuddled federal courts: the so-called 'industry-wide' public disclosure bar. In short, the Seventh Circuit gutted the doctrine, quietly distinguishing or rejecting the approaches taken by various federal courts and leaving in place a far more streamlined method.*

In light of this decision and continued struggles by federal courts to reach consensus, this examination seeks to understand both the unspoken problems with the public disclosure bar as applied to an entire industry as well as the future of False Claims Act law in light of recent developments. It first unpacks the underlying debates in the industry-wide public disclosure bar and the questions left unresolved by the patchwork approach by myriad courts. It then turns to the Seventh Circuit's decision, untangling the court's approach to clearly articulate the new test implied by the case. The decision reached in Leveski *is, in most regards, a laudable attempt to undercut the industry-wide public disclosure bar and increase the administrability of FCA qui tam jurisprudence and the access to court by meretricious relators. This noble aim, however, may exacerbate the dangers of superfluous and excessive qui tam litigation by working counter to recent statutory revisions under the Affordable Care Act.*

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INTRODUCTION

This year marks the 150th birthday of the False Claims Act (FCA). Despite its age, the FCA is still growing and developing in fits and starts befitting a far younger statutory regime. Such growing pains are especially evident in the statute's whistleblower provisions: contemporary circuit splits and statutory revisions over FCA qui tam litigation indicate the law is far from settled.

Such qui tam provisions have long been a source of extensive litigation, fractured judicial interpretation, and impassioned legal scholarship. Of frequent interest is the FCA's public disclosure bar, which bans whistleblowers from collecting on allegations that are already public knowledge. In recent decisions, federal courts have hinted at the existence of an unwritten public disclosure expansion that has only further complicated matters: an industry-wide public disclosure bar against ostensibly parasitic qui tam litigation in industries already plagued by corruption. In 2013, the Seventh Circuit reached a decision in *Leveski v. ITT Educational Services, Inc*.[1] concerning the for-profit education industry, which represented both a culmination and novel presentation of industry-wide public disclosure bar jurisprudence. In short, the court almost entirely rejected an industry-wide bar, which had been applied by various district courts. Instead, the Seventh Circuit opted for a more individualized approach that emphasized a relator's legitimacy and role as the original source rather than the government's ability to bring suit or the existence of prior public disclosure.

This examination steps in at this juncture to assess how this controversy festered and what implications lie in the foreseeable future. It proceeds in three parts. In Part I, I provide a brief background to the development of FCA qui tam doctrine, focusing in particular on the industry-wide public disclosure bar and the lack of any meaningful agreement by federal courts on its details and

1. 719 F.3d 818, 819 (7th Cir. 2013).

operation. Part II untangles and considers how the Seventh Circuit's recent decisions, culminating in *Leveski*, provide an answer to some of these questions and, in some important ways, undercut the very existence of an industry-wide bar. The implications of this development are considered in Part III. I contend that the decision reached in *Leveski* is, in most regards, a laudable attempt to undercut the industry-wide public disclosure bar and increase the administrability of FCA qui tam jurisprudence and the access to court by meritorious relators. This piece goes on to consider, however, how this noble attempt may exacerbate the dangers of qui tam litigation by working counter to, rather than in concert with, recent statutory revisions under the Affordable Care Act (ACA).

I. THE PUBLIC DISCLOSURE PATCHWORK FOR INDUSTRY-WIDE FRAUD

A. The Best Laid Plans . . .

The FCA is an antique piece of legislation with roots as far back as the American Civil War.[2] In a century and a half's time, the FCA's aim has remained unchanged: to prohibit the submission of false or fraudulent claims for payment to the United States.[3] In order to uncover violations of the FCA, the Act allows suits to be brought either by the Attorney General of the United States or by a private party—known as a "relator"—in a qui tam suit.[4] The government may intervene in the qui tam litigation or decline to do so; in either event, the relator stands to earn a large reward should the suit be successful.[5]

Given the substantial bounty—a veritable "bonanza"[6]—at stake for a private citizen in bringing a false claims case,[7] the FCA has "historically been susceptible to abuse" by "parasitic" lawsuits that simply re-allege instances of fraud already in the public domain.[8] The FCA therefore has a number of built-

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2. Hubbard v. United States, 514 U.S. 695, 704-05 (1995). For the original statute, see An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, § 4, 12 Stat. 696 (1863).

3. 31 U.S.C. §§ 3729-3733 (2006). The FCA holds liable those who "knowingly present[] to the government, or cause[] to be presented a false or fraudulent claim for payment or approval." *Id*. § 3729(a)(2).

4. *Id*. § 3730(a), (b)(1). *See generally* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1270-86 (2012).

5. If the government intervenes, the relator is entitled to between fifteen and twenty-five percent of the proceeds; if the government declines, the relator is entitled to between twenty-five and thirty percent. 31 U.S.C. § 3730(d) (2006).

6. United States *ex rel*. Chovanec v. Apria Healthcare Grp., 606 F.3d 361, 364 (7th Cir. 2010).

7. For instance, in 2009, Pfizer was forced to pay a $2.3 billion settlement to the United States government that paid out $51 million to individual relators. Josh Meyer, *Officials: Pfizer to Pay Record $2.3B Penalty*, L.A. TIMES (Sept. 3, 2009), http://articles.latimes.com/2009/sep/03/business/fi-pfizer3.

