IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *ex rel.* CAUSE OF ACTION,	)	
Plaintiff-Relator,	)	Case No.: 12-C-9673
v.	)	Hon. Robert M. Dow, Jr.
CHICAGO TRANSIT AUTHORITY,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF CASES ii

INTRODUCTION 1

FACTS 1

STANDARD OF REVIEW 6

ARGUMENT 7

I. THERE HAS BEEN NO PUBLIC DISCLOSURE UNDER THE 2010 FCA. 7

A. The Public Disclosure Bar, As Amended By PPACA, Applies Retroactively Because, Under *Landgraf*, It Evinces a Policy Change. 8

B. There Has Been No Public Disclosure, As Contemplated By The PPACA-Amended FCA. 12

C. The Public Disclosure Bar, As Amended By PPACA, Is Not Jurisdictional And Does Not Require The Court To Dismiss CoA's Suit. 14

II. IN THE ALTERNATIVE, IF THE 1986 VERSION OF THE PUBLIC DISCLOSURE BAR APPLIES, PUBLIC DISCLOSURE WAS INEFFECTIVE. 15

A. Granting CTA's Motion Will Lead To An Absurd Result. 16

B. An Effective Disclosure Requirement Is An Appropriate Alternative Interpretation That Is Consistent With The Public Policy Goals That Animate The FCA. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) 9, 13

Collins v. Youngblood, 497 U.S. 37 (1990) 10

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 9, 13

Craig v. Ontario Corp., 543 F.3d 872 (7th Cir. 2008) 6

Crawford v. United States, 796 F.2d 924 (7th Cir. 1986) 6

Faiz-Mohammad v. Ashcroft, 395 F.3d 799 (7th Cir. 2005) 8

Glaser v. Wound Care Consultants, Inc., 570 F.3d 907 (7th Cir. 2009) 12

Grafon Corp. v. Hausermann, 602 F.2d 781 (7th Cir. 1979). 6

Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280 (2010) 9, 11, 12, 15, 18

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 16

Hallowell v. Commons, Acting Indian Agent, 239 U.S. 506 (1916) 11

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 10, 12

Labojewski v. Gonzales, 407 F.3d 814 (7th Cir. 2005) 8

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 8, 9, 10, 11

Leveski v. ITT Educ. Servs., 719 F.3d 818 (7th Cir. 2013) 6, 11

Martin v. Hadix, 527 U.S. 343 (1999) 8, 11

Republic Nat'l Bank of Miami v. United States, 506 U.S. 80 (1992) 11

Royal Towing, Inc. v. City of Harvey, 350 F. Supp. 2d 750 (N.D. Ill. 2004) 6

Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885 (2011) 12

Transit Express, Inc. v. Ettinger, 246 F.3d 1018 (7th Cir. 2001) 6

United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942 (7th Cir. 2003) 6

United States ex rel. Fallon v. Accudyne Corp., 97 F.3d 937 (7th Cir. 1996). 14

United States ex rel. Feingold v. AdminaStar Fed., Inc., 324 F.3d 492 (7th Cir. 2003) 11, 14

United States ex rel. Garbe v. Kmart Corp., 968 F. Supp. 2d 978 (S.D. Ill. 2013)................ 11, 14

United States ex rel. Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933 (7th Cir. 2012)............... 11

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).. 18

United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180 (10th Cir. 2008) 15

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) 17

United States ex rel. Stone v. OmniCare, Inc., No. 09-C-4319, 2011 U.S. Dist. LEXIS 73123 (N.D. Ill. July 7, 2011) 8, 11

United States v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999)... 13

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 9, 13

Statutes

31 U.S.C. § 3729.. 5, 7, 18

31 U.S.C. § 3730(e)(4)..6, 8-15

49 U.S.C. § 5307... 2

49 U.S.C. § 5335(b) 2

49 U.S.C. § 5336(a)(2)... 2, 3

49 U.S.C. § 5336(b) 3

49 U.S.C. § 5336(c)(1)(B)(i).. 2

49 U.S.C. § 5336(c)(2).. 3

False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986)................. 18

Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009)....... 19

Informers Act, Pub. L. No. 213, 57 Stat. 608 (1943).. 18

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)..7-15

Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983).......... 3

Rules

Fed. R. Civ. P. 12(b)(1) 1, 6, 15

Fed. R. Civ. P. 12(b)(6) 6, 15

Regulations

49 C.F.R. § 630.3(b) 3

Congressional Reports

S. Rep. No. 111-10 (Mar. 29, 2009). 19

S. Rep. No. 99-345 (July 28, 1986) 18

Other Authorities

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Editorial, *White House Wealth: President Obama's Team Virtually All Chicago Millionaires*, Chi. Tribune (Apr. 9, 2009), http://articles.chicagotribune/2009-04-09/news/0904080851_1_clinton-white-house-investment-private-sector 17

Fed. Transit Admin., 2006 Urbanized Area Reporting Manual, Glossary (2006) 3

J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539 (2000) 17

Letter from Peter Rogoff, Fed. Transit Admin., U.S. Dep't of Transp., to Kevin O'Malley, Gen. Manager, Chi. Transit Auth. (Apr. 27, 2012) 5

Lynn Sweet, *The Valerie Jarrett Story: Named Senior Obama White House Advisor*, Chi. Sun-Times Blog (Nov. 15, 2008, 12:57 PM), http://blogs.suntimes.com/sweet/2008/11/the_valerie_ jarrett_story_name.html 16, 17

