EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	MDL No. 1717-JJF
ADVANCED MICRO DEVICES, INC., a Delaware corporation, and AMD INTERNATIONAL SALES & SERVICES, LTD., a Delaware corporation, Plaintiffs, v. INTEL CORPORATION, a Delaware corporation, and INTEL KABUSHIKI KAISHA, a Japanese corporation, Defendants.	C.A. No. 05-441-JJF

SUPPLEMENTAL SUBMISSION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON AMD'S EXPORT COMMERCE CLAIM

Defendant Intel Corp. ("Intel") has moved for dismissal or summary judgment on the "export commerce" claim asserted by plaintiff Advanced Micro Devices, Inc. ("AMD"). AMD's export commerce claim alleges that Intel's anticompetitive conduct artificially suppressed global demand for AMD microprocessors, and that because of the suppressed demand, AMD was ultimately forced to cease microprocessor production at Fab 25 in Austin, Texas, and to shift production entirely overseas. Intel's motion contends that AMD terminated microprocessor production at Fab 25 for three reasons unrelated to Intel's unlawful conduct: (1) Fab 25 was obsolete by 2000; (2) AMD needed to devote Fab 25 exclusively to flash memory production;

and (3) Fab 25 was unnecessary because AMD had or believed it had sufficient foreign microprocessor capacity.

Further, in its reply brief, Intel erroneously asserts that the parties agree that this Court's subject matter jurisdiction turns solely on whether AMD's decision to convert Fab 25 to flash was proximately caused by Intel's unlawful conduct. *See* Intel Rep. Br. 1. AMD never agreed to that proposition, which is flatly incorrect.[1]

AMD has already demonstrated the legal and factual flaws in Intel's position. In particular, AMD has shown that Intel's motion flatly ignores the very different demand environment AMD would have faced if Intel's anticompetitive conduct (conceded by Intel for purposes of its motion) had not artificially suppressed demand for its products. Recent expert discovery sheds further light on AMD's production options during the damages period. An expert report submitted by Daryl Ostrander, Ph.D., analyzes AMD's production capacity against estimates of the additional demand for AMD microprocessors that would have existed in the absence of Intel misconduct (provided by another expert, Dr. Mark Watson), and it supports the inference already created by substantial contemporaneous factual evidence: absent Intel's antitrust violation, AMD would have continued domestic microprocessor production—in Fab 25 or a domestic foundry—because it would have had no other viable production option to meet customer demand. [2] This testimony was not available when the parties completed their briefing on the motion because estimates of additional demand just became available.

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[1] AMD states in its opposition brief that Fab 25 was the only practical choice for considerable capacity expansion due to an agreement imposed by Intel that caps AMD's outsource capacity volume at 20%, *see* AMD Opp. Br. 19 (D.I. 1184), but did not exclude the possibility of producing less than 20% of its volume at a domestic foundry.

[2] A true and correct copy of the Expert Report of Daryl Ostrander, Ph.D. is attached as Exhibit 1. Dr. Ostrander will swear to the contents of his report at either the Court's or Intel's request.

Before retiring in 2008, Dr. Ostrander spent twenty-seven years working in AMD's manufacturing operations. From 2005 to 2008, he was AMD's Senior Vice President of Manufacturing and Technology. In that position, Dr. Ostrander managed AMD's worldwide fab operations in Dresden and Singapore, assembly and test operations in Penang, Singapore, and Suzhou, and technology development operations in New York. For his entire twenty-seven years, Dr. Ostrander was involved in capacity planning, as the executive in charge during his last four years and as a participant during the twenty-two years before that. Based on his expertise concerning AMD's production facilities and capacities, Dr. Ostrander is qualified to testify as to the production options that would have been available to AMD in an environment of significantly increased demand, and to what a reasonable production planner would have done to meet such demand in light of the available options. Dr. Ostrander's specialized testimony would be helpful to a lay juror unfamiliar with microprocessor production and capacity planning.

Dr. Ostrander's expert testimony demonstrates that if AMD had faced substantially increased demand, AMD would have been required to continue production at Fab 25 because of capacity constraints elsewhere, and that none of the three reasons cited by Intel as the basis for ceasing microprocessor production at Fab 25 would have precluded AMD from continuing production in Fab 25 if demand necessitated it. Furthermore, even assuming that Fab 25 was unavailable, Dr. Ostrander concludes that AMD would have continued its export business through a domestic foundry.

1. For purposes of his expert report, Dr. Ostrander was asked to assume that on July 1, 2001, AMD learned of significant market changes that would dramatically increase demand for its microprocessors. He was provided with four possible demand forecasts (from Dr. Watson's report) and asked to prepare capacity and capital expenditures plans for each. Because of Intel's

pending motion, he prepared plans for eight different scenarios: one for each demand forecast both with and without the use of Fab 25 in Austin.

Dr. Ostrander's report shows that without the use of Fab 25, AMD would have been unable to manufacture millions of microprocessors that it otherwise would have sold absent Intel's unlawful conduct. Expert Report of Daryl Ostrander, ¶ 60. Under the different demand forecasts, Dr. Ostrander calculates that AMD would have been unable to support demand for between 6.755 and 11.206 million units without the use of Fab 25. *Id.* According to another expert, Dr. Thomas Lys, this failure would translate to lost profits between $544 million and $1.36 billion. *Id.* Dr. Ostrander's report concludes that given the profits that AMD would have forgone, it is "unfathomable" that AMD would not have used Fab 25 for microprocessor production. *Id.*

2. Dr. Ostrander's report also reviews and rejects each of the three reasons cited by Intel as precluding the continuation of microprocessor production at Fab 25.

a. First, Dr. Ostrander shows that obsolescence would not have rendered Fab 25 unavailable to meet increased demand. His report shows that fab upgrades in the microprocessor industry are necessary and routine, *id.* ¶ 30-32, and that Fab 25 was well-situated in multiple respects for an efficient, cost-effective upgrade if customer demand justified it, *id.* ¶¶ 54, 61, 63-66. Compared to other potential options for meeting increased demand, Dr. Ostrander concludes, continuing production at Fab 25, with necessary and appropriate upgrades, would have been "the clear best choice." *Id.* ¶ 61.

b. Second, Dr. Ostrander's report shows that AMD was neither economically nor technologically committed to using Fab 25 solely for flash production. His report explains that microprocessor production would have been "far more lucrative" than flash production, which

operated on such low margins under AMD's production agreement that it was "essentially a giveaway" to AMD's production partner "so that AMD would not have to carry an unused asset on its books." *Id.* ¶ 57. And as of July 2001, flash was only in "the qualification stage" at Fab 25—flash production had not yet commenced. *Id.* ¶ 55. Moreover, AMD would not have had to reverse its flash decision in order to produce more microprocessors: it could have done both by creating a "hybrid fab." *Id.* ¶¶ 56-58, 61-64. "[E]arning flash profits . . . and using Fab 25 for microprocessor production," Dr. Ostrander concludes, "was never an either/or proposition." *Id.* ¶ 58.

c. Finally, as noted above, Dr. Ostrander demonstrates that if AMD had faced customer demand unconstrained by Intel's unlawful conduct, it simply would not have had the production capacity elsewhere—either in other fabs or through foundry agreements—to meet the increased demand. *Id.* ¶¶ 59-60. Thus, terminating microprocessor production at Fab 25 in the face of increased demand would have cost AMD as much as $1.366 billion in lost profits from customer orders it would have been forced to decline—profits no rational company would forgo "simply to support a flash business that was headed toward commodity prices." *Id.* ¶ 60.

