MOFORWARD 2020

Need-To-Know Regulatory
and Legal Developments

November 5, 2019 | McLean, VA

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AGENDA

Tab	Time	Presentation Title
-	9:30 – 9:45 AM	**Opening Remarks** *Jay DeVecchio*
1	9:45 – 10:15 AM	**Bid Protests, Latest Developments & Twists** *Kevin Mullen & Jim Tucker*
2	10:15 – 10:45 AM	**Disputes & Claims: And You Thought Nothing Has Changed?** *Dave Churchill, Kathy Weinberg & Caitlin Crujido*
3	10:45 – 11:15 AM	**Cybersecurity & the New DoD Counterintelligence & Security Agency Behemoth** *Tina Reynolds & Aki Bayz*
4	11:15 – 11:45 AM	**Data Breaches & Other Things That Keep You Awake At Night** *John Carlin & Alex Iftimie*
5	11:45 AM –1:00 PM	**False Claims Trends & Developments – A Look from Inside and Out (Luncheon)** *Catherine Kane Ronis (BAE Systems), Alex Ward & Dan Chudd*
6	1:00 – 1:30 PM	**A Practical and Economical Approach to Internal Investigations** *Sandeep Nandivada & Rachael Plymale*
7	1:30 – 2:00 PM	**The New Export Regime and Foreign Investment Risk** *Joe Benkert & Charles Capito*
8	2:00 – 2:30 PM	**Supreme Court Update** *Joe Palmore*
-	2:30 – 3:00 PM	**BREAK**
9	3:00 – 3:30 PM	**Joint Ventures & Transactions – Hidden Risks for Contractors** *Damien Specht & Alissandra Young*
10	3:30 – 4:00PM	**Other Transactions – Data Rights & Intellectual Property Simplified** *Jay DeVecchio & Locke Bell*
-	4:00 – 4:15 PM	**Closing Remarks** *Jay DeVecchio*
-	4:15 – 6:00PM	**Reception – Foyer**

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MOFO SPEAKERS

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GUEST SPEAKER

Catherine Kane Ronis

Catherine Kane Ronis is the Vice President & Associate General Counsel, Litigation and Investigations for BAE System, Inc. She manages complex litigation matters and government investigations, including False Claims Act cases, bid protests, commercial litigation, and other government contract disputes.

In her role, Catherine is responsible for providing support and counseling to ensure that the legal rights of the Company and its business units are protected and enforced in connection with actual and threatened litigation in a timely and cost efficient manner. She also routinely counsels business clients on important non-litigation matters, including product safety issues and trade secret issues.

Before joining BAE Systems, Catherine was a partner in a major international law firm. As part of her practice, Catherine successfully counseled several Fortune 50 companies on regulatory matters and led a number of large teams in a variety of litigation and investigation matters before the federal and state courts, and regulatory agencies. Catherine also volunteered her time representing indigent clients at the Legal Aid Society.

Catherine graduated magna cum laude from Syracuse University College of Law, where she received numerous awards, was on the Deans' List, and was a Senior Editor for the Syracuse Law Review. Catherine received her undergraduate degree from Holy Cross College with a double major in economics and political science.

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BID PROTESTS, LATEST DEVELOPMENTS & TWISTS

Kevin Mullen
Jim Tucker

November 5, 2019

Bid Protests: Agenda

1. LOGCAP V and Task/Delivery Order Protest Jurisdiction
2. *SpaceX* and Other Transaction Authority Protest Jurisdiction
3. Potential Impact of New LPTA Regulations
4. Section 809 Panel Recommendations: Real Changes for Protests(?)

Task/Delivery Order Protest Jurisdiction

- The GAO is the exclusive forum for task and delivery order protests, subject to $10M/$25M threshold:

  (f) Protests.–

  (1) Protests not authorized.–A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for:

  (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

  (B) a protest of an order in excess of $10,000,000.

  (2) Jurisdiction over protests. – Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

  41 U.S.C. § 4106(f).

- Unless an order falls under one of the exceptions, the Court of Federal Claims lacks jurisdiction to consider the protest.

Task/Delivery Order Protest Jurisdiction

- LOGCAP V Procurement: Large Army competition for award of four to six IDIQ contracts, combined with issuance of 10 initial task orders corresponding to seven geographical regions.
- Seven separate region-based best value decisions, with tiered awards. For first region an offeror wins, it receives a LOGCAP contract and the task orders associated with that region; if it wins a subsequent region, it receives additional task orders but no additional contract.
- Army awarded four IDIQ contracts and 10 task orders to four of six offerors.

Task/Delivery Order Protest Jurisdiction

- Four protests filed at the GAO (two awardees objecting to the particular task orders they received, and two offerors that were awarded nothing).
- The GAO denied the first protest on the merits. *DynCorp Int'l, LLC*, B-417506, B-417506.10, July 31, 2019, 2019 CPD ¶ __.
- Before the GAO decided the other three protests, the first protester refiled at the Court of Federal Claims, causing the GAO to dismiss the remaining protests. *AECOM Mgmt. Servs., Inc., et al.*, B-417506.2 *et al.*, Aug. 7, 2019, 2019 CPD ¶ __.

Task/Delivery Order Protest Jurisdiction

- Does the Court of Federal Claims have jurisdiction to hear the protests of the two IDIQ contract awardees who wanted different task orders? Judge Loren Smith answered the question in *PAE-Parsons Global Logistics Services, LLC v. United States*, No. 19-1205 (Sept. 30, 2019).
- The judge found the Court had jurisdiction over these protests because the same best-value analysis used to select IDIQ contract awardees was also used to determine which task orders to issue to which offerors:
  - "The Agency issued all four IDIQ awards simultaneously. However, the manner in which the Agency determined which offeror would receive each award—in descending order of priority, with separate best value determinations and adjectival ratings for each [region]—clearly indicates that the Army functionally issued four *separate and distinct* LOGCAP V IDIQ contract awards. The fact that task orders resulted from those IDIQ awards does not divest this Court of its jurisdiction over the IDIQ contract awards themselves, as the task order awards are inextricably linked to the ratings for the IDIQ contract."

Task/Delivery Order Protest Jurisdiction

- What about standing as an interested party?
  - "Even if this Court were to determine that a successful awardee lacks standing to protest another offeror's inclusion in an IDIQ pool, P2GLS would still have standing to bring this protest. The nature of this Solicitation essentially resulted in four concurrently awarded—but very different—IDIQ contracts. As eligibility for each specific LOGCAP V IDIQ contract was predicated on an offeror's success or failure to receive a higher-priority LOGCAP V IDIQ contract, plaintiff is clearly a disappointed bidder with regard to the specific IDIQ contract at issue here. While P2GLS unquestionably received a LOGCAP V award, it did not receive the LOGCAP V award that served as the mandatory prerequisite to receive the AFRICOM task order. As the Agency performed a separate best value determination for each [region]—and as the task orders were so intrinsically linked to the IDIQ awards as to be nearly indistinguishable from the IDIQ contract awards themselves—the IDIQ contract associated with the SOUTHCOM task orders was clearly a different IDIQ contract than that which was associated with the AFRICOM task order. Therefore, plaintiff clearly has standing as a disappointed bidder with regard to the IDIQ contract award at issue in this case."

Task/Delivery Order Protest Jurisdiction

- Impact of the *PAE* decision?
- Probably minimal: LOGCAP V's award structure is unusual, and most task/delivery order protests will be distinguishable on the facts.
- Most likely to affect competitions where initial task orders are issued together with multiple-award IDIQ contract ***AND*** there are material differences among the task orders.
- Not clear that the Federal Circuit would agree Judge Smith was right on the jurisdictional question.

Other Transaction Authority Protests

- Other Transaction Agreements (OTAs): "transactions other than contracts, grants or cooperative agreements" 32 C.F.R. § 3.2.
- Congress has granted DoD and certain other agencies authority to enter into OTAs. Authority varies from agency to agency.
- The FAR does not govern OTAs because OTAs are defined as not being procurement contracts.
- In recent years, there has been increasing use of OTAs.
- Although the GAO will review the threshold question of whether an agency is improperly using an OTA approach rather than a traditional procurement approach, it generally will not review protests of the award or solicitations for the award of an OTA. *See, e.g.*, *MorphoTrust USA, LLC*, B-412711, May 16, 2016, 2016 CPD ¶ 133.
- What about the Court of Federal Claims?

Other Transaction Authority Protests

- Court of Federal Claims has jurisdiction over bid protests brought by "an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).
- The Federal Circuit has held that the Court's bid protest language "is exclusively concerned with procurement solicitations and contracts." *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010).

Other Transaction Authority Protests

- *Space Exploration Technologies Corp. v. United States*, No. 19-742C (Fed. Cl. Aug. 28, 2019).
- Air Force OTA competition for development of space launch vehicles.
- The solicitation also contemplated a later phase-2 competition for two FAR-based requirements contracts for launch services, which would be open to all offerors – not just the OTA awardees.
- Four companies submitted proposals. The Air Force awarded OTAs to three of the offerors.
- SpaceX, the disappointed offeror, protested the award decision to the Court of Federal Claims.

Other Transaction Authority Protests

- Judge Lydia Kay Griggsby considered the Government's motion to dismiss the protest for lack of jurisdiction.
- The parties agreed that the OTA competition itself was not a "procurement" in the strict sense of that term, but disagreed whether the competition was "in connection with a procurement or proposed procurement."
- Apparently relying on Federal Circuit precedent that the Court's protest jurisdiction "is exclusively concerned with ***procurement*** solicitations and contracts," the Court did not analyze whether the protest triggered jurisdiction simply by objecting "to a proposed award or the award of a contract." Although OTAs are not procurement contracts, they likely satisfy the common-law definition of a contract as an enforceable agreement between two parties.
- Court held that, although the Phase 2 competition would be a procurement, and the Phase 1 OTA competition was "related to" the Phase 2 procurement, it was not "in connection with" it: different solicitations, different acquisition strategies, different goals, and the Government would not own the prototypes to be developed under the OTAs.
- Court did ***not*** hold that the Court lacks jurisdiction to entertain ***any*** OTA protest, but the *SpaceX* holding could have fairly broad applicability – assuming other judges follow Judge Griggsby's non-precedential lead.

Other Transaction Authority Protests

- Court dismissed the protest and transferred the case to U.S. District Court for the Central District of California.
- Bid protests in Federal district court?
- Prior to January 2001, district courts had concurrent jurisdiction over bid protests under the Administrative Procedure Act. *See Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Congress eliminated that jurisdiction with the Administrative Dispute Resolution Act (ADRA), making the Court of Federal Claims the only court with jurisdiction over bid protests.
- If the Tucker Act as amended by ADRA applies only to "procurements," and the Court of Federal Claims will not hear OTA protests, then does *Scanwell* jurisdiction survive for bid protests of non-procurements, such as OTAs?

Potential Impact of New LPTA Regulations

- Lowest-Price Technically Acceptable (LPTA) Procurements have been the subject of a number of statutory restrictions dating back several years.
- On September 26, 2019, after long delay, DOD finalized DFARS amendments implementing the statutory limitations. The new restrictions are codified primarily at DFARS 215.101-2-70 and took effect on October 1, 2019.
- DFARS 215.101-2-70 limitations are applicable not only to DFARS Part 215 negotiated procurements, but also to Part 208 Supply Schedule procurements, Part 212 commercial item procurements, Part 213 simplified acquisitions, and Part 216 orders placed under IDIQ contracts.
- On October 2, 2019, FAR Council proposed a FAR amendment that largely mirrors the DFARS rule. Until the FAR rule is finalized, only DOD is subject to the new restrictions.

Potential Impact of New LPTA Regulations

- For DOD to use LPTA, "[t]he contracting officer [must] document[] the contract file describing the circumstances justifying the use of the lowest price technically acceptable source selection process." DFARS 215.101-2-70(a)(1)(viii).
- Agencies still enjoy considerable discretion in choosing their acquisition methods, but the new rule places important objective constraints on that discretion.
- The combination of the express regulatory limitations and restrictions with the requirement to document the justification increases the prospect for a successful pre-award protest if a prospective offeror can show the agency adopted an LPTA methodology without complying with the regulations.

Section 809 Panel Protest Recommendations

- "Advisory Panel on Streamlining and Codifying Acquisition Regulations" a/k/a Section 809 Panel: Tasked by Congress to develop recommendations to enhance efficiency of the DOD acquisition system.
- Full Report available at Section809Panel.org.
- Panel released the third and final volume of its report in January 2019.
- Four of the 58 recommendations in Volume 3 directly address bid protests.
- One additional recommendation (No. 35) tangentially addresses protests, by proposing to allow only agency-level protests for acquisitions of a new class of acquisitions of "readily available products and services."
- All recommendations would require new legislation.

Section 809 Panel Protest Recommendations

- Rec. 66: "Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured."
  - Transparency in public procurement?
  - Accountability?
  - A privately-enforceable check on potential process violations?
  - Vindication of offerors' rights?
  - How do you measure the effectiveness of a protest?

Section 809 Panel Protest Recommendations

- Rec. 67: "Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the COFC after filing at the GAO and require the COFC to issue a decision within 100 days of ordering a procurement be delayed."
  - Longstanding agency dissatisfaction with second-bite protests: added delay and expense, appears to make the GAO protest defense a wasted effort, Court rarely comes to a different conclusion.
  - But second-bite protests are relatively infrequent.
  - Would compel protesters to choose forum carefully – *e.g.*, differences in substantive law, differences in predictability and procurement expertise, availability of an automatic stay, availability of an appeal forum, etc.

Section 809 Panel Protest Recommendations

- Rec. 68: "Limit the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000."
  - RAND Report found that slightly more than 10 percent of GAO protests and 4 percent of COFC protests involved procurements valued at less than $100k.
  - Panel avoided choosing a higher threshold because of concerns over requirements imposed by the nation's international trade agreements.
  - Minimal impact.

Section 809 Panel Protest Recommendations

- Rec. 69: "Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing."
  - Our favorite recommendation.
  - Some agencies already do this.
  - Expands on NDAA 2018's as-yet unimplemented requirement for DoD to provide a redacted source selection decision document as part of debriefings for all contract awards in excess of $100 million, and, when requested by nontraditional or small businesses, for all contract awards in excess of $10 million.
  - Recognizes that protests often result from lack of transparency by agencies.


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DISPUTES & CLAIMS: AND YOU THOUGHT NOTHING HAS CHANGED?

David Churchill
Kathy Weinberg
Caitlin Crujido

November 5, 2019

Agenda

- Have Things *Really* Changed?
- Mistakes Contractors Are *Still* Making
- Speaking of Changes…
- TINA Developments (more than just a name change)
- TINA Audit Mistakes
- TINA Enforcement
- Revisiting the *Maropakis* Saga

Have Things *Really* Changed?

Mistakes Contractors are *Still* Making

- Contractors are making the same mistakes they have been making for years and the case law has generally remained the same.
- These mistakes range from the straight forward:
  - Failure to abide by the plain language of the contract
  - Failure to read the fine print
  - Failure to submit invoices timely
- To the more complex:
  - Failure to track additional work costs
  - Failure to understand the Changes clause

Speaking of Changes

- It is important to invest in understanding "changes."
- All too often, your own personnel don't understand this obligation either.
- The Government tends to ignore its obligation to pay. FAR 52.243-1(b) states:
  - If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer **shall make** an equitable adjustment in the contract price, the delivery schedule, or both, and **shall** modify the contract.
- Therefore, think differently about this subject. Think of it as a compliance or risk reduction issue. Reassess your approach and resources, particularly in times of budgetary cutbacks.

Common Challenges with Changes

- Government consistently seeks to change performance away from the way the company priced, planned, and scheduled it. Why?
  - The solicitation often does not reflect (or the budget will not accommodate) what the users really want. So they try to get you where they want you to be.
  - Government program and technical personnel will impose their desiresthat are not contained in the contract.
- Government insists on performance exceeding contract requirements but does not execute a formal change order.
  - Company engineers and program managers may not appreciate the risks associated with the additional work and agree to perform. As a result, the chances of losing money and jeopardizing the schedule and performance increase.

Some Examples of Changes

- Defective Specifications
  - Contractor must build product in accordance with detailed government-furnished design. There is an implied warranty in these "build-to-print" contracts that the specifications are accurate, compatible, and if followed will result in product desired.
- Over-Inspection, Testing, and Rejection
  - Customer might over-inspect and over-test, which requires the contractor to perform to standards beyond the contract requirements.
- Delays
  - There is an implied warranty in every contract that the government will not hinder or delay the contractor's performance.
- Government-Furnished Property or Equipment
  - Under FAR 52.245-1(d), the government warrants that the GFP "described in the schedule or specifications" will be suitable for its intended purposes.

The *Most* Common Example of Changes

- The most common event leading to a changes claim likely is a difference of opinion over contract interpretation.
- Many of the well-known rules of contract interpretation tend to favor the contractor ***if*** the company is diligent in the pre-award Q&A process.
- That said, companies should not hesitate to call out ambiguities or articulate the company's "interpretation" or "understanding" of a particular paragraph or sentence in the RFP or SOW.
  - "We ***interpret*** paragraph 3.2.1 to mean _____."
  - "Our ***understanding*** of ___ is _____."
- Think of your pre-award Q&A strategically as a means of avoiding post-award disputes.

Okay, But TINA *Has* Changed, Right?

- There have, indeed, been some TINA developments (besides the long-form name).
  - Significant increases in the number of post-award audits are expected.
  - Post-handshake sweeps have been banned; and
  - Shay Assad, former Undersecretary of Defense for Acquisition and later the Pentagon's Pricing Director, is no longer at the Pricing helm.

DCAA Audits

- DCAA plans to increase time devoted to post-award audits by **500%** and to complete 60 post-award audits in the new fiscal year, compared to 20 in the year just ended, 21 the year before, and 26 the year before.
- The reviews will focus on large, fixed-price contracts.
- Since 2015, DCAA has completed 108 TINA audits, with 79 finding "potential" defective pricing. These resulted in 10 fraud referrals, 8 of which resulted in active cases.

Responding to TINA Audits

- Your company receives a draft defective pricing audit report with allegations of defective pricing. What are the company's next steps?
- While each defective pricing allegation stands on its own, there are common mistakes to be aware of and avoid.
- Generally:
  - Have all such responses made or reviewed by the legal operation.
  - Don't admit defects and try to negotiate their impact with DCAA.
  - Evaluate whether allegedly undisclosed "cost or pricing data":
    - Really was cost or pricing data,
    - Really was undisclosed, and
    - Really did cause the negotiated price to be increased.
  - Find offsets!

TINA Audit Mistake #1: Negotiations

- Draft audit reports are ***NOT*** invitations to engage in negotiations, and it is dangerous to assume otherwise.
  - DCAA is ***not*** negotiating.
  - Each submittal the company makes during a post-award audit, and every response to even a draft defective pricing allegation, can constitute an ***admission*** that can bind the company.
  - It is usually a huge mistake to admit defective pricing while trying to limit the scope of the findings. DCAA accepts the admission but holds on grimly to the price reduction recommended in the audit report.
  - Because of the potential significance of responses to audits, the company should have a "point person" to handle audit requests, but the legal operation should be involved with all allegations of defective pricing.

TINA Audit Mistake #2: Cost or Pricing Data

- Do not accept DCAA's assertions that a particular undisclosed piece of information was cost or pricing data.
  - Just because DCAA has seized upon a scrap of information and has alleged that it is cost or pricing data, do not assume they are correct; the information might not have constituted cost or pricing data at the time.
  - Cost or pricing data is all facts that, as of the date of price agreement, "prudent buyers and sellers would reasonably expect to affect price negotiations significantly."
  - What constitutes cost or pricing data depends on the circumstances of each negotiation.
    - Ask yourself: ***Could the datum reasonably have been expected, as of the handshake date, to affect negotiations significantly? Or was its significance only apparent in hindsight?***

TINA Audit Mistake #3: Disclosure

- Do not assume DCAA correctly concluded the datum was not disclosed during negotiations.
- DCAA looks for "disclosure" only in the proposal, the pre-award audit report, and the Government's price negotiations memorandum.
- To prepare an appropriate audit response, the Company must dig deep. Sources include:
  - Interviewing the members of the estimating and negotiation teams to determine whether information was verbally disclosed;
  - Scrutinizing all correspondence submitting information to the Government or responding to CO or audit questions;
  - Examining the pre-award audit in detail to determine if it indicates the auditor actually reviewed a source of information that includes the disputed datum; and
  - Combing through pre-award audit workpapers for numbers/entries that show the disputed datum was used or recorded.

TINA Audit Mistake #4: Causation

- Even if a datum constituted "cost or pricing data" and the Company cannot prove it submitted the datum, don't assume a price adjustment is automatically warranted. It is not that simple.
  - A price adjustment is warranted *only* if the DCAA can demonstrate that the non-disclosure caused an element of cost to be overstated and the price increased.
  - The company may be able to show logically that, because of the circumstances of the negotiations, the datum, if disclosed, would have been ignored by the Government.
  - If the disputed information requires a great deal of interpretation, the Government may not be able to prove what impact disclosure would have had on any element of cost.

TINA Enforcement: What's New?

- Consider also the recent history of Shay Assad, Former Undersecretary of Defense for Acquisition, then Pentagon's Pricing Director.
- Assad has said that the appointments of Ret. Marine Gen. James Mattis as defense secretary and of Ellen Lord, previously CEO of Textron Systems, as Undersecretary of Defense for Acquisition and Sustainment, means the fox is currently guarding the henhouse.
- A dispute with his bosses led Assad to set a retirement date. Before he retired, he asserted that 1% of negotiated defense costs were defectively priced, and that DCAA had found a "golden nugget" – a claim Textron management had misrepresented production costs.
- He recommended a special, independent unit, be set up to investigate. Within hours, reports were circulating implying he had been forced out because of his own travel cost issues.
- It is too early to tell what effect Assad's departure might have on announced audit priority and resources.

Finally, Revisiting the Maropakis Saga

- A brief refresher:
  - In 2010, the Federal Circuit held that "a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action.
  - Judge Newman adamantly dissented, noting that "the right to defend against an adverse claim is not a matter of 'jurisdiction,' nor of grace; it is a matter of right. The denial of that right . . . is contrary to the purposes of the CDA, contrary to precedent, and an affront to the principles upon which these courts were founded."
- The Federal Circuit recently found itself tasked with answering a new *Maropakis*-related question in *Sec'y of the Army v. Kellogg Brown & Root Servs., Inc.*

Sec'y of the Army v. Kellogg Brown & Root Servs., Inc.

- Faced with an insufficient security force and strict deadlines in Iraq, KBR hired and charged for the use of Private Security Contractor.
- The Government initially paid the costs, but changed course. It invoiced KBR from 2007 to 2010 to recoup its costs. After each payment, KBR filed a certified CDA claim with the CO for the offset amount, plus interest.
- KBR later filed a protective CDA claim for the entire amount requested by the Government, asserting the defense of prior material breach.
- The Federal Circuit considered whether the ASBCA had jurisdiction over KBR's affirmative defense of prior material breach.
- The Federal Circuit held that the ASBCA had jurisdiction because KBR asserted the defense under the contract as written and simply sought denial of the Government's claim. It did not ask for an adjustment of the contract terms.

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CYBERSECURITY & THE NEW DOD COUNTERINTELLIGENCE & SECURITY AGENCY BEHEMOTH

Tina Reynolds
Aki Bayz

November 5, 2019

CYBERSECURITY

Cybersecurity – Where We Started

- Basic Safeguarding FAR Clause (52.204-21)
- DFARS data security/network penetration clause (252.204-7012)
- Executive Order 13556 directing agencies to develop and implement policies for protection of "controlled unclassified information" (CUI)
  - NARA CUI guidelines for government agencies
  - DFARS -7012 clause applies to "covered defense information" (CDI) (i.e., CUI pertaining to a defense program or contract)
- FedRAMP program for certification of cloud-based products
- Contractors feel that the government has not done enough to address its own vulnerabilities and are concerned with increasing burden of regulations

Cybersecurity – Where We Are

- NARA has come out with CUI guidelines for the government, but no civilian FAR CUI rule yet enacted
  - FAR Case 2017-016 is still active
  - Prior indications were that FAR Council would apply NIST 800-171 standard to all types of CUI, as with the DFARS clause for CDI
  - Tremendous confusion about how to determine what is CUI; how to mark as such
- More cloud-based contractors seeking FedRAMP certification
  - Need to use agency authority to operate (ATO) process because full FedRAMP is not presently available to most contractors
- Cybersecurity has become an issue in:
  - Bid protests
  - False Claims Act litigation
  - Suspension and debarment
  - Special contract clauses

Cybersecurity – Where We Are (cont.)