8. United States *ex rel*. Rost v. Pfizer, Inc., 507 F.3d 720, 727 (1st Cir. 2007); *see also* United States *ex rel*. Campbell v. Redding Med. Ctr., 421 F.3d 817, 822-23 (9th Cir. 2005).

in mechanisms to separate the wheat from the chaff, including what is known as the "public disclosure bar." Under this provision, the court must dismiss a false claims action if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . unless . . . the person bringing the action is an original source of the information."[9]

In practice, the public disclosure bar operates quite sensibly: a relator's qui tam case is dismissed if her allegations have already been published in, for instance, a hearing, audit, or newspaper.[10] After all, these public disclosures already alert the government that it should investigate alleged instances of fraud, and so a mere repetition of this information does not provide anything substantively valuable to an FCA investigation.[11] But courts have also considered more nebulous restrictions against qui tam claims, including what has come to be known as the "industry-wide" public disclosure bar.[12]

The industry-wide public disclosure bar operates upon a theory of notice and enablement, barring qui tam cases when the government already knows to investigate an entire industry and is equipped to pursue specific actions.[13] If, for instance, there are nine government-run laboratories in a narrow subfield of research, and the government has already been alerted to identical FCA violations by two of those laboratories, a relator should not be allowed to collect a large bounty for alleging an "easily identifiable" and identical violation by another one of these nine laboratories.[14] The deployment of this restriction, however, is subject to powerful limitations: it is appropriate only for "sufficiently narrow" industries where allegations of fraud can truly be assumed to spread across the industry.[15] Moreover, the industry-wide fraud is

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9. 31 U.S.C. § 3730(e)(4)(A) (2010). This language was amended in 2010 with the passage of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see generally* Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN. ST. L. REV. 77, 79 (2011), but the previous language was operationally similar. Though the old provision did not include the word "substantially" in describing similar allegations or transactions, 31 U.S.C. § 3730(e)(4) (2010), courts had interpreted the previous language to include the substantiality requirement, *see* Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 920 (7th Cir. 2009), and the new language to simply incorporate and codify that long-standing understanding, United States *ex rel*. Baltazar v. Warden, 635 F.3d 866, 869 (7th Cir. 2011); *see also* Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 828 (7th Cir. 2013).

10. *See* 31 U.S.C. § 3730(e)(4)(A) (2010).

11. *See* United States *ex rel*. Gear v. Emergency Med. Assocs. of Ill., Inc., 436 F.3d 726, 728 (7th Cir. 2006).

12. *See id*. at 729 (introducing the phrase "[i]ndustry-wide public disclosure[] bar"); *see also* United States *ex rel*. Harshman v. Alcan Elec. & Eng'g, Inc., 197 F.3d 1014, 1018-19 (9th Cir. 1999) (detailing and then applying an emerging move by circuit courts of appeals to bar qui tam suits across an industry when the government is already on notice).

13. *Alcan*, 197 F.3d at 1018-19 (barring relator's qui tam suit when "prior public disclosures contained enough information to *enable* the government to pursue an investigation . . ." (emphasis added)).

14. United States *ex rel*. Fine v. Sandia, 70 F.3d 568, 571 (10th Cir. 1995) (presenting the facts of the above hypothetical).

15. *Alcan*, 197 F.3d at 1018-19.

more likely to be disclosed, and a qui tam suit barred, if control over the industry is centralized. If all nine of the aforementioned laboratories operate under the same oversight of a single regulator—for example, the Department of Energy—then uncovered FCA violations by a few of these actors can serve to put the government on notice that the entire well has been poisoned.[16]

B. . . . Go Oft Astray

What is sound in theory is cacophonous in practice. The industry-wide public disclosure bar, despite its simple aims, involves a wide variety of complex statutory and judicial considerations. Moreover, when faced with these difficult questions, federal courts have splintered in their attempts to provide answers.[17]

First, what exactly is a "sufficiently narrow" industry? The various circuits have been unable to articulate any manner of unifying language or propose any identifiable test. The Tenth Circuit has found a nine-company industry to be sufficiently narrow.[18] The District Court for the Central District of California has implied that a two-thousand-company industry is similarly narrow.[19] But the Fifth Circuit thinks a ninety-five-company industry is not.[20] In trying to manufacture an objective test for when an industry is narrow enough to make industry-wide fraud apparent to the government, courts have sought unity but have not delivered particularly specific guidance or bright lines, and on occasion the lines seem to loop back in on themselves.

Second, what exactly does it mean for a qui tam suit to make "substantially" new allegations? To be sure, the answer depends upon the level of generality at which the question is viewed. And the proper level of generality has been in flux. On the most abstract level, a qui tam suit has been barred, even when it alleges new information, when the government "is capable" and "equipped" to pursue the action itself.[21] But other courts have allowed qui tam suits that provide "vital facts that were not in the public

16. *Sandia*, 70 F.3d at 571.

17. The massive disagreement between federal circuits on FCA interpretation is not limited to the public disclosure question. *See* Christopher M. Alexion, Note, *Open the Door, Not the Floodgates: Controlling Qui Tam Litigation Under the False Claims Act*, 69 WASH. & LEE L. REV. 365, 367 (2012). *See generally* 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (4th ed. 2013).

18. *Sandia*, 70 F.3d at 571.

