United States District Court
For The District of Wyoming

In Re: **Natural Gas Royalties** ***Qui Tam* Litigation**	**MDL Docket No. 99-MD-1293-WFD** (99-MD-1602 , 99-MD-1603, 99-MD-1604, 99-MD-1605, 99-MD-1607, 99-MD-1608, 99-MD-1609, 99-MD-1610, 99-MD-1611; 99-MD-1612, 99-MD-1614, 99-MD-1615;99-MD-1616; 99-MD-1621; 99-MD-1622; 99-MD-1625, 99-MD-1626, 99-MD-1627, 99-MD-1628, 99-MD-1629, 99-MD-1630, 99-MD-1631, 99-MD-1632, 99-MD-1633, 99-MD-1634, 99-MD-1635, 99-MD-1638, 99-MD-1639, 99-MD-1640, 99-MD-1641, 99-MD-1642, 99-MD-1644, 99-MD-1645, 99-MD-1650, 99-MD-1654, 99-MD-1656, 99-MD-1657, 99-MD-1659, 99-MD-1666, 99-MD-1667, 99-MD-1668, 99-MD-1669, 99-MD-1670, 99-MD-1682, 99-MD-1684)*

ORDER GRANTING MOTION FOR FEES AND EXPENSES PURSUANT TO 31 U.S.C. § 3730(d)(4)

This matter comes before the Court on Defendants' various motions for sanctions under 31 U.S.C. § 3730(d)(4), Fed. R. Civ. P. 11, and this Court's inherent powers. The Court having considered the motions, the briefs and exhibits submitted in opposition and support thereof, having conducted a hearing on the issue, and considering itself otherwise fully advised, hereby adopts the following findings of fact and conclusions of law:

*The following Defendants have withdrawn their fee motions: 99-MD-1602 (Gas Transmission Northwest Corp. f/k/a Pacific Gas Transmission Co.); 99-MD-1608 (Northern Border Pipeline Co. and Northern Natural Gas Production Co.); 99-MD-1611 (Aquila, Inc., f/k/a UtiliCorp United Inc.); 99-MD-1615 (Mesa Operating Co., n/k/a Pioneer Natural Resources U.S.A., Inc.); 99-MD-1616 (Gary Williams Energy Corp.); 99-MD-1621 (Exxon Co., U.S.A.); 99-MD-1622 (Valero Natural Gas Co.); 99-MD-1628 (Columbia Gas Development Corp.); 99-MD-1634 (Michigan Consolidated Gas Co.); 99-MD-1640 (Public Service Co. of Oklahoma); 99-MD-1654 (North American Resource Co.); 99-MD-1666 (Oryx Energy Co.); 99-MD-1668 (Occidental Oil & Gas Corp., Occidental Energy Ventures Corp., OXY USA Inc., Placid Oil Co.); 99-MD-1669 (Bear Paw Energy, LLC). In 99-MD-1645, Marathon Oil Company still claims fees, expenses, and costs.

All Defendants in the following cases have withdrawn the requests for fees and costs: 99-MD-1601, 99-MD-1613, 99-MD-1617, 99-MD-1618, 99-MD-1619, 99-MD-1623, 99-MD-1624, 99-MD-1636, 99-MD-1637; 99-MD-1643; 99-MD-1646; 99-MD-1647; 99-MD-1648; 99-MD-1649; 99-MD-1651; 99-MD-1652; 99-MD-1653; 99-MD-1655; 99-MD-1658; 99-MD-1660; 99-MD-1661; 99-MD-1662; 99-MD-1663; 99-MD-1664; 99-MD-1665; 99-MD-1671; 99-MD-1672; 99-MD-1673.

I. FINDINGS OF FACT

Grynberg I

1. In April of 1995, Relator Jack J. Grynberg filed a *qui tam* action in the United States District Court for the District of Columbia. In his initial complaint and subsequent amendments, Relator alleged that over 60 companies in the natural gas industry had defrauded the federal government by underpaying royalties on gas purchased from federally owned or Indian lands using at least one of ten mismeasurement techniques. *See United States ex rel. Grynberg v. Alaska Pipeline Co.*, No 95-725, 1997 WL 33763820 (D.D.C. March 27, 1997) (*Grynberg I*). In addition to the named defendants, Grynberg reserved the right to add "other entities which have purchased natural gas produced from Royalty Properties and underreported the heating content and volume of gas so purchased by the means of one or more of the practices" identified in his complaint. *See Grynberg I* Second Amended Complaint at ¶ 80.

2. On March 27, 1997, United States District Judge Thomas F. Hogan dismissed *Grynberg I*. Judge Hogan ruled that Grynberg had: (1) improperly joined all of the defendants in a single lawsuit and (2) failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). As to Rule 9(b), the court held:

> Plaintiff's complaint does not approach the specificity required by Rule 9(b). Plaintiff has taken a shotgun approach to this litigation, firing out more than ten accusations at seventy defendants, hoping that some accusations stick on some defendants. **He has never specified which allegations he expects will hit which defendants; his most definite**

> **statement is that 'each Defendant engaged in at least one of the Practices' . . . but he never identifies which defendants engaged in which practices. Furthermore, [P]laintiff does not identify the time or place where each defendant engaged in these practices. Instead, he 'pinpoints' time and place for each defendant at some unnamed federal or Indian land where gas is measured and at some unnamed time during the statute of limitations period.**
>
> ***
>
> **This is not a sufficient pleading, but instead, an attempt to shift his investigatory burden onto defendants.**

Grynberg I, 1997 WL 33763820, at *4 (emphasis added).