3. Dr. Ostrander's report also shows that if Fab 25 is assumed to be unavailable, AMD would not have simply abandoned its export business in 2001 when faced with increased demand. Rather, according to Dr. Ostrander, AMD would have produced microprocessors in a domestic foundry —IBM—that had the necessary capacity on the appropriate process technologies to produce AMD's microprocessor products. *Id.* ¶ 75-77. Dr. Ostrander explains that among companies that offered foundry services in 2001, IBM "alone had the necessary SOI technology

that AMD planned to use in the manufacture of all [AMD's] K-8 generation products."[3] *Id.* ¶ 76. According to Dr. Ostrander, establishing a foundry relationship with IBM in New York "would have been easier, more productive and would have required fewer resources . . . than an Asian foundry." *Id*. Without Fab 25, Dr. Ostrander concludes that AMD would have produced microprocessors in IBM's New York fab in the face of increased global demand for AMD microprocessors, *id.* ¶ 76-77, but would have experienced significant capacity shortfalls, *id.* ¶ 60.

* * * *

Dr. Ostrander's expert testimony confirms the implausibility of any inference that AMD would have terminated domestic microprocessor production in the face of customer demand unconstrained by Intel's anticompetitive conduct. The opposite is true: because Fab 25 was the best available option for meeting substantially increased demand and AMD's only viable foundry option was in the U.S., AMD thus would have *expanded* domestic production, not ended it. Intel's motion to dismiss or for summary judgment should be denied.

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Dated: September 2, 2009

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[3] Dr. Ostrander also explains that another foundry company—Chartered—acquired IBM's SOI technology in 2006. *Id.* ¶ 81.

EXHIBIT 1

REDACTED IN ENTIRETY

EXHIBIT B

LEXSEE 2009 U.S. DIST. LEXIS 30093

UNITED STATES OF AMERICA, ex rel. JEFFREY D. FELDSTEIN, M.D., Plaintiff/Relator, v. ORGANON, INC., SCHERING-PLOUGH, INC., Defendants.

Civil Action No. 07-CV-2690 (DMC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2009 U.S. Dist. LEXIS 30093

April 6, 2009, Decided
April 7, 2009, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: [*1] For UNITED STATES OF AMERICA, THE, Plaintiff: MARK GRADY, LEAD ATTORNEY, OFFICE OF UNITED STATES ATTORNEY, BOSTON, MA.

For JEFFREY D. FELDSTEIN, Plaintiff: STEVEN I ADLER, LEAD ATTORNEY, COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, PA, HACKENSACK, NJ; CHRISTOPHER P. MASSARO, COLE SCHOTZ MEISEL FORMAN & LEONARD, HACKENSACK, NJ.

For ORGANON, INC., a corporation, SCHERING-PLOUGH, Defendants: MELISSA TONER LOZNER, MICHAEL B. HIMMEL, LEAD ATTORNEYS, LOWENSTEIN SANDLER, P.C., ROSELAND, NJ.

JUDGES: Hon. Dennis M. Cavanaugh, U.S.D.J.

OPINION BY: Dennis M. Cavanaugh

OPINION

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon motions by Defendants, Organon USA Inc. (improperly pleaded as Organon, Inc.) ("Organon") and Schering-Plough Corporation (improperly pleaded as Schering-Plough, Inc.) ("Schering") (collectively "Defendants") to dismiss the Amended Complaint, to supplement the record, and for sanctions. Pursuant to *Fed. R. Civ. P. 78*, no oral argument was heard. After carefully considering the submissions of the parties, and based upon the following, it is the finding of the Court that Defendants' motion to supplement the record is **granted;** Defendants' motion for sanctions is **denied;** and Defendants' motion **[*2]** to dismiss is **granted.**

I. BACKGROUND [1]

1 The facts set-forth in this Opinion are taken from the Parties' respective papers.

A. Factual Background

Plaintiff/Relator, Jeffrey D. Feldstein, M.D.'s ("Relator") *qui tam* action alleges that Organon intentionally withheld information from the FDA when it sought and eventually obtained FDA approval of Raplon(R), a neuromuscular blocking agent. Organon is a pharmaceutical company which engages in the creating, manufacturing, distributing, and marketing of pharmaceuticals throughout the United States and abroad. In 2007, Schering purchased Organon. Raplon(R) was designed to paralyze a patient's throat area to allow the painless insertion of an endotracheal tube into a patient's trachea. An endotracheal tube establishes an airway to facilitate the administration of oxygen and anesthetic

agents to patients during surgical or obstetric procedures. The FDA approved Raplon(R) on August 18, 1999. Soon after Raplon(R) became available, some patients suffered serious and sometimes fatal side effects which met the definition of serous adverse events ("SAE") as set forth in FDA regulations. After these adverse events began to be reported, Organon voluntarily **[*3]** withdrew Raplon(R) from distribution. The withdrawal of Raplon(R) took place on or about March 27, 2001.

On May 31, 2000, Organon hired Relator to serve as Associate Director of Medical Services for Antithrombotics. Relator's duties at Organon included assisting with the launch of a new drug, Arixtra, and developing post-marketing trials and research grants for Arixtra. During his tenure at Organon, Relator discovered that Organon personnel were concealing instances of bleeding associated with Arixtra from the FDA and the medical community. Relator alleges that his supervisor, Dr. Jonathan Deutsch, who was Organon's Director of Hospital Products, attempted to coerce Relator into disseminating information that would conceal the bleeding associated with Arixtra. Relator alleges that he was ultimately terminated because he refused to comply with Dr. Deutsch's demands.

Prior to his termination, Relator voiced his concerns about Arixtra to a colleague, Dr. Daniel Sack, who was Organon's Associate Director of Anesthesiology. During a discussion about Dr. Deutsch, Dr. Sack informed Relator about numerous SAEs and multiple deaths caused by Raplon(R) since its approval. Dr. Sack gave Relator **[*4]** an e-mail which Relator claims indicated that personnel at Organon knew prior to Raplon(R)'s approval by the FDA that Raplon(R) caused SAEs. This e-mail was allegedly prepared by Dr. Deutsch and sent to Organon's Vice President of Medical Services, Dr. Deborah Shapse. The e-mail provides that "at the Dalla meeting [bronchospasm [2]] was heatedly discussed by the investigators, as a potential problem that needed to be addressed prior to [Raplon(R)'s] launch." The e-mail further notes that an Organon employee referred to as Cari is concerned and "that Medical Services needs to have a treatment protocol in place for bronchospasms prior to launch."

2 A bronchospasm is a sudden constriction of the muscles in the walls of the bronchioles.

Based on Dr. Sack's e-mail and his belief that Organon tried to conceal information about Arixtra, Relator asserts that Organon took steps to conceal material information from the medical community and the FDA pertaining to Raplon(R). Relator claims that in March or April of 2001, he contacted the FDA and informed them that he possessed evidence that Organon had suppressed information during Arixtra and Raplon's approval processes. In May of 2001, Relator met **[*5]** with two United States Attorney's, Nancy Rue and Roberta Brown, to discuss his allegations against Organon. Relator gave the Government a copy of Dr. Sack's e-mail. According to Relator, the Government expressed interest in his allegations but would not act until he commenced a suit under the False Claims Act. After his meeting with the Government officials, Relator continued to investigate and gather evidence.

B. Procedural Background

On April 4, 2002, Relator commenced this action by filing a *qui tam* Complaint under the False Claims Act, *31 U.S.C. §§ 3729-33* ("FCA"), against Organon and Akzo Nobel, Organon's then corporate parent, in the United States District Court for the District of Massachusetts. The complaint was filed under seal. In accordance with *31 U.S.C. § 3730(b)(4)(B)*, **[*6]** the United States was afforded 60 days, or until June 4, 2002, to decide whether to intervene. Beginning with its first motion filed on May 21, 2002, the Government made thirteen separate applications for extensions of time, presumably so that it could investigate the allegations in Relator's Complaint and decide whether to intervene. On June 13, 2006, the Government elected not to intervene in this action.