19. Order Granting Defs.' Mots. To Dismiss at 9, United States *ex rel*. Lee v. Corinthian Colleges, No. 2:07-cv-01984-PSG-MAN (C.D. Cal. Mar. 15, 2013), ECF No. 224. For the size of the for-profit education industry discussed in *Lee* (reaching upwards of 2000 companies), see *Data Extracts*, POSTSECONDARY EDUC. PARTICIPANTS SYS. (PEPS), http://www.ed.gov/offices/OSFAP/PEPS/index.html (last visited Feb. 20, 2014).

20. United States *ex rel*. Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 380 (2009).

21. United States *ex rel*. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994).

domain," regardless of whether the government was capable of making out a case.[22] And at the other end of the spectrum, even information that is merely "genuine[ly] useful" has been enough to allow a relator's claim to move forward.[23]

Third, when it comes to the public disclosure bar, what is the relationship between judicial interpretation and statutory language? Imagine, for instance, that a relator is able to provide information of a company's fraud that is not substantially the same as disclosed allegations, but the government is currently pursuing other companies in the same, narrow industry for the same fraudulent behavior. Is the relator's suit barred because the industry-wide disclosure renders her allegations as necessarily substantially the same as disclosed information? Or are these separate inquiries, and if so, what is their relationship? The latter approach has seen some support,[24] but there has been little in the way of explicit guidance on the interaction of the industry-wide public disclosure bar and substantially new allegations.[25]

II. A QUIET REVOLUTION?

The Seventh Circuit has actively grappled with the questions at the junction of public disclosure, industry-wide fraud, and substantially new relator allegations. Though the court began its jurisprudence with a fairly staunch defense of the industry-wide public disclosure bar,[26] it has tempered its approach with a few recent decisions. The two most recent—*United States ex rel. Baltazar v. Warden*[27] and *Leveski*[28]—brought these considerations to bear with increased vigor. In what follows, I will parse the court's decision in *Leveski*, which builds upon positions staked out in *Baltazar*, to uncover these principles and follow the court's logical steps in a more streamlined approach.

A. Leveski*'s Roots and the For-Profit Education Industry*

Leveski concerns the practice of for-profit colleges paying recruiters

22. United States *ex rel.* Baltazar v. Warden, 635 F.3d 866, 869 (7th Cir. 2011).

23. United States *ex rel.* Lopez v. Strayer Educ., Inc., 698 F. Supp. 2d 633, 644 (E.D. Va. 2010) (citing *In re* Natural Gas Royalties Qui Tam Litig., 566 F.3d 956, 961 (10th Cir. 2009)); *see also* Cohen, *supra* note 9, at 102 (arguing that any information that is "genuinely helpful to the prosecution of the fraud" is not barred).

24. *See, e.g.*, United States *ex rel.* Found. Aiding the Elderly v. Horizon W., 265 F.3d 1011, 1016 n.5 (9th Cir. 2001); Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 566 (11th Cir. 1994).

25. Courts have recently admitted that the relationship between the general public disclosure bar and substantially new allegations cannot be subject to any type of "categorical rule" which outlines their interaction. United States *ex rel.* Davis v. District of Columbia, 679 F.3d 832, 838 (D.C. Cir. 2012); *see also* United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 24-25 (1st Cir. 2009).

26. *See* Gear v. Emergency Med. Assocs. of Ill., Inc., 436 F.3d 726 (7th Cir. 2006).

27. *Baltazar*, 635 F.3d 866.

28. 719 F.3d 818 (7th Cir. 2013).

incentive bonuses to enroll under-qualified students. This is by no means a new problem: some estimates have uncovered at least twenty-seven qui tam suits involving this FCA violation since the late 1990s.[29]

How does this practice run afoul of the FCA? The federal government has long provided billions of dollars to educational institutions in the form of tuition assistance for students.[30] In exchange, these institutions must file annual Program Participation Agreements with the Department verifying such compliance with Department of Education standards.[31] One of the more complex Department of Education regulations concerns the payment of recruiters used by for-profit education institutions to attract students to enroll. Recruiters may be paid for their work in increasing the visibility of their respective programs.[32] They are barred, however, from being paid "incentive-based compensation" by education institutions based "directly or indirectly on success in securing enrollments."[33] In short, recruiters cannot be given bonuses for meeting certain enrollment quotas, as there is a real concern that such practices would encourage under-qualified and underfinanced students to foolishly enroll in these institutions and subsequently default on their loans.

Unfortunately, there has been no shortage of for-profit education institutions filing certification reimbursement claims while paying recruiters incentive-based bonuses.[34] And with the rise of these improprieties and the proliferation of resulting qui tam suits, federal district courts from a variety of jurisdictions, including the Eastern District of Virginia,[35] the Northern District of Illinois,[36] and the Central District of California,[37] have acted quickly to throw out the suits as superfluous and parasitic. As one district court noted, the government was already "on notice of the likelihood of related fraudulent

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29. *See* Nicola T. Hanna et al., *History and Status of False Claims Act/Qui Tam Actions Against For-Profit Schools*, GIBSON DUNN (Dec. 10, 2009), http://www.gibsondunn.com/publications/pages/FalseClaimsActQuiTam-ForProfitSchools.aspx. These cases have included lawsuits against the University of Phoenix (United States *ex rel*. Hendow v. Univ. of Phoenix, No. CV S-03-457, 2004 WL 3611690 (E.D. Cal. 2004)); Chapman University (United States *ex rel*. O'Connell v. Chapman Univ., 245 F.R.D. 646 (C.D. Cal 2004)); Kaplan (United States *ex rel*. Torres v. Kaplan Higher Educ. Corp., No. 09-21733-CIV, 2011 WL 3704707 (S.D. Fla. 2011)); and ITT Educational Services (United States *ex rel*. Graves v. ITT Educ. Servs., Inc., 284 F. Supp. 2d 487 (S.D. Tex. 2003).

