SIXTH DIVISION
September 21, 2018

No. 1-17-0968

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

PHONE RECOVERY SERVICES OF ILLINOIS, LLC, on behalf of the STATE OF ILLINOIS, the COUNTY OF COOK, the CITY OF CHICAGO, and the COUNTY OF KANE, Plaintiffs-Appellants-Cross Appellee, v. AMERITECH ILLINOIS METRO, INC., d/b/a AT&T; BANDWIDTH.COM CLEC, LLC; BROADWING COMMUNICATIONS, LLC; LEVEL 3 COMMUNICATIONS, LLC; COMCAST PHONE OF ILLINOIS, LLC, Defendants-Appellees. (City of Chicago Plaintiff-Cross-Appellant.)	)	Appeal from the Circuit Court of Cook County. No. 14 L 5238 Honorable James Snyder, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Pierce and Griffin concurred in the judgment

ORDER

¶ 1 *Held*: We reverse the trial court's dismissal of relator's complaint based on application of the public disclosure bar. We remand the cause to allow relator an opportunity to amend its complaint and replead the fraud claims. We do not address the city of Chicago's cross-appeal at

this time because the trial court's denial of the city's motion to dismiss is not final and appealable.

¶ 2 Plaintiff, Phone Recovery Services of Illinois, LLC (relator), appeals the order of the circuit court granting defendants' motion to dismiss its claim filed pursuant to the Illinois False Claims Act (IFCA) (740 ILCS 175/4 (West 2016)) and the City of Chicago's False Claims Ordinance (Chicago FCA) (Chicago Municipal Code § 1-22-030). On appeal, relator contends the court erred in dismissing its claim because the allegations are not based on publicly disclosed information, and relator is an original source of the information supporting the allegations. Plaintiff City of Chicago filed a cross-appeal, alleging that the court erred in denying its motion to dismiss where relator's claims are barred by a law prohibiting suits against the city based on any tax ordinance. For the following reasons, we reverse and remand.

¶ 3 JURISDICTION

¶ 4 The trial court entered its order granting defendants' motion to dismiss on December 23, 2016. On March 24, 2017, the trial court denied relator's motion to reconsider, and relator filed a notice of appeal on April 18, 2017. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. May 30, 2008), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 Relator is a limited liability corporation in Illinois, which claims it "has direct experience with telephone companies' 9-1-1 surcharge billing practices throughout the United States ***." In his affidavit, Roger Schneider, relator's founder and managing director, stated that he was a member of the Board of Commissioners for the Emergency 911 District in Madison County, Alabama (Board), and operated a business. In 2004, his business obtained a quote from

a local telecommunications company for telephone service. The salesperson from the company advised Schneider that they could reduce his monthly bill "by lowering the number of 911 related fees that my company would pay." Schneider informed the Board of this communication, and the Board "sued that telecommunications provider resulting in a settlement with the carrier***." Schneider began to investigate other telecommunications companies in other jurisdictions "to determine if they are correctly billing, collecting, and remitting 9-1-1 fees" and as part of his investigation, he analyzed bills from defendants in this case. Schneider stated that through his efforts, he "discovered that the Defendants in Illinois were under-billing, [under]-collecting, and under-remitting the correct number of 9-1-1 surcharges."

¶ 7 Relator filed a sealed *qui tam* complaint on behalf of the State of Illinois, including the city of Chicago, Cook County, and Kane County. The suit alleged that defendants violated the IFCA and the Chicago FCA when they "intentionally and knowingly" failed to appropriately charge, collect and remit emergency systems surcharges "to certain private business telecommunications subscribers." On September 5, 2014, relator filed a sealed amended complaint. The State declined to intervene and filed a motion to unseal the amended complaint, which the trial court granted.