Upon Relator's motion, on May 17, 2007, the District Court of Massachusetts ordered the case transferred to this Court. On February 11, 2008, the Honorable Mark Falk, U.S.M.J. unsealed the Complaint and ordered Relator to serve the Complaint upon the Defendants. On April 14, 2008, Relator filed an Amended Complaint and Jury Demand. Counsel for Organon and Schering were served with the Amended Complaint on April 17, 2008. Defendants filed a motion to dismiss on August 4, 2008. Defendants filed a motion to supplement the record on November 19, 2008, and a motion for sanctions on December 11, 2008.

II. DEFENDANTS' MOTION TO SUPPLEMENT THE RECORD

Defendants' seek to supplement the record in support

of their motion to dismiss, with a sworn certification by Relator dated May 15, 2003 ("2003 **[*7]** Certification"), which was drafted in connection with another lawsuit filed against Organon. Defendants argue that the 2003 Certification directly contradicts a more recent certification by Relator submitted in opposition to Defendants' motion to dismiss.

A court has discretion to grant leave to supplement the record of a case. See *Edwards v. Pa. Tpk. Comm'n, 80 F. Appx 261, 265 (3d Cir. 2003)*. In Edwards, the Third Circuit denied a motion to supplement the record because the moving party had waited until five months after discovery had closed to seek leave to supplement the record. Id. Here, Defendants submitted their reply to Relator's opposition in August 2008, but did not file their motion to supplement until November of 2008, several months later. Defendants have explained that they only recently discovered the 2003 Certification. Relator rebuts Defendants' explanation by informing the Court that the 2003 Certification was submitted as part of another action Relator filed against Organon, which means that Defendants had access to the 2003 Certification prior to filing their motion to dismiss. While this is technically true, Defendants explain that their current counsel was not **[*8]** involved in the other litigation.

Defendants argue that Relator would not be prejudiced if the 2003 Certification is allowed to be a part of the record. This argument is based on the fact that Defendants already knew about the 2003 Certification and had an opportunity to address the Certification in their brief in opposition to Defendants' motion to supplement the record.

Although Defendants' submission would have been more appropriate as a part of their original motion papers, the 2003 Certification is relevant regarding the issue of when and how Relator obtained information about Raplon(R). Additionally, Relator has had an opportunity to address the certification and has used this opportunity to explain that the 2003 Certification is consistent with Relator's more recent certification. Because of the 2003 Certification's relevance and the fact that Relator will not be prejudiced, Defendants' motion to supplement the record is **granted.**

III. DEFENDANTS' MOTION FOR SANCTIONS

Defendants request sanctions against Relator pursuant to *Fed. R. Civ. P. 11* and the Court's inherent authority. Defendants assert that Relator is abusing the judicial system and perpetrating a fraud on the Court because **[*9]** he has advanced factual allegations that Defendants believe are contradicted by the actual facts of this case. Defendants in large part rely on the 2003 Certification to support their contention that the actual facts of this case stand in contradiction to the facts as alleged by Relator.

Rule 11 in pertinent part provides:

> b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; [and]
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

Fed. R. Civ. P. 11(b)(1) and *(3)*. "*Rule 11* is intended for only exceptional circumstances." *Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987)*. "The legal standard for alleged violations **[*10]** of *Rule 11* is reasonableness under the circumstances. Reasonableness is defined as an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well grounded in fact and law." *Amboy Bancorporation v. Jenkens & Gilchrist, 2007 U.S. Dist. LEXIS 68831, 2007 WL 2746832, at *5 (D.N.J. Sept. 14, 2007)*.

At issue here is whether a certification by Relator dated August 4, 2008 ("2008 Certification"), **[*11]** contains factual assertions that are unsupported by any evidence of record and are contradicted by the 2003 Certification. Although the 2003 Certification does seem to contradict the 2008 Certification, Relator has explained that the two certifications are in fact consistent. In the

2008 Certification, Relator explained that he initially learned of Defendants' alleged wrongdoing regarding Raplon(R) before he was terminated. In the 2003 Certification, Relator stated that he did not learn about Defendants' alleged wrong doing until after he was terminated. In his opposition to Defendants' motion to supplement the record, Relator explains that he did become aware of issues with the Raplon(R) approval process before he was terminated but only became aware of the extent of the wrongdoing thereafter.

The record at this point supports Relator's contention that he obtained information both before and after he was terminated. Nonetheless, based on the 2003 Certification, it appears that Relator did not learn that Defendants allegedly violated the law until after he was terminated. Although the 2008 Certification might be slightly misleading, Relator has clarified his assertions. Given Relator's **[*12]** candor and efforts to correct any ambiguities, and the fact that the 2003 Certification has been added to the record, this is not one of the rare cases where sanctions are warranted. Therefore, Defendants' motion for sanctions is **denied.**

IV. DEFENDANTS' MOTION TO DISMISS

Defendants have moved to dismiss Relator's Amended Complaint on the grounds that the Court lacks jurisdiction over this action because of previous disclosures to the public and allegations that Relator is not an original source; the Amended Complaint does not satisfy the heightened *Fed. R. Civ. P. 9(b)* pleading requirements for fraud claims; and Relator has failed to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*. Defendants also seek dismissal of Schering as a Defendant for failure to establish successor liability.

A. Standing

31 U.S.C. § 3730(e)(4)(A)(the "Public Disclosure Bar") "provides that no court has jurisdiction over a FCA *qui tam* action that is based on certain public disclosures unless the action is brought by an 'original source.'" *United States ex rel. Mistick PBT v. Hous. Auth. Of the City of Pittsburgh, 186 F.3d 376, 378-9 (3d Cir. 1999)* (quoting *31 U.S.C. § 3730(e)(4)(A)*). Defendants argue that this **[*13]** Court lacks jurisdiction over this matter because Relator's action is based entirely on prior public disclosures and Relator is not an original source of the information at issue. For this reason, Defendants assert that Relator's Amended Complaint must be dismissed with prejudice pursuant to *Fed. R. Civ. P. 12(b)(1)* as barred by the Public Disclosure Bar.

When considering a motion to dismiss for lack of standing under *Fed. R. Civ. P. 12(b)(1)*, a court must first determine if the challenge to jurisdiction is "facial" or "factual." *Turicentro v. American Airlines, Inc., 303 F.3d 293, 300 n.4 (3d Cir. 2002)*. A "facial" challenge is brought when a defendant contends that a plaintiff has failed to properly allege jurisdictional facts in the complaint. Id. In contrast, a "factual" challenge is appropriate in situations where the facts underlying the complaint do not establish subject matter jurisdiction. "When resolving a factual challenge, the court may consult materials outside the pleadings, and the burden of proving jurisdiction rests with the plaintiff." *Med. Soc'y of N.J. v. Herr, 191 F. Supp. 2d 574, 578 (D.N.J. 2002)* (citing *Gould Elecs. Inc. v. U.S., 220 F.3d 169, 176, 178 (3d Cir. 2000))*. **[*14]** When considering motions seeking dismissal for lack of jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*, "no presumpti[on of] truthfulness attaches to a plaintiff's allegations." *Martinez v. U.S. Post Office, 875 F. Supp. 1067, 1070 (D.N.J.1995)* (citing *Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977))*. "Accordingly, unlike a *Rule 12(b)(6)* motion, consideration of a *Rule 12(b)(1)* motion need not be limited; conflicting written and oral evidence may be considered and a court may 'decide for itself the factual issues which determine jurisdiction.'" Id. (citing *Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.)* cert. denied, *454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1981))*. Nonetheless, "[w]here an attack on jurisdiction implicates the merits of plaintiff's federal cause of action, the district court's role in judging the facts may be more limited." *Martinez, 875 F. Supp. at 1071* (citing *Williamson, 645 F.2d at 413 n.6*). Once a *Fed. R. Civ. P. 12(b)(1)* challenge is raised, the burden shifts and the plaintiff must demonstrate the existence of subject matter jurisdiction. *PBGC v. White, 998 F.2d 1192, 1196 (3d Cir. 1993)*.

i. Prior Public Disclosures

The FCA Public Disclosure Bar provides **[*15]** that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional,

> administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The Public Disclosure Bar applies where: (1) information was publicly disclosed via a source listed in *§ 3730(e)(4)(A)*; (2) the public disclosure included an "allegation or transaction" within the meaning of the statute; and (3) the complaint is "based upon" those disclosures. *United States ex rel. Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 519 (3d Cir. 2007)*. By its plain terms, the Public Disclosure Bar covers "allegations . . . from the news media." *31 U.S.C. § 3730(e)(4)(A)*. The statute also bars allegations filed as part of civil complaints. See, e.g., *United States ex rel. Paranich v. Sorgnard, 396 F.3d 326, 334 (3d Cir. 2005)* (holding that "a complaint in a civil action falls into the context of 'criminal, **[*16]** civil, or administrative hearings and is sufficiently public within the meaning of the [Public Disclosure Bar] to constitute a public disclosure").