30. 20 U.S.C. § 1092 (2012).

31. *Id*. §§ 1092, 1094 (describing accountability and reporting requirements for institutions receiving United States Department of Education funding).

32. *See* 34 C.F.R. § 668.14(b)(22)(ii)(A) (2010).

33. 20 U.S.C. § 1094(a)(20) (2012).

34. *See* Editorial, *An Industry in Need of Accountability*, N.Y. TIMES, Aug. 16, 2011, at A20.

35. United States *ex rel*. Lopez v. Strayer Educ., Inc., 698 F. Supp. 2d 633, 633 (E.D. Va. 2010).

36. Schultz v. DeVry Inc., No. 07-C-5425, 2009 WL 562286 (N.D. Ill. 2009).

37. Order Granting Defs.' Mots. To Dismiss at 9, United States *ex rel*. Lee v. Corinthian Colls., No. 2:07-cv-01984-PSG-MAN (C.D. Cal. Mar. 15, 2013), ECF No. 224.

activity" across the for-profit education industry.[38]

Leveski arose against this backdrop. The relator – Debra Leveski – worked for ten years at ITT Educational Services, starting out as a recruiter in 1996.[39] Leveski alleged, through extensive affidavits and detailed evidence, that her performance evaluations and therefore her payment were "directly correlated" with the number of students she convinced to enroll in the for-profit institution.[40] In 2002, Ms. Leveski was promoted to the position of Financial Aid Administrator where, according to her allegations of "specific conversations," raises in her salary were determined by "securing federal funding for students by getting them repacked or packaged."[41]

In 2007, however, Leveski was contacted by a Mississippi attorney who had made a practice out of suing for-profit education institutions for FCA violations.[42] Leveski had been sought out to discuss the potential of bringing a case against ITT; after some independent research through her old files as well as looking at other qui tam cases filed against ITT, Leveski determined that she would indeed bring a qui tam case with the Mississippi attorney as her counsel.[43] Prior to these conversations, however, Leveski had no intent to bring suit.[44]

The litigation proved disastrous for Leveski at the district court level. The case took four years and myriad procedural rulings to even reach the public disclosure question.[45] And when it did, the district judge dismissed the case under a 2011 Seventh Circuit case, which held that "though a complaint may add a few allegations not covered by the previous disclosure, it is not enough to take this case outside the jurisdictional bar."[46] Moreover, the judge granted sanctions against Leveski's attorneys, admonishing them as "brazen" mercenaries seeking to manufacture opportunistic qui tam suits.[47]

B. The Seventh Circuit's Approach Untangled

The Seventh Circuit expressed broad disagreement with the lower court's determinations, and in doing so, articulated an approach to the public disclosure bar that quietly answered a litany of questions surrounding its industry-wide application. The *Leveski* decision is not altogether novel, either throughout the

38. *Lopez*, 698 F. Supp. 2d at 641.
39. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 820 (7th Cir. 2013).
40. *Id*. at 821.
41. *Id*. at 823-24.
42. *Id*. at 824.
43. *Id*. at 824-25.
44. *Id*. at 824.
45. *Leveski*, 719 F.3d at 825-28.
46. *Id*. at 827 (citing Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 920-21 (7th Cir. 2009)).
47. *Id*.

various courts of appeals[48] or in the Seventh Circuit in particular.[49] It is, however, a culmination of these previous decisions and one of the first cases to find no public disclosure bar in an industry in which other federal courts have found fit to apply such a bar.

As an initial matter, the court did not explicitly address the question of an industry-wide public disclosure bar. Implicitly, the opinion hints quietly that the relator's allegations are already a matter of public knowledge: "serious questions," notes the court, "have been publicly raised about whether some for-profit educational institutions have violated the incentive compensation provisions of the HEA," allegations that are "well within the public domain."[50] Yet these public disclosures did not defeat the relator's claim.[51] The Seventh Circuit reaches this conclusion, and undercuts the idea of an industry-wide public disclosure bar, without great fanfare; it quietly builds upon *Baltazar*'s determination that industry-wide allegations do not "block[] qui tam litigation against every member of the entire industry."[52] Along the way, however, the court's decision articulates a general test for when a relator's suit may survive in these situations, answers some important questions about FCA public disclosure, and makes some important choices about the policy rationales underlying the industry-wide public disclosure bar.

