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

UNITED STATES OF AMERICA, *ex rel*, CAUSE OF ACTION.	)	
Plaintiff,	)	**Case No.: 12 C 9673**
vs.	)	**Judge Robert M. Dow**
CHICAGO TRANSIT AUTHORITY	)	

Defendant.

DEFENDANT CHICAGO TRANSIT AUTHORITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS FED. R. CIV. P. 12(b)(1) MOTION TO DISMISS

The Chicago Transit Authority, by Karen S. Seimetz, General Counsel, respectfully submits this Memorandum of Law in Support of CTA's Motion to Dismiss Plaintiff's Complaint for Damages, Injunctive Relief, and Declaratory Judgment pursuant to Fed. R. Civ. P. 12(b)(1), and states as follows:

I. INTRODUCTION

The Chicago Transit Authority ("CTA") is a municipal corporation that provides public transportation in the City of Chicago and thirty-five surrounding suburbs. On May 8, 2012, an organization called "Cause of Action" and represented by "Cause of Action Institute" filed this *qui tam* action under seal in the United States District Court for the District of Maryland alleging violations of the False Claims Act, 31 U.S.C. § 3729 *et seq*.[1] On November 29, 2013, the United States' Motion to Transfer Venue was granted and this action was transferred to the Northern District of Illinois. Then on December 18, 2013, the United States filed its Notice of Election to

[1] Cause of Action fails to identify what type of legal entity it is or whether it is the same legal entity as Cause of Action Institute. According to the Delaware Department of State, "Cause of Action Institute" was incorporated as a non-profit corporation on July 21, 2011.

Decline Intervention. CTA was served with a summons and a copy of the Complaint on January 20, 2014.

In its Complaint, Cause of Action alleges that between 2001 and 2010, CTA used a definition of bus vehicle revenue miles that was inconsistent with the definition applied by other transit agencies that received federal funds through the United States Department of Transportation ("Department of Transportation") and that was inconsistent with the definition provided by the National Transit Database reporting manuals. Complaint ¶20. During each of those years, the then current CTA President certified various information provided by CTA to the Department of Transportation, Federal Transit Administration ("FTA"), including CTA's bus vehicle revenue miles. Complaint ¶¶ 5, 26-35. The FTA uses a formula that includes vehicle revenue miles, along with bus passenger miles, fixed guide way revenue vehicle miles and fixed guide way route miles, as well as population and population density to calculate federal funding for transit agencies. Complaint ¶ 2.

In 2007, the State of Illinois Office of the Auditor General published an audit that questioned CTA's method of calculating and reporting bus revenue miles to the FTA. Complaint ¶¶ 36-37, Ex. 1. Thomas Rubin was a member of the audit team and personally prepared a twenty-five page technical report wherein he detailed what he considered evidence that CTA was overstating its reported bus vehicle revenue miles to the FTA. Complaint ¶¶ 38-39, 51, Ex. 1. Mr. Rubin presented his findings and technical report to CTA and the Illinois Office of the Auditor General. Complaint ¶ 52, Ex. 1. In addition, Mr. Rubin reported his findings and presented his technical report to the Department of Transportation Office of Inspector General. Complaint ¶ 53, Ex. 1. Cause of Action attached the Auditor General's audit, an affidavit from Mr. Rubin and Mr. Rubin's technical report as exhibits to its Complaint.

This Complaint, however, must be dismissed for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4) as: (1) all of the allegations and transactions underlying the Complaint were publicly disclosed in the 2007 audit and/or when Mr. Rubin presented his findings and technical report to the Illinois Office of the Auditor General and the Department of Transportation Office of Inspector General; and (2) Cause of Action is not an "original source" as defined under the False Claims Act.

II. THE COMPLAINT SHOULD BE DIMSISED FOR LACK OF SUBJECT MATTER JURISDICTION UNDER FED. R. CIV. P. 12(b)(1)

A. The False Claims Act Imposes a Jurisdictional Hurdle That the Relator Must Satisfy In Order to Proceed With His Case.

Jurisdiction is a threshold issue that must be resolved before the merits of the case can be considered. *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 470 (2007).[2] The party invoking federal jurisdiction bears the burden of establishing the elements of subject matter jurisdiction. *INLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995); *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980).