Monica P. Navarro, *A Look at the Constitutional Implications of Retrospective Laws: The Case of the False Claims Act*, 28 Thomas M. Cooley L. Rev. 96 (2011) 17, 18, 19

Robert S. Rivkin, Dep't of Transp., http://www.dot.gov/mission/robert-s-rivkin 16

U.S. Department of Justice, Civil Division, Fraud Statistics Overview (Dec. 23, 2013) 19

What is the NTD Program?, Nat'l Transit Database, Fed. Transit Admin., http://www.ndtprogram/gov/ntdprogram /ntd.htm 2

INTRODUCTION

Defendant Chicago Transit Authority's ("CTA") Motion to Dismiss and accompanying Memorandum of Law in Support of its Fed. R. Civ. P. 12(b)(1) Motion to Dismiss (collectively, "Motion") fundamentally misunderstands Rule 12 and the False Claims Act ("FCA"). ECF No. 42, 45.[1] CTA's analysis is incomplete and incorrect because it fails to address the nonjurisdictional character of the 2010 version of the FCA's public disclosure bar that applies retroactively to the claims in this case. In the alternative, the public disclosure bar has not been triggered under the 1986 statute because any public disclosure of the underlying allegations of this suit was ineffective. For these reasons, and the others articulated below, the Court should deny CTA's Motion.

FACTS

CTA is a municipal corporation operating a public transportation system, including trains and buses, in the city of Chicago, Illinois, and in the surrounding suburbs. Compl. ¶ 1. Plaintiff-Relator Cause of Action Institute ("CoA")[2] is a non-profit, nonpartisan government accountability organization that fights to protect economic opportunity when federal regulations, spending, and cronyism threaten it. *See* Cause of Action, http://www.causeofaction.org (last visited May 19, 2014). CoA uses investigative, legal, and communications tools to educate the American public about the importance of government transparency, efficient and effective government, and the right to live a free and prosperous life without the interference of arbitrary

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[1] CTA filed two apparently identical memoranda in support of its motion to dismiss. ECF Nos. 43, 45. To the extent that the two documents are not identical, Cause of Action responds to the later in time document, ECF No. 45, in this Opposition.

[2] Cause of Action is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. Although CTA suggests that Cause of Action Institute and Cause of Action are two separate entities (Mot. at 1 n.1), they are in fact the same legal entity.

and abusive political power. *About*, Cause of Action, http://www.causeofaction.org/about (last visited May 19, 2014).

Since its inception, CoA has been in communication with Mr. Thomas Rubin. Mr. Rubin was previously retained by the Illinois Auditor General as an independent auditor of the CTA and as a result of communication with him, CoA was alerted to CTA's fraudulent reporting to the National Transit Database ("NTD"), which is the subject of this lawsuit. CoA continues to work with Mr. Rubin in connection with this lawsuit and intends to retain him as an expert witness.

The Federal Transit Administration ("FTA") is an agency within the United States Department of Transportation ("DOT") that administers, *inter alia*, formula grants for transit systems under the Urbanized Area Formula Program ("UAFP"). In general, UAFP provides federal grant monies to fund the capital and operating expenses of transit programs in urbanized areas. 49 U.S.C. § 5307; Compl. ¶ 2. Recipients of these grants are required by statute to submit data regarding their transit systems to NTD and to certify that such information is correct. 49 U.S.C. § 5335(b); *see* Compl. ¶¶ 3-5. There are currently over 660 transit systems that report data to NTD. *See What is the NTD Program?*, Nat'l Transit Database, Fed. Transit Admin., http://www.ndtprogram/gov/ntdprogram /ntd.htm (last visited May 10, 2014). The data reported to NTD is used to apportion over $5 billion each year in grant funds for transit agencies in "urbanized areas." *Id.*

The portion of allocated grant funds that each area with a population greater than 200,000 is entitled to receive depends, in part, on the ratio between its "total bus vehicle revenue miles . . . divided by the total bus vehicle revenue miles attributable to all areas." 49 U.S.C.

§ 5336(c)(1)(B)(i); *see id.* § 5336(a)(2); Compl. ¶ 2.[3] For example, as a result of the total number of Vehicle Revenue Miles ("VRM") reported for buses by all areas in the year 2004, each mile was worth thirty-eight cents ($0.38). Compl. Ex. 3 at 1. Simply put, an area that reports a greater number of VRM drives down the value per mile and receives a greater piece of the "pie" of total amount of grant money allocated on the basis of bus VRM.

FTA defines VRM as "[t]he miles that vehicles are scheduled to or actually travel while in *revenue service*." Fed. Transit Admin., 2006 Urbanized Area Reporting Manual, Glossary 396 (2006) ["NTD Manual Glossary"] (May 20, 2014), *available at* http://www.ntdprogram.gov /ntdprogram /pubs/ARM/2006/pdf/2006_Reporting_Manual_Glossary.pdf (emphasis added).[4] This definition includes layover and recovery time but specifically excludes "Deadhead,"[5] "Operator training," "Vehicle maintenance testing," and "School bus and charter services." "Revenue Service" is defined, in turn, as "[t]he time when a vehicle is available to the general public and there is an expectation of carrying passengers." NTD Manual Glossary at 384; *see* Compl. ¶ 41. Similar to VRM, Revenue Service includes layover and recovery time, but excludes deadhead, operator training, vehicle maintenance testing, and school bus and charter

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[3] The portion of funds to which an area is entitled also depends on such factors as the number of "bus passenger miles," "fixed guideway revenue vehicle miles," and "fixed guideway directional route miles." 49 U.S.C. §§ 5336(b), (c)(2).