How, then, does the Seventh Circuit work through the questions of public disclosure and industry-wide improprieties? The court begins with the obvious first question: "whether Leveski's allegations are 'substantially similar to publicly disclosed allegations.'"[53] If not, then Leveski is clear to bring her claim free from the statutory bar.[54] Unlike other federal courts, however, which consider the industry-wide public disclosure bar a *separate* restriction apart from the substantially similar question,[55] the Seventh Circuit builds its consideration of industry-wide disclosure *into* the question itself. The substantially similar inquiry therefore branches into two prongs: whether the relator's allegations are similar to previous allegations against the particular

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48. *See, e.g.*, *In re* Natural Gas Royalties Qui Tam Litig., 562 F.3d 1032, 1042-43 (10th Cir. 2009) (dictum); United States v. Alcan Elec. & Eng'g, Inc., 197 F.3d 1014, 1019 (9th Cir. 1999) (dictum); United States *ex rel*. Findley v. FPC-Boron Emps.' Club, 105 F.3d 675, 687 (D.C. Cir. 1997) (dictum).

49. *See* United States *ex rel*. Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933, 933 (7th Cir. 2012); United States *ex rel*. Baltazar v. Warden, 635 F.3d 866, 866 (7th Cir. 2011); *Glaser*, 570 F.3d at 907.

50. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 834 (7th Cir. 2013) (citation omitted).

51. *Id*.

52. *Baltazar*, 635 F.3d at 868.

53. *Leveski*, 719 F.3d at 829 (quoting *Glaser v. Wound Care Consultants, Inc*., 570 F.3d 907, 920 (7th Cir. 2009)).

54. *Id*.

55. *See* Order Granting Defs.' Mots. To Dismiss at 9, United States *ex rel*. Lee v. Corinthian Colls., No. 2:07-cv-01984-PSG-MAN (C.D. Cal. Mar. 15, 2013), ECF No. 224.

defendant,[56] and whether the relator's allegations are similar to previous allegations against the defendant's industry on the whole.[57]

Without knowing what it means for allegations to be 'substantially similar,' however, the Seventh Circuit's helpful re-articulation is not of particularly great use. And, what's more, there is little semblance of agreement on this point among the various federal courts.[58] The Seventh Circuit, however, has begun to tease out a cognizable definition of 'substantially similar' in a string of recent case law that lands firmly in *Leveski*. In a 2012 case, the court determined that a relator's allegations must *not* be viewed "at the highest level of generality . . . in order to wipe out *qui tam* suits that rest on genuinely new and *material* information,"[59] a view that the *Leveski* court cites verbatim in its opinion.[60] In the abstract, this provides a helpful judicial philosophy, but it then prompts the question of what 'material' information is. The court provides some answers in noting that material information includes "vital facts," often in the form of "relevant names, meetings, and other details" to the proceedings, but need not allege an entirely new scheme of fraudulent behavior.[61] In fact, information that adds more nuance or sophistication to an already publicly known scheme is sufficient to pass the public disclosure bar.[62]

What, then, are the limits of material information? As the court notes, information that merely "add[s] a few allegations" or simply "added a few examples from [the relator's] own personal experience" on the job are insufficient to pass the industry-wide public disclosure bar.[63] This limitation is fairly straightforward when dealing with prior public disclosures against the same defendant: if a prior suit made clear that a for-profit college paid recruiters on incentives, and all a subsequent relator does is point out some specific instances of this misconduct, then that qui tam suit is barred. The industry-wide public disclosure question is a bit more complex. From *Leveski*, the result is probably the following in industries subject to widespread allegations of impropriety: a relator must either add greater nuance or complexity to the existing alleged scheme, or point out specific examples—in the form of actors, instances, new "tactics," and evidence—of that realized impropriety by her employer.[64]

The interesting aspect of the Seventh Circuit's decision is that it seems to

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56. *Leveski*, 719 F.3d at 829.

57. *Id*. at 831-34 (discussing the industry-wide public disclosure bar in the context of the substantially similar question).

58. *See supra* notes 21-23.

59. United States *ex rel*. Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933, 936 (7th Cir. 2012) (emphasis added).

60. *Leveski*, 719 F.3d at 831. The *Leveski* court reiterates its opposition to "the highest level of generality" on two other occasions in its opinion. *Id*. at 832.

61. *Id*. at 832; *see also Baltazar*, 635 F.3d at 869.

62. *Leveski*, 719 F.3d at 832; *Goldberg*, 680 F.3d at 935.

63. *Leveski*, 719 F.3d at 833.

64. *Id*.

utterly disregard discussions of the narrowness and centrality of the industry in question, building upon dicta from *Baltazar*.[65] The court makes this quite clear in noting that so long as "new facts and new details [are added] to . . . general knowledge that were not previously in the public domain," it frankly does not matter if the industry in question is narrow, centralized, and under suspicion.[66] Resultantly, the Seventh Circuit has made the industry-wide public disclosure bar less about the ability of the government to bring suit and more about the legitimacy of the relator and her allegations. The target of the bar is implicitly no longer duplicitous suits but instead "re-package[d]" suits and mercenary attorneys seeking out token relators.[67]

III. CAUSE FOR CELEBRATION, AND CAUTION

To borrow from another writer: if you know the position a person takes on FCA qui tam claims, you can determine his whole philosophy on litigation.[68] How one feels about the appropriate expansiveness of the public disclosure bar is shibboleth to how he or she feels about the balance and tension between the accessibility of courts and the overproliferation of litigation, between informed whistleblowers and opportunistic attorneys. The following will discuss why the policy rationales underlying the Seventh Circuit's decision are cause for celebration in the short term; it will also, however, identify how the weakening of the industry-wide public disclosure bar may work counter to recent statutory revisions despite sharing their spirit.