- Cyber and data security compliance increasingly becoming a differentiator for companies
- Solicitations are incorporating cyber compliance into the evaluation process
  - Some agencies are reviewing NIST 800-171 compliance in detail
- Sometimes more than one agency reviews compliance at same time
  - DCMA has this authority as part of purchasing system review
  - Other agencies request and review information as part of RFP process
  - Creates inefficiencies and inconsistent evaluation
  - Government does not have the technical expertise to conduct accurate and thorough reviews

Cybersecurity – Where We Are Going

1. New NIST Guidance in form of SP 800-171 Rev 2 and SP 800-171b (released June 19, 2019)

- Rev 2 makes minor, primarily editorial and organizational changes
- 800-171b includes enhanced security requirements for "critical programs" and "high value assets"
  - Lays out 31 new recommendations for contractors to harden their defenses and protect CUI data that resides on their networks from advanced persistent threats or government-sponsored hackers
- The recommendations include specific processes for:
  - Implementing dual-authorization access controls for critical operations
  - Employing network segmentation where appropriate
  - Deploying deception technologies and threat-hunting teams
  - Establishing a security operations center to continuously monitor system and network activity

Cybersecurity – Where We Are Going (cont.)

2. DoD Cybersecurity Maturity Model Certification (CMMC) Process is a game changer

- New process to enhance protection of CUI across the supply chain
- *New development – maturity levels with increasing security obligations based on perceived threat level*
  - CMMC will review and combine various cybersecurity standards and best practices and map these controls and processes across several maturity levels that range from basic cyber hygiene to advanced protections
  - For a given CMMC level, the associated controls and processes, when implemented, will reduce risk against a specific set of cyber threats
  - Levels will range from 1 to 5, with 5 having the most stringent requirements
    - Level 3 is closest to the current NIST 800-171 standards
  - 18 cybersecurity domains/control families
    - Four of these — asset management, cybersecurity governance, recovery and situational awareness — not part of NIST framework

Cybersecurity – Where We Are Going (cont.)

New development – verification component

- Builds upon existing regulation (DFARS 252.204-7012) based on trust and self-certification by adding a third-party audit component
- Intent is for certified independent certified third-party auditing organizations (C3PAOs) to conduct audits and inform risk
- Plan is to stand up a non-profit CMMC accreditation body to operate the certification program and oversee the C3PAOs that will issue credentials to contractors
  - Similar structure to FedRAMP program
- C3PAOs will grade vendors on their practices and processes in the 18 cybersecurity-related domains, including access control, governance, incident response, risk assessment and employee training
  - Scores will range from one to five, with higher marks indicating stronger security
- Timing: DoD plans to publish final CMMC in January 2020 and use certification as "go/no go" factor in RFPs issued starting in Fall 2020

Cybersecurity – Where We Are Going (cont.)

What DoD is saying

- Katie Arrington, CISO, DoD Acquisition Policy Office:
  - CMMC is a "message to contractors that they need to better prioritize security in order to do business with the Pentagon and stifle foreign theft of defense secrets."
  - "Our adversaries aren't looking at penetrating the nuclear triad at the highest point. . . They're going to the lowest tier to gain access, and they're patient."
- Ellen Lord, Undersecretary for Acquisition and Sustainment:
  - "The CMMC establishes security as the foundation to acquisition and combines the various cybersecurity standards into one unified standard."
  - DoD will roll out the program "in a strategic manner," beginning with contractors that support the most "critical programs and technologies."
- DoD received over 2,000 comments in response to the draft rule
- An updated draft rule is coming in November, and defense agencies' requests for information will start using the standards next year

Cybersecurity – Where We Are Going (cont.)

CMMC Reality Check

- DoD has told contractors for seven years to follow NIST 800-171, but now:
  - New rules apply to all contractors, not just those with CDI
  - New requirements don't always follow the language in SP 800-171
  - NIST requirements now split inconsistently between CMMC certification levels
  - Benefits of unified standard will be minimal if civilian agencies do not also adopt the same standard
- Levels 4 and 5 will be used for undefined "critical defense programs"
  - Involve additional safeguards: threat hunting, network segmentation, real-time asset tracking, 24x7 security operations, device authentication, autonomous initial response actions

Cybersecurity – Where We Are Going (cont.)

- Contractors don't know which level will be most common and, therefore, which level they will need to be prepared to achieve
- Unclear if subcontractors will all have to meet the minimum cybersecurity level required for the prime contract
- Costs of cybersecurity compliance are allowable, but commercial companies without cost contracts cannot recover - may decide no longer makes financial sense to do business with the Pentagon

Resources

- NIST June 2019 Draft Guidance: https://csrc.nist.gov/CSRC/media/Publications/sp/800-171b/draft/documents/sp800-171B-draft-ipd.pdf
- DoD CMMC Information and Draft Rule: https://www.acq.osd.mil/cmmc/index.html
- MoFo Government Contracts Insights blog article on CMMC: http://govcon.mofo.com/defense/department-of-defenses-cybersecurity-maturity-model-certification-planning-moves-forward/

THE DCSA

Defense Security Service in Transition

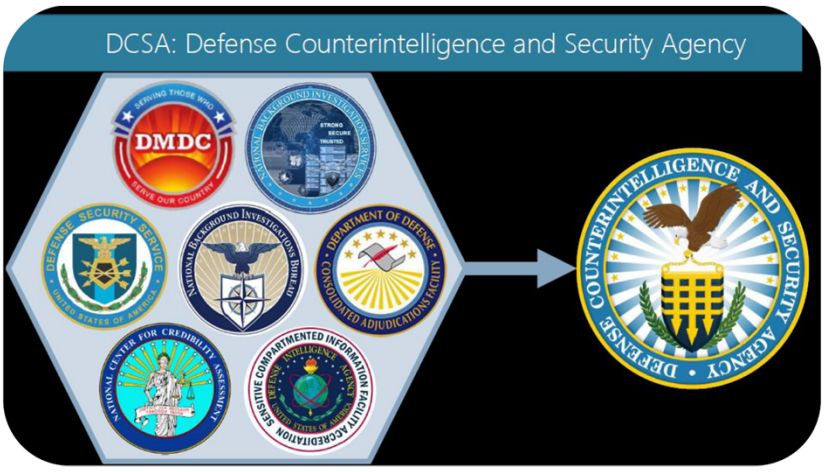
- Executive Order 13869 of April 2019 authorized shifting primary responsibility for federal background investigations from OPM to DoD.
- On June 24, 2019, the Defense Security Service (DSS) was renamed the Defense Counterintelligence and Security Agency (DCSA).
- The new entity will retain some of its original mission of security oversight and education, but is reorganized to include:
  - Security clearance investigations
  - National Industrial Security Program (NISP) oversight for the DoD
  - Counterintelligence support
- DCSA launched its new website on September 27, 2019: https://www.dcsa.mil/

DCSA Vision and Mission

- *"**Mission**: DCSA is a strategic asset to the Nation and our allies - continuously ensuring a trusted federal, industrial and affiliated workforce, and enabling industry's delivery of uncompromised capabilities by leveraging advanced technologies and innovation. We uniquely blend critical technology protection, trusted personnel vetting, counterintelligence, and professional education and certification to advance and preserve America's strategic edge."*

- *"**Vision**: Guardians of our Nation's assets - ensuring trust, countering threats and vulnerabilities, and advancing delivery of uncompromised technology."*

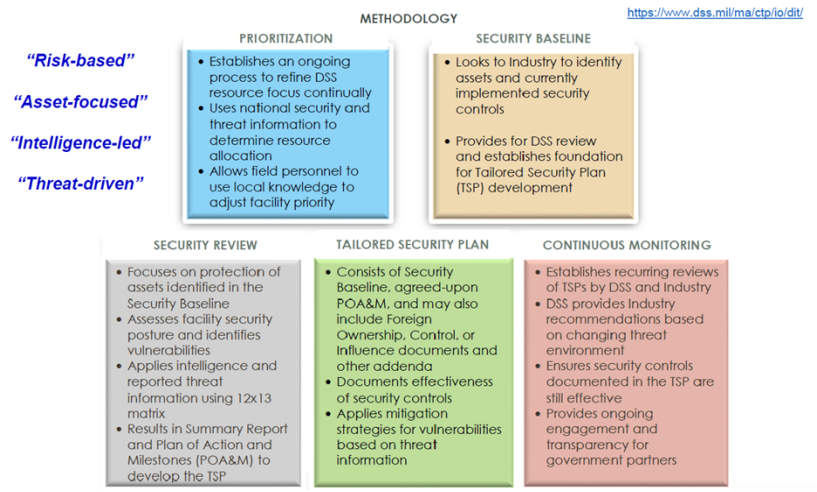
DSCA Composition



Critical Technology Protection

- The need for change was clear
  - Adversaries are successfully attacking cleared industry at an unprecedented rate
  - As a result, they are using compromised national security information and stolen technology to upgrade their military capabilities and compete against our economy
- The Defense Security Service (DSS) is in the midst of changing its approach to Industrial Security oversight to address the current threat environment.
- This effort, known as DSS in Transition (DiT), consists of new methodology broken down into 5 components.

5 Components of New Methodology



DSS and Government Partnership

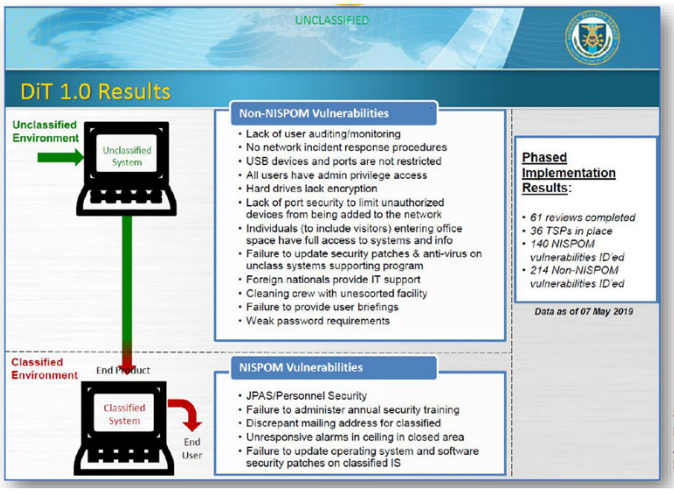
- As DSS transitions from a primary focus on NISPOM compliance to critical technology protection, industry will also need adjust.
- The criticality of close partnership with government stakeholders will increase.
- The expectation is DSS and government partners will:
  - Increase information exchange
  - Share program priorities
  - Identify critical technologies
  - Leverage subject matter experts
  - Assess risks from identified vulnerabilities
  - Ensure contracted capabilities are delivered uncompromised ("DU")

Current Engagement Types & Active Monitoring

- Current Engagement Types:
  - Comprehensive Security Review (CSR)
    - Full scope of the new methodology
    - Review will not result in a security rating, but will result in a Tailored Security Plan (TSP); current focus area for DSS
  - Targeted Security Review
    - Based on criteria related to the technology, program or company; bulk of targeted review completed in Phase 1
    - No TSP; rated like the Security Vulnerability Assessment (SVA)
- *"DSS is treating active monitoring in its existing form as a re-evaluation of the TSP, on or around the 1-year mark following the CSR, to determine whether or not it is effective, and it is working as intended."*
- *"Phase 2 of active monitoring, which is what we are trying to build upon now, would leverage technology and automation to be able to continuously engage, interact, and evaluate the TSP, and its effectiveness at a contracting facility."*

  --John Massey, Asst. Dep. Dir. Of Operations, DSS, June 6, 2019

DSS in Transition Results



Source:
DSS DiT 2.0
John Massey, DSS

The Way Forward

Source:
DSS DiT 2.0
John Massey, DSS

Future Expansion

- Continuous monitoring of security program and TSP
- Security Ratings Score
- Workforce 2.0
  - Continuous Evaluation/Continuous Vetting
  - Consolidated Personnel Security Investigations; 3 tiers
- Insider Threat Program Effectiveness
- DiT→"Risk-based Industrial Security Oversight"

Resources

- DSCA Website
https://www.dcsa.mil

- DCSA Knowledge Center
https://www.dcsa.mil/contact/knowledge_center/

- DCSA Facebook
https://www.facebook.com/DCSAgov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DATA BREACHES & OTHER THINGS THAT KEEP YOU AWAKE AT NIGHT

John Carlin
Alex Iftimie

November 5, 2019

Cyber Threats

The threat is evolving

- Blended threats
- Weaponizing information
- Cyber as a threat vector
- The Internet of Things
- Economic/industrial espionage
- Ransomware

Potential Risks of a Cyber Attack

- Investigation and possible enforcement
  - Multiple regulators
- Damage to brand/reputation
- Theft of intellectual property
- Loss of sales or customer churn
- Business disruption
- Financial penalties
- Class action lawsuits

"Sony CEO on How the Hack Changed Business"
A discussion with Sony Entertainment CEO Michael Lynton and John P. Carlin
Vanity Fair New Establishment Summit

Hypothetical Ransomware Attack

- Your CISO calls to inform you that ransomware has infected an internal company drive containing DoD customer data. IT pulled the affected server offline to contain the spread of the ransomware, but it appears to have encrypted the entirety of data on the affected drive.
- The attackers left a ransom note stating that your systems have been encrypted using a unique key, and that unless you pay 40 bitcoin in the next 48 hours to recover your data, the decryption key will be automatically deleted.
- Your CISO informs you that the affected drive was a working drive that contained project deliverables for ongoing customer work – some of these projects are due in the coming days.
- What issues/questions does this trigger?

Key Issues

- Incident response process – cadence of calls/tasks/reporting
- Maintaining privilege
- Outside legal/forensic/communications assistance
- Whether to pay?
  - Does the company have policies and procedures for deciding next steps?
- Notifications to:
  - customers
  - regulators
  - law enforcement
  - employees
- Cyber Insurance
- Evidence preservation / litigation holds
- Materiality analysis

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FALSE CLAIMS TRENDS & DEVELOPMENTS – A LOOK FROM INSIDE AND OUT

Catherine Kane Ronis
Dan Chudd
Alex Ward

November 5, 2019

Discussion Topics

- Overview
- Government Initiatives
- Expansions of and Limitations on FCA Liability Theories

Overview

- Statistics & General Enforcement Trends
- The View from the Top:
  - Qui tam actions are a "devastating threat to the Executive's constitutional authority." — William Barr (prior to confirmation as Attorney General)

Government Initiatives: "Voluntary" Dismissal

- Granston Memo: Seven factors
- Granston in practice
- Standards: *Swift*'s unfettered discretion or *Sequoia Orange*'s valid government purpose
- Senator Grassley's views

Government Initiatives: Cooperation Credit

- Categories of cooperation:
  - (1) disclosure
  - (2) cooperation
  - (3) remediation
- Scope and quality of cooperation
- Credit for cooperation: Based on stated factors but still discretionary

Government Initiatives: Data Analytics

- Old hat in healthcare
- DoD IG's efforts
- Analytics as part of corporate compliance

Government Initiatives: Private Equity

- *Patient Care America*: DoJ's "continuing commitment to hold all responsible parties to account"
- Knowledge and causation?
- Factors: Level of involvement, portfolio company compliance programs, response to red flags

Liability Theories: Cyber Compliance

- *Cisco*, *Aerojet Rocketdyne*, and *Cimino*
- Theories: Fraudulent inducement and failure to remedy known flaws
- Risks and challenges: Enhanced and evolving requirements
- Best practices to avoid liability

Liability Theories: Something Old and Something New

- *Hillier:* Small Business violations
- *University Furnishings*, *University Loft,* and *Z Gallerie*: Customs violations

Liability Theories: Evolving Elements

- *AseraCare*: Good faith disagreement is not a lie
- *Stevens Institute* and *Fadlalla*: Is materiality still "demanding and rigorous"?

Liability Theories: The Outer Limits

- Unassessed penalties and failure to report regulatory violations
- Fraud in the inducement after contract award

The Supreme Court Weighs In

- *Cochise Consultancy*: Extended statute of limitations in non-intervened cases
- Practical consequences


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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL A. CIMINO,	)	
Plaintiff-Relator,	)	
v.	)	**Case No. 13-cv-00907 (APM)**
INTERNATIONAL BUSINESS MACHINES CORPORATION,	)	
Defendant.	)	

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiff-Relator Paul Cimino is a former employee of Defendant International Business Machines Corporation ("IBM"). His job was to sell IBM's Rational brand of software to the Internal Revenue Service ("IRS"). Relator brought this action against IBM under the federal False Claims Act in June 2013. He alleges that IBM, with the assistance of the professional services firm, Deloitte LLP, fabricated audit findings concerning the IRS's software usage, and then presented these false findings to the IRS in order to coerce the agency into renewing a software enterprise license in the amount of $265 million. According to Relator, the IRS renewed the software license under the threat of a $91 million penalty, which was supported by the false audit findings. After a multi-year investigation, the United States declined to intervene. Relator nevertheless elected to prosecute the action.

IBM now moves to dismiss Relator's First Amended Complaint. For the reasons below, the court grants Defendant's Motion.

II. BACKGROUND

A. Factual Background

Defendant IBM is a multinational corporation that offers computer hardware, software, and business solutions to organizations and government agencies. First Am. Compl., ECF No. 35 [hereinafter Am. Compl.], ¶¶ 44–45. Relator Paul A. Cimino was a senior sales representative in IBM's Federal Sector unit during the relevant time period and was primarily responsible for promoting sales of IBM's Rational brand of software to the IRS, a bureau of the U.S. Department of the Treasury. *Id.* ¶ 42. In late 2011, the IRS appointed Relator to a fifteen-member IBM board—the Development Tools Assessment Group—tasked with evaluating the IRS's software and licensing needs. *Id.* ¶ 51.

The IRS and IBM signed a license agreement in 2007 ("Initial License") authorizing the IRS to use IBM software products, including the Rational, WebSphere, and Tivoli brands. *Id.* ¶ 48. The term of the Initial License was for one base year with the right to exercise several option years. *Id.* ¶ 49. As a result of exercising these options, the Initial License was set to expire on September 30, 2012, though "the IRS had the right to exercise at least one additional option year." *Id.* ¶ 49. As of 2012, the annual cost to the IRS for IBM's software was approximately $23 to $30 million. *Id.* ¶¶ 14, 69.

Sometime in 2011, through communications with IRS employees, Relator learned that the IRS was not interested in renewing the entire Initial License. *Id.* ¶ 54. The IRS was not using all of the products it had purchased from IBM, *see id.* ¶ 12, and it had begun migrating away from some IBM products to open-source software, *see id.* ¶ 54. The IRS nevertheless would need to continue using some of IBM's software for the upcoming tax season, *see id.* ¶ 70, so it intended to negotiate an extension only for the software that it actually needed, *id.* ¶¶ 54–56.

Relator alleges that "IBM stood to lose significant revenue if the IRS stopped purchasing the software" in the Initial License, a potential outcome which prompted IBM to formulate a plan to pressure the IRS into a new, long-term deal. *Id.* ¶¶ 57–59. The first phase of the alleged scheme would be to convince the IRS that it should forgo the final option year. *Id.* ¶¶ 59, 61, 65. IBM did so by suggesting a friendly compliance audit that would provide the IRS with software usage data, allowing the IRS to realize cost savings in a new agreement by choosing only the software it needed. *Id.* ¶ 66. The Initial License authorized IBM to audit the IRS's software deployment. *Id.* ¶ 18; see also Def.'s Mot. to Dismiss, ECF No. 48 [hereinafter Def.'s Mot.], Def.'s Ex. 1, ECF No. 48-2 [hereinafter Def.'s Ex. 1], at 18 ("IBM may verify your compliance with this [Software Relationship Offering] . . . . IBM may use an independent auditor.").[1] IBM expected, however, that the compliance audit would reveal that the IRS had overutilized software and therefore would be subject to steep compliance charges allowed under the Initial License. Am. Compl. ¶ 67; *see also id.* ¶ 62 (IBM employee referring to compliance audit as "hammer" to use against the IRS). IBM expected that once the IRS declined the option year, the agency would be compelled to enter into a large new contract that included products it did not need, due to the press of the approaching tax season and threat of stiff overage fees. *Id.* ¶ 70.

Relator cites several statements by IBM employees to this effect. *See id.* ¶ 61 (July 2012 email between IBM's Dermot Murray, Senior Director of Federal Civilian Software, and Len Fleischmann, Manager of Enterprise Sales for IBM's Federal Sector, that the "[o]nly way to work a new deal is for IRS to cancel the contract. . . . Having IRS out of contract provides the maximum

[1] IBM attaches both the Initial License and the license renewal to its Motion to Dismiss. Although Relator protests that IBM has failed to attach the full new agreement, *see* Opp'n of Relator to Def.'s Mot. to Dismiss First Am. Compl., ECF No. 51, at 2 n.2, it identifies no absent portion that is material to the issues in dispute. The court therefore may consider these agreements without converting Defendant's motion into a motion for summary judgment. *See Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004).

leverage on getting the deal done."); *id.* ¶ 62 (IBM employee describing compliance audit in April 2012 as IBM's "only . . . shot at making money this year"); *id.* ¶ 65 (IBM's Michelle Adams telling the IRS in May 2012 that it could realize savings by choosing not to exercise the option year); *id.* ¶ 66 (July 2012 conversation between Adams and the IRS's Patricia Hoover, Adam Kravitz, Greg Rosenman, and others explaining how an audit could benefit IRS).

The IRS eventually agreed to the audit and declined to exercise the option year "in favor of a three-month 'bridge' ending in December 2012." *Id.* ¶ 68. IBM engaged Deloitte LLP to conduct the audit. *Id.* ¶ 17. After Deloitte's audit showed only $500,000 in possible compliance charges—to Deloitte, a result almost unheard of with an entity as large as the IRS, *see id.* ¶ 74—"IBM suppressed these initial audit results and never released them to the IRS," *id.* ¶ 20. Instead, IBM management requested that Deloitte manipulate the audit by basing it on assumptions "that were either without basis or . . . impossible" in order to create leverage over the IRS. *Id.* ¶¶ 76–77. One way that IBM purportedly drove up overage fees was to have the audit premised on the assumption that licenses deployed on discontinued servers, and thus never used, *see id.* ¶ 85, were in constant use, *see id.* ¶ 83. By September 2012, IBM's changes to Deloitte's audit assumptions resulted in approximately $18.9 million in overage fees. *Id.* ¶ 86.

On September 18, 2012, Deloitte presented the over-deployment statistics—though not the associated compliance penalties—to IBM's point of contact at the IRS, Adam Kravitz, "so that they could come to agreement on baseline findings." *Id.* ¶ 87. Kravitz rejected the figures because IBM could not substantiate them. *Id.* ¶ 88. In November 2012, IBM changed the audit assumptions yet again—this time, resulting in $292,000,000 in overage fees. *Id.* ¶ 91. Although IBM's Murray considered the number "ridiculous" and Fleischmann "'was not comfortable

representing' that number to the IRS[, . . . the number] was represented to the IRS anyway." *Id.* ¶¶ 91–92.

IBM also created an internal audit team (of which Relator was a member) to validate Deloitte's findings. *Id.* ¶ 94. Where Deloitte had found $27 million of Rational brand software over-deployment, the internal audit team found at most $3 million of over-deployment. *Id.* ¶ 101; *see also* Am. Compl., Relator's Exs. 1 & 2, ECF No. 35-1. Unsatisfied, Relator's supervisor, Ann Marie Somerville, and Dermot Murray instructed the audit team to employ impossible assumptions. Am. Compl. ¶ 110. For example, although technically impossible, Somerville instructed the team to assume that numerous IRS employees were using certain Rational brand "floating user" licenses concurrently—including employees who did not develop software and had no need to use the Rational brand. *Id.* Eventually, the team came up with $9.3 million in overage fees. *Id.* ¶ 116. Still too low to create leverage, IBM did not disclose these numbers to the IRS. *Id.* ¶¶ 117–18.