***Grynberg II* - The Present Litigation/1997 *Qui Tam* Complaints**

3. Rather than accept the Court's dismissal in *Grynberg I* as a necessary consequence of his failure to obtain or possess any evidence or information to support his massive, industry-wide claims, Grynberg instead elected to broaden his allegations. Rather than limit his complaint to the sixty-plus defendants named in *Grynberg I*, he filed at least seventy-three lawsuits against more than three hundred defendants and moved to have the cases consolidated for pre-trial purposes before this Court.

4. Judge Hogan's Order in *Grynberg I* left two obstacles which Grynberg would have to overcome. First, he would need to identify which Defendants engaged in each of the types of misconduct Grynberg had theorized could occur (rather than simply pleading that each Defendant engaged "in at least one" of the alleged practices as he did in *Grynberg I)*. Second, to file an industry-wide complaint, Grynberg would need to

identify the "time" and "place" of the alleged misconduct of each of the hundreds of companies he decided to sue.

5. To overcome these hurdles in the cases now before this Court, Grynberg alleged that he did in fact know which mismeasurement practices each Defendant performed. He alleged that *every* Defendant fraudulently engaged in, or fraudulently caused others to file false reports regarding *all* of the alleged mismeasurement practices.[1] As the Special Master correctly observed, "Relator's allegation in each of the 1997 *Qui Tam* Complaints that each named defendant employed each of the listed mismeasurement techniques [was] designed to overcome the lack of particularity found by Judge Hogan." Report and Recommendations of Special Master, Doc. 1573, at 5, n.3. Grynberg made these allegations, knowing that he lacked the factual basis necessary to support such specific allegations.

Order on Defendants' Motions to Dismiss Under Fed. R. Civ. P. 9(b)

6. This Court noted the significant differences between the *Grynberg I* Complaint and the 1997 *qui tam* complaints in its Order denying Defendant's Rule 9(b)

[1] Both the number of Defendants and the number of alleged mismeasurement techniques grew considerably in the time between the dismissal of *Grynberg I* and the initiation of the present litigation. As noted above, the targets of Grynberg's claims had expanded from roughly 60 defendants in *Grynberg I* to more than 300 in the cases before this Court. Additionally, the ten mismeasurement techniques Grynberg alleged in *Grynberg I* had now grown to more than twenty. Before this Court, Grynberg specifically alleged that *each* of the more than three hundred Defendants engaged in *each* of twenty specified mismeasurement techniques.

motions to dismiss. This Court described *Grynberg I* as follows:

> The complaint in *Grynberg I* described ten practices that result in the undermeasurement of gas and its heating content. The complaint alleged that each defendant employed at least one of the ten techniques described, and alleged that each defendant submitted royalty statements based on the incorrect measurements. The complaint did not identify the time or place where any of the defendants engaged in the practices, except to state that the defendants had engaged in the practices on some unnamed federal or Indian lands at some unspecified time within the statute of limitations period.

See Order on Motions to Dismiss, 99-MD-1293, Doc. 388 at 2. In contrast, in describing Grynberg's allegations in the present actions, this Court noted that the 1997 complaints alleged that the "Defendants have knowingly . . . underreported the heating content and volume of that gas by undermeasuring and misanalyzing it in the ways described in paragraph 32-54 of [the] complaints." *Id.* at 3. The Court's 9(b) decision also noted that the 1997 Complaints alleged Grynberg had "undertaken an investigation of the gas measurement techniques utilized by the Defendants. . . ." *Id.* at 15. Based in part on this representation and the specificity with which Grynberg alleged the mismeasurement practices each Defendant engaged in, the Court denied Defendants' Rule 9(b) motions.[2] The Court concluded that Grynberg had cured a fundamental

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[2] In his affidavit attached to his response to Defendants' motions to dismiss, Grynberg stated that he did not know details such as which employees of the Defendants measured the gas or precisely how much gas was mismeasured. *See* January 13, 2000 Grynberg Affidavit. The words chosen in the affidavit created the impression that while Grynberg knew a lot, he did not know every detail. The Court declined to apply an exacting Rule 9(b) standard that would require Grynberg to plead his claims in terms of such specific details. *See* Order on Motions to Dismiss at 18.

defect of the *Grynberg I* Complaint and had now placed all Defendants on notice regarding the precise measurement practices he accused them of committing.

Subject Matter Jurisdiction Discovery - 31 U.S.C. 3730(e)(4)

7. Having survived the Rule 9(b) motions, the focus of this case then switched to the public disclosure bar and the "original source" exception thereto. Grynberg was called upon to demonstrate that this Court had subject matter jurisdiction over his claims because the information on which his suits were based had either (1) never been publicly disclosed or (2) had been publicly disclosed but Relator was an "original source" of the information.

8. In the course of conducting subject matter jurisdiction discovery, it soon became clear that the allegations that allowed Grynberg to survive the Rule 9(b) motion was a classic bait and switch. Grynberg's lack of a factual basis for his allegations first became obvious when he produced to the Defendants the documents he was required to submit to the government to support his claims under 31 U.S.C. § 3730(b)(2).[3]

What the Court's Rule 9(b) Order did not do, however, was excuse Grynberg from having any factual basis for his allegations. Suffice it to say, had the Court known then what it knows now (and more specifically, what *Grynberg knew then*), the result of Defendants' Motions to Dismiss may have been drastically different, and the Defendants and this Court would have been spared more than a decade of frivolous litigation.

[3] Under 31 U.S.C. § 3730(b)(2), a relator is required to provide a "copy of the complaint and written disclosure of **substantially all material evidence and information the person possesses** . . . on the Government. . .") (emphasis added).