[4] NTD regulations incorporate by reference the definitions contained in NTD's reporting manual. 49 C.F.R. § 630.3(b). This definition, along with others used herein, was taken from the 2006 Manual. On knowledge and belief, these definitions have remained materially unchanged since at least 2006, the year of the oldest NTD manual available on its website and, presumably, since the implementation of VRM as a component of the grant formula following the enactment of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 2097-2200 (1983).

[5] "Deadhead miles" are defined as "[t]he miles and hours that a vehicle travels when out of revenue service," including those miles spend "[l]eaving or returning to the garage or yard facility," "[c]hanging routes," and "[w]hen there is no expectation of carrying revenue passengers." NTD Manual Glossary at 352; *see* Compl. ¶ 40. Although the definition of VRM specifically excludes deadhead, there is no requirement that a particular segment of mileage be classified as either VRM or deadhead when it does not fall squarely into either category.

services. Additionally, "Bus" is defined as "[a] transit mode comprised of rubber-tired passenger vehicles *operating on fixed routes and schedules over roadways*." NTD Manual Glossary at 348 (emphasis added). Taken together, these definitions require that for bus mileage to constitute VRM two conditions must exist: (1) the bus must be driven on a fixed route and schedule; and (2) the bus must be available to the public with an expectation of carrying passengers.

During a 2007 audit of CTA, Mr. Rubin concluded that CTA was overreporting bus VRM when making its annual certifications to NTD. Compl. Ex. 3 at 1-2, 23; *see* Compl. ¶¶ 6-9, 37-39. Mr. Rubin's analysis and conclusions were included in a report that he submitted to the Illinois Auditor General. Compl. Ex. 3 at 1; Compl. Ex. 2, ¶ 5; *see* Compl. ¶¶ 42-52. CTA's overreporting of VRM in its NTD certifications resulted in CTA receiving a larger portion of the share of available funds than it was otherwise entitled to receive. Compl. Ex. 3 at 1; *see* Compl. ¶¶ 6-9. Indeed, although Mr. Rubin noted the difficulty in quantifying the monetary effect of CTA's misreporting, he roughly estimated the impact to be "between well over one million to more than five million dollars in excess grant funding allocation" in fiscal year 2006 alone. Compl. Ex. 3 at 1, 23-25. The amounts of excess annual grant funding allocation for previous years as far back as 1982 were "similar or slightly smaller." *Id.*

When CTA certified its VRM data it included miles that were plainly not allowable.[6] Compl. ¶¶ 6-7, 20, 37, 39, 46. Specifically, CTA included miles driven between storage or operating facilities and the beginning or end of scheduled routes or between multiple scheduled routes, despite the fact that these miles were not part of established schedules or routes. Compl. Ex. 3 at 1, 19-21. CTA justified its inclusion of these miles in its VRM data by alleging that

[6] CTA's brief highlights the fact that the Illinois Auditor General suspected that CTA was possibly overreporting its VRM. Mot. at 8.

before, after, and between scheduled routes, its buses bear a sign that reads "In Service" and that there exists a policy of picking up passengers during this time. *Id* at 13, 19-21. Moreover, CTA erroneously reported its VRM knowing that its definition diverted from that required by NTD.[7] Compl. ¶¶ 6, 46, 48, 50.

During the course of his work on the CTA audit, Mr. Rubin informed CTA of its erroneous reporting of VRM. Compl. ¶¶ 44-46; Compl. Ex. 3 at 4. When CTA refused to acknowledge its erroneous reporting, Mr. Rubin prepared a formal report that he submitted to the Illinois Auditor General. Compl. ¶¶ 44-47, 51. The conclusions of this report mirror much of what has been described herein. Yet, the Illinois Auditor General declined to report CTA's overstatements of VRM to DOT, despite Mr. Rubin's explanation that this was required by the Government Accountability Office ("GAO") standards governing the audit of entities receiving federal dollars. Compl. ¶¶ 51-53; Compl. Ex. 3 at 4-5. Accordingly, in 2009, Mr. Rubin independently submitted his report to the DOT Office of Inspector General, as required by GAO's audit standards. Compl. ¶ 54; *see also* Compl. Ex. 3 at 4-5.

On May 8, 2012, CoA filed this *qui tam* action under seal in the United States District Court for the District of Maryland, alleging CTA's violation of the FCA, 31 U.S.C. § 3729 *et seq.* Compl. ¶ 1. CoA previously provided all of the material related to this complaint to the

[7] CTA apparently reasoned that, as a result of its policy of picking up passengers before, after, and between scheduled routes, such miles cannot properly be classified as "deadhead miles," and must therefore automatically be included in VRM. Compl. Ex. 3 at 11-12. However, this position is erroneous and ignores the clear regulatory requirement that bus VRM be connected to a fixed route *and* schedule. Further, CTA erroneously assumed that any mileage not properly classifiable as deadhead must, *ipso facto*, be included as VRM. As a result of its position and erroneous VRM calculation, CTA has reported a higher VRM than it should and has been receiving a greater portion of grant funding than it would otherwise have received. Compl. Ex. 3 at 1; *see* Compl. ¶¶ 6-9. In an April 27, 2012 letter to CTA, DOT required CTA to revise its data respecting "revenue service" for 2011 (the year immediately after the years at issue in this case), for this very same reason—because CTA included within "revenue service" bus miles that were not on published schedules. Letter from Peter Rogoff, Fed. Transit Admin., U.S. Dep't of Transp., to Kevin O'Malley, Gen. Manager, Chi. Transit Auth. (Apr. 27, 2012) [attached as Exhibit 1].

