

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Submitted December 10, 2024*

Decided December 13, 2024

BeforeDIANE S. SYKES, *Chief Judge*JOHN Z. LEE, *Circuit Judge*DORIS L. PRYOR, *Circuit Judge*

No. 23-2297

SCOTT RYDIN FOSTER,
*Plaintiff-Appellant,**v.*PHH MORTGAGE, et al.,
*Defendants-Appellees.*Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division.

No. 20-cv-4230

Steven C. Seeger,
*Judge.***ORDER**

Following similar lawsuits, Scott Foster sued nearly a dozen mortgage lenders and servicers under the qui tam provision of the False Claims Act, 31 U.S.C. § 3730(b). Foster alleges that the defendants lied to homeowners: They promised to put loans in forbearance even as they simultaneously foreclosed on the loans, which were backed by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Mortgage Corporation (Freddie Mac).[†] The district judge dismissed the suit. He correctly ruled that the court lacked subject matter jurisdiction because the conduct underlying the allegations of wrongdoing had been publicly disclosed before Foster sued. We thus affirm.

Foster alleges that the scheme to defraud mortgagors ran from January to June 2010. According to the complaint, the defendants falsely promised homeowners that they would put the mortgagors' loans in forbearance, telling them that, to be eligible for forbearance, the homeowners had to stop paying their loans. While the loans were ostensibly placed in forbearance, the defendants simultaneously put the loans on a foreclosure track and eventually declared them delinquent because of nonpayment. The defendants then foreclosed on or short-sold the loans.

The defendants' bait-and-switch scheme—promising forbearance then forcing a foreclosure or short sale—cost the United States tens of thousands of dollars per homeowner because the loans were backed by Fannie Mae and Freddie Mac. Foster learned of this scheme because he is a real estate broker in Illinois who specializes in short sales and was a homeowner himself: He alleges that PHH Mortgage (one of the defendants in this suit) promised him a forbearance in March 2010, but later reneged on the promise and foreclosed on his loan.

In 2020, Foster filed this *qui tam* suit on behalf of the United States, which declined to intervene. *See* 31 U.S.C. § 3730(b)(4)(B). Foster obtained counsel, as is necessary to proceed in the district court in a *qui tam* suit under the False Claims Act, *see Georgakis v. Ill. St. Univ.*, 722 F.3d 1075, 1077 (7th Cir. 2013), and cured defects in his initial complaint. The defendants then moved to dismiss Foster's operative complaint, arguing, among other reasons, that the basis for its allegations had already been publicly disclosed. As proof, they presented federal complaints already filed against the banks, consent judgments involving the defendants, and a federal congressional oversight report. The federal complaints alleged that the defendants lied to consumers when referring loans to foreclosure and simultaneously placed the loans on forbearance and foreclosure tracks, the same "scheme" alleged in Foster's complaint. The district judge dismissed the suit for two reasons, but we need only mention the first. He ruled that the allegations in the complaint had been publicly disclosed before Foster sued, and

[†] Both Fannie Mae and Freddie Mac are federally chartered, privately owned corporations. *Federal National Mortgage Association v. City of Chicago*, 874 F.3d 959, 960 (7th Cir. 2017).

therefore, the court lacked subject-matter jurisdiction. Foster sought leave to file a third amended complaint, but the judge denied the motion, concluding that doing so would be futile.

On appeal, Foster argues that the district judge erred by dismissing the suit. We begin our analysis by noting a threshold issue. After Foster appealed, his counsel withdrew, and we allowed Foster to proceed pro se. The defendants seek dismissal, contending that Foster, who is not an attorney, cannot appeal a qui tam suit pro se. It is true that a plaintiff must have counsel to bring a qui tam suit in the district court. *See Georgakis*, 722 F.3d at 1077. But as we noted in an order earlier in this appeal, we have not yet decided whether an appellant may challenge pro se the dismissal of a qui tam suit when the appellant had counsel in the district court. App. Dkt. 20. We need not decide this issue today because this issue and the district judge's first reason for dismissal—lack of subject-matter jurisdiction—are both non-merits issues, and there is no priority among reasons not to reach the merits of a lawsuit. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

We review decisions about subject-matter jurisdiction de novo and a district judge's findings on underlying jurisdictional facts for clear error. *City of Chicago ex rel. Rosenberg v. Redflex Traffic Sys., Inc.*, 884 F.3d 798, 802 (7th Cir. 2018). And although we typically review the denial of a motion to amend a complaint for an abuse of discretion, "when the basis for denial is futility," as here, we review de novo the legal basis for the futility. *Nowlin v. Pritzker*, 34 F.4th 629, 635 (7th Cir. 2022) (quoting *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Ind.*, 786 F.3d 510, 524 (7th Cir. 2015)).

The substantive principles of the False Claims Act are well settled. First, the Act permits "both the Attorney General and private qui tam relators to recover from persons who make false or fraudulent claims for payment to the United States." *Graham Cnty. Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283 (2010). But the Act also bars "parasitic lawsuits by 'opportunistic plaintiffs who have no significant information to contribute of their own.'" *Bellevue v. Universal Health Servs. of Hartgrove, Inc.*, 867 F.3d 712, 716 (7th Cir. 2017) (quoting *Graham Cnty.*, 559 U.S. at 294). Congress enacted the public-disclosure bar to block suits involving allegations that have already been publicly disclosed, because the government can "vindicate society's interests" without a qui tam suit. *Id.* (citation omitted). In March 2010, Congress amended this bar to remove the phrase "[n]o court shall have jurisdiction over an action under this section" and replaced it with "[t]he court shall dismiss an action or claim under this section." *Id.* at 717 (quoting 31 U.S.C. § 3730(e)(4)(A)). But when, as here, some of the

alleged misconduct occurred pre-amendment, we treat the public-disclosure bar as jurisdictional. *See id.* at 717–18 (applying the pre-amendment version of § 3730(e)(4)(A), when the alleged unlawful conduct spanned both pre- and post-amendment periods).

To determine whether the bar applies, we ask: (1) have the relator’s allegations been publicly disclosed; (2) if so, is the suit “based upon” those allegations; and (3) if it is, was the relator the original source of the information in the suit? *Id.* at 718. The answers to the first two questions are “yes”: The defendants presented uncontested, publicly available information that matches Foster’s allegations and that precedes this suit. Primarily focusing on the third question, Foster insists that he is the “original source” of his suit’s information. He is the original source only if he “has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions” and “voluntarily provided the information to the Government before filing an action.” 31 U.S.C. § 3730(e)(4)(B). If Foster can show he is the original source, then the bar does not block his suit. *See Bellevue*, 867 F.3d at 718.

Foster has not submitted evidence suggesting that he is the original source of the information in his suit or that he gave it to the government before suing. He contends only that he witnessed banks defrauding him and his clients. But he does not argue, or supply evidence (as he must to avoid the bar), that he provided this information to the government before suing, let alone that it materially added to the information already publicly disclosed. He cites a letter he sent to the Federal Housing Finance Agency that described the claims in his suit, but he sent this letter *after* he filed this lawsuit. In addition, his complaint merely alleged the same facts as in previous complaints. Therefore, Foster’s claims are blocked by the public-disclosure bar.

AFFIRMED