A. Celebration: Administrability and Access

All else being held constant,[69] the end of industry-wide public disclosure bar analysis should be welcomed. First, it rids federal courts of the indecipherable patchwork of questions required of an absolute industry-wide bar. Under the old regime, courts unsuccessfully tried to consistently determine what constituted a narrow industry, relying upon the size of the industry, the breadth of previous disclosures, and the centralized nature of the industry. Using a series of sliding scales to craft an absolute bar does not make a good deal of sense. Moreover, the approach adopted by some federal courts that tied the industry-wide public disclosure bar to whether the government was on notice and enabled to investigate and bring further FCA actions suffered

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65. The pertinent contention of the *Baltazar* decision was to validate the proposition that "reports documenting a significant rate of false claims by an industry as a whole," without specific instances or attributions, "do not prevent a *qui tam* suit against any particular member of that industry." 635 F.3d at 868.

66. *Leveski*, 719 F.3d at 834.

67. *Id.* at 833.

68. DAVID FOSTER WALLACE, THE PALE KING 140 (Large print ed., 2011) (describing the same phenomenon exhibited by a person's view of the tax code).

69. This, as explained below, is not actually the case.

from two problems: it required courts to guess in hindsight the investigative capabilities of the government, and it severed a relator's litigation status from the details of her allegations. A particularly weak relator claim could proceed if the government was inactive in investigating that industry, and a strong relator claim could fail if the government was more vigorous.

The methodology identified in *Leveski* simplifies this inquiry. This approach dispenses with the messier questions of the public disclosure bar as applied to an entire industry, making the inquiry quite simple: does the relator bring forth a unique and helpful set of allegations that would lead to a previously unattainable FCA claim. Moreover, it places the onus on the relator, not on the status of government investigation, and shifts the focus back to where it belongs: the original source bar. The *Leveski* court indicates this clearly, noting that "it is not appropriate to ask whether Leveski . . . was the first person to bring HEA violations by for-profit educational institutions to the public's attention. Rather, it is appropriate to ask whether Leveski is the original source of the specific allegations in her complaint."[70] This reframing of the question is particularly helpful because it takes us back to the root of the public disclosure bar: to cut down on *parasitic* lawsuits and "opportunistic plaintiffs who have no significant information to contribute *of their own*."[71] The industry-wide public disclosure bar made the inquiry more about cutting out useless and superfluous suits; if a relator could prove that she was the original source of the details and allegations, then her case should be allowed to proceed to the merits, where a weak case could be sussed out. Moving that inquiry to the jurisdictional phase of litigation only complicated the inquiry.

Second, the industry-wide public disclosure bar assumes that any legitimate relator should have a degree of legal sophistication that strains credulity. It is certainly true that the FCA qui tam provisions should guard against mercenary relators attorneys who recruit token relators to make accusations against their employers. This, after all, is a common phenomenon in the for-profit education industry, and deeply concerned the *Leveski* court in its analysis.[72] But many potential relators might not know an FCA violation when they see one; they only learn that they can bring suit after reading about a similar case in the papers or being contacted by attorneys specializing in these types of cases.

The danger of an industry-wide public disclosure bar is that it neglects the

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70. *Leveski*, 719 F.3d at 836.

71. Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel*. Wilson, 559 U.S. 280, 294 (2010) (emphasis added) (quoting United States *ex rel*. Springfield Terminal R. Co. v. Quinn, 14 F.3d 645, 649 (C.A.D.C. 1994)); *see also* Wang v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992) ("[T]here is little point in rewarding a [whistleblower's] second toot."); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1274 (2012) ("The goal of [FCA] . . . provisions is to filter out . . . qui tam suits that . . . merely piggyback on existing public enforcement efforts.").

72. *See Leveski*, 719 F.3d at 833.

important signalizing function of a qui tam suit: one very public and successful suit by a relator can cause another potential relator to see similar improprieties from his or her position. Leveski, after all, did not know that she had an actionable claim until she came across both an aggressive attorney and the details of a similar, previous case.[73] A parasitic lawsuit is one that merely piggybacks on previous facts and allegations, not one that uses the framework of previous successful suits as a vehicle for advancing a relator's unique facts and allegations. Vigilance against a mere repetition of facts by a relator is still required, but there are strong reasons to think that an industry-wide public disclosure bar goes too far and does not recognize the relative legal inexperience of whistleblowers and relators.

Finally, the industry-wide public disclosure bar creates an incentive for relators to race to the courthouse to file massive, industry-wide lawsuits with multiple defendants. If a few lawsuits alleging a particular FCA violation in an industry can bar further suits, then plaintiffs are more likely to try to capture an entire industry in litigation as early as possible to ensure that they are not shut out in the cold. The result of this phenomenon is a likely increase in frivolous lawsuits—the larger the net thrown out, the more likely a bad case gets caught in the net—and the inappropriate use of private plaintiffs as regulatory mechanisms to check the standards of entire industries.[74]

B. Caution: One Hand, Ignorant of the Other

The Seventh Circuit makes clear in *Leveski* that its intentions are to open the door for relators to make their full cases before a trier of fact without the undue hindrance of procedural checkpoints.[75] This priority is certainly parallel to Congress' view of the FCA: the revisions to the FCA language enacted through the ACA were specifically "calculated to increase whistleblower litigation" and crack the courthouse doors a little wider.[76]

In the abstract, the aim of the Seventh Circuit and Congress to expand relator access to court seems admirable. However, the expansion of access has its costs, and moreover, the move to undercut the industry-wide public disclosure bar may actually work against the aims of the FCA revisions in the ACA.