In order to constitute 'allegations or transactions' within the meaning of the Public Disclosure Bar, the public disclosure must either allege the actual fraud, or must allege both the misrepresented state of facts and the true state of facts such that an inference of fraud may be drawn. *Atkinson, 473 F.3d at 519*. In fact, public disclosure of the material elements of a fraud claim has been found to be enough to bar a *qui tam* action even if the disclosure itself does not allege any wrongdoing. *United States ex rel. Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995)*; see also *United States ex rel. Dingle v. BioPort Corp., 270 F. Supp. 2d 968, 977 n.1 (W.D. Mich. 2003)*, aff'd, *388 F.3d 209 (6th Cir. 2004)*.

The "based upon" component of the Public Disclosure Bar does not require that the publicly disclosed information be the actual and only basis of the relator's complaint. Rather, the relator's allegations "need only be 'supported by' or 'substantially similar to' the disclosed allegations and transactions." *Atkinson, 473 F.3d at 519* (quoting **[*17]** *Mistick, 186 F.3d at 385-88*). Notably, the Third Circuit has expressly held that the phrase "based upon" does not mean "actually derived from," because such an interpretation would render the original source exception superfluous. *Mistick, 186 F.3d at 385-88*.

Defendants suggest that Relator's action is based entirely upon allegations that were previously made in prior public disclosures. Specifically, Defendants argue that a comparison of the allegations in Relator's Amended Complaint with the allegations in other civil complaints and news media reports, all of which predate the inception of this suit, conclusively demonstrate that Relator's allegations are based upon those public disclosures and, therefore, fall squarely within the Public Disclosure Bar.

Defendants claim that the essence of Relator's Amended Complaint is the allegation that Organon wrongfully acquired FDA approval of Raplon(R) by misrepresenting, or failing to disclose to the FDA, Raplon(R)'s propensity to cause serious injury, and that doctors utilized Raplon(R) in reliance upon the FDA's approval and/or Organon's failure to disclose Raplon(R)'s risks. As a result of this alleged fraud on the FDA, Relator alleges, **[*18]** that the Government (i.e., Medicare and Medicaid) would not have paid claims for the use of Raplon(R). Defendants assert that prior to the filing of this action on April 4, 2002, public disclosures revealed the same alleged misrepresentation and the same alleged true state of facts as asserted by Relator. Defendants detail that the allegations related to Raplon(R)'s adverse events were well-documented and publicized long before Relator filed this action. In addition, well before Relator's filing, there was public disclosure of substantially similar allegations of fraud and cover-up of adverse event data. For example, the complaint filed in Rogers v. Organon, Inc. on February 20, 2002. The Rogers complaint alleged that Organon "failed to conduct adequate and appropriate studies which would have revealed that Raplon created a high risk of certain personal injuries and/or death and failed to provide any and/or adequate warnings concerning this risk." The Rogers complaint also alleged that Organon:

> was negligent in the design, manufacturing, testing, advertising, marketing, promotion, labeling, warnings given and sale of Raplon in that, among other things, it . . . (b) Failed to conduct **[*19]** adequate pre-clinical and clinical testing and post-marketing surveillance to determine the safety of the drug Raplon; . .

> . (f) Recklessly, falsely, and/or deceptively represented or knowingly omitted suppressed or concealed facts of such materiality regarding the safety and efficacy of Raplon(R) from prescribing physicians and the consuming public, and that had prescribing physicians and the consuming public known of such facts, the drug Raplon would never have been prescribed to plaintiff.

Indeed, the Rogers complaint described Organon's actions as constituting "knowing omissions, suppression or concealment of material facts, made with the intent that others rely upon such concealment, suppressions or omissions in connection with the marketing of Raplon." Moreover, the Rogers complaint alleged that "Defendant acted unlawfully and negligently, used or employed unconscionable commercial and business practices, engaged in deception, fraud, false pretenses, false promises or misrepresentations, and/or perpetrated the knowing concealment, suppression or omission of material facts with the intent that physicians and consumers including Plaintiffs, rely upon such concealment, suppression **[*20]** or omission, in connection with the sale or advertisement of Raplon." In further support of their position, Defendants cite the Spencer v. Organon, Inc. complaint filed on October 11, 2001, and the Payne v. Organon, Inc. complaint filed on November 28, 2001.

In response, Relator argues that his allegations are not substantially similar to the allegations contained in the complaints and articles discussed by Defendants. Relator further argues that the complaints and articles discussed by Defendants do not set forth all of the essential elements of his claim.

Defendants and Relator agree that the essence of Relator's claim is that "Organon as a result of willful failure to disclose and/or through the use of fraudulent and/or deceptive information...caused many hospitals and physicians and/or patients to submit false reimbursement claims to Medicare and Medicaid." Relator argues that the complaints submitted by Defendants contain "garden-variety negligence and strict liability claims arising from personal injuries that were allegedly caused by Raplon." Relator further argues that the cases and articles discussed by Defendants do not deal with his claim that Organon orchestrated a conspiracy **[*21]** to knowingly conceal SAEs from the FDA in order to again approval of Raplon(R).

There is no controversy over whether the articles and cases identified by Defendants are sources listed in *§ 3730(e)(4)(A)*, nor that these public disclosures include allegations or transactions within the meaning of the Public Disclosure Bar. Newspaper articles are, by the statute's expressed terms, disclosures, and civil cases fall within the civil hearing category of permissible disclosures. *Sorgnard, 396 F.3d at 334*. At issue here is whether the claims and allegations in the public disclosures discussed by Defendants are "substantially similar" to those in the Amended Complaint.

The factual premise of Relator's opposition to Defendants public disclosure argument is in error. Defendants cite several forms of public disclosures at length. These passages clearly raise claims of knowing and/or intentional fraud and deception. For example, in claim (f) of his complaint, Rogers alleges that Organon:

> Recklessly, falsely, and/or deceptively represented or knowingly omitted suppressed or concealed facts of such materiality regarding the safety and efficacy of Raplon from prescribing physicians and the consuming **[*22]** public, and that had prescribing physicians and the consuming public known of such facts, the drug Raplon would never have been prescribed to plaintiff.

Relator is correct that the cases discussed by Defendants involve personal injury and do not seek return of money paid out by the Government through Medicare and Medicaid, however, this does not negate that the factual and legal underpinnings of the relief Relator seeks, and the relief sought in the personal injury cases identified by Defendants are the same.