Department of Justice ("DOJ") on March 28, 2013. Compl. Ex. 5. On November 29, 2013, the United States' Motion to Transfer Venue was granted and this action was transferred to the Northern District of Illinois. ECF No. 18. The United States filed a Notice of Election to Decline Intervention on December 18, 2013. ECF No. 27. On January 20, 2014, CTA was served with a summons and a copy of the Complaint. ECF No. 34. CTA now moves for dismissal of this action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Mot. at 1. For the reasons explained below, CTA's motion should denied.

STANDARD OF REVIEW

Jurisdiction is a threshold question. *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986). While the party invoking federal jurisdiction bears the burden of establishing the elements of subject matter jurisdiction, *Craig v. Ontario Corp.*, 543 F.3d 872, 876 (7th Cir. 2008), the precise standard of review under Rule 12(b)(1) depends on the movant's purpose. *See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (*overruled on other grounds*). If a defendant contends that "the allegations of jurisdiction are facially insufficient to show jurisdiction," then the same standard for Rule 12(b)(6) controls.[8] *Royal Towing, Inc. v. City of Harvey*, 350 F. Supp. 2d 750, 752 (N.D. Ill. 2004). Here, CTA has challenged the sufficiency of CoA's complaint—namely, CoA's ability to overcome the public disclosure bar, 31 U.S.C. § 3730(e)(4)—but it has not challenged the truth of the underlying transactions that form the basis of CoA's *qui tam* suit. Accordingly, this Court should adopt the

[8] On the other hand, if a defendant brings a "factual (instead of a facial) challenge to jurisdiction," *Leveski v. ITT Educ. Servs.*, 719 F.3d 818, 828 (7th Cir. 2013), the court is "not bound to accept as true the allegations of the complaint." *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979). Instead, it "may properly look beyond the jurisdictional allegations . . . and view whatever evidence has been submitted on the issue." *Id.*

Rule 12(b)(6) standards and accept CoA's well-pleaded factual allegations and make all reasonable inferences in CoA's favor. *See Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001).

ARGUMENT

In its Motion to Dismiss, CTA inaptly argues that two distinct versions of the FCA apply to CoA's case—the 1986 version applying to CTA's NTD reporting for 2001 through 2008 and the 2010 revisions applying to NTD reporting for 2009 and 2010. Mot. at 4. It further contends that, under either version of the FCA, there is no jurisdiction over CoA's case because the CoA's allegations have already been publicly disclosed and because CoA is not an original source of those allegations. Mot. at 5-13.[9] CTA is incorrect. The Court has jurisdiction over this case because the 2010 version of the FCA applies and there has been no public disclosure under such statute. Alternatively, even if the 1986 version of the FCA applies to a subset of CoA's claims, there has been no public disclosure and there is still jurisdiction over CoA's claims.

I. THERE HAS BEEN NO PUBLIC DISCLOSURE UNDER THE 2010 FCA.

The Court has jurisdiction over CoA's case because the 2010 version of the FCA applies, and there has been no public disclosure for three reasons. First, the statutory changes introduced by the Patient Protection and Affordable Care Act of 2010 ("PPACA") have a permissible *retroactive* effect, and control over all claims in this case. Second, there has been no public

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[9] CTA indicates that CoA "errantly identified May 20, 2009, rather than March 22, 2010, as the effective date of the FCA, as amended by the ACA." Mot. at 5 n.5. To the contrary, CoA correctly identifies May 20, 2009 as the effective date of FCA "as amended by the Fraud Enforcement and Recovery Act of 2009 (FERA)." Compl. ¶¶ 61-62. Moreover, CTA misidentifies the effective date of the Patient Protection and Affordable Care Act of 2010 ("PPACA") as March 22, 2010, rather than March 23, 2010. P.L. 111-148, title X, § 10104(j)(2), 124 Stat. 119 (2010) (codified at 31 U.S.C. § 3729 *et seq.*).

disclosure under the current version of FCA. And third, this result is supported by the fact that PPACA explicitly clarified the nonjurisdictional nature of the public disclosure bar.

A. The Public Disclosure Bar, As Amended By PPACA, Applies Retroactively Because, Under *Landgraf*, It Evinces a Policy Change.

PPACA made slight modifications to the FCA's definition of "public disclosure" and clarified that the FCA's public disclosure bar is not jurisdictional. 31 U.S.C. § 3730(e)(4). The Court should observe that these changes have a *retroactive* effect.[10] In *Landgraf v. USI Film Products*, the Supreme Court established a two-part test to determine whether a particular statute applies retrospectively. 511 U.S. 244, 280 (1994); *see also Labojewski v. Gonzales*, 407 F.3d 814, 818 (7th Cir. 2005). First, "the court must discern whether Congress has spoken to whether the statute should have retroactive effect." *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799, 801-02 & n.3 (7th Cir. 2005) (citing *Landgraf*, 511 U.S. at 257, for the proposition that "the Court's first task is to discern whether the 'statutory text' manifests congressional intent to apply the act retroactively"). This occurs when "Congress has expressly prescribed the statute's [retroactive] reach," *Landgraf*, 511 U.S. at 280, and to the extent that no other explicit constitutional impediments exist. *Id.* at 267-68.