¶ 8 The amended complaint alleged that "telecommunication service providers fall into three categories (1) incumbent local exchange carriers; (2) competitive local exchange carriers; and (3) mobile/cellular providers," and that "VoIP providers enable customers to communicate (place and receive calls) over the internet." Relator examined private business telephone records and compared the data to the Federal Communications Commission (FCC) reports and data, including the Local Telephone Competition Report of 2013." By using a national "average utilization rate" provided by the FCC for each type of telecommunication service provider,

relator calculated an estimate of actual active phone numbers which "can approximate the number of emergency telephone system (9-1-1) surcharges that should be collected from telecommunication service providers annually from wireline phone numbers ***." Relator compared the data to a sample of private business subscriber's billing records and found that defendants "intentionally and knowingly failed to appropriately charge the correct number of emergency telephone systems surcharges to subscribers on a monthly basis***." Specifically, the complaint alleged that defendants "charge fewer number of emergency telephone systems surcharges than are appropriate *** for the number of telecommunications lines" servicing a subscriber.

¶ 9 As evidence, the complaint detailed deficiencies in two Comcast business bills from March and April 2014, where the businesses had "at least two PRIs which have a total of 46 outgoing channels or PBX trunklines." Relator alleged that although they should have been paying 230 surcharge fees, they paid only 46 surcharge fees. The complaint also alleged deficiencies in AT&T bills for various businesses from March 2013 to March 2014. One of these bills, from a property in Kane county, showed a $7.00 surcharge on a PBX system although the obligation "is to pay five times the number of voice grade channels entering the PBX." Another AT&T bill to a business in Chicago showed that the business had "97 DIDs and extensions" but were only charged 33 emergency surcharges. A conservative estimate, based on "the information at hand," that the company had "2 ISDN PRI circuits, this business should have been paying at least 230 surcharge fees and probably more." The complaint also described deficient bills from North American Telecom, which is not a defendant in this case, issued to businesses throughout the state, including Madison, Adams, Cook, and McHenry counties.

¶ 10 Relator alleged that defendants "misrepresent[ed] the number of lines to be assessed surcharges" in order "to gain a competitive advantage in the telecommunications service provider market by offering subscribers lower prices ***." The complaint alleged that "as a direct and proximate result of the aforementioned fraudulent and knowing violations *** "the State of Illinois, including the County of Cook; the City of Chicago; and the County of Kane have [*sic*] been and continues to be defrauded from hundreds of millions of dollars of emergency telephone system surcharge fees."

¶ 11 Defendants filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)), primarily arguing that the complaint must be dismissed under the IFCA's and Chicago FCA's public disclosure bar. The trial court denied the motion, and advised defendants that the argument should be raised in a motion to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 2016)) of the Code. Defendants then filed a section 2-619 motion to dismiss, arguing that the complaint's allegations were substantially similar to allegations that had been publicly disclosed in news articles, and relator was not an original source of the information underlying the claims. Relator opposed the motion and submitted Schneider's affidavit in response.

¶ 12 Defendants attached the news articles to its 2-619 motion. The trial court took judicial notice of the articles, but not "of the truth of the facts contained therein." For purposes of this appeal, the articles can be grouped into two categories: articles involving the conduct of AT&T, a defendant here, and those involving other parties or no named parties. The news articles involving AT&T, published by the Chattanooga Times Free Press, The Tennessean, the Knoxville News-Sentinel, and the Dow Jones Factiva, concerned federal lawsuits filed by

counties in Tennessee against AT&T. These articles were published between June 2011 and April 2012.

¶ 13 As reported in the articles, the suits contended that in violation of the Tennessee False Claims Act, AT&T "intentionally undercounted lines used to calculate and remit 911 charges" where it was "required to remit 911 charges on every voice line supplied through a multiplex circuit***." As one of the articles explained, the "switch from analog to digital phone services *** muddied interpretations of the 1984 state law allowing for the creation of fee-supported 911 districts. While there used to be a physical phone line for every phone number, digital technology allows for about a dozen telephone lines to be carried over separate channels within a single digital line." For example, digital technology "allows for a single circuit to house 23 channels, each of which has an assigned telephone number and can be used for voice calls***." The lawsuits claimed that the phone companies count "each circuit as one line, thereby avoiding fee payment on up to 22 other lines." In 2007, the Tennessee attorney general issued an opinion finding that under state law, Tennessee's 911 districts should levy a service charge on each line capable of dialing 911.