Moreover, contrary to Relator's assertion, all elements of his fraud do not need to be previously disclosed, rather, only the material elements need to be disclosed. *Sandia Corp., 70 F.3d at 572*; see also *BioPort Corp., 270 F. Supp. 2d at 977 n.1*. The specific factual elements regarding Medicare and Medicaid have not been previously disclosed but these elements are not material to the fraud allegedly perpetrated on the FDA by Organon, and this is the fraud that underlies Relator's and

the personal injury complainant's claims. Therefore, the allegations in Relator's Amended Complaint are "based upon" the "public disclosure" of "allegations" within the meaning of the FCA's Public **[*23]** Disclosure Bar. *31 U.S.C. § 3730(e)(4)(A)*.

ii. Original Source

An "original source" within the meaning of the FCA is "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." *31 U.S.C. § 3730(e)(4)(B)*. The Third Circuit has explained that to be an original source, a relator "must have had (1) direct and (2) independent knowledge of the information on which the allegations are based and (3) have voluntarily [provided the] information to the Government before filing the action." *Paranich, 396 F.3d at 335* (emphasis in original). "'Independent knowledge' is knowledge that does not depend on public disclosures. 'Direct knowledge' is knowledge obtained without any intervening agency, instrumentality or influence: immediate." *Atkinson, 473 F.3d at 520* (internal citations and some quotation marks omitted).

Defendants note that Relator at no time states that he had any personal involvement or familiarity with the FDA approval process for Raplon(R). Plaintiffs argue that Relator failed to allege that he **[*24]** had direct and independent knowledge as to any Medicare and Medicaid claims submitted by the "many hospitals, physicians and/or patients." With regard to Relator's Medicare and Medicaid claim, Defendants assert that Relator cannot identify any entities or individuals by name, nor allege that he had personal contact with any of them. They argue that Relator is merely speculating that somebody, somewhere, somehow submitted illegitimate claims for reimbursement to the Government.

Defendants point to case law from other Circuit Courts which provide that independent knowledge "must not be derivative of the information of others, even if those others may qualify as original sources." *United States ex rel. Fine v. Advanced Scis., Inc., 99 F.3d 1000, 1007 (10th Cir. 1996)*; See also *United States ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995)* (citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160-61 (3d Cir. 1991))*. Defendants turn to the Eighth Circuit for the proposition that "collateral research and investigations...[do] not establish direct and independent knowledge of the information on which the allegations **[*25]** are based within the meaning of *§ 3730(e)(4)(B)*." Id. (internal citations and quotation marks omitted). Indeed, the Third Circuit has cautioned that "courts must be mindful of suits based only on 'secondhand information, speculation, background information or collateral research.'" *Pa. Shipbuilding, 473 F.3d at 523*.

Relator argues that a person possesses "direct" knowledge when he or she has obtained firsthand knowledge through his or her own efforts and not the efforts of an intermediary. Relator cites Haskins v. Omega Institute, Inc., for the proposition that "there is no requirement that a relator be physically present during the alleged acts" because "evidence can be amassed through an independent investigation." *25 F. Supp. 2d. 510, 514 (D.N.J. 1998)*. Relator alleges that he is a direct independent source because he is an insider and a whistleblower who acquired an e-mail through his own efforts during the course of his employment with Organon and that he voluntarily provided this information to the Government. Relator also details his education and negative experience at Organon with Arixtra as support for his claim that he is an original source.

Defendants raise a factual challenge **[*26]** to the Amended Complaint. Defendants assert that the facts as pleaded establish that Relator does not have standing. Relator is not an original source of the information alleged in his Amended Complaint. Relator contends that an e-mail he obtained alerted him to the probability that Organon perpetrated a fraud on the FDA. Relator alleges that he obtained this e-mail as a result of his own investigation and that this is sufficient to satisfy the direct knowledge requirement. Relator misinterprets the direct knowledge element of the Public Disclosure Bar.

As a preliminary matter, Relator admittedly obtained the e-mail at issue after having a casual conversation with a colleague. During that conversation the colleague offered him the e-mail. The colleague giving the e-mail to Relator constitutes intervening agency, thus, defeating any claim that Relator is an original source. More importantly, Relator did not obtain substantial firsthand knowledge of wrongdoing. Relator explains that based on his education and his negative experience with Organon,

he knew that the e-mail at issue meant that Organon committed fraud. The e-mail itself does not suggest such an inference. Relator has no first **[*27]** hand knowledge of the Raplon(R) FDA approval process and did not obtain any after the fact. Moreover, Relator's claim that Organon's fraud "caused many hospitals, physicians and/or patients to submit false reimbursement claims to Medicare and Medicaid" is speculative. Defendants are correct that Relator pleads no facts to suggest that he is an original direct source of information that could possibly support his allegation. Furthermore, any information that Relator has obtained is secondhand and/or derivative.

The facts of record demonstrate that there has been a public disclosure of the information upon which Relator's claims are based, and Relator is not an original source of this information. Therefore, Relator does not have standing to pursue this action, and Defendants *Fed. R. Civ. P. 12(b)(1)* motion is **granted.**

B. Heightened Pleading

Although it has been demonstrated that Relator lacks standing, the Court will briefly address Defendants' *Fed. R. Civ. P. 9(b)* motion, which provides an alternate basis for dismissal. *Rule 9(b)* provides, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, **[*28]** and other conditions of a person's mind may be alleged generally." Under *Fed. R. Civ. P. 9(b)*, a plaintiff alleging fraud merely needs to state the circumstances of the alleged fraud "with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged.'" *Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007)* (citing *Lum v. Bank of America, 361 F.3d 217, 223-224 (3d Cir. 2004)*. "*Rule 9(b)* requires, at a minimum, that plaintiffs support their allegations of ... [f]raud with all of the essential factual background that would accompany the first paragraph of any newspaper story - that is, the 'who, what, when, where and how' of the events at issue." *In re Rockefeller Ctr. Props. Secs. Litig., 311 F.3d 198, 217 (3d Cir. 2002)* (citation omitted). "[R]ule 9(b) falls short of requiring every material detail of the fraud such as date, location, and time, [but] plaintiffs must use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.'" *Id. at 216* (quoting *In re Nice Systems, Ltd. Sec. Litig., 135 F. Supp. 2d 551, 577 (D.N.J. 2001))*. Moreover, "in applying *Rule 9(b)*, courts should be 'sensitive' **[*29]** to situations in which 'sophisticated defrauders' may 'successfully conceal the details of their fraud.'" Id. (quoting *In re Burlington Coat Factory Sec. Litig, 114 F.3d 1410, 1418 (3d Cir. 1997)*.

Defendants argue violations of the FCA must be pleaded with particularity and that Relator's Amended Complaint fails to provide the necessary specifics. They claim that Relator has "failed to identify with particularity a specific false claim [submitted to the Government]." *United States ex rel. Schmidt v. Zimmer, Inc., No. 00-1044, 2005 U.S. Dist. LEXIS 15648, 2005 WL 1806502, *2 (E.D. Pa. July 29, 2005)*. Defendants explain that the Schmidt Court held that a *qui tam* complaint that alleges "simply and without any stated reason" a relator's belief that claims requesting illegal payment "must have been submitted, were likely submitted or should have been submitted to the Government" does not satisfy *Fed. R. Civ. P. 9(b)*'s heightened pleading standard. *2005 U.S. Dist. LEXIS 15648, [WL] at 3*.

Defendants further argue that Relator's allegations regarding Defendant's alleged wrongful conduct lack specificity. Specifically, Defendants argue that Relator has failed to provide support for his allegation that Organon knowingly misrepresented and/or concealed **[*30]** relevant information from the FDA in order to obtain, and subsequently retain approval for Raplon(R). Defendants argue that Relator has not identified any submissions to the FDA that contained misrepresentations or from which information was omitted. Defendants claim that they have been left without a clear understanding of the misconduct at issue in this case. Defendants contend that the only tangible evidence that Relator relies upon is an e-mail he obtained from a colleague and that the e-mail does not contain any information that would substantiate Relator's allegations and that the e-mail does not detail any information to authenticate it or determine its origin. Likewise, Defendants argue that Relator fails to provide any identifying information concerning the internal, non-public documents and Organon's various submissions to the FDA upon which he claims to rely. Additionally, Defendants argue that Relator cannot plead upon information and belief because such pleading is not permitted in FCA cases where the relator is a corporate insider, which Relator claims to be and is. See *United States ex rel. Barlett v. Tyrone Hosp., Inc., 234 F.R.D.*

113, 122 (W.D. Pa. 2006).