As an initial matter, it is clear that there is no shortage of FCA qui tam

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73. *See id*. at 832.

74. *See generally* David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES IN LAW (forthcoming 2014).

75. *See Leveski*, 719 F.3d at 835 ("[W]e do not necessarily imply that Leveski has a winning case. . . . [U]ltimately, it is up to her to convince a trier of fact that her allegations are true.").

76. Greenberg Traurig, LLP, *Health Reform Legislation Provisions Regarding Fraud and Abuse*, HEALTH & FDA BUS. (Apr. 2010), http://www.ahcancal.org/advocacy/Documents/GTAlertHRRegardingFraudAbuse.pdf.

suits; much ink has been spilled, quite persuasively, to demonstrate that there are already thousands of frivolous qui tam suits filed every year.[77] [And the numerosity of such frivolous suits is not without a price. FCA litigation is one of the fastest growing areas of federal litigation,[78] consuming an ever-increasing amount of legal and judicial resources.[79] Moreover, extensive qui tam litigation causes targeted and often innocent companies to expend millions in legal costs to defend themselves against relator suits.[80]

Why, given this context, should we be particularly worried about the death knell of the industry-wide public disclosure bar? In short, it represents a strange instance in which the legislative and judicial branches have simultaneously weakened different provisions of the FCA qui tam code in opposition to one another, opening the door to a potential flood of qui tam litigation. The federal courts, and especially the Seventh Circuit, are like John Adams ironically murmuring, "Thomas Jefferson survives" on his deathbed. They pin their hopes of turning back frivolous suits on other provisions that have already been killed off by Congress.

I mentioned earlier that the Seventh Circuit abrogated the power of the industry-wide public disclosure bar partly because it relied upon the strong backstop of the original source provision: that whether or not Leveski based her allegations upon a prior public disclosure, the "many pieces of evidence" that she provided the court "could have only come from her."[81] This, argued the court, was the prime protection against Leveski being "fed this evidence" by her attorney or by the industry-wide allegations of fraud.[82] The industry-wide public disclosure bar served a similar function, in that it tried to determine whether a suit was parasitic through a top-down approach. If the information was generally known and everyone was on notice, then it was reasonable to assume that a relator could not contribute anything material and from direct knowledge. The Seventh Circuit transitioned to a bottom-up approach,

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77. Alexion, *supra* note 17, at 404-05 ("Evidence of parasitic *qui tam* actions is alarming."); *see also* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out of Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1264-65 (2008); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 971 (2007) ("Data on the disposition of false claims actions . . . indicate that the number of frivolous suits is high.").

78. In 2010, nearly 600 new qui tam actions were filed, the highest yearly total in over two decades. DEP'T OF JUSTICE, *Fraud Statistics Overview* (Dec. 23, 2013, 2:42 PM), www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

79. *See* Marc S. Raspanti & Meredith S. Auten, *Why is Qui Tam Litigation Often So Difficult to Resolve?*, 15 AHLA CONNECTIONS, Sept. 2011, at 23, http://www.falseclaimsact.com/wp-content/uploads/2013/02/feature_sept20111.pdf.

80. *See* Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 297 (2007) ("[T]he relator has neither an ethical nor financial interest compelling it to consider the impact of frivolously imposing defense costs on target companies.").

81. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 836 (7th Cir. 2013).

82. *Id*.

querying whether a relator actually is legitimate regardless of whether or not a reasonable relator or government agent would be on alert to investigate for improprieties in the industry.

Here is the rub: while the Seventh Circuit has moved the emphasis onto the original source doctrine and whether Leveski had "direct and independent knowledge,"[83] Congress through the ACA has literally blacked out that exact restriction. The pre-2010 FCA regime required that if a public disclosure had occurred, a relator had to establish that she was an original source by demonstrating "direct and independent knowledge of the information on which the allegations are based."[84] This provision was construed narrowly[85] to limit relators to only those who had firsthand knowledge or observation of fraud.[86] However, the ACA "wholly deleted"[87] the requirement that an original source have "direct and independent knowledge."[88] This was not uncontroversial: the Department of Justice expressed grave concerns with this amendment, contending that relators with no firsthand knowledge—copying that which was handed to them either from the public domain or from a mercenary attorney—would not be barred under the FCA qui tam provisions.[89] As one commentator has pointed out, a relator now "can learn of the fraud second- or third-hand from any source whatsoever, as long as . . . they did not learn of the fraud from the public disclosure itself."[90] Such second-hand sources undoubtedly include the brazen mercenary attorneys that so preoccupied the Seventh Circuit's jurisprudence.

A close reader will point out that the Seventh Circuit's decisions discussed here all dealt with pre-ACA False Claims Act language, when the original source doctrine was far more robust. I do not deny this, but I also do not think this is as important as it may at first seem. The industry-wide public disclosure bar emanates from the phrase "based upon [a] public disclosure," which has long been interpreted by the Seventh Circuit to mean, "substantially similar to publicly disclosed allegations."[91] As the *Leveski* court explicitly admits, the post-ACA language simply codified the Seventh Circuit's pre-ACA understanding of this phrase: the court undercuts the industry-wide application

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83. *Id*. at 837.