9. Nothing in those documents showed that every Defendant engaged in every mismeasurement practice he alleged. In fact, nothing in those documents showed that *any* Defendant engaged in *any* practice that resulted in the mismeasurement of gas. The information Grynberg provided to the government failed to establish that Grynberg had "direct and independent knowledge" of the information underlying the allegations in any of his 1997 *qui tam* complaints, thus disqualifying him as an "original source" eligible to bring these suits.[4]

10. More than 200 Defendants, about two-thirds of the total number of Defendants in this litigation, were *never even mentioned* in the documents that allegedly provided the evidentiary basis for Grynberg's lawsuits. *See* Report and Recommendations of Special Master at 158 (referencing the "209 No Document

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[4] At the hearing on Defendants' fees motions, Relator's counsel argued that the scope of evidence the Special Master and this Court considered in addressing the whether Grynberg had "direct and independent knowledge" of the information underlying his allegations qualifying him as an "original source" was unduly restrictive. As a result, Relator argued that the "filter" through which this Court assessed the available evidence kept out "a good deal of evidence of substantive merits of this case" and Relator has never had "his day in court on the factual record. . . ." Transcript of Hearing on Defendants' Motions for Attorney's Fees at 93:21-24. Unfortunately for Relator, not only have the Special Master and this Court now disagreed with his position, but the Tenth Circuit has, as well. *See In re Natural Gas Royalties Qui Tam Litigation*, 562 F.3d 1032, 1044 (10th Cir. 2009) (limiting the Court's "assessment of Relator's knowledge in this case . . . to information he voluntarily provided to the government before filing suit" and agreeing that there was "insufficient evidence in the record to support consideration of either Relator's oral communications with government employees or documents that may have been copied by government representatives during their reviews of Relator's files.").

Defendants" not mentioned in any of Grynberg's (b)(2) disclosure documents); *see also In re Natural Gas Litigation*, 562 F.3d at 1045 (holding that Relator could not qualify as an original source in those cases where Relator "did not even provide the names of any Defendants" to the government). In several other cases, the only documents Grynberg provided to the government were "pages of handwritten notes briefly mentioning telephonic or attempted telephonic interviews with employees of various Defendants." *Id.* This "secondhand knowledge" does not constitute "direct and independent" knowledge, precluding Grynberg from serving as an original source as to those Defendants. *Id.* A few other Defendants were briefly mentioned in one or two documents other than the phone call notes, but "the references to these Defendants were innocuous, irrelevant to the allegations in Relator's complaints, or based upon speculation, publicly available documents, and secondhand information" and again, failed to establish any "direct and independent knowledge" by Relator. *Id.* at 1046. Even in the "three cases in which Grynberg's claim of original source status was strongest," the "limited" direct and independent information Grynberg provided was "minimal in comparison to the broad scope of his allegations against them" and was insufficient to establish Grynberg had the requisite direct and independent knowledge to qualify him as an original source. *Id.* at 1047.

11. Grynberg's deposition testimony confirmed, in fact, that he had no evidentiary support for his allegations that each Defendant engaged in, or fraudulently

caused others to file false reports regarding each of the more than twenty mismeasurement techniques identified in his complaints, but instead, only that he hoped to find such evidence during the course of discovery. Grynberg consistently testified in his deposition that he could not identify the alleged mismeasurement practices without the benefit of discovery. *See, e.g.,* Grynberg Dep. 1894:11-16; 4920:10-4921:7; 72:18-73:16; 496:16-18; 515:6-12; 1114:22-1115:1; 1832:5-1833:6; 1835:19-23; 1852:7-12; 1940:13-16; 2258:25-2259:3; 2935:8-10; 3838:3-13; 4000:24-4001:10; 4731:25-4732:9; 4980:8-13; 5051:8-11; 5321:20-22;

12. In written discovery, Magistrate Beaman ordered Grynberg to supplement his responses to the Coordinated Defendants' Interrogatories. More specifically, in response to Interrogatory 10, Magistrate Beaman found that Grynberg's answers were not adequate in that they failed to"*specifically* identif[y] his allegations with regard to *each individual defendant* and their respective alleged fraudulent misconduct" and ordered him to supplement his responses failed "to reflect the specific mismeasurement practice[s] that he claims *each individual* defendant has engaged in." Order Ruling on Coord. Defs.' Mtn. To Compel Sufficient Interrogatory Answers By Relator Grynberg, Doc. 1050 at 16-17 (emphasis original).

13. What Grynberg produced was page after page of redundant responses, simply reiterating the allegations in the complaints and adding the words "or caused others to." *See* Grynberg's Fourth Supplemental Responses, Vol. II, Coord. Defs.' Oral

Argument Exhibits to Hearing on Defs.' Mtns. For Attorney's Fees.

14. Grynberg acknowledged in his deposition testimony that without discovery, he could not provide a direct response to the question he was ordered to answer by Magistrate Beaman:

> Q And it's also correct that without discovery, you cannot identify which specific defendant causes a specific mismeasurement practice on a specific lease?
>
> A Yes.

Grynberg Dep. 4920:24-4921:2.

15. Grynberg made sweeping and "fictitiously specific" accusations, hoping that he would uncover evidence to support his claims in discovery. Years later, the factual foundation for Grynberg's claims and the evidence supporting his assertion of public disclosure and original source status was no sturdier than it had been when Judge Hogan dismissed *Grynberg I*. Further, Grynberg distorted the import of this Court's ruling under Fed. R. Civ. P. 9(b) to suggest that he could – contrary to Judge Hogan's ruling – properly "shift his investigatory burden onto defendants." *Grynberg I*, 1997 WL 33763820, at *4.