¶ 14 A lawyer working on one of the cases was quoted as saying that AT&T engaged in these practices "to gain a competitive edge" so that it could charge "a big hospital or corporation" for 10 lines instead of 100. As a result "the 911 board was not being compensated for the other lines." AT&T disputed that it had committed fraud, stating it "simply disagreed with the districts' interpretation of the law." AT&T eventually agreed to voluntarily amend its practices to conform with the districts' interpretation. However, a lawsuit filed by Hamilton county alleged that AT&T's conduct went beyond interpretation of state law as it applied to multichannel phone lines. Rather, AT&T "promised to under-collect 911 charges to gain an unlawful and unfair

competitive advantage ***." The lawsuit stated that AT&T actually proposed undercollecting the 911 fees in a bid to the Hamilton County government, which allowed AT&T to undercut the next lowest bidder by 69 cents per line per month. An article published in April 2012, reported that another county in Tennessee, Bedford, had filed a federal lawsuit alleging "that AT&T has intentionally undercounted lines used to calculate and remit 911 charges with the Bedford County Emergency Communications District."

¶ 15 Three of the remaining articles involved underpayments of 911 fees by companies providing wireless telecommunications service, such as TracFone Wireless, Inc., and U.S. Cellular. The last article reported on a lawsuit that had been filed on behalf of a West Virginia county against internet service provider Vonage. The complaint alleged that Vonage failed to pay 911 fees even though it was providing telephone service. According to the article, state law mandates that "all telephone service providers are required to pay a 911 service fee of $2 per household customer to the local 911 provider."

¶ 16 In ruling on defendants' motion to dismiss, the trial court relied on this court's opinion in *State ex rel. Beeler, Schad and Diamond, P.C. v. Target Corp.*, 367 Ill. App. 3d 860 (2006), to determine whether the allegations in the complaint were publicly disclosed, and whether relator was an original source of the information underlying the allegations. The trial court found that the complaint's allegations "contain allegations from those media sources cited by the defendants" and as such, they "have been made public." Also, the claims were substantially similar to the previously disclosed information. Finally, the court determined that relator was not an original source because Schneider's mere analysis of defendants' bills did not indicate "direct or independent knowledge of any allegations in this complaint sufficient to sustain it." The trial

court granted defendants' motion to dismiss and subsequently denied relator's motion to reconsider. Relator filed this timely appeal.

¶ 17 ANALYSIS

¶ 18 Section 2-619(a)(9) of the Code permits involuntary dismissal of a complaint where "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2016). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts a defense defeating the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Dismissal is proper only if plaintiff can prove no set of facts that would support a cause of action. *In re Estate of Boyar*, 2013 IL 113655, ¶ 27. We review the trial court's dismissal pursuant to section 2-619 *de novo*. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

¶ 19 The IFCA allows a private person to bring a civil action for false claims on behalf of the person and State. 740 ILCS 175/4(e)(4)(A) (West 2016). Although this appeal concerns the IFCA, our supreme court in *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 506 (2005), found that because the statute "closely mirrors the Federal False Claims Act" (FCA), the analysis contained in federal cases is instructive.[1] See also *Target*, 367 Ill. App. 3d at 865 (finding federal cases relevant because the language in the FCA "is virtually identical to the language in the [IFCA]"). We will therefore consider federal cases interpreting the FCA.

¶ 20 The FCA authorizes private citizens, or relators, to file *qui tam* actions on behalf of the government to recover money the government paid due to false or fraudulent claims. *Glaser v.*

[1] The language of the Chicago FCA also mirrors the IFCA and FCA, but defines "original source" 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 city before filing an action under this section ***." Chicago Municipal Code § 1-22-030 (f).

Wound Care Consultants, Inc., 570 F.3d 907, 913 (7th Cir. 2009). "To encourage the exposure of fraudulent activities, the FCA allows a successful *qui tam* plaintiff to receive up to 30% of the final recovery." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 570 (10th Cir. 1995). However, in order to deter "parasitic" *qui tam* actions, the FCA provides that once the information of the fraud becomes public, the only party who may bring a claim under the FCA is the Attorney General or a relator who is an original source of the information. *Wound Care*, 570 F.3d at 913. Public disclosure occurs "when the critical elements exposing the transaction as fraudulent are placed in the public domain." *United States ex rel. Feingold v. AdminaStar Federal, Inc.*, 324 F.3d 492, 495 (7th Cir. 2003). The "public-disclosure bar is designed to prevent lawsuits by private citizens in such situations because '[w]here 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*.