"[I]f Congress has not clearly spoken—if the statute is silent or ambiguous about its retroactive reach," the second part of the *Landgraf* test is triggered. *Labojewski*, 407 F.3d at 818. This second step requires the court to consider "whether the new [statute] attaches new legal consequences to events completed before its enactment." *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999). The "touchstones" for this inquiry are "'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *United States ex rel. Stone v. OmniCare, Inc.*, No. 09-C-

[10] The Court need only determine whether the public disclosure bar, 31 U.S.C. § 3730(e)(4), as amended by the PPACA, is permissibly retroactive. CoA does not argue that all of PPACA's changes to the FCA are retroactive.

4319, 2011 U.S. Dist. LEXIS 73123, at *10 (N.D. Ill. July 7, 2011) (citing *Martin*, 527 U.S. at 357-58). Whenever a new law "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *Landgraf*, 511 U.S. at 280, the default presumption against retroactivity, which is "deeply rooted in our jurisprudence," prevails. *Landgraf*, 511 U.S. at 265.

PPACA "makes no mention of retroactivity." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010). Thus, the Court should examine whether the retroactive effect of PPACA's modification of the public disclosure bar is permissible. The 1986 and 2010 versions of the public disclosure bar prevent most private persons from bringing *qui tam* suits based upon *publicly disclosed* information, however, the definition for *publicly disclosed* is different in each version. Specifically, before the 2010 amendments, the FCA defined public disclosure to include, rather ambiguously, "criminal, civil or administrative hearing[s]," as well as other forms of "reports, hearings, audits, or investigations" without explicit reference to either the Federal government, or state and local authorities. 31 U.S.C. § 3730(e)(4) (2009). As it now reads, the plain language of paragraph (e)(4) restricts publicly disclosed materials to those contained "in a *Federal* criminal, civil or administrative hearing in which the Government or its agent is party[,]" "in a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation[, or]" "from the news media."[11] 31 U.S.C. § 3730(e)(4) (emphasis added). Thus, the scope of what constitutes public disclosure and bars *qui tam* litigation, was *narrowed* by the 2010 revisions.

[11] Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Indeed, when a "statute's language is plain, 'the sole function of the courts' is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). Here, Congress deliberately chose to introduce the term "Federal" in its enumeration of "public disclosure." It also chose to not include non-public disclosures to a competent government. Under the traditional canon of *expressio unius est exclusio alterius*, and

The 2010 version of the FCA's narrower definition of *publicly disclosed* does not impair the rights of those who have defrauded the government; it does not increase the liability of a party that has defrauded the government; and it does not impose any new duties in relation to previous fraudulent transactions. *See Landgraf*, 511 U.S. at 280. This is particularly evident when viewed in contrast to the 1986 amendments to the FCA. Before the 1986 FCA amendments, "once the United States learned of a false claim, *only* the *Government* could assert its rights under the FCA against the false claimant," and *qui tam* litigation was foreclosed.[12] *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948-49 (1997) (emphasis added). After 1986, defendants could no longer hide behind the fact of public disclosure. In a real way, then, the amendments "attach[ed] a new disability, in respect to transactions . . . already past." *Id.* at 948; *see also* Br. for United States as *Amicus Curiae* 14 n.6, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) ("Proof that the government had the information when suit was brought was . . . a jurisdictional defense to an action brought by a qui tam relator." (citation omitted)); *cf. Collins v. Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense" is impermissible as *ex post facto*).

Unlike the 1986 amendments considered in *Hughes Aircraft Co.*, 520 U.S. at 948, which, fundamentally altered the public disclosure bar by abolishing an affirmative defense), PPACA's revisions merely clarify that the public disclosure bar is nonjurisdictional and make minor

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notwithstanding prior case law construing the pre-PPACA public disclosure bar, no disclosure other than those specifically listed should trigger Section 3730(e)(4). *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (*expressio unius* has "force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice" (citation omitted)).

[12] Many of the cases holding that the 2010 FCA revisions are not retroactive rely heavily on the reasoning from *Hughes*. As explained herein, we believe these cases to be poorly reasoned.

modifications to what constitutes a public disclosure.[13] In this sense, PPACA's changes to Section 3730(e)(4) cannot be understood as abolishing affirmative defenses or establishing new causes of action. They are purely *procedural* and simply clarify the nonjurisdictional character of the public disclosure bar.[14] *See Landgraf*, 511 U.S. at 274. In other words, PPACA "evinces a change of policy," *Hallowell v. Commons, Acting Indian Agent*, 239 U.S. 506, 508 (1916), and "speak[s] to the power of the court [to hear certain *qui tam* suits on a discretionary basis] rather than to the rights or obligations" of prospective parties. *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring). This change of policy, which sought to liberalize *qui tam* litigation, was motivated by an entirely "benign and legitimate" purpose. *See Landgraf*, 511 U.S. at 267-68 ("[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactive provisions often serve entirely benign and legitimate purposes . . . .").