16. Relator was wrong. Although the Court ruled that Rule 9(b) did not require Grynberg to plead his claims "in terms of 'the specific day, month and year' that the measurement occurred; 'the particular natural gas well on the particular royalty property' from which gas was extracted; 'the date of the claimed false statement;' and the

'specific claimed undermeasurement,'" nothing in the Court's Order on Defendants' motions to dismiss condoned the practice engaged in by Grynberg in this case. *See id.* ("Rule 9(b) prevents plaintiffs from first filing lawsuits alleging fraud, only to search out all of the facts in support of the cause of action during discovery.") (citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

17. Instead, in denying Defendants' Rule 9(b) motions, the Court relied upon Grynberg's representations that he knew that each of the Defendants filed a false report by undermeasuring, by using each of the techniques alleged in paragraphs 32 through 57 of his complaints, at least on the properties identified in Exhibit B, and at least since 1985.

Evidence Demonstrating the Frivolousness and Vexatiousness of Grynbergs' Complaints

18. It would be a daunting task for this Court to catalogue all of the reasons and facts known in the record that bear on the frivolousness of Grynberg's claim to "original source" status as well as the vexatious nature of this litigation as a whole. Nonetheless, given the nature of the motion and the task before this Court in ruling on the Defendants' various motions for fees, the Court is mindful that some elucidation is required. The facts set forth below are illustrative of the approach and tactics employed by Grynberg over the course of this litigation and justifying the imposition of fees:

The MMS Data/Exhibit B

19. After Judge Hogan's decision dismissing his claims in *Grynberg I* and prior to refiling the lawsuits at issue, Grynberg served separate Freedom of Information Act ("FOIA") requests with the Minerals Management Service ("MMS"). In these requests, Grynberg sought "a list, by lease (federal and Native American) of pipeline companies as purchasers of natural gas" for the years 1986 and 1987. *See* Letter from Jack J. Grynberg to Kenneth Vogel, Chief, Office of Enforcement, MMS (Apr. 29, 1997); Letter from Jack J. Grynberg to Greg Kann, Minerals Management Service (May 5, 1997) *see also* Fourth Supplemental Resp. to Defs.' Interrogs. at 38 (describing Grynberg's FOIA request). In response to this request, the MMS provided him two disks of data.

20. From this data, Grynberg created "Exhibit B" to the complaints, which purported to identify the location where the alleged mismeasurement occurred. Grynberg Dep. at 234:1-10. The MMS data provided to Grynberg was over ten years old and identified only the names of *buyers* of federal gas and the numbers associated with the *payor* of federal royalties. MMS did not provide Grynberg with the names of the entities that *measured* gas produced from federal properties. *See* Grynberg Dep. at 235:4-8.

21. Grynberg described Exhibit B as "identif[ying] only those Royalty Properties on which Defendants or their affiliates have been the direct payors of royalties to the United States Government." *See, e.g.* Midcon Amended Complaint, 99-MD-1668,

Tagalong 97-1418, D.Colo., at ¶ 20, attached as Exhibit G to Midcon Defs. Mtn. to Dismiss & Mtn. For Sanctions, Doc. 1673.

22. Grynberg relied on Exhibit B to establish where the Defendants were engaging in the mismeasurement techniques alleged in the complaints. Exhibit B listed a payor number and a buyer number for each federal lease, identified by lease number. When considered in conjunction with Grynberg's explanation of the use of Exhibit B, the clear import of Exhibit B was in establishing those federal leases where the payor and the buyer were the same. According to Grynberg, the assumption underlying Exhibit B was that anywhere the buyer of natural gas is also paying the royalty to the government, the buyer must be taking title at the point of the wellhead and must be measuring gas. Accordingly, Grynberg's complaints relied on Exhibit B to establish where the Defendants were allegedly mismeasuring gas using the techniques Grynberg identified in his complaints.

23. Grynberg continued to rely on his Exhibit Bs even after the government advised Grynberg and the Court that they were "inaccurate," "virtually worthless," and premised on a faulty assumption that "buyers" measured gas. For example, in the December 8, 1997 Ex Parte Motion of the United States For an Extension of Time, the government explained its problem with Exhibit B as follows:

> Exhibit B is inaccurate. Rather than be a correlation of leases to the pipeline company which controls the measurement of gas on the lease site for purpose of royalty settlement, Exhibit B appears to be a correlation

> as of 1986 of the pipeline company which purchased gas downstream of the point of royalty settlement to the lease from which the gas was produced.

Id. at ¶ 9; *see id.* at ¶ 10 (noting that "[t]he analysis of Exhibit B and the determination that it was not an accurate correlation of a lease to the pipeline company which controls the measurement of gas on the lease" was a "time-consuming process"). The government's assessment of the value of Exhibit B did not improve over time. The government later reported:

> Many defendants have informed us that the preparation of their individual submissions has been hampered considerably by the fact that the 'Exhibit B's' attached to the complaints, that purport to identify the Federal and Indian gas leases on which the defendants are alleged to have practiced the mismeasurement techniques alleged in the complaints, are grossly inaccurate.[4]
>
> [4] The relator compiled the 'Exhibit B's' by taking a list of the approximately 30,000 federal leases managed by the Department of Interior's Mineral Management Service, and sorting that list according to the 'buyer' shown on the royalty entry. The 'buyers' were named as defendants on the assumption that they were responsible for measuring the gas at the wellhead. That assumption has proven wrong countless times. Thus, we have found that the Exhibit B's are virtually worthless in identifying the federal leases that might be affected by the relator's allegations in any given case.

October 23, 1998 Memorandum in Support of Unopposed Application of the United States for an Order Extending Time to Inform the Court of its Election in Intervention and Continuing the Matter Under Seal at 4-5. Nonetheless, Grynberg continued to

litigate his claims after being advised by the government that his fundamental assumption that the FOIA response identified companies who measured gas was just plain wrong.