¶ 21 To determine whether the public disclosure bar applies, courts consider the following questions: (1) whether the disclosure contains allegations or transactions from a listed source; (2) whether the disclosure has been made public within the meaning of the FCA; (3) whether the complaint is based upon the public disclosure; and, if the information had been publicly disclosed by answering the previous questions in the affirmative, (4) whether the relator is an original source of the information on which the complaint is based. *Target*, 367 Ill. App. 3d at 868; *Bellevue v. Universal Health Services of Hartgrove, Inc*., 867 F.3d 712, 718 (7th Cir. 2017). The parties on appeal do not dispute that the public disclosures here, allegations contained in news articles, are from a listed source. See 740 ILCS 175/4(e)(4)(A) (West 2016) (providing that "[t]he court shall dismiss an action or claim under this Section, unless opposed by the State, if

substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed *** from the news media***").

¶ 22 Relator argues, however, that no public disclosure occurred because nothing in the news articles referenced fraudulent conduct on the part of defendants Bandwidth.com CLEC, LLC, Broadwing Communications, LLC, Level 3 Communications, LLC, or Comcast Phone of Illinois, LLC.). Where the fraud consists of industry-wide misconduct, courts have required public disclosure of "allegations specific to a particular defendant" before finding the action barred since the government may "know[] on a general level that fraud is taking place," but it has difficulty identifying all of the parties engaging in the fraud. *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994). In such a case, "the government needs the help" of private citizens "to catch" all misbehaving parties. *Id*. The underlying purpose of a *qui tam* action is to lead the government to discover specific, individual fraud. *Id*. To apply the public disclosure bar to any defendants simply because they are members of the industry challenged in the complaint, without more, would hinder this purpose.

¶ 23 However, other circuits have recognized that the bar may apply to unnamed defendants if the public disclosures "alerted the government to the industry-wide nature of the fraud and enabled the government to readily identify wrongdoers through an investigation." *In re Natural Gas Royalties*, 562 F.3d 1032, 1039 (10th Cir. 2009). The reasoning is that where the disclosures provide "specific details about the fraudulent scheme and the types of actors involved in it," the government has been set "on the trail of the fraud" and would not "need to comb through myriad transactions" through the industry to find potential fraud. *Id*. at 1042.

¶ 24 For example, in *Fine* the government issued a report examining the research and development activities at three of the Department of Energy's (DOE) nine laboratories. *Fine*, 70

F.3d at 569. The report found that two of the laboratories improperly "taxed" nuclear waste funds. *Id*. Fine, the relator, filed a *qui tam* action alleging that another DOE laboratory improperly taxed its nuclear waste funds. *Id*. at 570. The court determined that public disclosures detailing the mechanics of the fraud, and revealing that at least two of the nine DOE laboratories were engaged in the misconduct, was sufficient to alert the government that defendant would also improperly "tax" nuclear waste funds. *Id*. at 571. The court distinguished *Cooper*, noting that there is little similarity between combing through the entire private insurance industry to identify actors engaged in fraud, and "examining the operating procedures of nine, easily identifiable, DOE-controlled, and government-owned laboratories." *Id*. at 572.

¶ 25 In *United States ex rel. Gear v. Emergency Medical Associates of Illinois, Inc.*, 436 F.3d 726, 728 (7th Cir. 2006), the court noted that since the "mid-1990s there have been public allegations" of medical schools that fraudulently bill Medicare for services performed by residents. The Department of Health and Human Services initiated audits of the nation's 125 medical schools, and within a few years three of the audits resulted in settlements totaling more than $37 million. *Id*. In February of 2000, the same time the relator filed his complaint, the University of Chicago agreed to a settlement of more than $10 million for improper billing. *Id*. at 729. The court determined that public disclosure barred the complaint where the disclosures "were of industry-wide abuses and investigations" and they implicated defendants, who the complaint alleged had fraudulently billed Medicare for services performed by residents in Midwestern University's residency program." *Id*. at 727-29. The court found that the industry was composed of teaching hospitals associated with the nation's 125 medical schools, and thus, defendants were "directly identifiable from the public disclosures." *Id*. at 729. In this case, "[the

government] is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose." [Internal citations omitted.] *Id*. at 729.