As originally enacted during the Civil War, the False Claims Act ("FCA") did not limit the sources from which a person seeking to bring a *qui tam* action could acquire information about the alleged fraud. *Graham County Soil & Water Conserv. Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 293-94 (2010). Through various amendments, Congress has sought to establish a balance between providing "adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant

[2] A court may dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint alone, but, where necessary, may also consider the complaint supplemented by facts evidenced in the record, or by undisputed facts plus the court's resolution of disputed facts. *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

information to contribute of their own." *Id.* at 294 (internal quotation marks and citations omitted).

As acknowledged in the Complaint, there are two versions of the FCA relevant to this action. The first remained in effect from October 27, 1986 until March 22, 2010. 31 U.S.C. §3729; *see also Leveski v. ITT Educ. Servs.*, 719 F.3d 818, 828 (7th Cir. 2013) (discussing the effective dates of the 1986 amendment to the FCA). Under the 1986 amendment to the FCA, §3730(e)(4) deprives federal courts of jurisdiction over any FCA *qui tam* action which is "based upon public disclosure of allegations or transactions" in federal, state or local audits, investigations, hearings, reports or in the news media (including material on government websites) unless the relator is an "original source" of the information.[3] An "original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

On March 23, 2010, §3730(e)(4) was amended by the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. §18001 *et seq.*, (2010). The 2010 amendment requires dismissal of a relator's FCA action if the complaint's allegations or the transactions it describes are publicly disclosed in a *federal* source (as opposed to state or local) or in the news media (including any kind of governmental or private website), unless relator is an "original source" of the material.[4] An "original source" is defined, in relevant part, as an individual "who has

[3] 31 U.S.C. §3730(e)(4) provided in the 1986 Version: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transaction in a criminal, civil or administrative hearing, in a congressional administrative, or Government Accounting Office (GAO) report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

[4] 31 U.S.C. §3730(e)(4), as amended by the ACA, provides: "The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed – (i) in a Federal criminal, civil, or administrative hearing in which h the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal

knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions[.]"

The ACA amendment is not retroactive. *Graham County*, 559 U.S. at 283, n. 1. In determining whether subject matter jurisdiction exists over the allegations in Cause of Action's Complaint, the Court must examine the conduct alleged in light of the version of §3730(e)(4) that was "in force when the events underlying the suit took place." *Leveski*, 719 F.3d at 828, quoting *United States ex rel. Goldberg v. Rush Univ. Med. Ctr.*, 680 F.3d 933, 934 (7th Cir. 2012). Accordingly, the 1986 version of the FCA applies to all alleged conduct occurring prior to March 22, 2010, and the FCA, as amended by the ACA, applies to conduct occurring on and after March 23, 2010.

Cause of Action claims CTA violated the FCA each time its president certified CTA's revenue bus miles to the FTA for reporting years 2001 through 2010. Complaint ¶¶ 66, 71.[5] As a result, allegations relating to CTA's reporting for years 2001 through 2008 (CTA's 2009 report was not filed until September 14, 2010) are subject to the FCA, as amended in 1986. Reporting for 2009 and 2010 is governed by the 2010 amendment to the FCA. In large part, this Court's analysis will be the same under both versions of the FCA. In order to avoid redundancy, CTA has used headings, where appropriate, to indicate which version of the FCA is applicable in the following discussion.

B. This Court Must Apply a Three-Step Analysis to Determine If Subject Matter Jurisdiction Exists.

The Seventh Circuit explained in *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009), that under §3730(e)(4), the district court must conduct a three-step inquiry to

report, hearing, audit, or investigation; or from the news media, unless the action is brought by the Attorney General or the person brining the information to the Government before filing an action under this section.

[5] Cause of Action errantly identified May 20, 2009, rather than March 22, 2010, as the effective date of the FCA, as amended by the ACA.

determine whether it has jurisdiction to hear a *qui tam* suit under the FCA. The court must determine: (1) whether the relator's allegations have been publicly disclosed; (2) if so, is the lawsuit "based upon" those publicly disclosed allegations; and (3) if it is, is the relator an "original source" of the information on which the lawsuit is based. *Glaser*, 570 F.3d at 913. This analysis is the same for both the 1986 and 2010 amendments.