Relator argues **[*31]** that he has provided Defendants with adequate notice of his claim. He argues that the e-mail in question contains statements from which an inference can easily be drawn that Organon fraudulently concealed information from the FDA. Relator asserts that he has identified the individuals at Organon who sent, received, and were referenced in the e-mail. Relator argues that after receiving the e-mail, he subsequently learned that the investigators who participated in the US Phase III Pivotal trial for Raplon(R) had serious concerns about Raplon's propensity to cause SAEs in some patients. Relator further argues that any detail he has not provided is within the Defendants' sole control. Relator points to Eastern and Western District of Pennsylvania cases that reject overly stringent applications of *Fed. R. Civ. P. 9(b)*. See *Landsberg v. Levinson, 2008 U.S. Dist. LEXIS 42794, 2008 WL 2246308 *3 n.16 (W.D. Pa.)*; *United States v. Kensington Hospital, 760 F. Supp. 1120, 1126-1128 (E.D. Pa. 1991)*. Landsberg specifically rejected *Clausen v. Laboratory Corp. Of America, Inc, 290 F.3d 1301, 1303 (11th Cir. 2002)*, a case cited by Defendants, where the complaint was dismissed for failure to identify an actual claim illegitimately submitted **[*32]** to the Government. See *Landsberg, 2008 U.S. Dist. LEXIS 42794, 2008 WL 2246308 *3 n.16*. Landsberg however, is a public disclosure case, not a *Fed. R. Civ. P. 9(b)* case. *2008 U.S. Dist. LEXIS 42794, [WL] at *3 n .16*. The Landsberg Court does detail in a footnote that it rejected Clausen but this dicta is not fully explained nor is the Third Circuit approach to *Fed. R. Civ. P. 9(b)*. Id.

Relator does not address Schmidt, an Eastern District of Pennsylvania case that embraced Clausen and United States ex rel. Quinn v. Omnicare, 382 F.3d 432, 439-40 (3d Cir. 2004), which held the same as Clausen. Schmidt provided that a relator must identify specific illegitimate claims for reimbursement in order to substantiate a FCA claim. *Schmidt, 2005 U.S. Dist. LEXIS 15648, 2005 WL 1806502 at *2-3*. Nonetheless, Relator's claim is that Defendants committed fraud when it obtained approval of Raplon(R) and as a result, all claims for payments from the Government for Raplon(R) were illegitimate. The fraud at issue allegedly took place when Organon obtained approval for Raplon(R) and not when claims were submitted to the Government.

As discussed above, Relator's claim is based on an inference from an e-mail that Relator believes to be true because of his background and his negative experience **[*33]** with Organon concerning Arixtra. This does not provide the specificity required by *Fed. R. Civ. P. 9(b)*. Relator assumes that Organon knew something and did not inform the FDA, however, Relator does not detail any concrete evidence that supports his allegations. Relator argues that he later learned that some investigators expressed concerns that Raplon(R) might cause SAEs but he does not explain why these investigators were concerned or what they did to follow up on these concerns or if their specific concerns were alleviated. Relator does not present any reports or test results or other documentation showing that Defendants knew Raplon(R) caused SAEs. The concerns of the investigators are unsubstantiated third party information that even if true are not sufficient to establish fraud. Relator's claim is highly speculative and insufficiently pleaded to satisfy *Fed. R. Civ. P. 9(b)*. Therefore, Defendants' motion to dismiss is **granted.**

C. Defendants' Remaining Grounds for Dismissal

Defendants move to dismiss the Amended Complaint for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*. Analysis of Defendants' *Rule 12(b)(6)* motion would be redundant because the Court has already **[*34]** dismissed Relator's Amended Complaint pursuant to *Rules 12(b)(1)* and *(9)(b)*. Likewise, Defendants' successor liability motion does not require analysis as the Amended Complaint is dismissed as to all Defendants.

V. CONCLUSION

For the reasons stated, it is the finding of the Court that Defendants' motion to supplement the record is **granted;** Defendants' motion for sanctions is **denied;** and Defendants' motion for dismissal is **granted.** An appropriate Order accompanies this Opinion.

/s/ Dennis M. Cavanaugh

Dennis M. Cavanaugh, U.S.D.J.

Date: April 6, 2009

LEXSEE 2003 BANKR. LEXIS 1267

IN RE: LINDA FAY JENKINS, Debtor. DONALD ARMSTRONG, Plaintiff, - against - LINDA FAY JENKINS, Defendant.

CASE NO. 02-38913-BJH-7, (Chapter 7), ADV. PRO. NO. 03-03138-BJH

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2003 Bankr. LEXIS 1267

October 7, 2003, Decided

SUBSEQUENT HISTORY: Partial summary judgment denied by *Armstrong v. Jenkins (In re Jenkins), 2003 Bankr. LEXIS 1447 (Bankr. N.D. Tex., Nov. 5, 2003)*

DISPOSITION: **[*1]** Armstrong's Motion to Supplement denied.

COUNSEL: For Linda Fay Jenkins, Debtor (02-38913-bjh7): Marvin R. Mohney, Dallas, TX.

Scott M. Seidel, Trustee (02-38913-bjh7), Passman & Jones, Dallas, TX.

Donald E. Armstrong, Plaintiff (03-03138-bjh), Pro se, Park City, Utah.

For Linda Fay Jenkins, Defendant (03-03138-bjh): Marvin R. Mohney, LEAD ATTORNEY, Dallas, TX.

JUDGES: Barbara J. Houser, United States Bankruptcy Judge.

OPINION BY: Barbara J. Houser

OPINION

Memorandum Decision and Order Denying Motion to File Supplemental Brief and Evidence In Opposition to Defendant's Motion to Dismiss Amended Complaint

On June 16, 2003, the Court held a hearing on the motion to dismiss amended complaint filed by Linda Fay Jenkins ("Jenkins") in the above adversary proceeding and a motion for partial summary judgment filed by Donald Armstrong ("Armstrong"). [1] After the hearing, Armstrong filed a motion to file supplemental brief and evidence in opposition to Defendant's motion to dismiss amended complaint and motion to appear by telephone (the "Motion to Supplement"). The Court held a hearing on the Motion to Supplement on August 7, 2003 at which time it took that motion under advisement.

1 Following the June 16 hearing, the Court entered an Order on June 26, 2003 directing Armstrong to supplement the record and directing Jenkins to advise the Court whether she continues to dispute the existence of an attorney-client relationship between she and Armstrong (the "Attorney-Client Relationship Issue"). The Order further directed the parties to advise the Court if they consented to a bench trial of the Attorney-Client Relationship Issue, following which the Court would advise the parties if a ruling on Jenkins' motion to dismiss and Armstrong's motion for summary judgment would await a separate trial of the Attorney-Client Relationship Issue. The parties complied with the first two directives, but Armstrong requested clarification of the Court's Order with respect to the separate trial. Accordingly, the Court held a further hearing, following which the Court

> entered an Order on September 4, 2003 which, among other things, denied Armstrong's summary judgment motion without prejudice to renew after separate trial of the Attorney-Client Relationship Issue and announced that Jenkins' motion to dismiss was under advisement.

[*2] The Court must decide if Armstrong, a pro-se, non-lawyer, should be permitted to supplement the record after he realized he had likely failed to carry his burden of proof during the hearing on Jenkins' motion to dismiss, which he had previously suggested be treated as a motion for summary judgement since both parties had submitted voluminous materials outside of the pleadings. The Court concludes that Armstrong should not be permitted to supplement the summary judgment record and its analysis is set forth below.