On November 29, 2012, IBM presented $91 million in compliance charges to the IRS's Kravitz. *Id.* ¶ 121. The charges included both overutilized licenses and retroactive technical support for those licenses. *Id.* ¶ 120. Kravitz again rejected the audit findings. *Id.* ¶ 122.

Undeterred, IBM went over Kravitz's head. When Kravitz was out on vacation in early December 2012, IBM thought "this [was] a good time to keep the pressure on." *Id.* ¶ 123. On December 11, 2012, Deloitte presented its inflated findings to Kravitz's superior, the IRS's Deputy Chief Information Officer, James McGrane and others. *Id.* ¶ 124. Deloitte's presentation included a spreadsheet that contained a hidden column that, if revealed, would have showed that there was minimal to no usage of the products purportedly overutilized. *Id.* IBM's Mark Gruzin, Dermot Murray, and others presented the same Deloitte findings to McGrane the following week on

December 19, 2012, when Kravitz remained out of the office. *Id.* ¶ 125. IBM told McGrane that it had retained lawyers to collect the $91 million overage payment, but that IBM would agree to waive the payment if the IRS entered a new contract. *Id.* ¶ 126. According to Chriss Schumm, an IBM employee who attended the meeting with McGrane, the IRS was "scared" of the Deloitte findings. *Id.* ¶ 127.

The IRS then signed a five-year, $265 million license with IBM in late December 2012 ("New License"). *Id.* ¶ 128; *see also* Def.'s Mot., Def.'s Ex. 2, ECF No. 48-3 [hereinafter Def.'s Ex. 2] (New License signed for the United States by Brian Carper on December 27, 2012). The New License contained a "Base Year" plus four additional "Option Years," with an agreement end date of December 30, 2017. Def.'s Ex. 2 at 5, 14. The IRS paid all or a substantial portion of the $265 million contract price. *Id.* ¶ 134. According to Schumm, the Deloitte findings were a "substantial factor" in the IRS's decision to renew the licensing agreement. Am. Compl. ¶ 127.

But there is more. According to Relator, IBM broke its promise to forgo the overage fees and secretly included at least $86.9 million in such fees in the New License under the guise of costs for prospective licenses and technical support. *Id.* ¶ 137. As support, Relator notes that IBM included the exact same number of purportedly over-deployed Rational floating user licenses—2,353, to be precise—as prospective licenses for first year of the New License. *Id.* ¶ 139; *see also* Def.'s Ex. 2 at 21 (New License showing 2,353 "IBM Rational Lifecycle Package Floating User" licenses from December 31, 2012 to December 31, 2013). By contrast, for each subsequent option year, the IRS purchased only 25 such licenses. Am. Compl. ¶ 139. "Upon information and belief," IBM never supplied the IRS with these 2,353 new licenses. *Id.* ¶ 140.

On September 30, 2015, the IRS amended the New License to add an additional six months, so that the contract would terminate on June 30, 2018. Def.'s Ex. 2 at 207–10. The IRS agreed to pay $16,147,772 for this additional six-month extension. *See id.* at 207.

B. Procedural Background

Relator initiated this suit on June 17, 2013, raising claims under the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"). *See generally* Compl., ECF No. 1. As required by the FCA, *see* 31 U.S.C. § 3730(b)(2), Relator filed the Complaint under seal to provide the United States the opportunity to investigate the claims and decide whether to intervene. Thereafter, over the course of four years, the United States sought, and the court granted, multiple extensions of time to investigate and to decide whether to intervene. *See* Sealed Orders, ECF Nos. 3, 5, 7, 11, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33; Sealed Min. Order July 4, 2018.

On July 27, 2018, while the matter remained under seal, Relator filed the First Amended Complaint, which is the operative pleading in the case. *See* Am. Compl. The First Amended Complaint advances three claims under the FCA: that IBM (1) knowingly presented or caused to be presented a fraudulent claim for payment to the IRS, *see id.* § 3729(a)(1)(A) (Count I); (2) made, used, or caused to be made or used a false record or statement material to IBM's fraudulent claim, *see id.* § 3729(a)(1)(B) (Count II); and (3) conspired to commit violations of §§ 3729 (a)(1)(A) and (1)(B) (Count III).

On August 31, 2018, the United States notified the court that it declined to intervene. *See generally* Notice of Election to Decline Intervention, ECF No. 38. Thereafter, the court ordered the First Amended Complaint be unsealed and served upon IBM. *See* Order, ECF No. 39. Defendant filed a Motion to Dismiss Relator's First Amended Complaint on February 4, 2019,

pursuant to Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6). *See generally* Def.'s Mot. The court held a hearing on IBM's Motion on September 13, 2019.

III. LEGAL STANDARD

To withstand a motion to dismiss under Rule 12(b)(6), the court must find that the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "[N]aked assertion[s] devoid of further factual enhancement" are not sufficient to support a complaint. *Id.* (alteration in original) (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 557). Factual allegations are not required to be "detailed," but pursuant to the Federal Rules, they must be more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*, 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief," and the case can be dismissed. *Id.* at 679 (cleaned up) (citing FED. R. CIV. P. 8(a)(2)).

When, as here, a complaint contains allegations of fraud, Rule 9(b) requires the plaintiff to "state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* "Together, Rules 8 and 9(b) require a plaintiff to plead the time, place, and content of the fraud and to identify the individuals allegedly involved." *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 936 (D.C. Cir. 2017) (citing *United States ex rel. Williams v. Martin-Baker Aircraft*

Co., 389 F.3d 1251, 1256 (D.C. Cir. 2004)). Further, the complaint must identify "the fact misrepresented and what was retained or given up as a consequence of the fraud." *Williams*, 389 F.3d at 1256 (D.C. Cir. 2004) (internal quotations and citation omitted).

Rule 9(b)'s particularity requirement "safeguards potential defendants from frivolous accusations of moral turpitude . . . [and] guarantee[s] all defendants sufficient information to allow for preparation of a response." *Id.* at 1256 (internal quotation marks and citation omitted). A court should, however, dismiss a complaint with prejudice for failure to plead fraud with particularity "only if it determines the plaintiff could not possibly cure the deficiency by alleging new or additional facts." *Shea*, 863 F.3d at 936 (internal quotation marks omitted) (finding district court did not abuse discretion by granting leave to amend where relator "outlined the basic mechanics" of the fraud and "could potentially provide more detail about the 'who,' 'what,' 'where,' and 'when' of the fraud as to each individual contract").

IV. DISCUSSION

The FCA was borne of Congress's desire to stop the "plundering of the public treasury" in the wake of sensational reports of fraud against the government as it purchased necessities for the Civil War. *United States v. McNinch*, 356 U.S. 595, 599 (1958). The FCA allows private parties, known as "relators," to bring a qui tam action—that is, an action on behalf of the United States—to recover civil penalties and damages for fraud. *See* 31 U.S.C. §§ 3729(a), 3730(b). The United States may elect to intervene in the qui tam action. *See U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003) (stating that "the Government may intervene or bring a related action based on the facts underlying the [*qui tam*] action") (citing 31 U.S.C. § 3730(b)(5)). Even if does not, the relator still may choose to prosecute the case. That is what occurred here.

Relator's FCA claims are predicated primarily on what is known as a fraud-in-the-inducement theory of liability. Under a fraud-in-the-inducement theory, a defendant violates the FCA if it submits claims to the government "under a contract which was procured by fraud, even in the absence of evidence that the claims were fraudulent in themselves." *United States ex. rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1326 (D.C. Cir. 2005) (internal citation omitted); *see also United States ex rel. Westrick v. Second Chance Body Armor Inc.*, 128 F. Supp. 3d 1, 18 (D.D.C. 2015). Secondarily, Relator asserts that IBM presented a false claim for payment, namely, the overage fees disguised as the cost of new licenses. Under such theory, the allegation is that the defendant made an explicitly false or fraudulent demand for payment. *See Pencheng Si v. Laogai Research Found.*, 71 F. Supp. 3d 73, 87 (D.D.C. 2014) (cleaned up). The Amended Complaint's pleaded factual allegations do not, however, plausibly support either of these theories.

A. Fraud in the Inducement

Relator alleges that IBM fraudulently induced the IRS to renew the Initial License by presenting it with false audit findings that the IRS was responsible for $91 million in overage penalties, when in fact it was not, and falsely promising to forgo those penalties if the IRS agreed to a new licensing agreement. Put differently, Relator claims that IBM coerced the IRS into paying $265 million for software that the agency did not want, to avoid $91 million in fabricated penalties. But that is not all. Relator's allegation that IBM surreptitiously inserted nearly $91 million in penalties into the contract under a false specification for new licenses means the IRS purportedly signed a contract to pay $265 million for only $174 million worth of software.

Even accepting the well-pleaded facts as true, the Amended Complaint does not give rise to plausible violations of the FCA. It falls short on two critical elements: causation and materiality. The court discusses each element in turn.[2]

1. Causation

As the name of the theory implies, a plaintiff alleging fraud in the inducement must plead "not only that the omitted information was material but also that the government was *induced by*, or relied on, the fraudulent statement or omission." *Westrick*, 128 F. Supp. 3d at 18 (citation omitted) (emphasis added); *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 491 (3rd Cir. 2017) ("Collapsing the materiality analysis into a causation inquiry would render the materiality element 'surplusage[.]'"); *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7–8 (1st Cir. 2016) (distinguishing between elements of materiality and causation). The parties disagree as to what the verb "induce" means in this context. Relator argues that it need only plead facts showing that the false audit findings were a "substantial factor" in the agency's decision to renew the licensing agreement. Draft Hr'g Tr. at 22–23. IBM, on the other hand, argues for a stricter "but for" standard, such that Relator in this case must plead that, absent IBM's presentment of the false audit findings, the IRS would not have entered into a new agreement. *See id.* at 23.

IBM is generally correct, but even it understates the stringency of the FCA's causation standard. The clear weight of authority among the circuit courts is that the element of causation for an FCA claim requires a showing that the alleged false statement is not only the actual, or but-for, cause of the government harm, but also the legal, or proximate, cause for the loss. *See United States v. Luce*, 873 F.3d 999, 1009–14 (7th Cir. 2017) (surveying cases and joining the Third and Fifth Circuits in adopting a "proximate cause" standard); *Petratos*, 855 F.3d at 491 ("And even

[2] The court need not examine Defendant's other arguments to dismiss, as Relator's failure to establish both materiality and causation warrant dismissal.

the causation element cannot be met merely by showing 'but for' causation."); *cf. United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006) (requiring the false claim to be an "integral to [the] causal chain leading to payment") (citations omitted). This legal standard is confirmed by the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, in which the Court explained that Congress intended to import common law concepts into the FCA. *See* 136 S. Ct. 1989, 1999 (2016). Proximate cause is the usual common-law understanding of causation in fraud cases. *See Luce*, 873 F.3d at 1012.

The D.C. Circuit appears to share in this view. In *United States ex rel. Schwedt v. Planning Research Corp.*, the court embraced the Third and Fifth Circuit's "restrictive standard" for causation. 59 F.3d 196, 200 (D.C. Cir. 1995) (citing *United States v. Miller*, 645 F.2d 473, 475–76 (5th Cir. 1981); *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977)). The court explained that "the submitter of a false claim should be liable only for those damages that arise because of the *falsity* of the claim, i.e., only for those damages that would not have come about if the defendant's misrepresentations had been true." 59 F.3d at 200. The D.C. Circuit did not refer to the causation standard as "proximate cause" in *Schwedt*, but instead used the "but for" formulation. *See id.* That is a distinction without a difference in this case, however, where there is no dispute that the alleged actual cause of the IRS's injury—the false audit findings—is also the legal, or proximate, cause. What is critical, however, is that for purposes of causation under the FCA, an allegation like the Relator makes here—that a false statement is merely a "substantial factor" in causing loss—is not enough to give rise to FCA liability under *Schwedt*. He must plausibly allege facts establishing but-for causation. *See United States v. DynCorp Int'l*, 253 F. Supp. 3d 89, 107 (D.D.C. 2017) (stating that the court "must evaluate whether the alleged false statements could plausibly have induced the government's agreement"); *United States ex rel. Kolchinsky v. Moody's*

Corp., No. 12CV1399, 2018 WL 1322183, at *5 (S.D.N.Y. Mar. 13, 2018) (stating that the relator must "'plead facts demonstrating that the government relied on the statement'—*i.e.*, that it was so induced") (citation omitted).

A decision from the First Circuit is helpful in illustrating how the causation standard operates when the plaintiff asserts a fraud-in-the-inducement theory. In *D'Agostino v. ev3*, the relator alleged that the defendant made multiple fraudulent representations to the FDA to obtain approval for a medical device. *See* 845 F.3d at 7. To plead causation, the court held, it was not sufficient for the plaintiff to allege that "the fraudulent representations 'could have' influenced the FDA . . . and the payments made by [the Centers for Medicare and Medicaid Services ("CMS")]." *Id.* Rather, "the defendant's conduct must cause the government to make a payment or to forfeit money owed." *Id.* at 8. Thus, the court explained, "[i]f the FDA would have approved [the device] notwithstanding the alleged fraudulent representations, then the connection between those representations to the FDA and a payment by CMS relying on FDA approval disappears." *Id.* In finding that the relator's pleading had come up short, the First Circuit relied on the fact that the FDA had taken no action with respect to the device even after the relator had made his claims of fraud: "The FDA's failure actually to withdraw its approval of [the device] in the face of [the relator's] allegations precludes [the relator] from resting his claims on a contention that the FDA's approval was fraudulently obtained." *Id.* The court concluded: "We hold only that causation is an element of the fraudulent inducement claims [the relator] alleges and that the absence of official action by the FDA establishing such causation leaves a fatal gap in this particular proposed complaint." *Id.* at 9.

D'Agostino and similar cases make clear the burden Relator faces in this case. He must plead facts demonstrating that but for the falsity of Deloitte audit's findings, the IRS would not

have entered into a $265 million licensing agreement with IBM. Or, in other words, Relator must plead that had the IRS known the truth about the audit findings, it would not have entered into the contract. *See, e.g.*, *Pencheng Si*, 71 F. Supp. 3d at 88 (holding that a fraudulent inducement theory "turns on the defendant's eligibility for payment by the government—had the government known about the fraud in the inducement, it never would have entered the contract, and no payments would have been made") (internal quotation marks and citation omitted); *United States ex rel. Keaveney v. SRA Int'l, Inc.*, 219 F. Supp. 3d 129, 145 (D.D.C. 2016) (holding that "Relators here have failed to allege how Defendants' alleged omission of the subcontractors' identities *induced* the government to initially enter into the contract") (citation omitted); *cf. United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F. Supp. 3d 180, 196 (D.D.C. 2017) (finding a fraudulent inducement claim viable on summary judgment where several agency decision-makers "indicated that if they had known about the [misrepresentations], they would not have recommended continuing or renewing the [contract]") (citation omitted).

Relator's allegations do not satisfy the FCA's "restrictive" causation standard. *Schwedt*, 59 F.3d at 200. The conclusory allegation that Deloitte's findings were a mere "substantial factor" in the decision to renew the licensing agreement is by itself fatal. Am. Compl. ¶ 127. The complaint's well-pleaded factual allegations are likewise deficient. Relator claims that the IRS's Deputy Chief Information Officer, McGrane, agreed to a new contract after his direct-report, Kravtiz, twice rejected the audit findings. *Id.* ¶¶ 88, 122. Even if the court were to suspend belief and accept that IBM could secure a $265 million contract by capitalizing on Kravitz's vacation plans, nowhere does Relator assert that McGrane (unlike Kravitz) actually accepted the audit's findings. The FCA "requires a causal rather than a temporal connection between fraud and payment," or in this case, the fraudulently induced agreement. *United States ex rel.*

Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005) (citation omitted). At most, Relator sets out a timeline establishing that McGrane authorized the new contract after IBM presented him with the false audit findings. That is not enough.

Relator also avers that an IBM employee, Chris Schumm, knew that the IRS was "concerned and 'scared' of the false Deloitte findings." Am. Compl. ¶ 127. But mere concern and fear on the part of the IRS, even if true, cannot equal causation. To satisfy the causal element, Relator must plead facts establishing that the false audit findings actually induced the IRS to enter into the new licensing agreement when it would not have otherwise. A generalized "concern," of the kind articulated by Relator, does not satisfy the rigorous element of causation.

2. Materiality

Relator also has not plausibly established the element of materiality. The Supreme Court has emphasized that the materiality standard under the FCA is "demanding" and not "too fact intensive" for courts to resolve on a motion to dismiss. *Universal Health Servs.*, 136 S. Ct. at 2003, 2004 n.6. The FCA defines information as material if it has a "natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Importantly, "courts need not opine in the abstract when the record offers insight into the Government's actual payment decisions." *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1032 (D.C. Cir. 2017) (citation omitted). As the Supreme Court has instructed: "[I]f the Government regularly pays a particular type of claim in full despite its actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." *Universal Health Servs.*, 136 S. Ct. at 2003–04.

Here, there is "strong evidence" that the IRS did not view the alleged false audit findings to be material. IBM's new licensing agreement with the IRS commenced on January 1, 2013.

See Def.'s Ex. 2 at 166. Relator filed this suit only six months later in June 2013, putting the IRS on notice of IBM's alleged fraud.[3] Yet, the IRS has paid IBM "[a]ll or substantial portion" of the $265 million new licensing agreement, much of which was paid after this case was filed. Am. Compl. ¶ 134. It also agreed to add six months to the agreement for an additional cost of $16,147,772. *See* Def.'s Ex. 2. at 207–10. The court finds it implausible that the IRS sat on its hands upon learning that IBM had tricked it into signing a contract for $265 million for software that it did not need. *See* Am. Compl. ¶¶ 54–56. In fact, it agreed to pay even more money to IBM. The claimed falsity therefore cannot be material. To hold otherwise would require the court to ignore "what actually occurred." *McBride*, 848 F.3d at 1034.

Nor is it lost on the court that, after a multi-year investigation, the United States declined to intervene in this case. Although the decision to intervene is not "dispositive," it is entitled to some "respect," *U.S. ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 197 n.14 (D.D.C. 2011), especially as here when the government conducted an extensive investigation spanning four years. The court therefore concludes that Relator has not plausibly established the element of materiality.[4]

3. "Hidden" compliance fees

In addition to claiming that IBM's presentation of the false audit findings led the IRS to enter into a new licensing agreement, Relator advances a second, related fraud-in-the-inducement theory. He maintains that IBM enticed the IRS to enter into the new contract with the false promise of waiving the $91 million in penalties, but then secretly reneged on that promise by including the penalties in the new contract under the guise of a line item for new licenses. Am. Compl. ¶¶ 137–

[3] At oral argument, Relator suggested that it was "completely unknown" whether or not the IRS knew of this lawsuit. Having been privy to the government's ex parte filings, the court knows that the IRS was made aware of this case not long after its filing. *See, e.g.*, Mem. of P&A in Support of Def.'s Unopposed Ex Parte Mot. for Sixth Month Extension of Time to Consider Election to Intervene, ECF No. 4 (sealed), at 4. Relator knows that, too, as his counsel received the government's sealed filings.

[4] Perhaps to state the obvious, the court has not accepted as true Relator's repeated assertions of "materiality" throughout his Amended Complaint. *See, e.g.*, Am. Comp. ¶¶ 31, 36, 118, 131.

38. For, example, he specifically alleges that IBM asserted that the IRS was over-deployed by 2,353 "IBM Rational Lifecycle Package Floating User" licenses before the Initial License expired, *id.* ¶ 139, then "IBM added those licenses to the bill as new, prospective licenses" in an effort to "conceal the fact that it was billing the IRS for licenses the IRS had allegedly over-used in previous years," *id.* ¶ 138. This theory, however, suffers from the same shortcomings as Relator's other one.

First, Relator fails to plead causation. There are no allegations in the Amended Complaint that the IRS accepted the false audit findings, let alone relied on a promise by IBM not to assess penalties if the IRS entered into a new agreement. Second, the Amended Complaint falls short on materiality. Again, the court cannot ignore "what actually occurred." *McBride*, 848 F.3d at 1034. The IRS learned long ago about IBM's alleged wrongdoing, including its alleged disguising of penalties as the costs of new licenses, yet the IRS took no corrective action, but in fact extended the agreement. Indeed, if what Relator alleges is true, it would mean that the IRS paid $265 million for $174 million worth of actual software licenses. The court finds it implausible that the IRS has not attempted, in some way, to recover the nearly $90 million for which it received nothing in return, if the claimed false promise were material. Relator's additional fraud-in-the-inducement theory therefore fails.

B. Presentation of False Claim

Relator also asserts that the disguised $91 million in penalties separately supports false presentment liability under the FCA. *See* 31 U.S.C. § 3729(a)(1)(A). Such a theory has four elements: (1) the defendant submitted a claim for payment to the government; (2) the claim was false; (3) the defendant knew the claim was false; and (4) the alleged falsity was material.

See Pencheng Si, 71 F. Supp. 3d at 87; *Universal Health Servs.*, 136 S. Ct. at 2002–03. Relator's presentment theory fails on the element of materiality.

Realtor again asks the court to "ignore what actually occurred," *McBride*, 848 F.3d at 1034, which it cannot do. The IRS knew, not long after entering the contract, about Relator's accusation that IBM had disguised the $91 million in penalties it promised it would forgo as the cost of new licenses. If Relator's accusation were true, it would mean that more than one third of the contract price was in fact penalties, and that the IRS never received the value of new software licenses. Yet, the IRS paid the $91 million, and made no effort to recoup it, and it continued to pay IBM for the duration of the contract and beyond. It is not plausible that the IRS would have sat by idly in the face of such an allegation.

Relator's contention "upon information and belief" that IBM "never actually provided [new licenses and support] to the IRS on a prospective basis as the License indicated" cannot save his Complaint. Am. Compl. ¶ 140. It is not plausible that the IRS failed to recognize that IBM had not delivered on one-third of its new licensing agreement, or that it did recognize that shortcoming, but still continued to pay IBM. And, while "information and belief" pleading remains available to a plaintiff claiming fraud, Realtor must assert that he lacked access to relevant records to affirmatively plead the factual contention. *See United States ex rel. Davis v. District of Columbia*, 591 F. Supp. 2d 30, 37 (D.D.C. 2008); *see also Williams* 389 F. 3d at 1258. Relator has not done so here.

Thus, having failed to plead materiality of the alleged "hidden" penalties, Relator's presentment claim cannot survive.

V. CONCLUSION

For the reasons set forth above, the court grants Defendant's Motion to Dismiss Plaintiff-Relator's Complaint, ECF No. 48. A separate final Order accompanies this Memorandum Opinion.

Dated: September 30, 2019

Amit P. Mehta
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA *ex rel.* ELGASIM MOHAMED FADLALLA, *et al.*,	*	
Plaintiff-Relators,	*	
v.	*	Civil Action No. 8:15-cv-01806-PX
DYNCORP INTERNATIONAL LLC, *et al.*,	*	
Defendants.	*	

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MEMORANDUM OPINION

This *qui tam* action concerns the provision of translators to assist our armed forces in the Middle East. Pending before the Court are seven motions to dismiss filed by Defendants TigerSwan, Inc. (ECF No. 64), AECOM National Security Programs, Inc. (ECF No. 80), KMS Solutions, LLC (ECF No. 81), DynCorp International, LLC (ECF No. 83), Global Linguist Solutions, LLC (ECF No. 85), Thomas/Wright, Inc. (ECF No. 100), and Shee Atika Languages, LLC (ECF No. 129). The motions are fully briefed, and no hearing is necessary. *See* Loc. R. 105.6. For the following reasons, the motions are GRANTED in part and DENIED in part.

I. Background

Relators'[1] false claims allegations arise out of the performance of two government contracts awarded to Global Linguist Solutions, LLC ("GLS") by the Commander, Headquarters, United States Army Intelligence and Security Command ("INSCOM"). ECF No. 9 ¶ 2. Relators are 29 United States citizens who worked for GLS under one or both of the contracts "as security-cleared linguists, translators and interpreters for U.S. military and intelligence-gathering

[1] While the individuals bringing this suit are properly "Plaintiffs" for their Trafficking Victims Protection Reauthorization Act claim and "Relators" for their False Claims Act claims, the Court will refer to them as "Relators" throughout to avoid confusion.

operations in the Middle East." *Id.* ¶ 5.