1. The allegations and transactions underlying the Complaint have been publicly disclosed.

The Supreme Court has held that § 3730(e)(4) should be broadly construed consistent with the scope of the FCA's public disclosure bar. *Schindler Elevator Corp. v. U.S., ex rel. Kirk*, 131 S.Ct. 1885, 1891 (2011) (the sources of public disclosure specified in the statue, especially the inclusion of "news media," suggests that the public disclosure bar on jurisdiction has a "broad sweep"). The function of a public disclosure is to bring to the attention of the relevant authority that there has been a false claim against the government. *U.S. ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003). "Where a public disclosure has occurred, that authority is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose." *Id.*

Consistent with these principles, the Seventh Circuit has held that "[d]isclosure of information to a competent public official about an alleged false claim against the government we hold to be public disclosure within the meaning of §3730(e)(4)." *Glaser*, 570 F.3d at 914 (quoting *U.S. v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) (explaining that "[t]he point of public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large about the dangers of

misappropriation of tax money.").[6] In this case, the Complaint explicitly alleges that disclosure was made to competent public officials.

a. Mr. Rubin's disclosures to the Illinois Office of the Auditor General and the Auditor General's report constituted public disclosures under the 1986 amendment to the FCA.

Cause of Action attached an affidavit and report prepared by Thomas Rubin to its Complaint. The Complaint describes Mr. Rubin's report as "[a] twenty-five page technical report prepared by the team and Rubin described the manner in which CTA had overstated its reported bus vehicle revenue miles." Complaint ¶ 51. In addition, Cause of Action attached an audit of CTA performed by the Illinois Office of Auditor General ("IL-OAG") that was published in March 2007. The allegations of fraud contained in the Complaint are based entirely on the claims contained in Mr. Rubin's affidavit, the technical report and the IL-OAG's audit.

The Complaint alleges that Mr. Rubin, as a member of the audit team, provided copies of the technical report to the IL-OAG. Complaint ¶¶ 52 and 54. This is supported by Mr. Rubin's affidavit, wherein he swore that he presented his technical report to IL-OAG staff during the conduct of the audit. Complaint, Ex. 2, ¶5.

The IL-OAG exists specifically to address the types of fraud alleged in the Complaint. The IL-OAG was created by Article VIII, Section 3 of the Constitution of the State of Illinois. Ill. Const. art. VIII, §3. The Illinois State Auditing Act, 30 ILCS 5/1-1 *et seq*. was enacted to empower and govern the Auditor General under the control and direction of the Illinois General Assembly. 30 ILCS 5/1-2. The Illinois State Auditing Act, among other things, sets objectives for audits. One of the IL-OAG's responsibilities is "auditing compliance with regulations relating to federal awarded expenditures and other governmental financial assistance in

[6] Overruled by *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009), but only to the extent it interpreted the statutory phrase "based upon" more narrowly than in *Glaser*.

conjunction with or as a byproduct of a financial statement audit." 30 ILCS 5/1-13.5(5). Furthermore, the Illinois State Auditing Act specifically gives the Auditor General jurisdiction to audit CTA to "determine whether [CTA is] operating in accordance with all applicable laws and regulations." 30 ILCS 5/3-1.

The IL-OAG has jurisdiction to investigate the allegations contained in the Complaint. In fact, the very allegations contained in the Complaint and technical report were personally taken by Mr. Rubin to the IL-OAG. Mr. Rubin's disclosure to the IL-OAG is enough for this Court to find that the allegations and transactions contained in the Complaint were publicly disclosed prior to the filing of this action, however, there were additional subsequent public disclosures.