¶ 26 In *United States v. CSL Behring, LLC.*, 855 F.3d 935, 941-43 (8th Cir. 2017), the court acknowledged *Cooper*, but found that the case "'has its limits'" as evidenced by *Fine* and *Gear*. Reconciling the holdings of *Cooper*, *Fine* and *Gear*, the court concluded that for public disclosures to bar claims against a particular defendant, they must either explicitly identify that defendant as a participant in the fraudulent scheme, or provide sufficient information about the participants such that the defendant is identifiable. *Id*. at 944. In determining whether public disclosures barred the complaint against defendants, the court found that the government reports identified "a narrow class of DME infusion drugs" and from this "narrow class" of drugs "one could identify both the drugs and the manufacturer of those drugs, which are defendants. Since the disclosures sufficiently alerted the government to defendants' participation in the fraudulent reporting of prices for DME infusion drugs, the public disclosure bar applied. *Id*. at 946.

¶ 27 Here, relator's complaint alleged that defendants "charge[d] fewer number of emergency telephone systems surcharges than are appropriate *** for the number of telecommunications lines" servicing a subscriber, and "misrepresent[ed] the number of lines to be assessed surcharges" in order "to gain a competitive advantage in the telecommunications service provider market by offering subscribers lower prices ***." Although the news articles in the record generally reported on this fraudulent scheme, none explicitly named defendants Bandwidth.com CLEC, LLC, Broadwing Communications, LLC, Level 3 Communications, LLC, or Comcast Phone of Illinois, LLC, as participants. Taken together, these articles imply that technological advances in providing telecommunications service enable all providers to engage in fraud by misrepresenting the number of lines to be assessed surcharges. They do not,

however, contain information regarding the percentage of providers that actually misrepresent their number of lines, or anything that would point to these defendants in particular as engaging in such fraud. Furthermore, unlike the implicated industries in *Fine*, *Gear*, and *CSL Behring*, which had a small number of easily identifiable participants, the telecommunications industry is composed of a large number of providers who offer different types of services. This is a case where the government may "know[] on a general level that fraud is taking place" in the telecommunications industry, but has difficulty identifying all of the parties engaging in the fraud and needs help "to catch" all misbehaving parties. *Cooper*, 19 F.3d at 566. We find that the public disclosure bar does not apply to the complaint against these defendants.

¶ 28 We next consider whether relator's claims against AT&T, the only defendant specifically named in the news articles, are subject to the public disclosure bar. These claims are barred if the information on which they are based was publicly disclosed, and the relator's lawsuit is substantially similar to the publicly disclosed allegations. *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267, 274 (7th Cir. 2016). Public disclosure occurs when "the critical elements exposing the transaction as fraudulent are placed in the public domain." *Feingold*, 324 F.3d at 495. These elements can enter the public domain if they were "covered by the news media," which includes the articles at issue here. *Id*.

¶ 29 However, for the public disclosure bar to apply, we must find that relator's fraud allegations are substantially similar to the publicly disclosed allegations. *Bellevue*, 867 F.3d at 718. Factors to consider in making this determination include: "whether relators present genuinely new and material information beyond what has been publicly disclosed; whether relators allege 'a different kind of deceit'; whether relators' allegations require 'independent investigation and analysis to reveal any fraudulent behavior'; whether relators' allegations

involve an entirely different time period than the publicly disclosed allegations; and whether relators 'supplied vital facts not in the public domain[.]'" *Id*. at 719 quoting *Cause of Action*, 815 F. 3d at 281. On this issue, the seventh circuit has cautioned against viewing claims "at the highest level of generality … in order to wipe out *qui tam* suits." [Internal quotation marks omitted.] *Cause of Action*, 815 F.3d at 281.