24. In the course of discovery on Grynberg's status as an original source, Grynberg explained that Exhibit B was the result of the data he received from the MMS in response to his FOIA requests. Grynberg indicated that he modified the data presented to him by the MMS and saved it in the format of Exhibit B to his complaints. He was unable to produce the original data for Defendants' inspection in discovery. When asked in deposition about the data he obtained from the MMS, Grynberg testified:

> Q. And so there is a disk that has the original information you got from the government, and then the disk that you modified?
>
> A. I don't have the original anymore. I just have the disk that we got from the government, which we then modified it. And that's what's on the computer, and that's the copy that we made to give to you. That's the only copy I have.
>
> Q. Okay. What happened to the disk from the government?
>
> A. Well, we used it, and we used that to – we loaded the computer, and I don't know where it is.
>
> Q. It's lost?
>
> A. I don't know where it is. May or may not be lost. Things were lost in our move. We moved about 14 months ago.
>
> Q. But what you are testifying to is that the disk that you got from

the federal government is not available to you or to us anymore?

A. I don't have it. But the basic information on the disk is available, and that's the basic information in Exhibit B.

Grynberg Dep. 80:7-81:2.

25. When Defendants served their own FOIA request seeking the very same data the MMS had given to Grynberg in 1997, the results they obtained demonstrated that Grynberg's Exhibit B, was at best, a selective compilation of portions of the MMS data. Although Grynberg's Exhibit B listed only a payor number and buyer name for the subject leases (suggesting the buyer and payor were the same for those leases), the original data provided by the MMS listed both buyer number and payor numbers for each of the subject leases (often demonstrating that the buyer and payor were not, in fact, the same entity).

26. Grynberg created Exhibit B in a way that appears to intentionally distort the information contained therein. Additionally, Grynberg later conveniently misplaced the original data, creating an obstacle for Defendants to shed light on this distortion. These two factors, considered together, lead the Court to the inescapable conclusion that Exhibit B was an outright fabrication designed to mislead this Court into believing Grynberg's allegations were based on something more than complete speculation.

Blue Dolphin

27. Further evidence of Grynberg's manipulation of the data contained in Exhibit

B is demonstrated by Grynberg's case against Blue Dolphin. In 1996, in *Grynberg I*, Blue Dolphin provided Grynberg with an affidavit along with a Rule 11 safe haven letter explaining how it operated its pipeline and demonstrating that it could not commit the kind of wellhead measurement fraud that Grynberg alleged.

28. Further, the data obtained from the MMS (on which Grynberg based the majority of his claims) gave Grynberg no basis for alleging Blue Dolphin was a buyer of gas, royalty payor or a wellhead measurer. Instead, the MMS data was consistent with the information Blue Dolphin provided to Grynberg in the 1996 affidavit. Nonetheless, Grynberg brought suit against Blue Dolphin, based on nothing more than speculation that flew in the face of Grynberg's own evidence as well as the evidence provided to him by Blue Dolphin.

Other Lost Notes and Documents

29. Grynberg's tendency to missplace documents that allegedly either supported his claim to original source (e.g., personal notes of his pre-filing investigation) or requested by Defendants (e.g., the MMS data disks and documents listed on Grynberg's privilege log) has not gone unnoticed by this Court. One such example arose with respect to a privilege log that, on its face, catalogued documents that were clearly not attorney-client or work-product privileged. In addressing the issue, the Special Master remarked:

The Special Master agrees with Defendants that there are a considerable

> number of documents listed on Relator's privilege logs that appear to be neither attorney-client privileged nor protected work-product, including but not limited to deposition transcripts; court pleadings; written discovery responses; correspondence between Relator and non-lawyers; documents received from opposing litigants in various lawsuits; reports, notes and/or correspondence involving individuals who may have been designated as testifying experts in various suits; contracts; court opinions; statutes; and regulations.

May 19, 2004 Special Master's Order, Doc. 1313. Accordingly, the Special Master ordered Grynberg to deliver all of the withheld documents to the Special Master for an *in camera* inspection. In response, Grynberg told the Special Master that many of the items listed had disappeared.

30. Similarly, although Grynberg's claim of original source status was allegedly based on an investigation he conducted prior to filing his claims, he claimed he was also missing personal notes from the investigation. Notably, the move in which these notes were allegedly "lost" took place after the filing of these lawsuits and well after Grynberg disclosed all of the information that he alleged qualified him as original source. None of the documents appear in the government's files regarding Grynberg's claims.

Grynberg's Previous Litigation

31. These cases are not Grynberg's first attempt to litigate his mismeasurement claims. *See, e.g.,* Coord. Defs.' Mem. In Support of Motion to Dismiss Based on Disclosure and Seal Requirements of the False Claims Act, Doc. 1335 at 16-22

(discussing examples of related prior litigation). Notably, Grynberg pursued his claims in these cases notwithstanding adverse results and findings in prior litigation. More importantly, Grynberg omitted any adverse results relating to his claims in pre-filing disclosure made to the government. *See id.*

TransColorado - The Unbuilt Pipline

32. One of the most flagrant examples of Grynberg's complete lack of a factual basis for the allegations in his complaint is TransColorado. Grynberg sued TransColorado knowing it had never even measured gas because it had not yet been constructed. *See* Letter from Jack J. Grynberg to Vince Terlep (October 1, 1998) (admitting that the "TransColorado line in question is . . .under construction, it is empty . . ."). In his deposition, Grynberg acknowledged:

> Q. Mr. Grynberg, where did TransColorado exist as of the time you filed the lawsuit?
>
> A. It either existed or was about to exist.
>
> ***
>
> Q. And you don't even know whether they existed as of that day?
>
> A. Didn't have to. I knew they were going to exist, so I included them.
>
> ***
>
> Q. Where did TransColorado measure gas on federal and Indian lands as of the date you filed the lawsuit?
>
> A. Well, if it didn't exist, it didn't measure, did it?