84. 31 U.S.C. § 3730(e)(4)(B) (1994).

85. *Id*. (citing United States *ex rel*. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991)).

86. *See, e.g*., United States *ex rel*. Paranich v. Sorgnard, 396 F.3d 326, 335-36 (3d Cir. 2005) (determining that direct knowledge meant immediate knowledge, like that "seen with the relator's own eyes").

87. Cohen, *supra* note 9, at 95.

88. 31 U.S.C. § 3730(e)(4)(B) (2010).

89. Alexion, *supra* note 17, at 401 (citing H.R. REP. NO. 111-97, 32 (2009)).

90. Cohen, *supra* note 9, at 96.

91. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 828 (7th Cir. 2013) (alteration in original).

of the public disclosure bar in both pre- and post-ACA jurisprudence.[92] On multiple occasions, the Seventh Circuit in *Leveski* observes that Leveski should not be barred from bringing her case because it was she, and not her attorney, that provided the specific details in her allegations. It is this fact that gives the court the comfort to set aside the industry-wide bar, "the same reasons" that lead the court to find both that Leveski was an original source and that she survives the disclosure bar.[93] Yet this very thing is no longer important under the ACA: Leveski need not have any direct knowledge of a detail in her allegations, so long as those details "materially add[] to" what is already publicly disclosed.[94]

I am not suggesting a parade of horribles, replete with fraud-chasing attorneys and tokenized relators. After all, a relator will still need to plead his allegations of fraud with particularity pursuant to Rule 9(b).[95] Moreover, the materiality requirement means that at some point, someone—be it a relator or attorney—is going to have to add in some detailed information. What is concerning, however, is that the public disclosure and original source provisions are becoming blurred and used as backstops for one another. If the industry-wide bar is an unworkable system, then it rightly deserves to go. But the court cannot justify this partly on the basis of the strength of the original source requirement, especially when the court is fully aware both that that particular original source requirement is gone in the new statutory language, and that the court fully anticipates that its interpretation survives under the new statutory language.

CONCLUSION

The federal courts may be called upon in the coming months to determine whether the Seventh Circuit was sound in its analysis in *Leveski*. In 2013, the Central District of California determined, citing to *Lopez* and *Schultz*, that the for-profit education industry was sufficiently narrow and corrupted to warrant an implicit industry-wide public disclosure bar against allegations of fraudulent reporting of recruiter payment.[96] The relators in that case—*United States ex rel. Lee v. Corinthian Colleges*—have appealed the matter to the Ninth Circuit, contending that their allegations are not, in fact, substantially similar to other public disclosures within the industry.[97] The *Leveski* decision was released

92. *Id.* at 828 n.1.

93. *Id.* at 836.

94. It is on this last restriction that some commentators have pinned their last hope of maintaining the proper balance of qui tam litigation. *See* Alexion, *supra* note 17, at 398; *see also* Cohen, *supra* note 9, at 101-02.

95. FED R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

96. Order Granting Defs.' Mots. To Dismiss at 9, United States *ex rel.* Lee v. Corinthian Colls., No. 2:07-cv-01984-PSG-MAN (C.D. Cal. Mar. 15, 2013), ECF No. 224.

97. Lance Duroni, *Corinthian Colleges Workers Ask 9th Circ. To Salvage FCA Suit*,

after the district court's order was reached in *Corinthian*, so a potential Ninth Circuit decision would be the first to consider the influence of *Leveski* beyond the Seventh Circuit.[98]

A determination by the Ninth Circuit presents an enticing opportunity for both an expanded adoption of *Leveski*'s treatment of an industry-wide application of the public disclosure bar as well as a more prudential understanding of its dangers in light of the ACA revisions. An ideal decision might begin by working through the relators' allegations as *Leveski* does: from the bottom up, judging the materiality of the allegations and their similarity to actual allegations, rather than opining on whether or not the for-profit education industry is rotten to the core. But such a decision might also recognize that its interpretation is tied to the pre-ACA language and the existence of a robust original source provision, and make clear that it offers no dispositive comments on post-ACA language. Maintaining the "golden mean"[99] of whistleblower access to court means viewing all of the novel provisions of the FCA qui tam code in concert. The public disclosure bar's application to an entire industry is a confounding vestige, constructed to patch holes in the pre-ACA language; its destruction, however, should be confined to its statutory genesis. Building a new FCA jurisprudence under the ACA language must be done on new ground, free from the debris of what came before.

LAW360 (Apr. 26, 2013), http://www.law360.com/articles/436466/corinthian-colleges-workers-ask-9th-circ-to-salvage-fca-suit. In a telling move, the United States filed an amicus brief with the Ninth Circuit solely to contest the idea and application of an industry-wide public disclosure bar to *Lee*. *Recent Developments Related to Litigation Involving the Education Sector*, GIBSON DUNN, Jan. 30, 2014, http://www.gibsondunn.com/publications/pages/Recent-Developments-Related-to-Litigation-Involving-the-Education-Sector(January-2014).aspx.

98. The *Leveski* decision was reached on July 8, 2013.

99. United States *ex rel*. Findley v. FPC-Boron Emps.' Club, 105 F.3d 675, 680 (D.C. Cir. 1997).