¶ 30 On a general level, relator's allegations of fraud by AT&T mirror the allegations, as reported by the news articles, that AT&T did not bill surcharges on all of the lines it should have counted under state law. On a more specific level, the relator's complaint differs in several significant aspects. First, relator's complaint named new defendants as engaging in fraudulent conduct, and alleged fraudulent conduct in a different jurisdiction, the state of Illinois. The seventh circuit has implied that naming a defendant not readily identifiable in the public disclosures can amount to new, material information (see *United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 869 (7th Cir. 2011) and *United States ex rel. Goldberg v. Rush University Medical Center*, 680 F.3d 933 (7th Cir. 2012)). Defendants disagree and contend that merely naming defendants who had not been identified in the public disclosures is insufficient to distinguish relator's allegations from the publicly disclosed allegations. As support, defendants cite to *United States ex rel. Jamison v. McKesson Corp*., 649 F.3d 322 (5th Cir. 2011). In *Jamison*, the relator's original complaint listed 450 defendants, and contained only general allegations without any information specific to the defendants. *Id*. at 330-31. The court found that this identification "failed to provide any new information" where the relator did not gather evidence to identify particular defendants, but rather "appears merely to have listed a large cross-section of possible defendants. It takes no particular knowledge or effort to describe a

general scheme of fraud and then list arbitrarily a large group of possible perpetrators ***." *Id*. at 331.

¶ 31 Unlike in *Jamison*, the complaint here identified fraud specific to two of the defendants, Comcast and AT&T, as examples. Also, relator's complaint listed only five defendants as opposed to the 450 defendants listed in *Jamison*, and its allegations were based on information relator gathered by examining the bills defendants Comcast and AT&T issued to private businesses in Illinois. We cannot say, as the *Jamison* court found in its case, that defendants here were arbitrarily selected and thus their identity failed to provide any new information.

¶ 32 The public disclosures also did not establish that all members of the telecommunications industry engaged in such fraud, or that defendants committed fraud in other jurisdictions such as Illinois. Although the news articles indicated that the fraudulent conduct in Tennessee stemmed from new digital technology widely used in the telecommunications industry, the articles reported that the suits were filed based on violations of Tennessee state law and the Tennessee attorney general's opinion on that law. The articles reporting outside of Tennessee are similarly defendant and state specific in describing the alleged fraudulent conduct. Taken together, these articles report on the violations and enforcement of state laws in particular states. They do not establish nationwide fraud or fraud specific to Illinois as alleged by relator. Nothing in the public disclosures set the government "on the trail of the fraud" so that it need not "comb through myriad transactions" to find potential fraud. *In re Natural Gas Royalties*, 562 F.3d 1032 at 1042.

¶ 33 Furthermore, while the news articles generally reported that telecommunication service providers failed to pay the proper amount of 911 surcharges because they undercounted the number of lines to be assessed, they did not establish the precise mechanism providers used to commit the fraud. On this issue we find *Goldberg* instructive.

¶ 34 In *Goldberg*, the district court dismissed relator's complaint, finding its allegations that defendant fraudulently billed Medicare for the unsupervised services of residents was based upon, or substantially similar to, a government report finding that billing for unsupervised work by residents was an industry-wide practice. *Goldberg*, 680 F.3d at 934. Although relator's complaint generally concerned the same fraud, it alleged more specific allegations about how defendant billed for the unsupervised services. *Id*. at 935. The suit alleged that the residents' services were supervised, but inadequately, although the hospital certified that they were adequately supervised. *Id*. The court of appeals vacated the district court's judgment, finding that because relator alleged a particular "kind of deceit" that the report did not cover, those allegations were not "substantially similar" to the report. *Id*. at 936. The court warned against viewing the allegations on "a very high level of generality *** because then disclosure of some frauds could end up blocking private challenges to many different kinds of fraud." *Goldberg*, 680 F.3d at 935.