Q. That's correct. Certainly, sir.

A. Okay. So I included them as one of the affiliates of El Paso, which is what my instruction was to do. I've testified to that a hundred times.

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Q. As of the filing of your lawsuit, Mr. Grynberg, in 1997, do you know who operated TransColorado?

A. Well, if it didn't exist, it wasn't operating.

Q. That's correct.
Do you know who was responsible for measuring volumes?

A. Best of my recollection, it was KN Energy.

Q. As of the time of filing the lawsuit?

A. If there was – it was going to. It didn't. But it was going to in the future.

Grynberg Dep. 6738:15-17, 6739:14-17, 6739:24-6740:6, 6743:8-21.

Grynberg Proceeds In Spite of Information from Agency and Government Officials Indicating His Claims Had No Merit

33. Grynberg persisted with the allegations of mismeasurement contained in Paragraph 37 of the Complaints notwithstanding the Government's assessment that his claims were not valid. *See* September 14, 1998 Memo from Jack J. Grynberg to Dr. Robert Lee (attaching "Justice Department" data suggesting that mismeasurement technique yielded the equivalent of an octane molecule"the size of a basketball" going through a two square-mile area).

34. In November 1996, before Grynberg initiated these actions, he knew that the Colorado Oil & Gas Conservation Commission had reviewed his claims and concluded that his lawsuit was "baseless and without merit." Colorado Oil & Gas Conservation Commission Memo from Rich Griebling to Maxine Stewart and Max Vezzani (November 4, 1996). A review of Grynberg's claims involving three employees with an aggregate of over 130 private sector industry experience, over 90 years of public sector regulatory experience, and 13 engineering degrees resulted in a conclusion by the Commission that Grynberg's claims were "baseless and without merit" and "misrepresent[ed] the process of measuring, buying, and selling natural gas under field conditions in the real world." *Id.* As a result, the Commission concluded that "Colorado should distance itself as far as possible from this lawsuit." *Id.*

35. Even in July 1997, Assistant U.S. Attorney for the District of Colorado, Michael Carey, told Grynberg that he did not understand "which mismeasurement practice applies to which company and to which lease." Letter from Michael Carey to Jeffrey Reiman (July 28, 1997). He specifically told Grynberg he needed "a correlation of mismeasurement practice, with specific company, with specific lease to corroborate the allegations as drafted." *Id.* He asked Grynberg to provide him with "specific factual references that provide evidence of mismeasurement for each defendant and company," and directed Grynberg to "[f]ocus on specific factual allegations and not general scientific principles, gas metering devices, or general allegations seemingly

enhanced with anecdotes." *Id.* In response, Grynberg explained that while he could identify the mismeasurement techniques, he could only state that the entities listed as Defendants "may mismeasure or cause to be mismeasured," but that he needed "additional discovery in order to establish that." Grynberg Dep. at 85-90.

Grynberg Ignores Affidavits from Non-Measuring Defendants

36. After a deposition of the Relator conducted in Casper, the parties had an informal discussion with the Court in chambers about a procedure for dismissing those Defendants who do not measure gas at all. Subsequently, at a September 24, 2003 hearing before the Special Master, for purposes of expediting Grynberg's deposition, the parties discussed a process for identifying those Defendants who would be eligible for dismissal if they could demonstrate they did not measure gas.

> MR. SHEPHERD: Judge Downes has ruled that, of course, all individual defendants have a right to depose Mr. Grynberg. And there are a large number of those. There are a large number of those that we believe shouldn't even be in this case.
>
> ***
>
> . . . I think there's two categories of defendants that we think – from talking to Mr. Jatko in Mr. Grynberg's deposition – that would be good candidates for Mr. Grynberg to agree to dismiss, and they wouldn't need to depose him.
>
> And the two categories are the two defendants that don't measure and don't own gathering systems, one. And he addressed that in his deposition.
>
> ***
>
> MR. JATKO: Well, we have had one defendant recently approach us with affidavits in the first category that Mr. Shepherd was talking about. That is, they don't measure and they don't own gathering systems.

> SPECIAL MASTER: Right.
>
> MR. JATKO: And we're extremely likely to dismiss that particular defendant. I haven't signed the paperwork they provided. . . . this material was accompanied by affidavits and support. . . . We have had some other conversations . . . with other defendants who say they intend to do the same thing, but we haven't received any material.
>
> SPECIAL MASTER: Okay. So it sounds to me like what you need, Mr. Jatko, is you need a list for Mr. Shepherd of the defendants that he – he believes fall into category one, . . . you want an affidavit and documentation to support the position that they don't own gathering systems?
>
> MR. JATKO: Right.

Transcript of Hearing Before Special Master at 12:16-14:25 (September 24, 2003) (omitted dialogue indicated).

37. More than sixty Defendants used the procedure outlined above to provide Grynberg with evidence and affidavits demonstrating that they did not measure gas. *See, e.g.,* Letter from Michael Smith to Special Master Bruce Pringle (October 13, 2003) (enclosing affidavits from various Coordinated Defendants that had been submitted to Grynberg for consideration).

38. In essentially all cases, Grynberg simply ignored the uncontroverted evidence and affidavits in the hope that, notwithstanding all of the evidence to the contrary, he would find evidence to support his allegations in the process of discovery.

39. In many instances, Grynberg justified his refusal to dismiss based on the information contained in Exhibit B. *See, e.g.,* Letter from Jack J. Grynberg to Robert S.

Rooth (October 13, 2003); Letter from Jack J. Grynberg to Robin F. Fields (October 14, 2003); Letter from Jack J. Grynberg to Rebecca Hitchcock Noecker (October 13, 2003). As noted above, the Court has concluded that Exhibit B was designed to misrepresent the data Grynberg obtained from the MMS. Grynberg's reliance on an exhibit he knew to be misleading when faced with evidence directly refuting his allegations is particularly galling to this Court.