Procedural History

Armstrong filed his original complaint against Jenkins in United States District Court for the Northern District of Texas, Case No.3:01CV2611-N (the "District Court Action") on December 10, 2001. As originally filed, the complaint in the District Court Action alleged claims for legal malpractice, negligent misrepresentation, breach of fiduciary duty, negligence, gross negligence, violation of the *Texas Deceptive Trade Practices Act and Consumer Protection Act*, and fraud. Thereafter, Jenkins filed a voluntary petition for relief under Chapter 7 in this Court on October 7, 2002. On January 13, 2003, Armstrong filed this non-dischargeability **[*3]** action (the "Adversary Proceeding") against Jenkins in which he incorporated the allegations contained in the District Court Action and asserted that the damages judgment he would obtain in the District Court Action was non-dischargeable in Jenkins' bankruptcy case under *11 U.S.C. § 523(a)(2), (4) and/or (6)*. Between the District Court Action and the Adversary Proceeding, Armstrong's complaints have been amended several times, and Jenkins has filed several motions to dismiss those complaints. [2]

> 2 Armstrong first filed his summary judgment motion in the District Court Action on July 24, 2002. At the time of Jenkins' bankruptcy filing, the District Court had not ruled on Armstrong's motion for summary judgment. As a result of an agreement between the parties following a motion by Armstrong to withdraw the reference, this Court entered a Report and Recommendation to the District Court recommending that the District Court Action be referred to this Court for jury trial by consent. On June 5, 2003, United States District Judge David Godbey entered an order referring the District Court Action to this Court. This Court has entered an Order consolidating the District Court Action with the Adversary Proceeding. Thus, Armstrong's previously filed summary judgment motion was before this Court and ripe for decision. On September 4, 2003, the Court entered an Order denying that motion without prejudice.

[*4] The first of Jenkins' motions to dismiss was filed in the Adversary Proceeding on February 14, 2003 (the "First Motion to Dismiss"). Jenkins also filed an affidavit in support of her motion to which were annexed several documentary exhibits. Thereafter, Armstrong responded and opposed a dismissal of the complaint (the "First Response"). The First Response contained, among other things, thirty numbered paragraphs of factual allegations under the headings of "Relevant Facts" and "Controverting Facts to the Defendant's Factual Allegations." The First Response also incorporated an Affidavit of Donald E. Armstrong in Support of the Plaintiff's Motion for Partial Summary Judgment then pending in the District Court Action ("Armstrong's Summary Judgment Affidavit") and all of the exhibits to that affidavit. Armstrong's Summary Judgment Affidavit contained seventy eight numbered paragraphs of factual allegations and referred to sixteen documentary exhibits, which were included in two volumes, each over an inch thick. Armstrong's Summary Judgment Affidavit also incorporated all of the exhibits attached to the original complaint in the District Court Action. Armstrong argued in the First Response **[*5]** that

> the Defendant presented evidence beyond the four corners of the complaint by providing the Defendant's Affidavit. This Court can either ignore the Defendant's Affidavit or treat the Defendant's Motion to Dismiss as a Motion for Summary Judgment. *Meister v. Tex. Adjutant General's Dep't 233 F.3d 332, 335 (C.A.5 Tex., 2000).* It is appropriate to evaluate the Defendant's Motion to Dismiss as a motion for summary judgment. With a motion for summary judgment, the Defendant must prove there are no undisputed facts and

> that the Defendant is entitled to a judgment as a matter of law.

Jenkins also filed a motion to dismiss Armstrong's complaint in the District Court Action. [3] Once again, she attached an affidavit and documentary exhibits. Once again, Armstrong responded with papers which incorporated numerous factual allegations and exhibits and, once again, Armstrong argued that "the Defendant's Motion to Dismiss should be treated as a motion for summary judgment since the Defendant has presented evidence from outside the pleadings." Response in Opp. to Mot. to Def.'s Mot. to Dismiss Compl., p. 15.

> 3 Jenkins noted that she had filed the same motion in the bankruptcy court, but "in an abundance of caution, because of Plaintiff's motion for this Court to withdraw the reference of this action, Defendant also is filing this motion in the District Court." Defendant's Motion to Dismiss Complaint, p. 1 n.1

[*6] Jenkins then filed an amended motion to dismiss the Adversary Proceeding on March 6, 2003. Armstrong opposed with a lengthy response and an affidavit dated March 27, 2003 which contained sixty seven numbered paragraphs of facts and which attached twenty six exhibits. In her reply filed on April 10, 2003, Jenkins included a "*Second Amendment* to Defendant's Motion to Dismiss Complaint" in which she argued for the first time that the claims asserted by Armstrong, even if proven, are dischargeable under *11 U.S.C. § 523(a)(2), (4), and (6)*.

Armstrong then filed an Amended Complaint in the Adversary Proceeding on April 14, 2003 and on May 2, 2003, he filed an Amended Complaint in the District Court Action. On April 22, 2003, Jenkins filed the present motion to dismiss, again relying upon *Fed. R. Bankr. P. 7012*, which incorporates *Fed. R. Civ. P. 12(b)(6)*, and again relying upon evidence outside the pleadings. This most recent motion to dismiss is upon the grounds that Armstrong's claims, even if proven, are dischargeable in her Chapter 7 bankruptcy case because Armstrong has failed to plead **[*7]** (or raise a genuine issue of material fact regarding each of the required elements of) a proper claim under *11 U.S.C. § 523(a)(2), (4), and/or (6)*.

Once again, Armstrong opposed the motion to dismiss and incorporated Armstrong's Summary Judgment Affidavit and all exhibits thereto into his response in opposition. As relevant here, the response again requested that the Court convert the motion to dismiss to a motion for summary judgment because "there are already substantial pleadings in this case. This case . . . is far past a normal motion to dismiss." Resp. in Opp. to Def.'s Mot. to Dismiss Amended Compl. Mot. to Strike and Mot. to File Amended Compl., p. 16.

At the outset of the June 16, 2003 hearing, the Court concluded that it was appropriate to treat the motion to dismiss as a motion for summary judgment because both parties requested that the Court do so. As the hearing progressed and the shortcomings of Armstrong's pleadings and evidence began to be discussed in detail, Armstrong changed his mind and "objected" to the Court treating the motion to dismiss as a motion for summary judgment, notwithstanding his prior, clearly articulated consent in both **[*8]** writing (in the various pleadings noted above) and orally (at the outset of the hearing). He asserted that had he realized he would have the burden to come forward with evidence, he would have either objected to the conversion to summary judgment or requested additional discovery. The Court carried Armstrong's objection through the conclusion of the hearing.

As noted previously, Armstrong filed the Motion to Supplement after the conclusion of the June 16, 2003 hearing.

The Motion to Supplement

In his Motion to Supplement, Armstrong asks the Court to permit him to file an additional brief and "additional affidavits and evidence in opposition to Defendant's Motion to Dismiss Amended Complaint." He does not identify what legal issues he wishes to brief, or what additional affidavits and evidence he wishes to file. In his Memorandum in Support of Motion to File Supplemental Brief and Evidence in Opposition to Defendant's Motion to Dismiss Amended Complaint, Armstrong essentially argues that he "had no opportunity or obligation to assert facts since the Defendant provided no facts. There were no "facts" for the Plaintiff to overcome." *Id.* at p. 3. He also asserts that **[*9]** Jenkins never met her burden "to establish that there are no facts in the record supporting the Plaintiff's allegations in the Amended Complaint. In fact, the Defendant presented no evidence relating to facts at all. Until the Defendant met

the Defendant's burden, the Plaintiff had no burden." *Id.* at p. 4.

Once again, Armstrong does not identify which legal issues he wishes to brief and what additional evidence he wishes to submit. He asserts that Jenkins has refused to comply with discovery and that "the Motion to Dismiss did not allege that the Plaintiff had not provided any facts proving the Plaintiff's allegations in the Plaintiff's Amended Complaint." He essentially argues that additional discovery is required before the motion to dismiss can be heard, that Jenkins did not meet her burden to establish the lack of facts, and that

> in a motion to dismiss it is the Defendant's burden to prove the Plaintiff has not alleged sufficient facts. The Plaintiff responded. Through this procedure, the burden of proof was shifted from the Defendant's difficult burden of proof with a motion to dismiss to the Plaintiff's difficult burden of proof to disprove a motion for summary judgment **[*10]** without discovery and without appropriate pleading.