State or local reports, audits or investigations can trigger the FCA's public disclosure bar. *Graham Cnty. Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 301 (2010) (reversing a Fourth Circuit holding that the public disclosure bar only applied when the allegations of fraud underlying a relator's complaint have been disclosed by a federal, rather than state or local official). Cause of Action attached a copy of the March 2007 IL-OAG audit to its Complaint. Complaint ¶36, Ex. 1. The audit references the same allegations contained in the Complaint and the technical-report, it just does so in a more measured manner. The audit states:

> Our review raised questions about the accuracy of CTA's reporting of revenue vehicle hours and miles. CTA may be incorrectly reporting some deadhead hours/miles as revenue hours/miles (i.e., miles and hours a vehicle travels when out of revenue service). This clearly is suggested by differences in reported hourly values for CTA and the peer group (Exhibit 3-19). The average vehicle revenue hours as a percent of vehicle hours is 87 percent for the peer group and 99 percent for CTA.
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> Complaint, Ex. 1, pg. ID # 28.

The IL-OAG relied on the same data as Mr. Rubin and had the benefit of Mr. Rubin's report — it simply came to a much different conclusion than the one Cause of Action hopes to

present to this Court. What Cause of Action terms fraud, the IL-OAG saw as possibly inaccurate reporting.

b. Mr. Rubin's subsequent disclosures to the Department of Transportation Office of Inspector General trigger the "public disclosure" bar under both the 1986 and 2010 amendments to the FCA.

In 2009, Mr. Rubin reported his concerns regarding CTA's reporting of bus vehicle revenue miles to the Department of Transportation's Office of Inspector General ("DOT-OIG") and presented the DOT-OIG with a copy of his technical report. Complaint ¶54, Ex. 2 ¶ 8. The Inspector General Act of 1978, as amended, empowers the DOT-OIG to conduct audits and investigations to head off or stop waste, fraud and abuse in departmental programs. *See* generally Pub. L. 110-409. There can be no more direct or comprehensive disclosure of the Complaint's allegations to a competent government official than Mr. Rubin's disclosure to the DOT-OIG.

The IL-OAG and the DOT-OIG represent the public at large and are tasked with preventing the very type of "fraud" alleged by Cause of Action in the Complaint. Even without the publication of the IL-OAG audit or any other public disclosures, Mr. Rubin's dissemination of his opinions and technical report constitute "public disclosure" for purposes of the FCA. "If the disclosure is made, as here, to precisely the public official responsible for the claim, it need not be disclosed to anyone else to be public disclosure within the meaning of the Act." *Bank of Farmington*, 166 F.3d at 861 (comments during a telephone call with a government official responsible for the loan allegedly involved in the misrepresentation was sufficient to establish public disclosure under the FCA).

The Complaint and Mr. Rubin's affidavit allege that Mr. Rubin made both the IL-OAG and the DOT-OIG fully aware of the allegations and transactions underlying this action. As a

result, the Complaint's allegations have been publicly disclosed and the Court must proceed to the next step of its jurisdictional analysis.

2. The allegations in the Complaint are "based upon" the allegations made publicly available by Mr. Rubin and the IL-OAG audit.

A FCA complaint is "based upon" publicly disclosed allegations or transactions when the allegations in the relator's complaint are substantially similar to publicly disclosed allegations or transactions. *Glaser*, 570 F.3d at 920 (finding that relator's complaint was "based upon" a prior agency investigation that involved the same entity and described the same fraudulent conduct). In the present case, Cause of Action's claims are clearly based on the same information that was previously disclosed.

The Complaint's allegations of misreporting and fraud are taken directly from and rely entirely on the allegations in Mr. Rubin's affidavit, his technical report and the IL-OAG audit. The only objective factual information about CTA's reporting in the Complaint that did not come directly from these sources can be found on the National Transit Database website. This includes the dates, miles and person reporting as set forth in paragraphs 26 through 35 of the Complaint. As a result, the allegations in this lawsuit are clearly "based upon" publicly disclosed information and the Court can proceed to the final step of its jurisdictional analysis.

3. Cause of Action is not an "original source" and therefore does not qualify for the original source exception.

a. The 1986 amendment to FCA.

The final jurisdictional inquiry this Court has to make is determining whether Cause of Action is an "original source." Under the 1986 amendment to the FCA, an "original source" "means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before

filing an action under this section which is based on the information." § 3730(e)(4). A relator must carry the burden to prove that: (1) the relator's knowledge is "direct"; (2) the relator's knowledge is "independent"; and (3) the relator must have voluntarily provided the information to the government before filing the action. *Glaser*, 570 F.3d at 921.