¶ 35 Similarly here, in contrast to the publicly disclosed information in the news articles, the allegations in relator's complaint specified the mechanism through which defendants allegedly committed fraud. Relator alleged that AT&T miscounted "PRIs which have a total of 46 outgoing channels or PBX trunklines," and companies that had "97 DIDs and extensions," were only charged 33 emergency surcharges when they "should have been paying at least 230 surcharge fees and probably more." The complaint alleged that relator discovered this particular fraud through Schneider's own methodology and analysis of bills from defendants. Where the relator's own effort, through independent investigation and analysis, was required to reveal the fraudulent behavior alleged in the complaint, those allegations are not substantially similar to the

disclosed allegations so that the public disclosure bar applies. *United States ex rel. Heath v. Wisconsin Bell, Inc.*, 760 F.3d 688, 691-92 (7th Cir. 2014).

¶ 36 Defendants disagree. Defendants contend that the articles, taken together, imply an industry-wide problem with "relatively few participants." The articles even described the same fraud as alleged by relator: that defendants undercounted the number of lines to be assessed 911 surcharges by counting as one a single line that is capable of servicing up to 23 customers. Defendants argue that since the articles have put the government on notice that fraud is being committed in the industry, public disclosure bars relator's *qui tam* complaint. We might agree if we viewed the public disclosure of allegations "at a high level of generality." *Goldberg*, 680 F.3d at 935. Relator's complaint, however, alleged not just the general fraud as reported in the articles, but also specified the particular mechanisms used to commit the general fraud. Unless we consider the misconduct of undercounting the number of lines to be assessed surcharges "at the highest level of generality – as covering all ways [of undercounting lines] – the allegations of [relator is] not 'substantially similar.'" *Id.* at 936. We agree with *Goldberg*'s position that "boosting the level of generality in order to wipe out *qui tam* suits that rest on genuinely new and material information is not sound." *Id.*[2]

¶ 37 Although we find that the public disclosure bar does not apply to relator's complaint, defendants alternatively argue that this court may affirm the trial court's dismissal where relator failed to plead fraud with the requisite specificity. In Illinois, a complaint alleging fraud "must allege, with specificity and particularity, facts from which fraud is the necessary or probable

[2] We note that in the supplementary authority defendants filed, the District of Columbia court of appeals "embrace[d] the approach" of the seventh circuit to resist viewing the substantial similarity question at a high level of generality. *Phone Recovery Services, LLC v. Verizon Washington, DC, Inc.*, No. 15-CV-1338 (D.C. Ct. App. Aug. 16, 2018).

inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496-97 (1996); see also *Cunliffe v. Wright*, 51 F.Supp.3d 721, 740 (N.D. Illinois 2014) (recognizing that IFCA claims, like FCA claims, are subject to heightened pleading requirements for fraud). To meet this heightened requirement, relator "must come forward with evidence linking the allegations of fraud to an actual false claim for payment. *United States ex rel. Kennedy v. Aventis Pharmaceuticals, Inc.*, 512 F.Supp.2d 1158, 1167 (N.D. Ill. 2007). In a complaint alleging fraud by multiple defendants, relator should inform each defendant of the specific misconduct that forms the basis of the action against the defendant. *United States ex rel. Walner v. NorthShore University Healthsystem*, 660 F.Supp.2d 891, 897 (2009).

¶ 38 Relator's complaint generally alleged that, "at all times material," defendants misrepresented "the number of lines to be assessed surcharges" when providing telecommunications service to certain unnamed "private business telecommunications subscribers." The complaint makes these allegations uniformly against all defendants, providing specifics on what misrepresentations were made only for defendants AT&T and Comcast. These specific allegations are alleged in the complaint as "examples," and provide no more information as to whom AT&T and Comcast made the misrepresentations, or when they were made.

¶ 39 Furthermore, relator's complaint alleging a reverse false claim requires a showing that defendants knowingly made, used, or caused to be made a false statement to avoid an obligation. *State ex rel. Beeler Schad and Diamond, P.C. v. Ritz Camera Centers, Inc.*, 377 Ill. App. 3d 990, 998 (2007). Although the data compiled by relator allegedly shows projected deficiencies in 911 fees, it does not indicate what deficiency amount can be attributed to each of the defendants, or even whether the amount defendants paid was actually deficient. At most, the data identifies an

estimated amount of 911 fees collected per year specific to three types of telecommunication service provider companies: incumbent, competitive, and mobile. The complaint does not identify which defendants belong to which type of provider.