A. Subcontractor Fraud Scheme

On December 5, 2007, INSCOM selected GLS as the "proposed awardee" of Contract W911W4-08-D-0002 ("Contract 1"), a $4.645 billion contract of an indefinite duration and quantity for "the provision of linguists to support U.S. military and intelligence-gathering efforts in the Middle East." *Id.* ¶¶ 59–61. To be awarded Contract 1, GLS had to submit a "Small Business Subcontracting Plan." *Id.* ¶¶ 69, 70. This plan included a statement of total dollars to be subcontracted to various categories of small businesses, to include those owned by veterans, women, and those considered "disadvantaged" businesses. *Id.* ¶¶ 69, 77. GLS was required to submit reports at the close of each fiscal year, in which it would note any subcontract awards to small disadvantaged business. The contract also specifically stated that GLS' failure "to comply in good faith with its subcontracting plan" would amount to a "material breach." *Id.* ¶ 79. Relators assert that the small business subcontract provisions were designed to "enhance the ability of small businesses to perform the contracts and provide the services needed to enhance the *competition* necessary to promote a free marketplace" as envisioned in the Aid to Small Business Act. *Id.* ¶ 73 (emphasis in original).

In bidding for Contract 1, GLS entered into "Teaming Agreements" with Small Business Defendants KMS Solutions, LLC ("KMS"), Shee Atika Languages, LLC ("Shee Atika"), Thomas/Wright, Inc. ("Wright"), TigerSwan, Inc. ("TigerSwan"), and Invizion, Inc. ("Invizion"). *Id.* ¶¶ 8, 83. GLS next represented to INSCOM "that it intended to utilize the Small Business Defendants in accordance with the subcontracting requirements of Contract 1." *Id.* ¶ 84. However, in practice, and through the Teaming Agreements, the Small Business Defendants acted as "GLS affiliates" and not "*bona fide* independent small business entities."

Id. ¶ 86. As part of GLS' contracting scheme, GLS performed all of the contract work while giving the appearance that the Small Business Defendants performed the same work under the subcontracts. *Id.* ¶ 88.

As part of the scheme, GLS had Relators sign various employment contracts to make it appear, falsely, that one of the Small Business Defendants was the Relator's employer. Each Relator executed multiple employment contracts, seriatim, within a matter of months. *See, e.g.*, *id.* ¶¶ 190, 230–32. GLS managers interacted with Relators almost exclusively, not the Small Business Defendants who nominally appeared on the employment contracts. *Id.* ¶ 94. GLS oversaw the recruitment and hiring process, paid for Relators' training, coordinated background investigations and medical testing, determined where Relators were deployed, and managed Relators' transportation to Kuwait. *Id.* ¶¶ 96–111. When these "transfers" occurred, GLS often told Relators to not worry and that nothing about their employment would change, except they would now be paid by the new subcontractor. *Id.* ¶¶ 261, 278–79, 283, 310, 340, 405. Small Business Defendants, in turn, "did not know, at any given time, which Relators were on their payrolls." *Id.* ¶ 115. Accordingly, "GLS received unjustified payments from the U.S. by falsely representing its employees, including Relators, as working for the Small Business Defendants, outsourcing task orders to them, and earning fees for such outsourced work." *Id.* ¶ 117.

In the National Defense Authorization Act for Fiscal Year 2008, Congress established the Commission on Wartime Contracting in Iraq and Afghanistan ("CWC") to investigate "fraud, waste, abuse and mismanagement of wartime government contracts." *Id.* ¶ 164. On August 12, 2009, the CWC "held a hearing on linguist support services provided by GLS," calling GLS President John Houck to testify. *Id.* ¶ 165. In questioning Houck on the role of the subcontractors, Houck falsely testified that GLS was "leasing" linguists from the Small Business

Defendants. *Id.* ¶ 167. Houck also stated that 60% of the linguists were employed by subcontractors, and that only 40% were GLS employees, when in fact GLS employed almost all linguists. *Id.* According to Relators, Houck's false testimony "thwart[ed] discovery . . . of GLS's material breaches of Contract 1 and false claims thereunder." *Id.* ¶ 177.

On July 11, 2011, INSCOM awarded Contract No. W911W4-11-D0004 ("Contract 2") to GLS for $9.7 billion. *Id.* ¶ 92. Like Contract 1, Contract 2 "calls for provision of similar linguistic, interpretation and translation services for U.S. military personnel and other agencies, only on a global basis." *Id.* ¶ 4. In submitting its proposal for Contract 2, GLS "falsely represented that it had complied with Contract 1," including the small business contracting requirements. *Id.* ¶ 92. Relators aver that INSCOM awarded Contract 2 to GLS, relying at least in part on these false representations. *Id.* ¶¶ 4, 180.

B. Work Visa Fraud Scheme with Alshora

Under Contract 1, GLS was responsible for ensuring that employees such as Relators secured necessary travel documents, and that all personnel, including subcontractors, complied with "Host Country, local and international laws and regulations . . . applicable to the contractor in the area of operations." *Id.* ¶ 65. As part of this contractual obligation, GLS represented that performance under Contract 1 complied with Kuwaiti labor and immigration laws. *Id.* ¶ 506. However, foreign nationals must obtain a Resident Visa to work in Kuwait, and businesses owned by foreign nationals cannot serve as employers. *Id.* ¶¶ 127–28.

To circumvent Kuwait's prohibition on GLS employing the Relators directly, GLS subcontracted with Alshora International General Trading and Contracting Company ("Alshora"), a Kuwaiti owned business, for Alshora to obtain Resident Visas for GLS employees in exchange for a "sponsorship fee." *Id.* ¶ 124. Beginning December 9, 2009, "Alshora and

GLS obtained Relators' signatures on documents purporting to identify Relators as Alshora employees." *Id.* ¶ 129. To further this scheme, GLS forced Relators to open bank accounts in Kuwait and then deducted from Relators' pay an amount for Alshora to deposit into the Kuwait accounts all to make it appear as if Relators worked for Alshora. *Id.* ¶ 130. GLS also held Relators' passports for weeks or months at a time and without explanation, thus preventing Relators from leaving Kuwait or venturing off the U.S. military bases to which they were assigned. *Id.* ¶¶ 194–97, 201, 219, 229, 249, 265, 373, 391, 419.

In late 2012, the business relationship between GLS and Alshora began to deteriorate and GLS planned to find a different Kuwaiti company to assist in the performance of Contract 2. *Id.* ¶ 134. GLS notified Alshora on January 10, 2013 to expect final payment under the subcontract on February 17, 2013. *Id.* ¶ 135. This notice prompted Alshora to demand that the linguists who had been issued Resident Visas "report to Alshora to have those visas cancelled" prior to February 17. *Id.* ¶¶ 136–37. Although GLS agreed to send linguists to the Alshora office to process the visa cancellations, GLS did not comply with the plan, which would have required their linguists to leave Kuwait and return to the United States. *Id.* ¶¶ 138–40. When the linguists, including certain Relators ("Resident Visa Relators"), failed to cancel their visas, Alshora "reported to Kuwaiti authorities that these linguists—its alleged 'employees'—had abandoned their worksites." *Id.* ¶ 141.

Under Kuwaiti law, abandonment of a worksite amounts to the criminal offense of "absconding." *Id.* ¶ 142. During this time, Alshora also learned that other GLS linguists, including certain Relators ("Non-Resident Visa Relators") had been working in Kuwait without having obtained Resident Visas. *Id.* ¶ 143. GLS never obtained Resident Visas for a number of linguists, who entered Kuwait on tourist visas and, unbeknownst to the linguists, worked in

violation of Kuwaiti law. *Id.* ¶¶ 316–19, 395–96, 440–43. Alshora reported these linguists "to Kuwaiti authorities as working illegally in Kuwait." *Id.* ¶ 145.

As a consequence of Alshora reporting the Relators to Kuwaiti authorities, Kuwait "ordered that Relators immediately stop work for the U.S. military and intelligence forces in Kuwait" as of February 19, 2013. *Id.* ¶ 146. As a further consequence, affected Relators faced arrest if they tried to leave the country. *Id.* ¶ 149. One Relator was in fact arrested en route to Jordan to visit his ill mother. *Id.* ¶¶ 235–38.

In April 2013, GLS transported Resident Visa Relators to the Kuwaiti Ministry of Labor and Social Affairs, and demanded they execute Powers of Attorney ("POAs") with the false promise of being issued new visas. *Id.* ¶¶ 150–53. GLS instead used the POAs to file civil complaints in Resident Visa Relators' names against Alshora for unpaid wages and without the Relators' knowledge or consent. *Id.* ¶¶ 154–55. Alshora, in turn, filed counterclaims against the Relators, seeking damages for the "allegedly frivolous filing" of Relators' complaints. *Id.* ¶ 156.

As to the criminal "absconding" charges, GLS also coerced the Resident Visa Relators into signing false confessions with the promise that they would be allowed to leave Kuwait. *Id.* ¶ 158. However, unbeknownst to the Relators, the "confessions" resulted in their immediate expulsion from Kuwait and they were banned from reentering any member nation of the Gulf Cooperation Council.[2] *Id.* ¶ 159. Those Relators who refused to sign confessions were detained for months before finally being released. *Id.*

Relators further allege "inhumane" treatment they suffered by being forced to stay in "overcrowded, unsanitary, and dangerous living conditions" while stationed in Kuwait. *Id.* ¶¶ 182–83. While private contractors generally live off base in private housing or on base in

[2] Gulf Cooperation Council Member Nations include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. ECF No. 9 ¶ 12.

structures built by their employers, Defendants placed Relators on bases in overcrowded tents not built to serve as permanent quarters for large numbers of long-term residents. *Id.* ¶¶ 185–87. Relators recount living in tents infested with rodents, bed-bugs, lice and mites. *Id.* ¶¶ 185–87, 274. Relators did not receive any medical care despite their having sustained a number of serious injuries. *Id.* ¶¶ 186, 346.

C. Procedural History

Based on the above-described scheme, Relators filed this *qui tam* action on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.* The FCA generally assigns liability to "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the United States. *Id.* § 3729(a)(1)(A). Private parties, known as *qui tam* relators, may bring FCA actions on behalf of the United States. The FCA provides the United States an opportunity to investigate the claims and choose whether to intervene in the Relators' place or allow Relators to proceed with the litigation. *Id.* § 3730(b). After prolonged investigation and deliberation in this case, the United States declined to intervene. *See* ECF No. 29.

In the Amended Complaint, Relators assert three FCA counts against prime contractor GLS and subcontractors Invizion, KMS, Shee Atika, TigerSwan, and Wright for false claims related to Contracts 1 and 2. *See* ECF No. 9 ¶¶ 488–547. Relators aver AECOM National Security Programs, Inc. ("AECOM") and DynCorp International, LLC ("DynCorp") are liable as joint owners of GLS. *Id.* ¶ 20. Relators further bring one count under the Trafficking Victims Protection Reauthorization Act ("TVPRA") concerning Relators' treatment and work conditions in Kuwait. *Id.* ¶¶ 548–93. On May 21, 2019, the Clerk entered default as to Defendant Invizion for failure to plead or otherwise defend. ECF No. 132. The other seven Defendants have moved

to dismiss the Amended Complaint on several grounds, each discussed below. *See* ECF Nos. 64, 80, 81, 83, 85, 100, 129.

II. Standards of Review

Defendants challenge the Amended Complaint on jurisdiction and sufficiency grounds, implicating Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Rule 12(b)(1) motions challenge a court's authority to hear the matter. *See Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 300–01 (4th Cir. 2009). The plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999). In determining whether jurisdiction exists, "the court may look beyond the pleadings and the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue." *Khoury v. Meserve*, 268 F. Supp. 2d 600, 606 (D. Md. 2003) (internal marks and citation omitted). Where the defendant contends that the complaint "simply fails to allege facts upon which subject matter jurisdiction can be based," the Court construes the factual allegations as true and most favorably to the plaintiff. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Whether the Court retains subject matter jurisdiction must be decided before reaching the merits of the case. *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir. 1999).

Where personal jurisdiction is lacking, dismissal of the claims may also be warranted. *Lightfoot v. Cendant Mortg. Corp*., 137 S. Ct. 553, 562 (2017). Pursuant to Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of establishing personal jurisdiction by a preponderance of the evidence. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc*., 334 F.3d 390, 396 (4th Cir. 2003). In deciding a Rule 12(b)(2) motion, the court is "permitted to consider evidence outside the pleadings." *All Risks, Ltd. v. Butler*, No. GLR-15-3146, 2016 WL 4435477, at *2 (D. Md. Aug. 22, 2016) (internal citations omitted).

A motion brought pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). The Court accepts "the well-pled allegations of the complaint as true," and construes all facts and reasonable inferences most favorably to the plaintiff. *See Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). To survive a motion to dismiss, a complaint's factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). The Court may also grant a 12(b)(6) motion on statute of limitations grounds, but "only if the time bar is apparent on the face of the complaint." *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017) (citation and internal quotations omitted).

In ruling on a Rule 12(b)(6) motion, the Court generally may not consider extrinsic evidence. *Zak v. Chelsea Therapeutics, Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015) ("Consideration of extrinsic documents by a court during the pleading stage of litigation improperly converts the motion to dismiss into a motion for summary judgment."). However, the Court may consider documents attached to pleadings if "integral to and explicitly relied on in the complaint" and the plaintiff does not challenge the documents' authenticity. *Id.* at 606–07 (quoting *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)).

III. Personal Jurisdiction

Two Small Business Defendants, TigerSwan and Shee Atika, contend that dismissal for lack of personal jurisdiction is warranted under Rule 12(b)(2) because they lack "minimum contacts" with this forum. ECF No. 64-1 at 1; ECF No. 129-1 at 13–15. TigerSwan more particularly argues that it has conducted no business in Maryland and that mere corporate registration and compliance with Maryland's unemployment laws does not amount to "minimum

contacts" sufficient to confer personal jurisdiction. ECF No. 64-1 at 9–11. Shee Atika similarly contends that "minimum contacts" with the state are lacking because it had always been an Alaska limited liability company prior to its dissolution and never operated in Maryland. ECF No. 129-1 at 14–15. TigerSwan and Shee Atika, however, advocate for their dismissal under the wrong standard.

Although courts routinely determine whether personal jurisdiction is proper under a "minimum contacts" theory, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985), where, as here, a federal statute authorizes nationwide service of process, a "national contacts" standard applies. *Autoscribe Corp. v. Goldman & Steinberg*, 47 F.3d 1164, 1164 (4th Cir. 1995) (table decision). In this context, "so long as the assertion of jurisdiction over the defendant is compatible with due process, the service of process is sufficient to establish the jurisdiction of the federal court over the person of the defendant." *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989, 991 (4th Cir. 1984). A defendant contesting personal jurisdiction under this standard must demonstrate that trying its case in the forum would violate its Fifth Amendment due process rights and that "extreme inconvenience or unfairness . . . would outweigh the congressionally articulated policy evidenced by a nationwide service of process provision." *Becker v. Noe*, No. ELH-18-00931, 2019 WL 1415483, at *18 (D. Md. Mar. 27, 2019) (quoting *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015)); *see also* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1068.1 (4th ed. 2019) (noting substantial deference is given to Congress' choice to include a nationwide service provision).

Under the FCA, nationwide service of process is accomplished by summons, which "as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court

and served at any place within or outside the United States." 31 U.S.C. § 3732(a). Accordingly, the Court considers TigerSwan and Shee Atika's national contacts with the United States rather than minimum contacts with the state of Maryland in determining whether it has personal jurisdiction over these Defendants. *Cf. United States v. Hobbs*, No. 16CV236, 2018 WL 1368325, at *6 (N.D. W. Va. Mar. 16, 2018) ("The Court discerns no reason why the Fourth Circuit would not adopt the national contacts test in the context of an FCA action such as this one.").

TigerSwan maintains sufficient contacts with the United States for this Court to exercise personal jurisdiction. TigerSwan is qualified as a small business under the United States Small Business Association. ECF No. 64-1 at 3. It formed as a corporation in Colorado, converted to a limited liability company in Delaware, and is registered in Maryland. *Id.* at 2–3. TigerSwan made payments to the Maryland Unemployment Insurance Department on behalf of a resident employee in Maryland. *Id.* at 4. Further, all back-office management duties arising from Contract 1 were conducted at TigerSwan's headquarters in North Carolina. *Id.* at 3–4. TigerSwan meets the minimum standard for contacts with the United States to establish the Court's personal jurisdiction.

Shee Atika similarly meets the national contacts test. Shee Atika was a limited liability company organized under the laws of Alaska and was 51% owned by an Alaska Native Corporation and 49% by an individual who resides in New Hampshire. ECF No. 129-5 ¶¶ 5, 6, 8. Shee Atika "received certifications from the United States Small Business Association" (*id.* ¶ 9) and had around 20 employees who worked in the United States on Contract 1, located in Alaska, North Carolina, and Virginia. *Id.* ¶ 22. The Court maintains personal jurisdiction over both Defendants for the FCA claims.

TigerSwan and Shee Atika alternatively contend that even if they meet the national contacts standard, notions of fairness and convenience should bar the Court from exercising personal jurisdiction. TigerSwan avers that, as a small business with no other connection to the forum state, litigation in this forum would unduly burden the corporation. ECF No. 75 at 5. Shee Atika similarly contends that, as a business no longer in operation that was located thousands of miles away in Alaska, litigating the case in Maryland would be "constitutionally unreasonable." ECF No. 129-1 at 16–17. The Court finds that the proffered inconveniences alone do not defeat personal jurisdiction.

Only in "highly unusual cases" will "inconvenience . . . rise to a level of constitutional concern." *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997). This is especially so where "[m]odern means of communication and transportation" have undoubtedly lessened the burden and expense of litigation. *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947–48 (11th Cir. 1997); *Becker*, 2019 WL 1415483, at *18 (dismissing Fifth Amendment concerns where the inconvenience was related to costs of travel); *see also ESAB Grp.*, 126 F.3d at 627 (finding that personal jurisdiction was established despite some inconvenience to the defendants but refusing to decide issues of proper venue). Although the Court is, and will remain, sensitive to Defendants' concerns, FCA litigation will proceed in this forum as to TigerSwan and Shee Atika. The motion to dismiss on this ground is denied.

Similarly, the Court will exercise pendant jurisdiction over the TVPRA claims. Pendent personal jurisdiction is proper where the claims arise under a "common nucleus of operative fact." *See Burt v. Maasberg*, No. ELH-12-0464, 2013 WL 1314160, at *36 (D. Md. Mar. 31, 2013) (quoting *ESAB Grp.*, 126 F.3d at 628). The FCA and TVPRA claims arise from a common nucleus of operative facts concerning the implementation of Contract 1. *See*

Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp., 452 F. Supp. 2d 621, 626, 628 (D. Md. 2006), *aff'd*, 273 F. App'x 256 (4th Cir. 2008) (stating multiple claims arising from the same insurance policy arose from a common nucleus of operative fact); *Orteck Int'l Inc. v. TransPacific Tire & Wheel, Inc.*, No. DKC 2005-2882, 2006 WL 2572474, at *9 (D. Md. Sept. 5, 2006) (exercising pendent personal jurisdiction over claims arising from a single sale). Thus, the Court may extend personal jurisdiction over TigerSwan and Shee Atika to the TVPRA claims. *See ESAB Grp.*, 126 F.3d at 628–29. As TigerSwan's motion to dismiss solely challenged personal jurisdiction, its motion is denied. ECF No. 64.

IV. FCA Claims (Counts I–III)

Counts One through Three of the Amended Complaint allege violations of three separate FCA provisions. In Count I, Relators aver that "Defendants knowingly presented, or caused to be presented, false and/or fraudulent claims for payment or approval by the U.S. Government, in violation of 31 U.S.C. § 3729(a)(1)." ECF No. 9 ¶ 489. In Count II, Relators aver that Defendants knowingly made, used, or caused to be made or used, "false records or statements to get false or fraudulent claims paid or approved by the U.S. Government, in violation of 31 U.S.C. § 3729(a)(1)(B)." *Id.* ¶ 525. In Count III, Relators allege a "reverse false claim," whereby Defendants knowingly made false statements to avoid having to pay an amount owed to the Government, in violation of 31 U.S.C. § 3729(a)(1)(G). *Id.* ¶ 542.

Relators' FCA claims are grounded in two primary factual theories. First, Relators assert that GLS falsely claimed to the Government that GLS had employed Small Business Defendants when, in actuality, the subcontractors were "fronts" for GLS which provided the services pursuant to the Contracts with the Government. *Id.* ¶ 493. Relators contend that the Small Business Defendants "knowingly participat[ed]" in this scheme and thus "caused each of these

false claims to be presented." *Id.* ¶ 499. Relators assert that had the Government "known of the falsity as to GLS's compliance with its Small Business Subcontracting Plan, the [Federal Acquisition Regulation], and applicable federal small business statutes, the Government may not have paid the invoices submitted under Contract 1." *Id.* ¶ 502.

Second, Relators allege that GLS falsely represented to the Government that it was in compliance with the TVPRA and Kuwaiti labor and immigration laws, including improper "sponsorship" fees paid to Alshora under Contract 1. *Id.* ¶ 503. GLS' false statements under Contract 1 were made "to induce the Government to award it Contract 2." *Id.* ¶ 533. Relators also allege that invoices submitted for payment under Contract 2 constitute distinct false claims "because GLS was ineligible to perform that contract due to its violations of the federal small business regulations, TVPRA and Kuwaiti law while performing Contract 1." *Id.* ¶ 518.

A. Public Disclosure Bar

Defendants AECOM, DynCorp, GLS, KMS, Shee Atika, and Wright (hereinafter, "Defendants")[3] principally argue that Relators' FCA claims are foreclosed by the FCA's public disclosure bar. *See* ECF No. 80-1 at 26. The FCA's public disclosure bar "aims to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits in which a relator, instead of plowing new ground, attempts to free-ride by merely reiterating previously disclosed fraudulent acts." *U.S. ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 43 (4th Cir. 2016) (internal marks and citation omitted). The statute, therefore,

[3] The Defendants each join and adopt the motions of GLS, AECOM, and DynCorp. *See* ECF No. 81-1 at 2; ECF No. 83-1 at 10–11; ECF No. 85-1 at 15; ECF No. 100-1 at 2 n.1; ECF No. 129-1 at 1 n.1.; ECF No. 141 at 6 n.1. Unless specified below, arguments apply to all six Defendants, regardless of the motion in which it was raised. The Court notes that AECOM and GLS ask the Court to disregard any argument Relators incorporate by reference into their opposition memoranda rather than state in full, asserting Relators have exceeded their page limits. *See* ECF No. 141 at 6 n.1; ECF No. 142 at 1 n.1. However, Defendants are guilty of the same practice. Thus, the Court declines to penalize Relators when in fact they were only responding in kind to Defendants' voluminous pleadings made even more voluminous through their own "incorporation by reference."

"disqualifies private suits based on fraud already disclosed in particular settings—such as hearings, government reports, or news reports—unless the relator meets the definition of an 'original source' under the FCA." *Id.* at 39.

The FCA claims in this case implicate two versions of the public disclosure bar. Prior to 2010, the FCA public disclosure provision read:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (2005). An "original source" was further defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)(B).

The pre-2010 version of the statute "operated as a jurisdictional limitation—the public-disclosure bar, if applicable, divested the district court of subject-matter jurisdiction over the action." *U.S. ex rel. May v. Purdue Pharma L.P. (May I)*, 737 F.3d 908, 916 (4th Cir. 2013). The "relator bears the burden of proving that the public disclosure bar does not preclude his FCA action." *U.S. ex rel. May v. Purdue Pharma L.P. (May II)*, 811 F.3d 636, 639–40 (4th Cir. 2016).

On March 23, 2010, Congress amended the provision to clarify the sources of public disclosure. This public disclosure provision, operative today, now reads:

> The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—
>
> (i) in a Federal criminal, civil, or administrative hearing in which the

> Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (2010).