The Seventh Circuit has held that the version of Section 3730(e)(4) applicable to any *qui tam* suit is the one in force at the time the underlying events that are the subject of the action transpired, rather than the version in force at the time of filing. *Leveski*, 719 F.3d at 828. Moreover, this circuit has held that the PPACA amendments are not retroactive. *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 934 (7th Cir. 2012) (relying on *Graham County*). This Court should examine whether PPACA's amendments to FCA's public disclosure

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[13] With respect to the 1986 version of the FCA, the Seventh Circuit has "made clear that [Sections] 3730(e)(4)(A) & (B) are matters of substantive law, and not an 'actual jurisdictional bar' as other courts have suggested." *United States ex rel. Garbe v. Kmart Corp.*, 968 F. Supp. 2d 978, 988 (S.D. Ill. 2013) (citing *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 494 (7th Cir. 2003)).

[14] Indeed, "'familiar considerations of fair notice, reasonable reliance, and settled expectations'" are not implicated by the 2010 revisions to the public disclosure bar. *See Stone*, 2011 U.S. Dist. LEXIS 73123, at *10 (citing *Martin*, 527 U.S. at 357-58). For example, under either the 1986 or the 2010 version of the FCA, CTA could not assure itself that it would never be sued for its fraud under the FCA, because, public disclosure or not, an original source could bring a claim against it.

bar are retroactive because this circuit's case law relies on Supreme Court language in *Graham County* that is *dicta*. *See* 559 U.S. at 283 n.1 ("[PPACA] makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates petitioners' claimed defense to a qui tam suit." (citing *Hughes Aircraft Co.*, 520 U.S. at 948 (1997))). [15]

B. There Has Been No Public Disclosure, As Contemplated By The PPACA-Amended FCA.

In *Glaser v. Wound Care Consultants, Inc.*, the Seventh Circuit articulated a three-step inquiry under Section 3730(e)(4) to determine whether it may adjudicate a *qui tam* suit. 570 F.3d 907, 913 (2009). The first step is to "examine[] whether the relator's allegations have been 'publicly disclosed.'"[16] *Id.* If the Court determines that there has not been a public disclosure, the Court need not address *Glaser*'s other two steps.

PPACA modified the public disclosure bar to restrict the "broad sweep" of what constitutes public disclosure. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (citation omitted). Specifically, before the 2010 amendments, the FCA defined public disclosure to include, rather nonspecifically, "criminal, civil or administrative hearing[s]," *as well as other forms* of "reports, hearings, audits, or investigations" without explicit reference to either the Federal government, or state and local authorities. 31 U.S.C.

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[15] Justice Stevens's footnote should be read as *dictum* because the question before the *Graham County* court was whether the word "administrative," as used in the public disclosure bar, applied to state, local, and federal sources. *Id.* While the modifications introduced by PPACA could have influenced the Court's statutory interpretation, the prior version of the public disclosure bar had already been interpreted differently by different circuits, *see id.* at 291 n.10, and contained no textual impediment that required a particular outcome. *See id.* at 303-13 (Sotomayor, J., dissenting) (suggesting that "administrative" excludes state and local disclosures).

[16] To CoA's knowledge, no binding authority exists stating that *Glaser*'s three-part test remains applicable after the 2010 amendments to the FCA. For the purpose of argument, however, CoA assumes, without conceding, that *Glaser*'s general form applies. Still, as explained further herein, the PPACA amendments altered the definition of "public disclosure." The current definition should then be used when applying *Glaser*'s three-step test.

§ 3730(e)(4) (2009). As it now reads, the plain language of paragraph (e)(4) *specifically restricts* publicly disclosed materials, *inter alia*, to those contained: "in a *Federal* criminal, civil or administrative hearing in which the Government or its agent is party"; "in a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation"; or "from the news media."[17] 31 U.S.C. § 3730(e)(4) (emphasis added).

While the Seventh Circuit has opined on the 2010 amendment to Section 3730(e)(4), it is the plain language of the statute that demonstrates congressional intent for the public disclosure bar to be limited to those enumerated items. This approach is consistent with the traditional canon of construction, *expressio unius est exclusio alterius*. This is true notwithstanding CTA's argument that disclosure to a competent government official remains public disclosure under the 2010 revisions.[18] To the contrary, disclosure to a competent government official is not a public disclosure unless there has also been a disclosure consistent with the language of Section 3730(e)(4).

In this case, the underlying allegations were contained in a "twenty-five page technical report prepared by [the performance audit team commissioned by the State of Illinois Auditor General] and Rubin." Compl. ¶ 51. CTA alleges that the information was shared with CTA, the

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[17] Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank*, 503 U.S. at 254. Indeed, when a "statute's language is plain, 'the sole function of the courts' is to enforce it according to its terms." *Ron Pair Enters., Inc.*, 489 U.S. at 241 (citation omitted). In this case, Congress has made a deliberate choice to include certain items and not others in its enumeration of what constitutes a "public disclosure." Under the traditional canon of *expressio unius est exclusio alterius*, and notwithstanding prior case law construing the pre-PPACA public disclosure bar, disclosure to a competent government official that does not otherwise constitute a public disclosure should no longer trigger Section 3730(e)(4). *See Barnhart*, 537 U.S. at 168 (2003) (*expressio unius* has "force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice" (citation omitted)).

[18] CTA assumes this point, without any analysis and relying solely on pre-PPACA cases. Mot. at 9 (citing *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999), for the proposition that disclosure to a "public official responsible for the claim" constitutes public disclosure under the PPACA amendments).