Courts have consistently applied the ordinary definition of "direct" when conducting FCA jurisdictional analysis. *Id.* at 917 ("But to avoid the jurisdictional bar at the original-source stage of the jurisdictional inquiry, the relator must *also* show he had 'direct' knowledge of the fraud, a phrase usually interpreted to require the relator to establish that his knowledge of the wrongdoing was based on his own investigative efforts and *not* derived from the knowledge of others."). The Seventh Circuit's explanation of "direct" knowledge in *Glaser* was consistent with other circuits that have examined the meaning of "direct" knowledge. S*ee e.g., U.S. ex rel. Stinson, Lyons, Gerlin, & Bustamante, P.A.I, v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1990) (direct knowledge means "marked by absence of an intervening agency, instrumentality, or influence: immediate,"); *United States ex rel. Findley v. FPC–Boron Employees' Club,* 105 F.3d 675, 690 (D.C.Cir.1997) (direct means "first hand"); *United States ex rel. Wang v. FMC Corp.,* 975 F.2d 1412, 1417 (9th Cir.1992) (direct means "saw with [the relator's] own eyes," and "unmediated by anything but [the relator's] own labor,"; *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.,* 190 F.3d 1156, 1162 (10th Cir.1999) ("[b]y the relator's own efforts, and not by the labors of others, and ... not derivative of the information of others,").

In the present case, Cause of Action's Complaint is not based on its own experiences or labor. It could not have been. Upon information and belief, Cause of Action was not even incorporated until July 21, 2011 — years after Mr. Rubin drafted his technical report and

presented it to both the IL-OAG and DOT-OIG. Cause of Action's information is derivative and duplicative of Mr. Rubin's work and completely dependent on his preexisting and independent agency. Cause of Action cannot show that it has "direct" knowledge, and therefore, it is not an "original source" for purposes of FCA jurisdiction.

In addition to its burden to establish it has direct knowledge, Cause of Action must also prove that its knowledge was independent of the publicly disclosed information. "To establish this element, we have required that he relator be 'someone who would have learned of the allegation or transaction independently of the public disclosure.'" *Glaser*, 570 F.3d at 921 (quoting *Bank of Farmington*, 166 F.3d at 865). The allegations of "fraud" in Cause of Action's Complaint are based on the same technical report and IL-OAG audit that constituted the public disclosures. Based on these facts, there is no way that Cause of Action can establish that this information was acquired independently. For this additional reason, Cause of Action is not an "original source" and its Complaint must be dismissed for lack of subject matter jurisdiction.

b. The 2010 amendment to the FCA.

As discussed above, the FCA's definition of "original source" was amended by the Affordable Care Act. Under the amended version, Cause of Action has the burden of proving that (1) it voluntarily disclosed the information on which the allegations or transactions in the claim are based to the government prior to public disclosure; or (2) it has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions. *See* § 3730(4)(B). Cause of Action does not fit either definition.

Mr. Rubin presented his technical report to the DOT-OIG in 2009. Complaint ¶ 54. Cause of Action did not come into existence until 2011. By the time Cause of Action was incorporated, the allegations and transactions that form the basis of the Complaint had already

been publically disclosed. As a result, Cause of Action cannot meet the first definition of an "original source."

Cause of Action cannot meet the second definition either because its knowledge is not independent of and does not materially add to the publically disclosed allegations or transactions. As stated above, Cause of Action's pleadings are derivative of, duplicative of and based entirely on Mr. Rubin's work. Absent Mr. Rubin's affidavit, technical report and the IL-OIG's audit, Cause of Action's Complaint would not even come close to stating a claim under the FCA. Because its claims are based on publicly disclosed information and it is not an "original source", Cause of Action has failed to establish that this Court has subject matter jurisdiction.

FOR THE FOREGOING REASONS, the Chicago Transit Authority respectfully requests that this Court grant its Motion and dismiss Cause of Action's Complaint for Damages, Injunctive Relief, and Declaratory Judgment pursuant to Fed. R. Civ. P. 12(b)(1), and grant such additional relief as the Court deems just and appropriate

Respectfully submitted,

Dated: March 13, 2014

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