The "original source" definition was also amended to include an individual who either:

> (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.[4]

Id. § 3730(e)(4)(B).

Unlike the previous public disclosure bar, the 2010 amendment is no longer jurisdictional and instead operates as "effectively, an affirmative defense." *Beauchamp*, 816 F.3d at 40. The amendment also "changed the required connection between the [relator's] claims and the public disclosure." *Id.* Where previously the statutory bar required a showing that a relator "actually derived" his knowledge from the public disclosure, under the amendment the bar now applies "if substantially the same allegations or transactions were publicly disclosed" as those averred by the relator. *Id.* (citations omitted).

The amendment also "expanded" the statute's definition of the "original source" exception to the bar. *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 299 (3d Cir. 2016). In the pre-2010 version, the relator had to demonstrate "direct" knowledge of the information and disclosure to the Government in advance of filing suit. The

[4] The incorrect sequence of numbering in (i) and (2) appears in the statute. *See* 31 U.S.C. § 3730(e)(4)(B).

post-2010 version no longer requires a showing of direct knowledge so long as the relator demonstrates that he shared with the Government pre-suit information that is "independent" of the public disclosures and that "materially adds" to the information that had been publicly disclosed. *Id.*

i. Subcontractor Fraud Claims

Because the 2010 amendments are not retroactive, the Court must apply the pre-2010 version of the statute to any alleged conduct that occurred before March 23, 2010 and the post-2010 version to the conduct that occurred after that date. *See May I*, 737 F.3d at 918; *Citynet, LLC ex rel. U.S. v. Frontier W. Va. Inc.*, No. 14-15947, 2018 WL 1582527, at *15 (S.D. W. Va. Mar. 30, 2018). Here, the conduct underpinning the subcontractor-related FCA claims straddle both versions of the public disclosure bar in that Contract 1 remained in effect from 2007 to at least 2012. *See* ECF No. 9 ¶ 134. Under either version of the public disclosure bar, the disclosures are public, but relators are permitted to sue as original sources.

Defendants argue that the August 12, 2009 hearing before the CWC (the "CWC Hearing") and surrounding media coverage, as well as news reports of Shee Atika's federal lawsuit against GLS in 2013, preclude suit over the subcontracting claims.[5] ECF No. 80-1 at 28, 29 n.15. Regarding the CWC Hearing, the parties do not dispute that under either version of the statute, the hearing constitutes a "congressional . . . report, hearing, audit, or investigation" and the cited newspaper articles are "news media." 31 U.S.C. § 3730(e)(4)(A); *see also Beauchamp*,

[5] As to the pre-2010 version, under Rule 12(b)(1), the Court may consider matters outside of the Complaint without converting the motion to dismiss into one for summary judgment. Moreover, even under the 2010 amendment, "a court may take judicial notice of matters of public record without transforming the motion to dismiss into a motion for summary judgment." *Hedley v. ABHE & Svoboda, Inc.*, No. RDB-14-2935, 2015 WL 4626880, at *2 n.5 (D. Md. July 31, 2015). Accordingly, the Court takes judicial notice of the CWC Hearing transcript, as well as the public court filings and newspaper articles cited by Defendants. *See James v. Acre Mortg. & Fin., Inc.*, 306 F. Supp. 3d 791, 797–99 (D. Md. 2018), *rev'd and remanded on other grounds sub. nom Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535 (4th Cir. 2019).

816 F.3d at 43 n.6 ("Courts have unanimously construed the term 'public disclosure' to include websites and online articles."). However, Relators respond that the disclosures are not material because they do not disclose the "fraud or its critical elements." ECF No. 121 at 21–22. In Relators' view, the relevant "fraud" for purposes of this analysis is that the Small Business Defendants "were not *bona fide* small businesses and performed no work under Contract 1." *Id.* at 21 (emphasis in original).

The fallacy of this argument is that neither version of the stature requires that "the public disclosure matches *with specificity* the allegations made by a *qui tam* relator." *U.S. ex rel. Black v. Health & Hosp. Corp. of Marion Cty.*, 494 F. App'x 285, 294 (4th Cir. 2012) (emphasis in original). This prong of the public disclosure bar "is satisfied if the disclosure 'put[s] the Federal Government on notice of a potential fraud.'" *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 291 (2010)). The CWC Hearing meets this standard.

Chairman Thibault announced the hearing's "focus" would be the "structure, operation, and oversight of [Contract 1], which involves extensive subcontracting," and includes "the potential for significant added cost that may or may not reflect proportional added value." *Commission on Wartime Contracting in Iraq and Afghanistan: Hearing on Linguist Support Services in Theater*, at 1 (Aug. 12, 2009) (hereinafter, "CWC Transcript").[6] The Chairman underscored that "every linguist out there . . . wears a GLS badge and is managed and supervised by GLS employees, regardless of who is doing their payroll." *Id.* at 2. Commissioners and other testifying witnesses explicitly questioned the propriety and efficiency of paying subcontractors for seemingly playing such a small role. *Id.* at 4, 10, 21. News reports covering the event

[6] Available at https://cybercemetery.unt.edu/archive/cwc/20110930032251/http://www.wartimecontracting.gov/images/download/documents/hearings/20090812/Transcript-Linguist_Support_Contracts_20090812.pdf.

referred to the hearing as a "scathing review . . . from government officials who described tens of millions of dollars in questionable costs and poor management" and reporting that the "sole role of a dozen" subcontractors was payroll. *Feds question Iraq interpreter contract*, NBC News, Aug. 12, 2009.[7] Another article quoted a commissioner's reference to the subcontracting structure as "ridiculously set up." Elizabeth Newell Jochum, *Defense Says Extensive Outsourcing on Iraq Linguist Contract is Jacking Up Costs*, Government Executive, Aug. 12, 2009.[8] These disclosures certainly put the Government on notice of a potential fraud surrounding GLS' use of its subcontractors.

As to the Shee Atika lawsuit, Defendants cite to one news article describing the complaint that Shee Atika filed in federal court against GLS, asserting breach of their subcontracting agreement. *See* Stewart Bishop, *Army Translation Contractor Breached $697M Deal, Suit Says*, Law360, July 16, 2013.[9] The article details the complaint allegations—that GLS failed to "award the subcontractor enough work to satisfy" the subcontract's "guaranteed work share provision." *Id.* Moreover, the article concluded that Shee Atika's "role as a subcontractor was key to GLS satisfying requirements that specified minimum percentages of the prime contract's revenue go to small businesses or small disadvantaged businesses." *Id.* This article similarly could put the Government on notice of GLS using subcontractors as "fronts." Thus, both categories of documents are covered by the statutes.

However, the bar to suit does not apply unless the Relators' allegations are "based upon" these public disclosures, as to pre-2010 conduct, and "substantially the same" as the disclosures

[7] Available at http://www.nbcnews.com/id/32393792/ns/world_news-mideast_n_africa/t/feds-question-iraq-interpreter-contract/#.XVsLRWdYbKK.
[8] Available at https://www.govexec.com/defense/2009/08/defensesays-extensive-outsourcing-on-iraq-linguist-contract-is-jacking-up-costs/29745/.
[9] Available at https://www.law360.com/articles/457435/army-translationcontractor-breached-697m-deal-suit-says.

with respect to post-2010 conduct. The United States Court of Appeals for the Fourth Circuit interprets the pre-2010 language narrowly; only where the "relator's *knowledge* of the fraud was actually derived from the public disclosure" will the provision preclude suit. *May I*, 737 F.3d at 919 (emphasis in original) (citing *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347–48 (4th Cir. 1994)). Where such knowledge is even "*partly based* upon prior public disclosures," further FCA litigation is barred. *Black*, 494 F. App'x at 295 (emphasis in original) (quoting *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 351 (4th Cir. 2009)).

The Relators' allegations are at least partly based on the CWC Hearing testimony and news articles. One hearing commissioner explicitly questioned whether GLS subcontracted to so many small businesses "because they had to meet a 35 percent small business goal and they really did not want the small businesses to do anything but to satisfy the government." CWC Transcript, at 22. Another hearing commissioner noted that the "only unique function" of the subcontractors was to provide "advisory management support, which one could argue really is no support at all." *Id.* at 23. Moreover, Relators cite directly to the CWC Hearing for the proposition that GLS was incentivized to appear to be subcontracting services to profit from the "fee on fee" system. ECF No. 9 ¶¶ 174–75. The Court finds the allegations sufficiently "based upon" prior public disclosures for purposes of the pre-amendment bar.

The post-2010 bar applies where "substantially the same allegations or transactions were publicly disclosed." *May I*, 737 F.3d at 917. Although the Fourth Circuit has not yet interpreted this new language, "other circuits look to whether the disclosures provide enough information so that the government could investigate the case and . . . make a decision whether to prosecute." *Citynet*, 2018 WL 1582527, at *20 (internal marks and citations omitted). As the Court finds the stricter "based upon" standard is met, the broader "substantially similar" test is certainly met

here.

The Relators describe the CWC's mandate as investigation of "fraud, waste, abuse and mismanagement" in government contracts. ECF No. 9 ¶ 164. The focus of the CWC Hearing was on GLS' hiring of, what one commissioner referred to as, "do-nothing subcontractors." CWC Transcript, at 15. The news articles also discuss potential misuse of small business subcontractors. The public disclosures provided sufficient information that the Government could investigate GLS' conduct further and, thus, meet the "substantially the same" standard.

Having found the CWC hearing and surrounding publicity is sufficient to constitute "public disclosures" under both versions of the FCA, the Court next turns to whether Relators may nonetheless proceed as "original sources" of the same information. Under either version of the statute, and to escape the public disclosure bar, Relators must demonstrate that they "voluntarily provided the information to the Government" before they filed the FCA action. 31 U.S.C. § 3730(e)(4)(B). This requirement may not be satisfied "through an ambiguous assertion that leaves open to question whether the plaintiff actually reported information relating to any particular claim or concerning any particular defendant." *U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268, 276 (4th Cir. 2014). The showing is easily met here.

Relators specifically contend that they "are original sources who provided evidence to the U.S. of such misconduct." ECF No. 9 ¶ 6. Relators further attest that they "voluntarily provided the information on which this lawsuit is premised to the Government" on March 23, 2015, three months before filing this action. ECF No. 121 at 30 n.34; *see U.S. ex rel. Ackley v. Int'l Bus. Machs. Corp.*, 76 F. Supp. 2d 654, 668 (D. Md. 1999) (finding disclosure at least 30 days before suit "reasonable in nearly every case").

Under the pre-2010 version of the statute, a relator must also prove that the relator has "direct and independent knowledge of the information on which the allegations are based and has

voluntarily provided the information to the Government." 31 U.S.C. § 3730(e)(4)(B) (2005). "A relator's knowledge is 'direct' if he acquired it through his own efforts, without an intervening agency, and it is 'independent' if the knowledge is not dependent on public disclosure." *Black*, 494 F. App'x at 295–96 (internal marks and citation omitted). Relators do "not need to have direct and independent knowledge of all the information on which a *qui tam* action is based;" rather, "the relator must have direct and independent knowledge of the facts necessary to plead a plausible fraud claim." *U.S. ex rel. Carter v. Halliburton Co.*, 973 F. Supp. 2d 615, 630 (E.D. Va. 2013) (citation omitted).

Relators have averred facts related to GLS' fraudulent subcontracting practices about which they had direct and independent knowledge. Relators were forced to sign contracts with a series of different subcontractors within a matter of months. Relators also knew that despite changing employers, GLS continued to assure them that nothing would change about the terms or conditions of their employment. One Relator, Louai Salim, describes GLS' brazen attempt to identify Relators by "colored cards" as employees of certain subcontractors. ECF No. 9 ¶ 306. At an employment orientation, all linguists holding that same colored card were told they would "work" for TigerSwan. *Id.* After that day, Salim never again interacted with a TigerSwan supervisor, only with GLS staff. *Id.* ¶ 309. Although nominally "employed" by various subcontractors, Relators never met or interacted with the subcontractors, or witnessed the subcontractors performing any work. Relators' direct experiences with GLS and the subcontractors do not hinge on any of the prior public disclosures.

Under the post-2010 amendment, the statute abandons the "direct" knowledge requirement and requires only that the relator's knowledge "is independent of and materially adds to" the claims. 31 U.S.C. § 3730(e)(4)(B) (2010). A relator "materially adds" to the public

disclosures "when it contributes information . . . that adds in a significant way to the essential factual background: 'the who, what, when, where and how of the events at issue.'" *Majestic Blue Fisheries*, 812 F.3d at 307 (citation omitted).

Relators' personal, firsthand experiences with GLS' subcontracting scheme materially adds to the factual background of the FCA fraud. The Amended Complaint paints a vivid picture of each Relator's personal experience with the fraud scheme, alleging facts that not only corroborate information publicly disclosed, but that also breathe important life into proving the scheme with admissible evidence. Accordingly, as original sources to the subcontracting-based FCA claims, Relators' GLS subcontractor claims will proceed.

ii. TVPRA and Alshora Claims

The Court next turns to the FCA claims based on GLS' alleged violations of the TVPRA and Kuwaiti law. The Amended Complaint allegations—confiscation of passports, failure to provide work visas, and Alshora reporting Relators as absconders and subsequent arrests—largely took place after 2010. Thus, the post-2010 amendment applies to these claims. Similar to the subcontracting scheme, although certain disclosures fall within the statute, the Relators may proceed because they qualify as original sources of the FCA-related evidence.

Defendants point to disclosure arising from two previously filed civil actions brought by linguists, including certain Relators, against GLS, DynCorp, and AECOM, alleging violations of Kuwaiti immigration laws. *See Zinnekah v. Global Linguist Sols., LLC*, Case No. 1:13-cv-01185 (E.D. V.A.); *Zaklit v. Global Linguist Sols., LLC*, Case No. 1:14-cv-314 (C.D. Cal.). Defendants argue that the news coverage of these suits constitutes public disclosures. The Court agrees.

Media coverage of a 2013 Virginia suit describes the dispute between GLS and Alshora, and reports that GLS was "breaking Kuwaiti law for a business advantage that placed all the risk

on employees." Steven Beardsley, *American Linguists in Kuwait Seek Help from US Courts to Return Home*, Stars and Stripes, Oct. 8, 2013.[10] The articles also described how linguists were trapped in Kuwait as a result of the Alshora fallout for fear of arrest. *Id.*; *see also* Yochi Dreazen, *Investigation: No Exit,* Foreign Policy, Oct. 2, 2013.[11]

As for a 2014 suit filed in California, news coverage described the deprivation of adequate medical care and substandard conditions that GLS linguists were forced to endure during their employment. *See* Dietrich Knauth, *Army Translators Seek Class Cert. In False Imprisonment Suit*, Law360, Sept. 2, 2014.[12] The media further reported that linguists "did not know when they were hired that their employment with GLS would be unlawful in Kuwait and leave them confined against their will." Karina Basso, *Army Translators File False Imprisonment Class Action Lawsuit*, Top Class Actions, Sept. 5, 2014.[13] These articles put the Government on notice that Defendants effectively abandoned linguists to languish in deplorable conditions and with no way to leave Kuwait without risking arrest and detention.

Relators' allegations are also "substantially the same" as the prior public disclosures. The articles covered how "GLS's actions and legal dispute with Al Shora made plaintiffs and other linguists fugitives in a foreign country." Knauth, *Army Translators Seek Class Cert. In False Imprisonment Suit*. These public disclosures describe specific allegations against multiple Defendants of Kuwaiti law violations, the same factual allegations that underlie Relators' claims.

That said, Relators shared with the Government information and evidence that they had acquired independently of news media. The lion's share of the Amended Complaint is based on

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[10] Available at https://www.stripes.com/american-linguists-in-kuwait-seekhelp-from-us-courts-to-return-home-1.245844.
[11] Available at https://foreignpolicy.com/2013/10/02/no-exit-3/.
[12] Available at https://www.law360.com/articles/572639/army-translators-seek-class-cert-infalse-imprisonment-suit.
[13] Available at https://topclassactions.com/lawsuit-settlements/lawsuit-news/39752-translators-file-false-imprisonment-class-action-lawsuit-gls/.

Relators' firsthand experiences with Defendants in Kuwait. Such information, no doubt, "materially adds" to that disclosed in the public domain. Relators convey that they were forced to essentially participate in a sham employment arrangement with Alshora. The Amended Complaint further describes, in great detail, how certain Relators were brought into Kuwait illegally on tourist visas, and how they suffered behind Defendants' seizure of Relators' passports, delays in travel arising from related arrest warrants and even arrest and detention. Thus, while Relators' TVPRA/Kuwaiti law-based claims were previously disclosed, the claims survive because Relators are original sources. Dismissal is denied on this ground.

B. Sufficiency of Pleading

Defendants next challenge the sufficiency of Relators' FCA claims under Rule 12(b)(6), arguing that Relators fail to satisfy the heightened pleading standard applicable to claims sounding in fraud. Federal Rule of Civil Procedure 9's requirement that "the circumstances constituting fraud" be stated "with particularity" applies to FCA claims. Fed. R. Civ. P. 9(b). Accordingly, Relators "must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 432 (4th Cir. 2015) (citation omitted); *see also U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) ("the 'who, what, when, where, and how' of the alleged fraud"). Even under this heightened standard, "[a] court should hesitate to dismiss a complaint . . . if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Smith*, 796 F.3d at 432 (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

i. Counts I and II

To state a claim under the FCA, Relators must allege sufficient facts by which the Court could plausibly infer that (1) Defendants made false statements or engaged in a fraudulent course of conduct; (2) with the requisite knowledge; (3) the statements or conduct was material; and (4) caused the government to pay out money or to forfeit monies due on a "claim." *U.S. ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 700 (4th Cir. 2014) (quoting *Harrison*, 176 F.3d at 788).

The parties agree that the majority of Relators pursue their claims under two broad theories of liability. First, the "false certification" theory encompasses instances where a government contractor was required to comply with certain contractual terms and where the defendant falsely certified that it had complied. *Harrison*, 176 F.3d at 786. An alternate theory is that Defendants obtained a contract through "fraudulent inducement," that is through "false statements or fraudulent conduct." *Id.* at 787. Because the FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government," the Court construes these theories broadly. *Id.* at 788 (quoting *United States v. Neifert–White Co.*, 390 U.S. 228, 232 (1968)). Taking each theory in turn, the Court finds Relators' detailed Amended Complaint satisfies the Rule 9(b) standard with respect to Counts I and II.[14]

[14] Defendants broadly attack Relators' Amended Complaint for pleading certain allegations "on information and belief." *See* ECF No. 83-1 at 31. While the "clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed," the Court is satisfied that the "information and belief" allegations meet Rule 9(b). *Harrison*, 176 F.3d at 789. These allegations serve the role of "connect[ing] the dots" between the many facts based on Relators' personal experience and the facts where they understandably lack access to necessary information. *U.S. ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 199 (4th Cir. 2018) ("We only conclude that Rule 9(b)'s heightened pleading standard requires that plaintiffs connect the dots, even if unsupported by precise documentation, between the alleged false claims and government payment."); *see also U.S. ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 206 n.29 (D.D.C. 2011) (finding relator's "information and belief" pleadings satisfy Rule 9(b)).

a. Subcontracting-Based Claims

Beginning with the subcontracting-based claims, Relators have adequately alleged each of the four elements to satisfy an FCA claim. "To satisfy this first element of an FCA claim, the statement or conduct alleged must represent an objective falsehood." *Wilson*, 525 F.3d at 376. Statements may be expressly or impliedly false, and even "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." *United States v. Triple Canopy, Inc.*, 857 F.3d 174, 178 (4th Cir. 2017) (quoting *Universal Health Servs., Inc. v. U.S. ex rel Escobar*, 136 S. Ct. 1989, 2000 (2016)), *cert. dismissed*, 138 S. Ct. 370 (2017).

Defendants contend that Relators have failed to allege an "objectively false" claim by relying on "broad contract language" and "general policy aims." ECF No. 85-1 at 19. The Court disagrees. The Amended Complaint avers that during the bidding for Contract 1, GLS entered into agreements with the Small Business Defendants to represent to the Government that GLS would meet certain levels of small business participation so as to win the contract. But GLS did not fulfill the promise, and instead worked in concert with the Small Business Defendants to have Relators enter into a series of sham employment agreements with Small Business Defendants. The Amended Complaint additionally avers that GLS President Houck testified falsely at the CWC Hearing as to which entity in fact employed the linguists, with the objective of sustaining the fraud. But for the false representations regarding the subcontractors' work, INSCOM would not have awarded Contract 1 or Contract 2 to GLS. The Amended Complaint pleads sufficiently objective falsehoods about the role of the small businesses to survive challenge as to the first element. *See, e.g.*, *U.S. ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 198–99 (D.D.C. 2011) (relators adequately pled FCA clam where prime contractor was

performing functions of purported subcontractor).

As to the second element, the false claims or statements must be made "knowingly." 31 U.S.C. § 3729(a)(1)(A)–(B). The FCA defines "knowingly" as "actual knowledge," "deliberate ignorance of the truth or falsity of the information," or "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). Relators must "show only that the defendant had *knowledge* of the illegality of its actions, rather than *specific intent* to defraud." *U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency*, 912 F.3d 731, 735 (4th Cir. 2019) (emphasis in original).

Defendants argue Relators improperly rely on "collective knowledge," rather than pleading that "a particular employee or officer acted knowingly." ECF No. 85-1 at 21 (quoting *United States v. Fadul*, No. 11-0385-DKC, 2013 WL 781614, at *9 (D. Md. Feb. 28, 2013)). However, Defendants rely almost exclusively on authority reviewing the sufficiency of the knowledge prong at the summary judgment stage, not on a motion to dismiss. *See Fadul*, 2013 WL 781614, at *9. At the motion to dismiss stage, general averments of actual knowledge are sufficient to survive challenge. *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (quoting Fed. R. Civ. P. 9(b)). This is especially appropriate where the Amended Complaint details the lengths that GLS went to create and maintain the sham employment arrangement.

As to the allegations that the Government would not have entered into Contract 2 but for Defendants' false statements under Contract 1, Defendants argue that the "government knowledge inference" negates the requisite scienter. ECF No. 83-1 at 33. Under Defendants' theory, where "the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a

fraudulent or false claim." *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002) (citation omitted). In *Becker*, the Fourth Circuit affirmed summary judgment where the defendant had followed the Government's instructions and therefore could not be said to have knowingly made a false record. *Id.* Defendants contend that the same result applies here because the Government learned of the alleged subcontracting issues after GLS' testimony at the CWC Hearing and yet allowed Contract 1 to proceed and further awarded Contract 2.

Defendants' argument is fundamentally flawed. The Amended Complaint avers that GLS President Houck *lied* at the CWC Hearing when he asserted that large percentage of linguists were employed by subcontractors. The Court must not only accept this averment as true, but also construe it most favorably to Relators. The Court cannot, therefore, infer that the Government learned the *truth* about the sham subcontractor agreements based on *lies* promulgated during the hearing.

As to the third element, materiality, the alleged false or fraudulent statements must be material to the Government's decision to award the contract. *See Harrison*, 176 F.3d at 785 ("Liability under each of the provisions of the False Claims Act is subject to the further, judicially-imposed, requirement that the false statement or claim be material."). A statement is material if it "has a natural tendency to influence agency action or is capable of influencing agency action." *Id.* (internal marks and citation omitted). While materiality under the FCA is a "demanding" standard, the Court's analysis "cannot rest on a single fact or occurrence as always determinative." *Escobar*, 136 S. Ct. at 2001–03 (internal marks and citation omitted).

Defendants contend that the Relators must allege facts demonstrating that the fraudulent statements go to the "essence of the bargain" with the Government. But this is just one of

several ways in which materiality may be shown. *Id.* at 2003 n.5. The Court will not hold Relators to Defendants' restrictive view of materiality.