Illinois Auditor General, and ultimately privately shared with DOT. It does not allege that the contents of Mr. Rubin's report were ever disclosed "in a Federal criminal, civil or administrative hearing in which the Government or its agent is party"; "in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation"; or "from the news media." There has, thus, been no public disclosure under the 2010 FCA revisions and CTA's motion should be denied.[19]

C. The Public Disclosure Bar, As Amended By PPACA, Is Not Jurisdictional And Does Not Require The Court To Dismiss CoA's Suit.

In this case, as explained above, there has not yet been a public disclosure under the current version of Section 3730(e)(4). Yet, even if the Court were to hold that there has been a qualifying public disclosure, CTA's motion should be denied, because the public disclosure bar is not jurisdictional.[20] With respect to the 1986 FCA, the Seventh Circuit has "made clear that [Sections] 3730(e)(4)(A) & (B) are matters of substantive law, and not an 'actual jurisdictional bar' as other courts have suggested."[21] *Garbe*, 968 F. Supp. 2d at 988 (citing *Feingold*, 324 F.3d at 494).

Congress removed the 1986-amended phrase of Section 3730(e)(4) of "[n]o court shall have jurisdiction" and replaced it with its PPACA-amended language: "[A] court shall dismiss an action, unless opposed by the Government . . . ." 31 U.S.C. § 3730 (e)(4). Taking this, and

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[19] CTA acknowledges that the 2010 FCA amendments apply to CoA's claims regarding CTA's 2009 and 2010 reports to the NTD.

[20] Interestingly, CTA moved to dismiss only on jurisdictional grounds, rather than alternatively moving to dismiss for failure to state a claim upon which relief can be granted. As discussed herein, if the court determines that the public disclosure bar is nonjurisdictional, that alone is grounds to deny CTA's motion.

[21] Indeed, the public disclosure bar does "not curtail the categories of disputes that may be resolved (a real 'jurisdictional' limit) but instead determines who may speak for the United States on a subject, and who if anyone gets a financial reward." *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940-41 (7th Cir. 1996).

the plain language of the provision into account, this Court should treat Section 3730(e)(4) as nonjurisdictional. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) ("Absent . . . a clear statement [that a rule is jurisdictional], 'courts should treat [the rule] as nonjurisdictional.'" (citation omitted)).

The Court should deny CTA's Motion as a threshold concern because it seeks to dismiss this action for lack of subject matter jurisdiction exclusively, instead of espousing and arguing the standard under Rule 12(b)(6). *See* ECF Nos. 44, 45. Because Section 3730(e)(4) is nonjurisdictional in both the 1986 and 2010 versions of the FCA, CTA should restyle its Motion under Rule 12(b)(6).

II. IN THE ALTERNATIVE, IF THE 1986 VERSION OF THE PUBLIC DISCLOSURE BAR APPLIES, PUBLIC DISCLOSURE WAS INEFFECTIVE.

If this Court should decline to retroactively apply the PPACA-amended 2010 version of the public disclosure bar, it may deny CTA's motion to dismiss by construing an effectiveness requirement from the public disclosure bar by employing the canons of statutory construction. Without *effective* public disclosure—where local, state or federal governments act in good faith upon receiving information that otherwise qualifies as public disclosure—the public disclosure bar is rendered inert.[22] This Court should consider whether there is extrinsic evidence to inform whether public disclosure was rendered ineffective because the government has—at the local, state or federal level—acted in bad faith, either in failing to meaningfully investigate *prima facie*

[22] CTA correctly identifies that existing case law states that under the 1986 version of the FCA "[s]tate or local reports, audits or investigations can trigger the FCA's public disclosure bar." Mot. at 8 (citing *Graham Cnty.*, 559 U.S. at 301); *see United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1184-85 (10th Cir. 2008) (disclosure by a government employee under a duty of confidentiality is not "public disclosure" if the contents of the disclosure are not in the public domain).

indicia of fraud perpetuated against the federal government, or in declining to intervene.[23] The Court's application of an effective public disclosure standard is a reasonable construction of the FCA. If the Court does not apply an effective public disclosure standard, an absurd result will follow. *See generally Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").[24] As elaborated below, the Court should require good faith as a necessary prerequisite to *effective* public disclosure. Where, as here, a plaintiff-relator demonstrates a strong appearance of impropriety or bad faith, the Court should allow the litigation to proceed.

A. Granting CTA's Motion Will Lead To An Absurd Result.

Dismissing this case under Rule 12(b)(1) will lead to an impermissibly absurd result. *See Griffin*, 458 U.S. at 575. In addition to the facts and arguments above, there are other critical facts that create an appearance of impropriety and demonstrate CTA bad faith that CoA discovered through its independent investigative efforts. CoA revealed that CTA's General Counsel from 2001-2004, Robert Rivkin, subsequently served as General Counsel at the U.S. Department of Transportation. *Robert S. Rivkin*, Dep't of Transp., http://www.dot.gov/mission/robert-s-rivkin (last visited May 14, 2014).[25] Moreover, Valerie

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[23] To the extent that the Court determines that there has been a public disclosure under the PPACA amendments, those disclosures were also ineffective.

[24] CTA acknowledges that the 2010 revisions apply, at least, to CoA's claims regarding 2009 and 2010 NTD reporting. Mot. at 5.