Legal Analysis

A decision to allow a party to supplement the record is within the court's discretion. *National Gypsum Co. v. Prostok, 2000 U.S. Dist. LEXIS 16174, No. Civ. A. 3:98CV0869P, 2000 WL 1499345 (N.D.Tx. Oct. 5, 2000)* (unreported decision). In *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 862 (5th Cir. 2003)* (reviewing for abuse of discretion a district court's decision not to accept additional evidence after a magistrate judge's recommendation on summary judgment had been issued), the Fifth Circuit identified several factors that a court should consider in deciding whether to accept additional evidence in connection with a pending summary judgment motion including: (1) the moving party's reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the moving party's case; (3) whether the evidence was previously available to the non-moving party when it responded to the summary judgment motion; and (4) the likelihood of unfair prejudice to the non-moving party if the evidence is accepted. *See also Fields v. Pool Offshore, Inc., 182 F.3d 353 (5th Cir. 1999)* **[*11]** (finding no abuse of discretion in denial of motion to supplement record where evidence was publicly available and could have been proffered either on original motion or in reply to opposition to original motion). In addition, the Court can consider whether the evidence to be added would be cumulative. *Sanders v. Casa View Baptist Church, 134 F.3d 331 (5th Cir. 1998)* (finding no abuse of discretion in denial of a motion to supplement the summary judgment record where evidence sought to be submitted was cumulative).

Applying these factors here, the Court concludes that Armstrong has failed to state a compelling reason why leave to supplement should be granted. First, and of significance, Armstrong has failed to identify what evidence he wishes to add to the summary judgment record. Consequently, he has failed to show that the potential evidence has any significance to his non-dischargeability case. Because the Court has not been advised of the specific additional evidence that Armstrong wishes to supplement the summary judgment record with, it cannot assess whether the evidence was previously available. Moreover, Armstrong has failed to offer a legally sufficient explanation **[*12]** for his failure to submit the "missing" evidence in any of the numerous pleadings he filed prior to the June 16 hearing. The only reason stated for failing to submit the "missing" evidence is that he did not respond to the motion to dismiss with facts because Jenkins did not provide any facts for him to respond to. However, as noted above, Armstrong has responded to each of the various motions to dismiss with *numerous* facts and voluminous exhibits. He has had ample opportunity to submit, and in fact has submitted, a great deal of evidence in response to the motion to dismiss. The Court believes, in light of the many repetitive submissions of affidavits which incorporate identical exhibits, that the evidence Armstrong would submit is most likely cumulative of that already before the Court.

Implicit in Armstrong's response is a potential second explanation for his failure to submit the "missing" evidence prior to the hearing -- *i.e.*, he needs to take more discovery before he can submit that evidence. Armstrong concedes that he has not filed a formal rule 56(f) motion. Nonetheless, the Court will treat his affidavits and responses to the motion to dismiss as a motion for a rule **[*13]** 56(f) continuance. *See Hinds v. Dallas Indep. School Dist., 188 F.Supp. 2d 664 (N.D. Tx. 2002)*; *Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 137 (5th Cir. 1987)* ("Although we have no duty to

be indulgent with motions that do not exist, we can treat [the plaintiff's] responses to summary judgment as an attempt to comply with *Rule 56(f) . . .*").

However, once again, he fails to identify with any specificity what additional discovery is required in order to defend against the motion. Based upon analogous Fifth Circuit case law, this implicit explanation is legally insufficient as well. The standard for resisting a summary judgment motion on the ground that more discovery is required is set forth as follows:

> Because the burden on a party resisting summary judgment is not a heavy one, one must conclusively justify his entitlement to the shelter of *rule 56(f)* by presenting specific facts explaining the inability to make a substantive response as required by *rule 56(e)* and by specifically demonstrating 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of **[*14]** the absence of a genuine issue of fact.' The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, particularly where, as here, ample time and opportunities for discovery have already lapsed. The determination of the adequacy of a nonmovant's rule 56(f) affidavits and the decision whether the grant a continuance thereon rests in the sound discretion of the trial court.

SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980) (citations omitted). To satisfy the standard for a rule 56(f) continuance, a claim that further discovery or a trial might reveal facts of which the nonmovant is unaware is insufficient; the nonmovant must show why the discovery is needed and how it will allow him to demonstrate a genuine issue of material fact. *Hinds v. Dallas Indep. School Dist., 188 F. Supp.2d 664 (N.D. Tx. 2002)*. Armstrong has failed to make the required showing here.

The Court has considered several other factors before coming to its conclusion that the Motion to Supplement will be denied. First, while this Court has always upheld Armstrong's right to represent himself in **[*15]** this non-dischargeability action, it has repeatedly suggested that non-dischargeability actions can be complex and that Armstrong should carefully consider his decision to represent himself in both this action and the related legal malpractice action. Notwithstanding the Court's numerous inquiries, Armstrong chose to continue to represent himself.

Second, as noted previously, it was Armstrong who urged the Court to treat the motion to dismiss as one for summary judgment. Armstrong has repeatedly argued that each of the motions to dismiss should be treated as motions for summary judgment since they presented matters outside the pleadings. Armstrong himself responded to each of the motions with voluminous materials outside the pleadings. He filed his own summary judgment motion in which he also presented a great deal of evidence.

Third, although the Court recognizes that pro se litigants are held to a more relaxed pleading standard and are entitled to have their pleadings liberally construed, *see Taylor v. Books a Million, Inc., 296 F.3d 376 (5th Cir. 2002)* (pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers) and *Hepperle v. Johnston, 544 F.2d 201, 202 (5th Cir. 1976)* **[*16]** (reversing dismissal of pro se complaint for failure to state a claim and stating that a judge "is to employ less stringent standards in assessing pro se pleadings . . . than would be used to judge the final product of lawyers"), this relaxed standard has limits, *see Taylor v. Books a Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002)* ("regardless of whether the plaintiff is proceeding pro se . . . conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss"), and does not relieve even a pro se litigant from the usual requirements of summary judgment. *Verone v. Catskill Regional Off-Track Betting Corp., 10 F.Supp.2d 372 (S.D.N.Y. 1998)* (granting summary judgment against pro se plaintiff who had failed to produce sufficient evidence in an age discrimination case despite liberal reading of responsive papers).

Moreover, Armstrong is not the usual pro se plaintiff. While he has no formal legal training, he is an experienced litigator. Annexed to Armstrong's March 27, 2003 Affidavit in Opposition to Defendant's Amended Motion to Dismiss ("March 27 Affidavit") as Exhibits 21 and 22 are nondischargeability **[*17]** complaints which Armstrong filed pro se against Paula Ziegler and Mark

Ladeda in the bankruptcy court for the Central District of California along with copies of default judgments he successfully obtained. Armstrong has represented himself in extensive litigation in his own (and affiliated) bankruptcy cases pending in Utah. He is intelligent, articulate, thorough and well-prepared and clearly has access to and uses a law library. He has frequently correctly stated the legal standards applicable to the various motions which have been heard before this Court. In short, while Armstrong is pro se, the Court does not find credible his assertion that he did not understand the ramifications of his forceful arguments that the motion to dismiss should be treated as one for summary judgment.

Finally, the Court does not believe that further briefing is required. Armstrong has filed extensive briefing already, on all of the myriad issues involved in this case. The present motion does not identify what further issues he wishes to brief. He has already had the opportunity to respond to each of the motions to dismiss and has filed lengthy and detailed legal argument.

For all of these reasons, the **[*18]** Motion to Supplement is denied. It is therefore

ORDERED that the Motion to Supplement is denied.

Signed: October 7, 2003.

Barbara J. Houser

United States Bankruptcy Judge