Defendants also assert that since the Government knew of the sham subcontracting practices by virtue of the CWC Hearing, the subcontracting terms must not have been material. Defendants' argument again falls flat. It is simply implausible to conclude that after the CWC Hearing, as alleged, the Government knew the truth about the subcontracting fraud. But more fundamentally, as to materiality, the CWC Hearing highlights that the subcontracting arrangement was indeed material to the contract award. The hearing focused on the Government's expenditure of significant funds to subcontractors under Contract 1 and to GLS for facilitating the subcontracting work and questioned the efficiency of the arrangement. Put simply, the purpose of the hearing was to explore the very cover-up GLS perpetrated before, during, and since. *See Triple Canopy*, 857 F.3d at 176 ("Triple Canopy's own elaborate cover-up suggested that the contractor realized the materiality of the marksmanship requirement."). The statements made to secure the Government contracts, as pleaded, are material.

As to the fourth and final element, the FCA "requires the presence of a claim—a call upon the government fisc—for liability to attach." *Harrison*, 176 F.3d at 785. Because the FCA was "not designed to punish every type of fraud committed upon the government," presentment of a false claim to the government is a "central question." *Id.* The FCA defines "claim" as "any request or demand, whether under a contract or otherwise, for money or property . . . that . . . is presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i).

The Fourth Circuit has recognized two ways to adequately plead presentment of a claim under Rule 9(b). *Grant*, 912 F.3d at 197. Relators may aver "with particularity that specific false claims actually were presented to the government for payment," or plead "a pattern of

conduct" that would have necessarily led to the submission of false claims. *Id.*

Defendants argue that Relators must plead the specifics of the submission of any false claim or risk dismissal. ECF No. 85-1 at 29–30. Again, the Defendants set the pleading bar too high. The Amended Complaint, read as a whole and most favorably to Relators, easily allows the inference that GLS would have submitted false claims to the Government. First and most obviously, the Amended Complaint sets out the sham subcontracting arrangement designed to ensure that GLS was awarded Contracts 1 and 2. Second, the Amended Complaint details the ongoing nature of the contractual relationship between GLS and the Government to provide linguistic services in exchange for getting paid on the Contracts. The Court may plausibly infer, therefore, that GLS had to continue making false claims to receive payment. Counts I and II with respect to the subcontracting fraud will not be dismissed.

b. Implied Certification Claims

The Court next turns to those FCA claims that are based on an "implied certification" theory. Relators may satisfy the element of falsity by plausibly averring that the defendant "impliedly certifies compliance with all conditions of payment" when the defendant fails to disclose a "violation of a material statutory, regulatory, or contractual requirement." *Escobar*, 136 S. Ct. at 1995. Under this theory, liability attaches where "the claim does not merely request payment, but also makes specific representations about the goods or services provided;" and "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *Id.* at 2001.

The Amended Complaint alleges that GLS submitted claims to the Government for reimbursement of Alshora's services, presented as valid "sponsorship" fees, when in fact Alshora was used as a front to make it appear that linguists were employed with a Kuwaiti based

company so as to circumvent Kuwaiti labor and immigration laws. *See* ECF No. 9 ¶ 504. As part of this scheme, the Amended Complaint alleges that GLS violated the TVPRA's forced labor provision by confiscating Relators' passports and abusing the Kuwaiti legal process, thereby subjecting Relators to threats of arrest, detention, and deportation.

In this respect, the Amended Complaint survives challenge. The Contract was obtained and performed against the backdrop of the Government's "zero tolerance policy regarding trafficking in persons." ECF No. 9 ¶ 559 (quoting Federal Acquisition Regulation ("FAR") § 52.222-50(b)). Accordingly, the Court may plausibly infer that to obtain the Contracts and to receive payment, GLS had to impliedly certify compliance with the TVPRA. The Amended Complaint provides scores of instances, as more fully detailed below, where GLS participated in violating the TVPRA when its relationship with Alshora fell apart. At this stage, the TVPRA false claims theory will proceed.

The Amended Complaint also avers Contract 1 specifically required that GLS "maintain and administer a security program in accordance with the National Industrial Security Program Operations Manual (NISPOM) DoD 5220.22M." ECF No. 9 ¶ 160. The NISPOM regulations, in turn, required GLS to certify that it was not under "foreign ownership, control or influence," in that no foreign business had the power "to direct or decide matters affecting the management or operations of that company in a manner which . . . may adversely affect the performance of classified contracts." *Id.* Yet according to the Amended Complaint, GLS knowingly ceded power and control to Alshora to dodge Kuwaiti labor and employment law while also certifying to the Government the opposite. When GLS' relationship with Alshora deteriorated, Alshora was able to halt the essential national security work of the linguists by reporting Relators to Kuwaiti authorities, who then issued a "stop-work" order. The Amended Complaint, therefore,

sufficiently states a false certification claim with regard to NISPOM regulations.

ii. Count III

The Court next turns to Count III, the "reverse false claim" against Defendants under 31 U.S.C. § 3729(a)(1)(G). This FCA provision imposes liability on anyone who makes a false statement "material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). Thus, "reverse false claims facilitate the improper withholding of money or property to which the United States is legally entitled." *U.S. ex rel. Landis v. Tailwind Sports Corp.*, 160 F. Supp. 3d 253, 255 (D.D.C. 2016).

Defendants contend that Relators have failed to plead an "obligation" to state a reverse false claim. ECF No. 85-1 at 32–33. The Court agrees. The FCA defines "obligation" as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b)(3). An obligation under this provision envisions a specific duty outlined in a contract or statute, not "[c]ontingent obligations—those that will arise only after the exercise of discretion by government actors." *Landis*, 160 F. Supp. 3d at 268.

The Amended Complaint avers, without elaboration, that "false claims were made to avoid paying back to the U.S. penalties under GLS's contracts with the Government." ECF No. 9 ¶ 544. Construed most favorably to Relators, the theory of liability rests on the proposition that had the Government known of Defendants' FCA violations, the Defendants would be required to reimburse the Government for monies disbursed under the contract. However, as a

matter of law "the Government's ability to pursue reimbursement for overpayments or fraudulently induced payments does not constitute an 'obligation.'" *Landis*, 160 F. Supp. 3d at 269. Relators cannot properly allege a reverse false claim that is premised on the same conduct as Relators' claims under 31 U.S.C. §§ 3729(a)(1)(A) and (a)(1)(B). *U.S. ex rel. Branscome v. Blue Ridge Home Health Servs., Inc.*, No. 16-00087, 2018 WL 1309734, at *5 (W.D. Va. Mar. 13, 2018); *see also United States v. Berkeley Heartlab, Inc.*, 247 F. Supp. 3d 724, 733 (D.S.C. 2017) ("And of course, if the conduct that gives rise to a traditional presentment or false statement action also satisfies the demands of section 3729(a)(1)(G), then there would be nothing 'reverse' about an action brought under that latter section of the FCA.") (citation omitted). Accordingly, Relators fail to plead an "obligation" owed to the Government. The Court dismisses Count III as to all Defendants.

iii. FCA Claims as to the Small Business Defendants

Small Business Defendants KMS, Wright, and Shee Atika separately challenge Relators' FCA claims as relying on "deficient group pleading" and failing to plead with particularity each of the subcontractors' involvement. *See* ECF No. 81-1 at 7. The FCA's provisions "indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud." *U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.*, 266 F. Supp. 3d 110, 126 (D.D.C. 2017) (citation omitted). Such claims must, therefore, be pleaded with particularity as required under Rule 9(b) of the Federal Rules of Civil Procedure. *See also U.S. ex rel. Brooks v. Lockheed Martin Corp.*, 423 F. Supp. 2d 522, 526 (D. Md. 2006) (internal marks and citation omitted) ("[W]hen a relator raises allegations of fraud against multiple defendants, the complaint must apprise each defendant of the specific nature of his or her participation in the fraud."), *aff'd in part, dismissed in part*, 237 F. App'x 802 (4th Cir. 2007).

Relators' allegations satisfy this standard as to KMS, Wright, and Shee Atika.

The Amended Complaint avers that GLS entered into agreements with KMS, Wright, and Shee Atika to provide subcontracting services under Contract 1 but instead GLS performed the work. The Small Business Defendants, including the three subcontractors at issue, entered sham employment agreements with the linguists to further the scheme. *See* ECF No. 9 ¶¶ 260, 278, 284, 297, 438. Although the Small Business Defendants "employed" the linguists, they performed no role as employers. The sole purpose of the Small Business Defendants was to make it appear as if GLS met the small business participation requirements set forth in Contract 1. The Small Business Defendants' knowing participation was essential to the fraud and resulted in the Government overpaying GLS and these subcontractors. *See Mann v. Heckler & Koch Def., Inc.*, 639 F. Supp. 2d 619, 629 (E.D. Va. 2009) (quoting *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943)) (The Supreme Court has held "that the 'taint' of fraud caused by defendants who knowingly participated in a collusive bidding process 'entered into every' payment made under the contracts that eventually resulted from the bidding process."). The FCA claims in Counts I and II against the Small Business Defendants survive challenge.

iv. FCA Claims as to AECOM and DynCorp

Defendants AECOM and DynCorp, partners and shareholders of GLS, a limited liability company, assert they must be dismissed from the action. ECF No. 80-1 at 13; ECF No. 83-1 at 20. Relators name as Defendants both "Global Linguist Solutions, LLC, . . . a Delaware-registered limited liability company" headquartered in Virginia, and a purportedly separate entity called "Global Linguist Solutions." ECF No. 9 ¶¶ 19, 20. The Amended Complaint describes DynCorp as majority shareholder of Global Linguist Solutions, LLC, but asserts that Global Linguist Solutions is a "joint venture between DynCorp and AECOM." *Id.* Defendants contend

Global Linguist Solutions, LLC is a limited liability company in which DynCorp owns a 51% interest and AECOM owns a 49% interest, and no other entity exists.[15] ECF No. 83-1 at 10 & n.1. In the Amended Complaint, AECOM's liability rests solely on a joint venture theory. ECF No. 9 ¶ 21. DynCorp's liability, in contrast, is also alleged under an alter ego theory. *Id.* ¶ 28.

Beginning with AECOM, Relators have not adequately pleaded the existence of a "joint venture" that extends liability to each by virtue of the corporate relationship. To support the existence of a joint venture, Relators rely solely on AECOM and DynCorp's reference to GLS as a "joint venture" in Security Exchange Commission filings and press releases. *Id.* ¶¶ 22–30. These allegations, however, are insufficient to transform a properly registered limited liability company, with protections against suit as to its members, into a general partnership without such protections.

The term "joint venture" is often used colloquially to describe a variety of business organizations, including a limited liability company ("LLC"). *See* Allen S. Gutterman, *Business Transactions Solutions* § 248:22 ("Once the parties have agreed to enter into a joint venture, they must decide upon the form of legal entity that will be used . . . (e.g., corporations, general or limited partnerships, and limited liability companies)."). Relators jointly refer to the LLC and the "joint venture" throughout as "GLS," without differentiating between the conduct of these allegedly separate entities. But nowhere does the Amended Complaint attribute any specific acts conferring liability to AECOM. The Court, therefore, must dismiss claims against AECOM.[16] However, dismissal will be without prejudice, and the Court will permit amendment of pleadings to include adding parties after discovery is underway.

[15] GLS also asserts it "is a limited liability company and does not operate any separate entity named "Global Linguist Solutions." ECF No. 85 at 1.
[16] The Court also dismisses "Global Linguist Solutions" because it is not an entity separate from GLS, LLC.

DynCorp's theoretic liability requires a different analysis. Relators allege that, even absent the existence of a joint venture, DynCorp may be held liable for GLS' misconduct because the two corporations are alter egos of one another. ECF No. 9 ¶ 28. Consequently, argues Relators, liability is extended to DynCorp as the parent company of GLS by piercing the corporate veil.

While courts generally will not disregard the corporate form, where the parent company "so dominated the subsidiary corporation as to negate its separate personality," the subsidiary is more properly considered "the parent's alter ego, agent, or mere instrumentality." *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 60 (D.D.C. 2007) (citation omitted). As Relators' claims are brought under the FCA, "federal law . . . controls the veil-piercing question." *Id.*

This inquiry is twofold. First, the Court must determine whether a "unity of interest" exists between the two entities sufficient to permit treatment of the two entities as one. *Id.* Next, the Court considers whether doing so would produce "an inequitable result." *Id.* "The first element looks to which formalities have been followed to maintain separate corporate identities, and the second element looks to the basic issue of fairness under the facts." *United States v. Universal Health Servs.*, Inc., No. 07-00054, 2010 WL 4323082, at *3 (W.D. Va. Oct. 31, 2010) (citation omitted).

With regard to the first element, courts consider a number of factors to assess the strength of the "unity of interest." They include "identity of ownership; commonality of officers and directors; the financial relationship between parent and subsidiary; whether the two maintain separate books, records, offices, and the like; and whether property of one is used by the other as essentially its own." *Hockett*, 498 F. Supp. 2d at 60.

Relevant here, the Amended Complaint asserts that DynCorp personnel managed the day-to-day operations of GLS, shared the same business address as GLS, controlled "back office" support for GLS' linguists, hired and fired GLS personnel, and developed training policies for GLS personnel. *See* ECF No. 9 ¶¶ 32–44. Relators also allege that certain personnel who held themselves out as GLS management were actually DynCorp representatives involved in managing the Relators in Kuwait. *Id.* ¶ 48. Taking these averments as true and most favorably to Relators, the Amended Complaint satisfies the first element of the "unity of interest" test.

Similarly, as to the second element, the Amended Complaint alleges sufficient facts making dismissal of DynCorp at this stage an "inequitable" result. DynCorp appears to have engaged in the FCA violations hand-in-hand with GLS. The Court will not permit DynCorp to escape liability at this early stage and under such "a fact-intensive inquiry." *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 544 (4th Cir. 2013). The motion to dismiss is denied as to DynCorp.

C. Statute of Limitations

Defendants lastly contend that the Relators' FCA claims are barred by the statute of limitations. The Court cannot agree.

An FCA civil action cannot be filed: "(1) more than 6 years after the date on which the [FCA violation] is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever is last." 31 U.S.C. § 3731(b). Although the Fourth Circuit has not addressed what constitutes a "violation" to trigger the limitations period, the majority of Circuits have found the violation occurs at the submission of a

false claim rather than the date of payment. *U.S. ex rel. Dugan v. ADT Sec. Servs., Inc.*, No. DKC 2003-3485, 2009 WL 3232080, at *4 (D. Md. Sept. 29, 2009); *see, e.g. United States v. Rivera*, 55 F.3d 703, 707 (1st Cir. 1995); *United States v. Ueber*, 299 F.2d 310, 312–13 (6th Cir. 1962).

Defendants argue that, under the FCA's six-year statute of limitations, any FCA claim based on conduct that occurred before June 19, 2009 is barred. ECF No. 85-1 at 38.[17] Relators respond that they are entitled to equitable tolling due to GLS' "on-going scheme of concealment." ECF No. 120 at 23. Under the fraudulent concealment doctrine, "where a plaintiff has been injured by fraud and remains in ignorance of it . . . the bar of the statute does not begin to run until the fraud is discovered." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (internal marks omitted). "This equitable doctrine is read into every federal statute of limitation," and Courts have specifically applied it to the FCA. *Id.*; *see also United States v. Uzzell*, 648 F. Supp. 1362, 1367 (D.D.C. 1986) (applying equitable tolling to the FCA); *United States v. CFW Const. Co., Inc.*, 649 F. Supp. 616, 619–20 (D.S.C. 1986) (same). The Relators must show that Defendants "concealed facts that are the basis of [Relators'] claim;" and despite "the exercise of due diligence," the facts were not discovered "within the statutory period." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995).

Alternatively, Relators contend they are entitled to the extended limitations period set out in § 3731(b)(2). This provision of the FCA allows claims to be brought as many as 10 years after the violation, so long as the action is brought within three years of when certain

[17] AECOM separately contends any conduct prior to March 25, 2010 is barred, asserting the Amended Complaint does not relate back to the original complaint because it was filed under seal. ECF No. 80-1 at 37 & n.24. The FCA requires Relators to file their *qui tam* complaint under seal. 31 U.S.C. § 3730(b)(2). AECOM provides no authority to support such an argument and the Court finds no principled reason to credit it. Thus, Relators' suit commenced when they filed the original complaint under seal. *See, e.g., U.S. ex rel. Gohil v. Aventis, Inc.*, No. 02-2964, 2017 WL 85375, at *6 n.14 (E.D. Pa. Jan. 10, 2017) (finding no "support for the defendants' argument that the sealing provision of the FCA should somehow prevent the court from allowing amended complaints to 'relate back'").

Government officials knew or should have known the relevant facts. 31 U.S.C. § 3731(b)(2). This provision applies to relator-initiated suits where the Government has declined to intervene. *See Cochise Consultancy, Inc. v. U.S. ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019).

The Court may dismiss an action on limitations grounds at the motion to dismiss stage "only if the time bar is apparent on the face of the complaint." *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017) (internal marks and citation omitted). As pled, Relators may be entitled to equitable tolling or to the FCA's extended limitations period. Whether the statute of limitations bars suit amounts to an affirmative defense that Relators need not rebut in the Amended Complaint. Further, as an affirmative defense, Defendants bear the burden of establishing the dates of violations as relevant to the six-year limitations period and when Government officials were on notice for purposes of the extended limitations provision. Thus, dismissal of any of Relators' FCA claims arising prior to June 2009 is not warranted.

V. TVPRA Claims (Count IV)

In Count IV, Relators allege standalone violations of the TVPRA as to Relators' forced labor and documentary servitude. ECF No. 9 ¶¶ 548–93. The TVPRA, 18 U.S.C. §§ 1581 *et seq.*, prohibits peonage, slavery, and trafficking in persons. The statute provides a civil cause of action to "[a]n individual who is a victim of a [TVPRA] violation." 18 U.S.C. § 1595(a). Relators specifically assert TVPRA violations of Section 1589 and Section 1592. The Court considers each in turn.

A. Section 1589 (Forced Labor)

Relators allege Defendants violated the TVPRA prohibition of "forced labor" through abuse of Kuwaiti immigration and labor laws. *See* ECF No. 9 ¶¶ 552, 588–93. A defendant is liable under § 1589 of the TVPRA if she "knowingly provides or obtains the labor or services of

a person" by any of the following means:

> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

18 U.S.C. § 1589(a). Under § 1589, "Congress intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion, as well as through physical or legal coercion." *Muchira v. Al-Rawaf*, 850 F.3d 605, 617 (4th Cir. 2017) (internal marks and citation omitted), *as amended* (Mar. 3, 2017), *cert. denied*, 138 S. Ct. 448 (2017).

Defendants move to dismiss Relators' § 1589 claim on sufficiency grounds pursuant to Rule 12(b)(6). Unlike the heightened pleading standard applied to the FCA, TVPRA claims are governed by Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Relators must plead facts sufficient to sustain the claim "rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3. "[A] formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement" will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal marks and citation omitted).

As to GLS, Relators state a TVPRA claim under § 1589(3) for knowingly obtaining their labor "by means of the abuse or threatened abuse of law or legal process." "Forced labor" generally involves demanding or conditioning labor in "squalid or otherwise intolerable living conditions, extreme isolation (from family and the outside world)" or "threats of inflicting harm

upon the victim or others (including threats of legal process such as arrest or deportation)." *Muchira*, 850 F.3d at 618–19. "The confiscation of an immigrant's passport and threats of arrest are common threats of legal process resorted to by traffickers and others who seek to instill fear in persons and force them to labor against their will." *Id.* at 623; *see also Lipenga v. Kambalame*, 219 F. Supp. 3d 517, 525 (D. Md. 2016) (rejecting dismissal where defendant "allegedly confiscated [plaintiff's] passport and threatened to call the police and have her deported"); *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 115 (D.D.C. 2012) ("[M]any courts have determined that threats of deportation constitute a condition of servitude induced through abuse of the legal process.").

Viewing the evidence most favorably to Relators, the Amended Complaint details a pattern of GLS confiscating Relators' passports for weeks, months, and even years, without explanation. For Non-Resident Visa Relators, GLS brought them to Kuwait on tourist visas and forced them to work without proper documentation. For the Resident Visa Relators, GLS forced them to sign fraudulent employment contracts with Alshora to obtain visas that failed to meet the needs of Relators, who should have been classified as highly skilled workers. GLS then allowed their employees' visas to be cancelled by Alshora, compromising Relators' legal work status and subjecting them to arrest warrants. Relators were then effectively held against their will, as they could not leave base for fear of arrest or deportation.

Moreover, GLS coerced certain Relators to sign false criminal confessions in Kuwait. Relator Edward Youkhana recounts a GLS manager referring to linguists as "slaves" when he complained about such treatment. ECF No. 9 ¶ 364. Relators allege GLS undertook these actions intentionally to force Relators to remain in Kuwait to work so that GLS would not be in breach of its contract with the Government. Accordingly, with respect to GLS, Relators have

stated a § 1589 claim.

Defendants DynCorp, AECOM, KMS, Wright, and Shee Atika argue that Relators fail to state a claim as to them because, as alleged, GLS is solely responsible for the relevant conduct. Relators respond that these Defendants are liable under § 1589(b), which "holds not just primary offenders accountable but also anybody who knowingly 'benefits, financially or by receiving anything of value, from participation in a venture which has engaged in' forced labor." *Bistline v. Parker*, 918 F.3d 849, 873 (10th Cir. 2019) (quoting 18 U.S.C. § 1589(b)). Although "venture" is not defined in that provision, the TVPRA uses the term elsewhere to mean "any group of two or more individuals associated in fact, whether or not a legal entity." *Id.* (quoting 18 U.S.C. § 1591(e)(6)); *see also Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (using § 1591(e)(6) definition for analysis of §1589(b)).

As to DynCorp, Relators allege "DynCorp personnel . . . directly supervised Relators who were, in turn, represented to the U.S. Army as being under GLS management." ECF No. 9 ¶ 48. Relators assert these individuals were responsible for some of the conduct directly at issue here, including confiscation of passports in Kuwait. *See id.* ¶¶ 195, 199, 271, 316–17, 409. Viewing the evidence most favorably to Relators, these allegations are sufficient to state a claim that DynCorp was a part of venture with GLS and knowingly benefited from the venture's forced labor.

While this provision saves Relators' claims with respect to DynCorp, the § 1589 claims against AECOM, KMS, Wright, and Shee Atika must be dismissed. Relators' Complaint does not include a single allegation that any of these Defendants knew at all about GLS' treatment of Relators in Kuwait regarding their living conditions, passport confiscation or other matters involving the bitter disputes with Alshora. Relators contend "AECOM's knowledge is imputed

through its partnership with [DynCorp] and its status as a joint venturer in GLS." ECF No. 122 at 10. As discussed above, however, Relators have failed to plead the existence of a joint venture apart from the GLS LLC.

As to the Small Business Defendants, Relators assert "knowledge is established from their reckless disregard of the legality of Relators' presence in Kuwait." ECF No. 123 at 7. But Relators do not allege Small Business Defendants were "well aware of the crimes being committed against" Relators. *Bistline*, 918 F.3d at 876. Thus, even under a "venture" theory, Relators have failed to state a § 1589 claim against AECOM, KMS, Wright, and Shee Atika. The claim will be dismissed as to these Defendants.

B. Section 1592 (Confiscation of Passports)

Relators further allege that Defendants violated § 1592 of the TVPRA, which applies to anyone who "knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport" of another:

> (1) in the course of a violation of section . . . 1589 . . .
>
> (2) with intent to violate section . . . 1589 . . . or
>
> (3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000.

18 U.S.C. § 1592(a). Defendants argue that, unlike the statute's forced labor provision, § 1592 does not apply extraterritorially. ECF No. 85-1 at 39. Thus, Defendants assert, Relators' § 1592 claims premised on the confiscation of passports in Kuwait must be dismissed for lack of subject matter jurisdiction.

In 2000, Congress enacted the TVPRA "to combat trafficking in persons, a contemporary

manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." *Roe v. Howard*, 917 F.3d 229, 235–36 (4th Cir. 2019) (quoting TVPRA, Pub. L. No. 106-386 § 102(a), 114 Stat. 1464, 1466) (codified at 22 U.S.C. § 7101(a)). Relators contend that denying extraterritorial application of § 1592 to their passport confiscation in Kuwait, committed in the context of a forced labor offense, would work an illogical result and "would frustrate the will of Congress." ECF No. 122 at 17. Neither party views this case through the proper analytical framework for determining whether a federal statute applies extraterritorially. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

It is a longstanding principle of American law that "in general, United States law governs domestically but does not rule the world." *Id.* at 2100 (internal marks and citation omitted). Congress, however, maintains "the undisputed authority to apply its laws beyond the territorial boundaries of the United States." *Roe*, 917 F.3d at 240 (internal marks and citation omitted). To determine whether Congress has exercised such authority, courts look to the canon of statutory interpretation known as the "presumption against extraterritoriality," which provides that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco*, 136 S. Ct. at 2100 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)).