II. CONCLUSIONS OF LAW

Attorney's Fees under 31 U.S.C. § 3730(d)(4)

1. The attorney's fees provision of the False Claims Act provides that prevailing defendants may recover attorney's fees under the following circumstances:

> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses **if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.**

31 U.S.C. § 3730(d)(4) (emphasis added). This standard is "a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1059 (10th Cir. 2004). In deciding a fee motion under § 3730(d)(4), this Court is mindful that it must "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been

unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (applying fees provision in section 42 U.S.C. § 1988); *see Grynberg v. Praxair, Inc.*, 389 F.3d at 1058, n.22 (noting that a successful defendant "must demonstrate that the plaintiff has misused his statutory privilege and distorted the intent of the legislation" in order to recover attorneys fees).

2. Congress expressly created this provision to protect innocent parties from abusive FCA claims. *See* S. Rep. No. 99-345, at *29 (1986), *reprinted in* 1986 U.S.C.C.A.C. 5266, 5294 ("The Committee added this language in order to create a strong disincentive and send a clear message to those who might consider using the private enforcement provision of this Act for illegitimate purposes. The Committee encourages courts to strictly apply this provision in frivolous or harassment suits as well as any applicable sanctions available under the Federal Rules of Civil Procedure.").

3. Notwithstanding the fact that the Court's dismissal was based on lack of subject matter jurisdiction, Defendants are prevailing parties within the meaning of 31 U.S.C. § 3730(d)(4). *Grynberg*, 389 F.3d at 1057; *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 355 (4th Cir. 2009); *U.S. ex rel. J. Cooper & Associates, Inc. v. Bernard Hodes Group, Inc.*, 422 F.Supp.2d 225, 238 (D.D.C. 2006).

4. In deciding whether to award attorney's fees and expenses under 3730(d)(4), this Court must determine whether Grynberg's suit falls within any of the three enumerated categories: clearly frivolous, clearly vexations, or brought primarily for

purpose of harassment. *J. Cooper & Assoc.*, 422 F.Supp.2d at 237.

5. "The FCA does not define the terms 'clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment,' but the Act's legislative history suggests that the standard of § 3730(d)(4) is analogous to that used for claims for attorney fees brought under 42 U.S.C. § 1988." *Grynberg*, 389 F.3d at 1055. Accordingly, when determining whether a plaintiff should be ordered to pay the defendant's attorney fees, this court applies the standard enunciated in *Christiansburg Garment Co. v. EEOC. Grynberg*, 389 F.3d at 1058. Under this standard:

> [t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.... [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so....

Id. (quoting *Houston v. Norton*, 215 F.3d 1172, 1174 (10th Cir.2000)). Further, in determining whether the award of attorneys' fees and expenses is appropriate, this Court must "review the entire course of the litigation." *Grynberg v. Praxair*, 389 F.3d at 1059.

6. A claim is frivolous "if it is utterly lacking in legal merit and evidentiary support." *J. Cooper & Assoc.*, 422 F.Supp. 2d at 238; *see also U.S. ex rel. Mikes v. Straus*, 274 F.3d 687, 705 ("A claim is frivolous when, viewed objectively, it may be said to have no reasonable chance of success, and present no valid argument to modify

present law."). Courts have awarded attorney's fees to prevailing defendants under the FCA when the relator cannot point to any evidence to support his claim. *See, e.g., Mikes*, 98 F.Supp.2d at 527 (finding claim frivolous where there was an "utter lack of evidentiary basis" for relator's claim).

7. This Court has already determined that this litigation was clearly frivolous. Although the litigation was dismissed on jurisdictional grounds, the underlying basis for the Court's ruling was that Grynberg had no evidence upon which to claim original source status and to base his claims. *See also In re Natural Gas Litigation*, 562 F.3d at 1045-47. This Court previously held:

> A review of the character of Grynberg's discovery and investigation in this case reveals that most of Grynberg's knowledge was secondhand, public or based on speculation, and that what little he knew about a few practices of a few Defendants was insubstantial when compared to the breadth and scope of the allegations in his Complaint. . . . Grynberg deliberately chose to make sweeping allegations of fraud against nearly the entire industry, based in large part on rank speculation. By employing such odious tactics he now becomes the instrument of his undoing.

Order on Report and Recommendation of Special Master at 40. A suit based on little more than rank speculation is the very definition of frivolous litigation. *See Mikes v. Straus*, 274 F.3d at 705.

8. "Evidence of vexatiousness or an intent to harass on the part of a plaintiff includes, but is not limited to, actions that deliberately delay the proceedings, attempts to relitigate a previously decided claim against the same defendant, the raising of new

allegations in an effort to circumvent the arguments in a defendant's motion to dismiss, and the inclusion of counts for which the available evidence 'defeat[s] any inference of a false claim.'" *J. Cooper & Assoc.*, 422 F.Supp.2d at 238; *see also Mikes*, 98 F.Supp.2d at 527 (describing case law identifying vexatious or harassing litigation). "The distinction between vexatious conduct and harassment stems from the intentions of the plaintiff. Although the word "harassment" suggests bad faith on the part of the plaintiff, 'the term "vexatious" in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him.'" *See J. Cooper & Assoc.*, 422 F.Supp.2d at 238 n. 19 (quoting *Christiansburg*, 434 U.S. at 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (interpreting 42 U.S.C. § 1988)).