¶ 40 Also, the complaint alleged that defendants engaged in "under-charging, under collecting, and under-remitting the emergency telephone systems surcharges" in violation of the city of Chicago's municipal code, Cook county's municipal code, and Kane County's municipal code. However, nothing in the data supports an allegation that each defendant knowingly failed to pay the required amount of 911 fees, as opposed to failing to pay based on a different interpretation of state regulations, or by a simple mistake. "Merely characterizing acts as having been done fraudulently is insufficient." *Boatwright v. Delott*, 267 Ill. App. 3d 916, 919 (1994). Relator's conclusory allegations, uniformly alleged against all defendants, fail to satisfy the requirement that the complaint allege a false claim with particularity as to each defendant.

¶ 41 Federal courts have relaxed the rule of pleading fraud with particularity where the plaintiff alleged an inability to obtain the essential information absent pretrial discovery. *Emery v. American General Finance, Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998). The rule is also relaxed where the facts plaintiff needed to plead fraud with particularity were inaccessible. *Bankers Trust Co. v. Old Republic Insurance Co.*, 959 F.2d 677, 683-84 (7th Cir. 1992). In those circumstances, plaintiff may plead on "information and belief" and plead the grounds for his suspicions. *Id*. at 684. Plaintiff, however, must set forth in the complaint that the information was inaccessible or cannot be obtained without discovery. *Emery*, 134 F.3d at 1323. Here, relator's complaint makes no such allegations.

¶ 42 Although we find that relator has not pled the fraud claims with particularity, given the unique posture of this case relator should have an opportunity to replead these claims.

Defendants initially filed a motion to dismiss pursuant to section 2-615, which the trial court denied. Upon the trial court's advice, defendants filed a section 2-619 motion to dismiss based solely on the public disclosure bar which the trial court subsequently granted. Defendants' 2-619 motion did not challenge the complaint's pleadings on fraud because such a motion admits the legal sufficiency of the complaint. *Lake Point Tower Condominium Association v. Waller*, 2017 IL App (1st) 162072, ¶ 11. Rather, a challenge to the sufficiency of pleadings for fraud is typically made pursuant to a section 2-615 motion to dismiss. See *Bank of Northern Illinois v. Nugent*, 223 Ill. App. 3d 1, 10-11 (1991) (affirming dismissal of a fraud count because the allegations were too conclusory to satisfy the pleading requirements of fraud).

¶ 43 We recognize that relator did not seek to amend the pleadings pursuant to defendants' 2-619 motion to dismiss. "The general rule is that where the trial court dismisses a complaint and plaintiff does not ask for leave to amend, the cause of action must stand or fall on the sufficiency of the stricken pleading." *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1019 (1993). However, since defendants brought the motion to dismiss pursuant to section 2-619, relator had no occasion to seek amendment of the pleadings in order to allege fraud with particularity. Furthermore, defendants on appeal asked this court to affirm the trial court's dismissal on that alternative ground because a reviewing court may affirm a dismissal on any basis supported in the record. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004). "Under these exceptional circumstances it would be unduly harsh and manifestly unfair to deny plaintiff an opportunity to amend his pleadings on remand simply because of factual insufficiencies in the pleadings which were not addressed by the trial court." *Stamp*, 263 Ill. App. 3d at 1020.

¶ 44 Therefore, pursuant to this court's discretionary authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we remand the matter to give relator an opportunity to replead the fraud claims.

¶ 45 Given our disposition of this appeal, we need not consider the city of Chicago's cross-appeal. The city argues that the trial court erred in denying its separate motion to dismiss because the Municipal Code prohibits actions by private persons in the name of the city regarding the enforcement of any tax ordinance. See Municipal Code of Chicago, § 1-22-030(e). Since we remand the cause for further proceedings, it would be improper at this time to consider the trial court's order denying the city's motion to dismiss. *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 132 (2008) ("denial of a motion to dismiss is an interlocutory order that is not final and appealable").

¶ 46 For the foregoing reasons, we reverse the judgment of the circuit court dismissing relator's complaint through application of the public disclosure bar. However, we remand the cause to allow relator an opportunity to amend the pleadings.

¶ 47 Reversed and remanded with directions.