In *RJR Nabisco*, the Supreme Court articulated a "two-step framework for analyzing extraterritoriality issues." 136 S. Ct. at 2101. First, the Court must "ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* To answer this question, "courts look to the text of the statute, but 'an express statement of extraterritoriality is not

essential.'" *Roe*, 917 F.3d at 240 (quoting *RJR Nabisco*, 136 S. Ct. at 2102). The structure, history, and context of the statute are also relevant to the inquiry. *Id.*

"If the first step reveals that a statute—or a specific statutory provision—has extraterritorial effect, our analysis is complete. If, on the other hand, the first step shows that a statute does not apply extraterritorially, a court must proceed to the second step identified in *RJR Nabisco*." *Roe*, 917 F.3d at 240 (citation omitted). Step two requires determining whether the case itself "involves a domestic application of the statute . . . by looking to the statute's 'focus.'" *RJR Nabisco*, 136 S. Ct. at 2101. "[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

Defendants contend that because Congress has not expressly announced that § 1592 shall be applied abroad, this Court lacks jurisdiction to consider the claims here. The Defendants are correct that in 2008, Congress amended the TVPRA to make clear the extraterritorial reach of certain provisions. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. The 2008 amendment provides in relevant part:

> In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—
>
> (1) an alleged offender is a national of the United States . . .

18 U.S.C. § 1596(a). Defendants argue that Congress' failure to include § 1592 in the amendment must be construed as a clear statement against its extraterritorial application.

The Court need not decide this question as presented because pursuant to 18 U.S.C. § 3271(a), Defendants, as government contractors, may be held liable for § 1592 offenses committed abroad. In the 2006 reauthorization of the TVPRA, Congress found that "[t]he

involvement of employees and contractors of the United States Government . . . in trafficking in persons, facilitating the trafficking in persons, or exploiting the victims of trafficking in persons is inconsistent with United States laws and policies and undermines the credibility and mission of United States Government programs in post-conflict regions." *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (effective Jan. 10, 2006).

Consistent with this finding, Congress expanded the TVPRA's extraterritorial reach by enacting § 3271 which reads:

> Whoever, while employed by . . . the Federal Government outside the United States, engages in conduct outside the United States that would constitute an offense under chapter 77 . . . of this title if the conduct had been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense.

18 U.S.C. § 3271(a). The phrase "employed by the Federal Government outside the United States" expressly includes anyone employed "as a Federal contractor . . . or as an employee of a Federal contractor" who is "present outside of the United States in connection with such employment" and is "not a national of or ordinarily resident in the host nation." 18 U.S.C. § 3272(1).

Defendants were Government contractors, present outside of the United States in connection with performance of Contracts 1 and 2, and were not nationals of Kuwait. *See* 18 U.S.C. § 3272(1). The misconduct, as pleaded, occurred outside the United States, and the documentary servitude provision, § 1592, is a Chapter 77 offense. Thus, pursuant to § 3271, § 1592 applies extraterritorially to Defendants.

In this respect, the Fourth Circuit decision in *Roe v. Howard*, guides this Court. 917 F.3d at 245. There, the Fourth Circuit was called to decide whether the TVPRA's civil remedy

provision, § 1595, reaches "conduct that comes within the extraterritorial predicates of the [TVPRA]." *Id.* at 243. The Court held that the remedy provision applied to the claims against the defendant, a State Department employee who violated the TVPRA overseas. Critically, the Court reasoned that § 3271 "manifests an unmistakable congressional intent to apply extraterritorially" the remedies provision where the defendant met the requirements of § 3271. *Id.* at 244 (citation omitted); *see also id.* ("If a plainer indication was needed, Congress included § 3271 in chapter 212A, titled 'Extraterritorial Jurisdiction Over Certain Trafficking in Persons Offenses.'").[18] The same result is warranted here. "Because a finding of extraterritoriality at step one will obviate step two's 'focus' inquiry," the Court's analysis ends. *RJR Nabisco*, 136 S. Ct. at 2101 n.5.

Although the TVPRA claim under § 1592 survives as to GLS and DynCorp, the Court cannot say the same for Defendants AECOM, KMS, Shee Atika, and Wright. This is because Relators have not pleaded any facts which support a plausible inference that these Defendants possessed the requisite knowledge to commit the offense. *See* 18 U.S.C. § 1595(a) (liability attaches to party who "knowingly benefits . . . from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter"). Indeed, none of the alleged facts establish that any of these named Defendants knew that the Relators' passports had been confiscated or kept from them. Nor is it plausible to assume otherwise when considering that Relators' main theory of liability rests on these Defendants acting, essentially, as dummy corporations by which GLS perpetrated its subcontracting fraud scheme on the Government. Accordingly, the § 1592 claims are dismissed as to AECOM, KMS, Shee Atika,

[18] The Court notes the Fourth Circuit's analysis involved a claim under § 1589, which now has explicit extraterritorial application under § 1596, regardless of whether the defendant is a government employee. *Roe*, 917 F.3d at 244. The conduct in *Roe*, however, occurred prior to the 2008 amendment which expanded § 1589's extraterritorial reach. *Id.*

and Wright.

C. Available Remedies

Defendants raise two final arguments regarding the availability of certain remedies under the TVPRA. First, Defendants assert that, to the extent Relators are seeking damages for "emotional distress and physical injuries" suffered in Kuwait (ECF No. 9 ¶ 593), such claims are "preempted" by the Defense Base Act, 42 U.S.C. §§ 1651 *et seq.* *See* ECF No. 80-1 at 38 n.27. Second, Defendants contend that Relators improperly seek restitution under § 1593 of the TVPRA. *Id.* at 43 n.30.

i. The Defense Base Act

The Defense Base Act ("DBA") "provides relief to employees of government contractors whose death or injuries occurred while accompanying military forces overseas." *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1122 (D.C. Cir. 2015). The DBA "builds upon and incorporates provisions of the Longshore Act, which was enacted to provide workers' compensation coverage to maritime employees." *Id.* Both the DBA and the Longshore Act "contain exclusivity provisions stating that employer liability under the statutes 'shall be exclusive and in place of all other liability.'" *Id.* at 1123 (quoting 33 U.S.C. § 905(a); 42 U.S.C. § 1651(c)). The DBA's statutory scheme represents a compromise, whereby "employees relinquish any common-law tort claims in exchange for the guarantee of a practical and expeditious statutory remedy for their workplace injuries." *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 348 (D.C. Cir. 2018) (internal marks and citation omitted).

Important to this analysis, the DBA covers accidental injuries that arise out of and during the course of employment. 33 U.S.C. § 902(2) (Longshore Act) (defining "injury" as "an accidental injury or death arising out of and in the course of employment"). Claims arising from

conduct outside a plaintiff's course of employment are not subject to the DBA's preemptive effect. *Sickle*, 885 F.3d at 348; *see also Jones v. Halliburton Co.*, 791 F. Supp. 2d 567, 584 (S.D. Tex. 2011) (sexual assault by coworker in Iraq did not constitute "condition of employment," and thus DBA did not preclude common law assault claims). One of the fundamental questions in this case, therefore, will be whether Defendants' alleged misconduct may be construed as within or beyond the scope of Relators' employment.

Viewing the Amended Complaint allegations as true and most favorably to Relators, the Court cannot conclude the claims arise in the course of Relators' employment. GLS used Relators as pawns in a fraudulent scheme designed to mislead the Government as to which entity actually "employed" them. GLS also perpetrated a companion shell game with Alshora to circumvent Kuwaiti laws, which resulted in Relators being held in inhumane conditions, without travel documents, and at risk for arrest, detention, and prosecution if they tried to cross the Kuwaiti border. No employee could predict that working as a translator would entail unwitting participation in a sinister scam where the employer becomes captor and abuser. These risks are not reasonably foreseeable to linguists serving the U.S. military abroad, even in a war zone.

Defendants rely heavily on *Brink v. Continental Insurance Co.* for the proposition that the DBA preempts Relators' TVPRA claims. In *Brink*, the Court held that the DBA preempted plaintiffs' RICO claims but in a starkly different context. 787 F.3d at 1126–28. There, plaintiffs' RICO claims were premised on the theory that defendants had conspired to deny DBA claims and delay payments owed under the DBA. *Id.* at 1127. Given that the conspiracy's primary objective was to circumvent the DBA, the Court in *Brink* easily concluded that the DBA provided the exclusive remedy for any liability arising as a result. *Id.* (citing 33 U.S.C. §§ 914, 931). Relators' claims, by contrast, have nothing to do with circumventing payments under the

DBA. Thus, *Brink* does not advance the analysis.

The Court recognizes, however, that discovery will add dimension to which entities were Relators' actual employers and Relators' reasonably foreseeable job risks. The Court, therefore, leaves open the possibility that the DBA applies to certain of the claims on a more factually robust record.

ii. Restitution under the TVPRA

Finally, the Complaint pleads the availability of restitution under § 1593 of the TVPRA. ECF No. 9 ¶¶ 556–58. Defendants contend the TVPRA's mandatory restitution provision applies only to criminal cases. ECF No. 80-1 at 43 n.30. Section 1593 provides that "in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense" under the TVPRA. 18 U.S.C. § 1593(a). Nothing in the text of the statute suggests that restitution applies solely to criminal cases, and other courts have awarded restitution in civil prosecutions. *See Lipenga*, 219 F. Supp. 3d at 530; *Lagasan v. Al-Ghasel*, 92 F. Supp. 3d 445, 457 (E.D. Va. 2015). Accordingly, the Court denies Defendants' motion regarding the availability of restitution.

VI. Conclusion

For the foregoing reasons, Defendants' motions to dismiss are GRANTED in part and DENIED in part. A separate Order follows.

9/4/2019
Date

/S/
Paula Xinis
United States District Judge

FILED
2016 Mar-31 AM 10:41
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA; ex rel., et al.,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO: 2:12-CV-245-KOB**
ASERACARE INC, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

"Contradiction is not a sign of falsity, nor the lack of contradiction the sign of truth."
~Blaise Pascal

This case has always been about whether AseraCare knowingly submitted *false* claims to Medicare by certifying patients as eligible for hospice who did not have a prognosis of "a life expectancy of 6 months or less *if* the terminal illness runs its normal course." *See* 42 C.F.R. § 418.22(b)(1) (emphasis added). The Government claims that the medical records of the 123 patients at issue in this case do not contain "clinical information and other documentation that support [this] medical prognosis," and thus, AseraCare's claims for those patients were "false." (Doc. 493 at 11-16). However, this case boils down to conflicting views of physicians about whether the medical records support AseraCare's certifications that the patients at issue were eligible for hospice care. When hospice certifying physicians and medical experts look at the very *same* medical records and disagree about whether the medical records support hospice

eligibility, the opinion of one medical expert *alone* cannot prove falsity without further evidence of an objective falsehood.

In its November 3, 2015, Memorandum Opinion, the court set out the applicable law in this case regarding the falsity element of the False Claims Act. (Doc. 482).[1] In finding that it had incorrectly instructed the jury on the falsity element in Phase One of the trial, the court granted a new trial and concluded that, to prove falsity, the Government would have to provide more evidence than just the opinion of a medical expert who disagrees with the certifying physicians and other medical experts regarding whether the medical records support hospice eligibility. (*Id.*). A mere difference of opinion between physicians, *without more*, is not enough to show falsity. *See e.g., United States ex rel. Phalp v. Lincare Holdings, Inc.*, 116 F. Supp. 3d 1326, 1360 (S.D. Fla. 2015) ("Expressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false.").

As the Eleventh Circuit recently reconfirmed, "our case law is clear: the submission of a false claim is the *sine qua non* of a False Claims Act violation." *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1052 (11th Cir. 2015) (citations and internal quotations omitted). "The FCA requires 'proof of an objective falsehood.'" *United States ex rel. Parato v. Unadilla Health Care Ctr. Inc.*, 787 F. Supp. 2d 1329, 1339 (M.D. Ga. 2011); *see also United States v. Aegis Therapies*, No. CV-210-072, 2015 WL 1541491, at *12 (S.D. Ga. Mar. 31, 2015). Further, "'[p]ractices that may be improper, standing alone, are insufficient to show falsity without proof that specific claims were in fact false when submitted to Medicare.'" *Urquilla-Diaz*, 780 F.3d at

[1] Because the court explained its reasoning for *sua sponte* consideration of summary judgment in its November 3, 2015 Memorandum Opinion (doc. 482), the court incorporates that document into this Memorandum Opinion by reference.

1045 (quoting *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005)) ("Liability under the False Claims Act arises from the submission of a fraudulent claim to the government, not the disregard of government regulations or failure to maintain proper internal procedures.").

After applying this law and granting a new trial, the court gave notice that it would *sua sponte* consider summary judgment[2] and afforded the Government an opportunity "to direct the court to admissible, objective evidence in the Phase One record, other than Dr. Liao's testimony, that would prove falsity and show that the Government presented more evidence than merely a difference of opinion to which reasonable minds could differ." (Docs. 482 & 483). The Government filed its "Opposition to the Court's Sua Sponte Consideration of Summary Judgment" (doc. 493), and AseraCare filed "Defendants' Response in Support of the Court's Consideration of Summary Judgment" (doc. 494).

After careful review of all of these submissions and the Phase One record, the court finds that the Government has failed to point the court to any admissible evidence to prove falsity other than Dr. Liao's opinion that the medical records for the 123 patients at issue did not support the Certifications of Terminal Illness (COTIs). As such, for the following reasons, the Government's

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[2] Contrary to the Government's assertion in its opposition, the court's granting of a new trial does not preclude the *sua sponte* consideration of summary judgment at this juncture in the case. *See Quinn v. Fresno Cnty. Sheriff*, No. 1:10-cv-01617, 2013 WL 898136, at *5 (E.D. Cal. Mar. 8, 2013) (*sua sponte* considering summary judgment after granting a motion for a new trial). The cases cited by the Government are inapplicable to a case involving the granting of a new trial. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1027 (11th Cir. 2000) (involves the district court's refusal to reopen a prior summary judgment order based on evidence presented at trial, not based on the court's granting of a new trial); *see also Purcell v. MWI Corp.*, 2015 WL 7597536, at *5 (D.C. Cir. Nov. 24, 2015) (stands for the proposition that the appellate court must look at what the district court had before it when deciding to deny summary judgment and not at the evidence presented at trial, but does not preclude a district court from *sua sponte* considering summary judgment under Fed. R. Civ. P. 56(f) *after the granting of a new trial*).

proof on the falsity element fails as a matter of law, and summary judgment in favor of AseraCare is due to be GRANTED for all remaining Counts in the Complaint.[3]

In its opposition to the court's *sua sponte* consideration of summary judgment (doc. 482), the Government did not mention Dr. Liao's testimony or report, but instead submitted an appendix containing 14 pages of information relating to the local coverage determinations (LCDs) and related hospice *guidelines* and 256 pages of its "disputed facts" that included only excerpts from each patient's medical records. Some of the "disputed facts" about each patient actually included the Government's *conclusions*, not facts, asserting that the medical records do not support the necessary medical prognosis for hospice certification. The other "disputed facts" were those parts of the medical record for the 123 patients at issue about which Dr. Liao testified to support his contradiction of the certifying physicians regarding the patients' eligibility for hospice during the relevant time periods.

Dr. Liao testified about why, in his opinion, the excerpts from the patients' medical records did not support the COTIs of the patients at issue. However, AseraCare's experts pointed to different pages from the patients' medical records that in their opinion showed that the patients were eligible for hospice. When two or more medical experts look at the same medical records and reach different conclusions about whether those medical records support the certifying physicians' COTIs, all that exists is a difference of opinion. This difference of opinion among experts regarding the patients' hospice eligibility *alone* is not enough to prove falsity, and the

[3] The Government does not specifically address or dispute that the court's granting of summary judgment based on a failure to prove "falsity" as a matter of law would apply to all remaining Counts, including the common law claims.

Government has failed to point the court to any *objective* evidence of falsity.

Interestingly, Dr. Liao even acknowledged that he changed his opinion concerning the eligibility of certain patients from his 2010 review of the medical records to his 2013 review; however, Dr. Liao testified that *both* his 2010 and 2013 conclusions were "accurate to a reasonable degree of certainty." *See* 9/1/15 Trial Tr. at 3151. The reason for the change of opinion: "Well, I was not the same physician in 2013 as I was in 2010." *See id*. at 3132. Moreover, the Government's own witness, Mary Jane Schultz, from Palmetto GBA, testified that "two doctors using their clinical judgment could come to different conclusions about a patient's prognosis and neither be right or wrong." *See* 8/17/15 Trial Tr. at 1244. If Dr. Liao can look at the same medical records of the same patient on two different occasions and come to different conclusions, yet not be wrong on either occasion, his contradiction of the certifying physician's clinical judgment *alone* cannot constitute sufficient evidence of falsity.

The court is concerned that allowing a mere difference of opinion among physicians alone to prove falsity would totally eradicate the clinical judgment required of the certifying physicians. The guidance from the Centers for Medicare and Medicaid Services ("CMS") in the Federal Register emphasizes the importance of a doctor's *clinical judgment* in the hospice certification process. Hospice Care Amendments Final Rule, 70 Fed. Reg. 70532, 70534 (Nov. 22, 2005), Gov. Ex. 227. This rule further "recognizes the fact that making medical prognostications of life expectancy is not always exact." *Id.*; *see also* 75 Fed. Reg. 70372, 70448 (Nov. 17, 2010), Def. Ex. 752A ("Predicting life expectancy is not an exact science."). If the court were to find that all the Government needed to prove falsity in a hospice provider case was one medical expert who reviewed the medical records and disagreed with the certifying

physician, hospice providers would be subject to potential FCA liability any time the Government could find a medical expert who disagreed with the certifying physician's clinical judgment. The court refuses to go down that road.

The Government does not challenge that each claim for each patient at issue had an accompanying COTI with the valid signature of the certifying physician. Nor does the Government point the court to any evidence that any of the documents in the patients' medical records were false; that any information on which the certifying physician relied was incorrect or false; or that the clinicians withheld information from the certifying physicians.[4] Moreover, the Government represented to the court that it did not intend to use the relators' and clinicians' testimony to prove falsity as to any of the identified patients. *See* 7/22/15 Hrg. Tr. at 184, 189. As the Government has repeatedly stated, the *only* evidence it offers to prove falsity of the claims for the patients at issue comes from the medical records of the 123 patients at issue and the testimony of Dr. Liao, who offered *his opinion*, *based on his clinical judgment* after a review of those medical records, about the hospice eligibility of those patients. *See* 7/22/15 Hrg. Tr. at 170, 180, 182, 184, 197, 224.[5]

So what remains as the Government's proof of falsity for the 123 patients at issue is Dr.

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[4] In its November 3, 2015, Memorandum Opinion, the court thoroughly explained that a major obstacle in the Government's proof of falsity results from its own failures in its preparation for trial and its answers to contention interrogatories during discovery. (Doc. 482)

[5] Given the Government's position regarding only using Dr. Liao's testimony and the patients' medical records to prove falsity, its position that the court's bifurcation order prevented it from presenting all of its evidence on the falsity element of the FCA lacks merit. The Government alleges that "significant admissible evidence exists that [was not] presented at trial due to the Court's bifurcation order." (Doc. 493 at 8, 32). However, that alleged "admissible evidence" goes to the knowledge and other elements in question in Phase Two, not falsity.

Liao's opinion, based on his review of the medical records, that, in his opinion, the patients at issue were not eligible for hospice because the medical records did not support the certifying physicians' COTIs. However, AseraCare's medical experts, as well as the certifying physicians, also reviewed the same medical records and found that they *did* support the COTIs of the patients at issue. The court finds that contradiction based on clinical judgment or opinion alone cannot constitute falsity under the FCA as a matter of law. The Government backed itself into a corner regarding its proof of falsity, and as such, it cannot prove the falsity of the claims for the 123 patients at issue.

The Government has presented no evidence of an objective falsehood for any of the patients at issue. Because a difference of opinion between physicians and medical experts about which reasonable minds could differ is all the Government has presented to prove falsity of the claims for the 123 patients at issue, the Government cannot prove the falsity element as a matter of law. Therefore, summary judgment in favor of AseraCare is due to be GRANTED pursuant to Fed. R. Civ. P. 56(f)(3) for the remaining Counts in the Complaint, specifically Counts One, Three, and Four.

The court will enter a separate Final Order.

DONE and ORDERED this 31st day of March, 2016.

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

COCHISE CONSULTANCY, INC., ET AL. *v.* UNITED STATES EX REL. HUNT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18–315. Argued March 19, 2019—Decided May 13, 2019

The False Claims Act permits a private person, known as a relator, to bring a *qui tam* civil action "in the name of the [Federal] Government," 31 U. S. C. §3730(b), against "any person" who "knowingly presents . . . a false or fraudulent claim for payment" to the Government or to certain third parties acting on the Government's behalf, §§3729(a), (b)(2). The Government may choose to intervene in the action. See §§3730(b)(2), (4). Two limitations periods apply to a "civil action under section 3730." §3731(b). An action must be brought within either 6 years after the statutory violation occurred, §3731(b)(1), or 3 years after the "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than 10 years after the violation, §3731(b)(2). The period providing the later date serves as the limitations period.

In November 2013, respondent Hunt filed a complaint alleging that petitioners—two defense contractors (collectively, Cochise)—defrauded the Government by submitting false payment claims for providing security services in Iraq up until early 2007. Hunt claims that he revealed Cochise's allegedly fraudulent scheme during a November 30, 2010, interview with federal officials about his role in an unrelated contracting fraud in Iraq. The United States declined to intervene in the action, and Cochise moved to dismiss the complaint as barred by the statute of limitations. Hunt countered that his complaint was timely under §3731(b)(2). In dismissing the action, the District Court considered three potential interpretations: that §3731(b)(2) does not apply to a relator-initiated action in which the Government elects not to intervene; that §3731(b)(2) applies in non-

intervened actions, and the limitations period begins when the relator knew or should have known the relevant facts; or that §3731(b)(2) applies in nonintervened actions, and the limitations period begins when the Government official responsible for acting knew or should have known the relevant facts. The court rejected the third interpretation and found that Hunt's complaint would be untimely under either of the first two. The Eleventh Circuit reversed and remanded, adopting the third interpretation.

Held:

1. The limitations period in §3731(b)(2) applies in a relator-initiated suit in which the Government has declined to intervene. Both Government-initiated suits under §3730(a) and relator-initiated suits under §3730(b) are "civil action[s] under section 3730." Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits. Cochise claims that starting a limitations period when the party entitled to bring a claim learns the relevant facts is a default rule of tolling provisions, so subsection (b)(2) should apply only when the Government is a party. But treating a relator-initiated, nonintervened suit as a "civil action under section 3730" for purposes of subsection (b)(1) but not subsection (b)(2) is at odds with fundamental rules of statutory interpretation. Because a single use of a statutory phrase generally must have a fixed meaning, see *Ratzlaf* v. *United States*, 510 U. S. 135, 143, interpretations that would "attribute different meanings to the same phrase" should be avoided, *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 329. Here, the clear text of the statute controls. Cochise's reliance on *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409, is misplaced. Nothing in *Graham County* supports giving the phrase "civil action under section 3730" in §3731(b) two different meanings depending on whether the Government intervenes. While the *Graham County* Court sought "a construction that avoids . . . counterintuitive results," there the text "admit[ted] of two plausible interpretations." *Id.,* at 421, 419, n. 2. Here, Cochise points to no other plausible interpretation of the text, so the "'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.,* 534 U. S. 438, 462. Pp. 4–8.