9. The Court finds that Grynberg's claim was clearly vexatious in that he knowingly relied upon inaccurate data to create the false appearance of compliance with Rule 9(b), an obstacle that had proven insurmountable to him in his previous *qui tam* litigation on these very same issues. Further, in this litigation, Grynberg broadened the scope of his allegations from *Grynberg I*, alleging that more than 300 defendants each fraudulently engaged in each of more than twenty types of fraudulent conduct. He did so without having any direct and independent knowledge to support his allegations and without providing the government with information to support the allegations as required under the FCA. Instead, Grynberg simply asserted that each defendant engaged in each type of misconduct to create the false appearance of compliance with

Fed. R. Civ. P. 9(b). Finally, Grynberg's claim was vexatious in that he refused to dismiss non-measuring Defendants even after he was confronted with evidence that they played no role in gas measurement for royalty purposes. *J. Cooper & Assoc.*, 422 F.Supp.2d at 239.

10. At oral argument, counsel for Relator urged that an award of sanctions is inappropriate in the context of a dismissal solely based on jurisdictional grounds. Although the Court disagrees with counsel's assertion that there are not other factors this Court could take into consideration with respect to the propriety of a fee award in this case, subsequent case law has made clear that a claim may be "clearly frivolous" within the meaning of§ 3730(d)(4) where the relator's status as an original source is wholly lacking in evidentiary support. *See Vuyyuru*, 555 F.3d at 353-356. In *Vuyyuru*, the Fourth Circuit noted that there was a "glaring lack of evidence" to establish that the relator had "direct and independent knowledge that any Defendant . . . had ever presented or caused to be presented a particular false claim" or that "he had voluntarily provided the government with such information before filing [the] action." *Id.* at 353. The Court concluded that the relator's "mere suspicion that there must be a false or fraudulent claim lurking around somewhere simply does not carry his burden of proving that he is entitled to original source status." *Id.* Because the relator had offered "no more than a scintilla of evidence that he had direct and independent knowledge" as to his false claim allegations, the Fourth Circuit upheld the district court's award of

attorney's fees under § 3730(d)(4). *Id.*

11. "To establish original source status knowledge, a *qui tam* plaintiff must allege specific facts – as opposed to mere conclusions – showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof." *In re Natural Gas Litigation,* 562 F.3d at 1045 (quoting *U.S. ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999). "Secondhand information, speculation, background information, or collateral research do not satisfy a relator's burden of establishing the requisite knowledge." *Id.* Given the nature of Grynberg's discovery and investigation, his claim that he was a proper relator under the "original source" exception to the public disclosure bar was "clearly frivolous." *See id.* at 1045-46 (discussing the absence of evidence in the record to support Grynberg's assertion of "original source" status).

12. In addition to filing their fee motions pursuant to the False Claims Act's attorney's fees provision, many of the defendants also filed motions seeking fees pursuant to Fed. R. Civ. P. 11. Contrary to Relator's assertion, the Court has discerned no authority which holds that pleadings signed, filed and advocated in False Claims Act cases are relieved from the dictates of . . . Rule 11." *U.S. ex rel. Sampson v. Crescent City E.M.S., Inc.*, 1997 WL 570688, *1 (E.D.La. 1997). In fact, several cases under the FCA have applied Rule 11 in the context of FCA claims. *See, e.g., Id.*; *Simpson v. Lear*

Astronics Corp., 77 F.3d 1170, 1177 (9th Cir. 1996) (remanding district court's decision to deny fees under § 3730(d)(4) and Rule 11 for development of record to establish reasons for district court decision) *U.S. ex rel. Herbert v. Nat'l Academy of Sciences*, 1992 WL 247587 (D.D.C. 1992) (granting attorney's fees and expenses under both § 3730(d)(4) and Rule 11); *U.S. ex rel. Tomlin v. Royco, Inc.*, 2010 WL 1727888 (M.D. Tenn. 2010) (denying attorney's fees under § 3730(d)(4) and Rule 11 but calling it a "close case").

13. The Court's reasons, set forth above, could also serve as a basis for awarding attorney's fees under Fed. R. Civ. P. 11. However, because the Court has already awarded attorney's fees under 31 U.S.C. § 3730(d)(4), the Court need not reach this issue. Further, to the extent that Defendants' Rule 11 motions requested a finding that dismissal was also warranted as a sanction in this matter, the Court notes that this Court's dismissal of Relator's claims based on the public disclosure/original source jurisdictional bar has already been affirmed by the Tenth Circuit. Accordingly, there is no need to address the availability of dismissal as a sanction in this matter. The Court similarly declines to address whether the Court's inherent powers could serve as an independent or supplementary basis for the imposition of fees in this case.

14. The Court remains convinced that Grynberg made the sweeping allegations of fraud contained in these complaints based on little more than rank speculation. Grynberg's lawsuit and his claims of "direct and independent knowledge" qualifying him

as an original source of evidence to support his claims were "clearly frivolous." His conduct in pursuing his claims in the face of evidence to the contrary constitutes "clearly vexatious" litigation. In filing these suits, Grynberg "misused his statutory privilege and distorted the intent of the legislation." *Grynberg v. Praxair*, 389 F.3d at 1059. An award of attorney's fees and expenses is both warranted and appropriate.

III. CONCLUSION

WHEREFORE, for the reasons set forth more fully above, Defendants motions for attorney's fees and expenses pursuant to 31 U.S.C. § 3730(d)(4) are **GRANTED**. It is therefore **ORDERED** that Relator shall pay Defendants their reasonable attorney's fees and expenses in these actions. Defendants shall submit their claims for attorney's fees to the Court within thirty (30) days of this Order. Prior to making any such submission, however, both parties are **ORDERED** to meet and confer to determine whether they can stipulate to the reasonable amount of attorney's fees incurred in this case.

DATED this 22nd day of July, 2011.

United States District Judge