[25] According to the website of the U.S. Department of Transportation, Mr. Rivkin still serves as General Counsel. However, this information appears to be out-of-date. Other sources confirm that he now serves as Senior Vice President and Deputy General Counsel of Delta Airlines. *See Delta Names Robert S. Rivkin Senior Vice President, Deputy General Counsel—International and Regulatory Affairs*, Delta Airlines (Apr. 9, 2013), http://news.delta.com/2013-04-09-Delta-Names-Robert-S-Rivkin-Senior-Vice-President-Deputy-General-Counsel-International-and-Regulatory-Affairs.

Jarrett, Chairman of CTA from 1995 to 2003, currently serves as a Senior Advisor to President Obama. Lynn Sweet, *The Valerie Jarrett Story: Named Senior Obama White House Advisor*, Chi. Sun-Times Blog (Nov. 15, 2008, 12:57 PM), http://blogs.suntimes.com/sweet/2008/11/the_ valerie_ jarrett_story_name.html. As late as April of 2009, Ms. Jarrett was still receiving deferred compensation from CTA, which at the time totaled $550,000. Editorial, *White House Wealth: President Obama's Team Virtually All Chicago Millionaires*, Chi. Tribune (Apr. 9, 2009), http://articles.chicagotribune/2009-04-09/news/0904080851_1_clinton-white-house-investment-private-sector. These individuals, who have powerful and influential ties with CTA, could have influenced the Federal government's response to Mr. Rubin's technical report in 2009, Compl. ¶ 54, and/or its decision not to intervene.

Permitting CoA to continue to serve as plaintiff-relator, and to defend the interests of the American people, would advance the purposes of the FCA, and would not be akin to allowing a parasitical plaintiff to proceed opportunistically on publicly disclosed information. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) (expressing the general concern of Congress in avoiding "parasitism" while also "encouraging . . . legitimate citizen enforcement actions"). The alternative here is an absurd result. If this suit is dismissed, CTA could have fraudulently claimed and received $30 to $150 million in taxpayer funds, without repercussion. *See* Compl. Ex. 3 at 1, 23-25.

B. An Effective Disclosure Requirement Is An Appropriate Alternative Interpretation That Is Consistent With The FCA's Public Policy Goals.

The FCA was adopted at the end of the Civil War and in the wake of widespread fraud against the Federal government. J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. Rev. 539, 555 (2000). An essential element of the Act was the inclusion of an old mechanism found at English common law—the *qui tam*

suit—by which private individuals, now known as relators, could pursue private litigation on behalf of the government and the American people. *See* Monica P. Navarro, *A Look at the Constitutional Implications of Retrospective Laws: The Case of the False Claims Act*, 28 Thomas M. Cooley L. Rev. 96, 99 (2011). Further, "[a]s originally enacted, the FCA did not limit the sources from which a relator could acquire the information to bring" his claim. *Graham Cnty.*, 559 U.S. at 293-94 (2010). Instead, a relator could rely on almost any information to establish the essential elements of fraud against the government.

It was not until decades later that Congress—partly in response to the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)—decided to amend the FCA and craft the provision now known as the *public disclosure bar*, which removed federal subject matter jurisdiction over suits "based on evidence or information the Government had when the action was brought." Informers Act, Pub. L. No. 213, 57 Stat. 608, 609 (1943). Yet, this reaction proved to be too much, and was received by Congress as having created too onerous a process for the detection and prosecution of fraud. *See* S. Rep. No. 99-345 (July 28, 1986), at 13 (discussing a report from the National Association of Attorneys General which stated that "to prohibit sovereign states from becoming *qui tam* plaintiffs because the U.S. Government was in possession of information provided to it by the State . . . unnecessarily inhibits the detection and prosecution of fraud on the Government.").

The 1986 amendments to the FCA sought to "correct[] restrictive [court] interpretations" and to make *qui tam* litigation "a more effective weapon against Government fraud." *Id.* at 4; *see generally* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified at 31 U.S.C. §§ 3729-33). The passage of the Fraud Enforcement and Recovery Act of 2009 marked yet another Congressional attempt to strengthen FCA and decrease instances of

fraud against the government in the wake of conservative judicial interpretation. Pub. L. No. 111-21, 123 Stat. 1617 (2009). Specifically, Congress hoped to provide tools for the "detect[ion] and prevent[ion of] fraud related to the Government's ongoing efforts to bail out banks and stimulate the economy." S. Rep. No. 111-10, at 3 (Mar. 29, 2009).

Examining the legislative history and FCA case law demonstrate Congress's increasing liberalization in the face of the judiciary's strict construction of the statute. That Congress has had to revisit the FCA repeatedly, and react to the judiciary so frequently, suggests that courts should adopt a broader interpretive approach to the FCA's public disclosure bar.

FCA is the "the single-most powerful antifraud enforcement tool in the history of the United States." Navarro at 96. Since 1987, recoveries under the Act have totaled nearly $39 billion, of which approximately $27 billion has been obtained vis-à-vis *qui tam* litigation. U.S. Department of Justice, Civil Division, Fraud Statistics Overview (Dec. 23, 2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. If this suit is dismissed, then CTA could potentially have fraudulently claimed and received $30 to $150 million in taxpayer funds without accountability or repercussion. *See* Compl. Ex. 3 at 1, 23-25. This result conflicts with the purpose of FCA. Accordingly, this Court should deny CTA's motion.

CONCLUSION

For the foregoing reasons the Court should deny Defendant's Motion to Dismiss and order Defendant to answer Plaintiff-Relator's Complaint.

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Respectfully submitted,

/s/ Daniel Z. Epstein
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