2. The relator in a nonintervened suit is not "the official of the United States" whose knowledge triggers §3731(b)(2)'s 3-year limitations period. The statute provides no support for such a reading. First, a private relator is neither appointed as an officer of the United States nor employed by the United States. Second, the provision authorizing *qui tam* suits is entitled "Actions by Private Persons." §3730(b). Third, the statute refers to "the" official "charged with responsibility to act in the circumstances." Regardless of precisely

which official or officials the statute is referring to, §3731(b)(2)'s use of the definite article "the" suggests that Congress did not intend for private relators to be considered "the official of the United States." See *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434. Nor are private relators "charged with responsibility to act" in the sense contemplated by §3731(b), as they are not required to investigate or prosecute a False Claims Act action. Pp. 8–9.

887 F. 3d 1081, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 18–315

COCHISE CONSULTANCY, INC., ET AL., PETITIONERS *v.* UNITED STATES, EX REL. BILLY JOE HUNT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 13, 2019]

JUSTICE THOMAS delivered the opinion of the Court.

The False Claims Act contains two limitations periods that apply to a "civil action under section 3730"—that is, an action asserting that a person presented false claims to the United States Government. 31 U. S. C. §3731(b). The first period requires that the action be brought within 6 years after the statutory violation occurred. The second period requires that the action be brought within 3 years after the United States official charged with the responsibility to act knew or should have known the relevant facts, but not more than 10 years after the violation. Whichever period provides the later date serves as the limitations period.

This case requires us to decide how to calculate the limitations period for *qui tam* suits in which the United States does not intervene. The Court of Appeals held that these suits are "civil action[s] under section 3730" and that the limitations periods in §3731(b) apply in accordance with their terms, regardless of whether the United States intervenes. It further held that, for purposes of the second period, the private person who initiates the *qui tam* suit

cannot be deemed the official of the United States. We agree, and therefore affirm.

I

As relevant, the False Claims Act imposes civil liability on "any person" who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the Government or to certain third parties acting on the Government's behalf. 31 U. S. C. §§3729(a), (b)(2). Section 3730 authorizes two types of actions: First, the Attorney General, who "diligently shall investigate a violation under section 3729," may bring a civil action against the alleged false claimant. §3730(a). Second, a private person, known as a relator, may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." §3730(b).

If a relator initiates the action, he must deliver a copy of the complaint and supporting evidence to the Government, which then has 60 days to intervene in the action. §§3730(b)(2), (4). During this time, the complaint remains sealed. §3730(b)(2). If the Government intervenes, it assumes primary responsibility for prosecuting the action, though the relator may continue to participate. §3730(c). Otherwise, the relator has the right to pursue the action. §§3730(b)(4), (c)(3). Even if it does not intervene, the Government is entitled to be served with all pleadings upon request and may intervene at any time with good cause. §3730(c)(3). The relator receives a share of any proceeds from the action—generally 15 to 25 percent if the Government intervenes, and 25 to 30 percent if it does not—plus attorney's fees and costs. §§3730(d)(1)–(2). See *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 769–770 (2000).

At issue here is the Act's statute of limitations, which provides:

> "(b) A civil action under section 3730 may not be brought—
>
> "(1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> "(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> "whichever occurs last." §3731(b).

On November 27, 2013, respondent Billy Joe Hunt filed a complaint alleging that petitioners—two defense contractors (collectively, Cochise)—defrauded the Government by submitting false claims for payment under a subcontract to provide security services in Iraq "from some time prior to January 2006 until early 2007." App. 43a. A little less than three years before bringing his complaint, Hunt was interviewed by federal agents about his role in an unrelated contracting fraud in Iraq. Hunt claims to have revealed Cochise's allegedly fraudulent scheme during this November 30, 2010, interview.

The United States declined to intervene in Hunt's action, and Cochise moved to dismiss the complaint as barred by the statute of limitations. Hunt conceded that the 6-year limitations period in §3731(b)(1) had elapsed before he filed suit on November 27, 2013. But Hunt argued that his complaint was timely under §3731(b)(2) because it was filed within 3 years of the interview in which he informed federal agents about the alleged fraud (and within 10 years after the violation occurred).

The District Court dismissed the action. It considered three potential interpretations of §3731(b). Under the first interpretation, §3731(b)(2) does not apply to a relator-initiated action in which the Government elects not to

intervene, so any such action must be filed within six years after the violation. Under the second interpretation, §3731(b)(2) applies in nonintervened actions, and the limitations period begins when the relator knew or should have known the relevant facts. Under the third interpretation, §3731(b)(2) applies in nonintervened actions, and the limitations period begins when "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts. The District Court rejected the third interpretation and declined to choose between the first two because it found that Hunt's complaint would be untimely under either. The Court of Appeals reversed and remanded, adopting the third interpretation. 887 F. 3d 1081 (CA11 2018).

Given a conflict between the Courts of Appeals,* we granted certiorari. 586 U. S. ___ (2018).

II

The first question before us is whether the limitations period in §3731(b)(2) is available in a relator-initiated suit in which the Government has declined to intervene. If so, the second question is whether the relator in such a case should be considered "the official of the United States" whose knowledge triggers §3731(b)(2)'s 3-year limitations period.

A

Section 3731(b) sets forth two limitations periods that apply to "civil action[s] under section 3730." Both

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*Compare 887 F. 3d 1081, 1089–1097 (CA11 2018) (adopting the third interpretation), with *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F. 3d 1211, 1216–1218 (CA9 1996) (adopting the second interpretation); *United States ex rel. Sanders* v. *North Am. Bus Industries, Inc.*, 546 F. 3d 288, 293–294 (CA4 2008) (adopting the first interpretation); and *United States ex rel. Sikkenga* v. *Regence Bluecross Blueshield of Utah*, 472 F. 3d 702, 725–726 (CA10 2006) (same).

Government-initiated suits under §3730(a) and relator-initiated suits under §3730(b) are "civil action[s] under section 3730." Thus, the plain text of the statute makes the two limitations periods applicable in both types of suits.

Cochise agrees with that view as to the limitations period in §3731(b)(1), but argues that the period in §3731(b)(2) is available in a relator-initiated suit only if the Government intervenes. According to Cochise, starting a limitations period when the party entitled to bring a claim learns the relevant facts is a default rule of tolling provisions, so subsection (b)(2) should be read to apply only when the Government is a party. In short, under Cochise's reading, a relator-initiated, nonintervened suit is a "civil action under section 3730" for purposes of subsection (b)(1) but not subsection (b)(2).

This reading is at odds with fundamental rules of statutory interpretation. In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning. See *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994). We therefore avoid interpretations that would "attribute different meanings to the same phrase." *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 329 (2000). Here, either a relator-initiated, nonintervened suit is a "civil action under section 3730"—and thus subject to the limitations periods in subsections (b)(1) and (b)(2)—or it is not. It is such an action. Whatever the default tolling rule might be, the clear text of the statute controls this case.

Under Cochise's reading, a relator-initiated civil action would convert to "[a] civil action under section 3730" for purposes of subsection (b)(2) if and when the Government intervenes. That reading cannot be correct. If the Government intervenes, the civil action remains the same—it simply has one additional party. There is no textual basis to base the meaning of "[a] civil action under section 3730" on whether the Government has intervened.

Cochise relies on our decision in *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U. S. 409 (2005), which addressed the question whether §3731(b)(1) or federal common law provided the limitations period for §3730(h) retaliation actions. Section 3730(h) creates a cause of action for an employee who suffers retaliation for, among other things, assisting with the prosecution of a False Claims Act action. At the time, §3730(h) did not specify a time limit for bringing a retaliation action, so the question before us was whether the phrase "civil action under section 3730" in §3731(b) encompassed actions under §3730(h). We considered the statute "ambiguous because its text, literally read, admits of two plausible interpretations." *Id.*, at 419, n. 2. One reading was that a "civil action under section 3730" includes §3730(h) actions because such actions arise under §3730. *Id.*, at 415. "Another reasonable reading" was that a "civil action under section 3730" "applies only to actions arising under §§3730(a) and (b)" because "§3731(b)(1) t[ies] the start of the time limit to 'the date on which the violation of section 3729 is committed.'" *Ibid.* That reading had force because retaliation claims need not involve an actual violation of §3729. *Ibid.* Looking to statutory context, we explained that the phrase "'civil action under section 3730' means only those civil actions under §3730 that have as an element a 'violation of section 3729,' that is, §§3730(a) and (b) actions"—not §3730(h) retaliation actions. *Id.*, at 421–422.

A relator-initiated, nonintervened suit arises under §3730(b) and has as an element a violation of §3729. *Graham County* supports our reading. Nonetheless, Cochise points out that in considering the statutory context, we discussed a similar phrase contained in §3731(c) (now §3731(d)), which stated: "In *any action brought under section 3730*, the United States shall be required to prove all essential elements of the cause of action, including

damages, by a preponderance of the evidence." (Emphasis added.) We explained that §3731(c) "use[d] the similarly unqualified phrase 'action brought under section 3730' to refer only to §§3730(a) and (b) actions." *Id.*, at 417–418. We then stated: "As [respondent] and the United States concede, the context of this provision implies that the phrase 'any action brought under section 3730' is limited to §3730(a) actions brought by the United States and §3730(b) actions in which the United States intervenes as a party, as those are the types of §3730 actions in which the United States necessarily participates." *Id.*, at 418.

Cochise contends that we should adopt a similar construction of the phrase "civil action under section 3730" in §3731(b). We disagree. Our discussion of §3731(c) was focused on "the context of th[at] provision" and on whether it could be read to impose the burden of proof on the Government even in cases where the Government did not participate. *Id.*, at 418. Those considerations do not apply here; there is nothing illogical about reading §3731(b) to apply in accordance with its plain terms. Moreover, if a "civil action under section 3730" included only an action in which the Government participates for purposes of §3731(b)(2), then we would be obligated to give it a like meaning for purposes of §3731(b)(1). This would mean that a relator-initiated, nonintervened suit would be subject to neither §3731(b)(1) nor §3731(b)(2)—a reading Cochise expressly disclaims. See Brief for Petitioners 20, n. 3. Nothing in *Graham County* supports giving the same phrase in §3731(b) two different meanings depending on whether the Government intervenes.

Again pointing to *Graham County*, Cochise next contends that our reading would lead to "'counterintuitive results.'" Brief for Petitioners 26. For instance, if the Government discovers the fraud on the day it occurred, it would have 6 years to bring suit, but if a relator instead discovers the fraud on the day it occurred and the Gov-

ernment does not discover it, the relator could have as many as 10 years to bring suit. That discrepancy arises because §3731(b)(2) begins its limitations period on the date that "the official of the United States charged with responsibility to act" obtained knowledge of the relevant facts. But we see nothing unusual about extending the limitations period when the Government official did not know and should not reasonably have known the relevant facts, given that the Government is the party harmed by the false claim and will receive the bulk of any recovery. See §3730(d). In any event, a result that "may seem odd . . . is not absurd." *Exxon Mobil Corp.* v. *Allapattah Services*, *Inc.*, 545 U. S. 546, 565 (2005). Although in *Graham County* we sought "a construction that avoids . . . counter-intuitive results," there the text "admit[ted] of two plausible interpretations." 545 U. S., at 421, 419, n. 2. Here, Cochise points to no other plausible interpretation of the text, so the "'judicial inquiry is complete.'" *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 462 (2002).

B

Cochise's fallback argument is that the relator in a nonintervened suit should be considered "the official of the United States charged with responsibility to act in the circumstances," meaning that §3731(b)(2)'s 3-year limitations period would start when the relator knew or should have known about the fraud. But the statute provides no support for reading "the official of the United States" to encompass a private relator.

First, a private relator is not an "official of the United States" in the ordinary sense of that phrase. A relator is neither appointed as an officer of the United States, see U. S. Const., Art. II, §2, cl. 2, nor employed by the United States. Indeed, the provision that authorizes *qui tam* suits is entitled "Actions by Private Persons." §3730(b). Although that provision explains that the action is

brought "for the person and for the United States Government" and "in the name of the Government," *ibid.*, it does not make the relator anything other than a private person, much less "the official of the United States" referenced by the statute. Cf. *Stevens*, 529 U. S., at 773, n. 4 ("[A] *qui tam* relator is, in effect, suing as a partial assignee of the United States" (emphasis deleted)).

Second, the statute refers to "the" official "charged with responsibility to act in the circumstances." The Government argues that, in context, "the" official refers to the Attorney General (or his delegate), who by statute "shall investigate a violation under section 3729." §3730(a). Regardless of precisely which official or officials the statute is referring to, §3731(b)(2)'s use of the definite article "the" suggests that Congress did not intend for any and all private relators to be considered "the official of the United States." See *Rumsfeld* v. *Padilla*, 542 U. S. 426, 434 (2004) (explaining that the "use of the definite article . . . indicates that there is generally only one" person covered). More fundamentally, private relators are not "charged with responsibility to act" in the sense contemplated by §3731(b), as they are not required to investigate or prosecute a False Claims Act action.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, September 18, 2019

Compounding Pharmacy, Two of Its Executives, and Private Equity Firm Agree to Pay $21.36 Million to Resolve False Claims Act Allegations

The Department of Justice announced today that compounding pharmacy Diabetic Care Rx LLC, or Patient Care America (PCA), PCA's Chief Executive Officer Patrick Smith, PCA's former Vice President of Operations Matthew Smith, and private equity firm Riordan, Lewis & Haden Inc. (RLH) have agreed to resolve a lawsuit alleging that they violated the False Claims Act through their involvement in a kickback scheme to generate referrals of prescriptions for expensive pain creams, scar creams, and vitamins, regardless of patient need, which were reimbursed by TRICARE, the federal health care program for military members and their families. PCA and RLH have agreed to pay $21,050,000, Patrick Smith has agreed to pay at least $300,000, and Matthew Smith has agreed to pay at least $12,788. These settlement amounts were based on defendants' ability to pay.

"Kickback schemes taint decision-making and cause taxpayer-funded health care programs to pay for items or services that patients may not need," said Assistant Attorney General Jody Hunt for the Department of Justice's Civil Division. "We will hold accountable health care providers involved in such schemes designed to induce referrals of prescriptions that are reimbursed by federal health care programs."

"The prosecution and resolution of this case demonstrates the U.S. Attorney's Office continuing commitment to hold all responsible parties to account for the submission of claims to federal health care programs that are tainted by unlawful kickback arrangements," said United States Attorney Ariana Fajardo Orshan. "Kickback schemes lead to unnecessary medical services and drive up the cost of health care for all."

"This settlement sends a clear message about the Defense Criminal Investigation Service (DCIS) and its law enforcement partners' unwavering commitment to protect the integrity of TRICARE, the Department of Defense's health care program which serves to protect our U.S. military, their family members, and military retirees," said Special Agent in Charge Cyndy Bruce of the DCIS Southeast Field Office. "Health care providers who manipulate and abuse the TRICARE program in order to seek financial gain by submitting false claims and demonstrating a lack of regard for TRICARE patients and the health care plan which is charged to provide their medical care, will be diligently investigated and held accountable for their actions."

This settlement resolves a lawsuit pursued by the United States against PCA for allegedly paying kickbacks to outside "marketers" to target military members and their families for prescriptions for compounded creams and vitamins, which were formulated to ensure the highest possible reimbursement from TRICARE. The United States alleged that the marketers paid telemedicine doctors who prescribed the creams and vitamins without seeing the patients, or in some cases, even speaking to them. The settlement also resolves the United States' allegations that PCA and a marketer routinely jointly paid the copayments owed by patients referred by the marketer, without any verification of the patients' financial needs, and then disguised the payments as coming from a sham charitable organization, which was affiliated with the marketer. Finally, the settlement resolves the United States' allegations that PCA continued to claim reimbursement for prescriptions referred by the marketers despite regularly receiving complaints from patients that revealed the prescriptions were being generated without patient consent or a valid patient-prescriber relationship. RLH, the private equity firm that managed PCA on behalf of its investors, allegedly knew of and agreed to the plan to pay outside marketers to generate the prescriptions and financed the kickback payments to the marketers. Patrick Smith and Matthew Smith were executives of PCA who allegedly executed the scheme.

The lawsuit resolved by the settlement was originally filed under the whistleblower (or "*qui tam*") provisions of the False Claims Act by Marisela Medrano and Ada Lopez, two former employees of PCA. The *qui tam* provisions permit private individuals to sue on behalf of the government for false claims and to share in any recovery. The False Claims Act authorizes the United States to intervene and take over such lawsuits, which the United States did here, in part. The share to be awarded in this case has not been determined yet.

This civil settlement was the result of a coordinated effort by the Civil Division's Commercial Litigation Branch (Fraud Section), the United States Attorney's Office for the Southern District of Florida, the Defense Criminal Investigative Service, and the U.S. Food & Drug Administration's Office of Criminal Investigations.

The lawsuit is captioned *United States ex rel. Medrano and Lopez v. Diabetic Care Rx LLC, d/b/a Patient Care America, et al*., No. 15-CV-62617 (S.D. Fla.). The claims resolved by the settlement are allegations only and there has been no determination of liability.

Topic(s):
False Claims Act
Health Care Fraud

Component(s):
Civil Division

Updated September 23, 2019

U.S. Department of Justice

Civil Division

Washington, DC 20530

January 10, 2018

PRIVILEGED AND CONFIDENTIAL; FOR INTERNAL GOVERNMENT USE ONLY

MEMORANDUM

TO: Attorneys
Commercial Litigation Branch, Fraud Section

Assistant U.S. Attorneys Handling False Claims Act Cases
Offices of the U.S. Attorneys

FROM: Michael D. Granston MDG
Director
Commercial Litigation Branch, Fraud Section

SUBJECT: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)

Introduction

Over the last several years, the Department has seen record increases in *qui tam* actions filed under the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., with annual totals approaching or exceeding 600 new matters. Although the number of filings has increased substantially over time, the rate of intervention has remained relatively static. Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. If the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. Thus, when evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A).

Historically, the Department has utilized section 3730(c)(2)(A) sparingly, in large part because the statutory text makes clear that relators can proceed with certain *qui tam* actions following the government's declination. Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources.

Accordingly, we have been circumspect with the use of this tool to avoid precluding relators from pursuing potentially worthwhile matters, and to ensure that dismissal is utilized only where truly warranted.

While it is important to be judicious in utilizing section 3730(c)(2)(A), it remains an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent. The Department plays an important gatekeeper role in protecting the False Claims Act, because in *qui tam* cases where we decline to intervene, the relators largely stand in the shoes of the Attorney General. That is why the FCA provides us with the authority to dismiss cases. This memo is intended to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A) and to ensure a consistent approach to this issue across the Department. We reviewed those cases in which the government moved to dismiss relators pursuant to this statutory provision since 1986, when this provision was added to the FCA. As discussed below, we identified approximately seven factors that the government has relied upon in seeking to dismiss a *qui tam* action pursuant to section 3730(c)(2)(A). To ensure consistency across the Department, these factors should serve as a basis for evaluating whether to seek to dismiss future matters, though they are not intended to constitute an exhaustive list, and there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam* action.[1]

Finally, as noted below, when the Department is considering dismissal, relators should be advised of this possibility since it will inform their judgment regarding whether to voluntarily dismiss their actions.

Discussion

The False Claims Act authorizes the Attorney General to dismiss a *qui tam* action over the relator's objection:

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the

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[1] In jointly handled and monitored cases, the prior approval of the Assistant Attorney General is required for a motion to dismiss a qui tam action, including under section 3730(c)(2)(A). In delegated cases, the authority for dismissing a *qui tam* complaint will generally be vested in the U.S. Attorney unless dismissal would present a novel issue of law or policy, or for any other reason raises issues that should receive the personal attention of the Assistant Attorney General. *See* Civil Division Directive 1-15, Subpart 1(e). In order to maintain consistency and evaluate the appropriateness of Assistant Attorney General approval, U.S. Attorneys' Offices should provide notice to the assigned Fraud Section attorney at least 10 days prior to filing any motion to dismiss in a delegated matter. In addition, for reporting purposes, the Department will collect information on an annual basis regarding the number of *qui tam* complaints dismissed upon motion by the United States. The Fraud Section will work with the Executive Office of United States Attorneys to formulate a reporting mechanism.

> motion and the court has provided the person with an opportunity for a hearing on the motion.

31 U.S.C. § 3730(c)(2)(A).[2] The FCA does not, however, provide a standard of review for evaluating such a request for dismissal. As a result, courts have developed two differing standards. *Compare United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (holding that the United States must identify a "valid government purpose" that is rationally related to dismissal) *with Swift v. United States,* 318 F.3d 250, 252 (D.C. Cir. 2003) (holding that the United States has an "unfettered right" to dismiss a *qui tam* action).

Moreover, the FCA does not set forth specific grounds for dismissal under section 3730(c)(2)(A). However, below is a non-exhaustive list of factors that the Department can use as a basis for dismissal, along with citations to cases where the government has previously sought dismissal based on these factors.

1. *Curbing Meritless Qui Tams*

The Department should consider moving to dismiss where a *qui tam* complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous. Examples of inherent legal defects include *qui tam* actions where the relator failed to allege an actionable obligation to support a reverse false claim violation, *see, e.g.*, *United States ex rel. Hoyte v. American National Red Cross*, 518 F.3d 61 (D.C. Cir. 2008); *United States ex rel. Wright*, No. 5:03-264 (E.D. Tex. Feb. 3, 2005), or to allege a non-federal defendant that is not covered by sovereign immunity. *See, e.g.*, *United States ex rel. Carter v. Board of Governors of the Federal Reserve, et al.*, No. 12-0129-cv-W-HFS (W.D. Mo. May 1, 2013); *United States ex rel. Casey v. Blevins*, No. 4:02-CV-60 (E.D. Ark. July 5, 2002); *Braswell v. Unger*, No. 4:14-cv-02574-JAB (D. Az. August 11, 2015). Factually frivolous cases can take a number of forms. *See, e.g.*, *United States ex rel. Roach v. Obama*, No. 14-0470 (D.D.C. December 18, 2014); *United States ex rel. May v. City of Dallas*, 2014 WL 5454819, at *5 (N.D. Tex. Oct. 27, 2014); *United States ex rel. Berg v. Obama*, 383 F. App'x 7 (D.C. Cir. 2010) (per curiam); *United States ex rel. Lachkovich v. Ashcroft, et al.*, No. 08-cv-00066-WYD-BNB (D. Colo. March 13, 2008).

In certain cases, even if the relator's allegations are not facially deficient, the government may conclude after completing its investigation of the relator's allegations that the case lacks merit. In such a case, the Department should consider dismissing the matter. *See United States ex rel. Nasuti v. Savage Farms, Inc.*, 2014 WL 1327015, at *11 (D. Mass. Mar. 27, 2014), aff'd, 2015

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[2] This is just one of several mechanisms contained in the FCA to ensure that the United States retains substantial control over lawsuits brought on its behalf. *See also* 31 U.S.C. § 3730(c)(1) (providing government with "the primary responsibility for prosecuting the action" when it intervenes); 31 U.S.C. § 3730(c)(2)(B) (allowing government to settle actions over relator's objections); 31 U.S.C. § 3730(c)(2)(C) (providing government with mechanism to restrict relator's participation in the case); 31 U.S.C. § 3730(b)(1) (requiring relator to obtain government consent prior to any dismissal of the action).

WL 9598315 (1st Cir. 2015) (dismissing *qui tam* claims that government concluded were "factually incorrect and without foundation."); *United States ex rel. Dreyfuse v. Farrell, et al.*, 3:16-cv-5273 (S.D. W.Va. March 28, 2017) (granting government's motion to dismiss claims that were submitted to state agency and which did not implicate any federal programs or funds); *United States ex rel. Stierli v. Shasta Services, Inc.*, 440 F. Supp. 2d 1108, 1113 (E.D. Cal. 2006) (granting government's motion to dismiss because, among other things, there was not any false or fraudulent claim paid or approved by the federal government); *United States v. Fiske*, 968 F. Supp. 1347, 1353 (E.D. Ark. 1997) (holding that relator's allegations, even if true, do not involve the submission of any false or fraudulent claim to the federal government). These cases may be rare, in part, because to maximize its resources the government typically will investigate a *qui tam* action only to the point where it concludes that a declination is warranted. This may not equate to a conclusion that no fraud occurred. If the Department is concerned that a case lacks any merit, but elects to afford the relator an opportunity to further develop the case, the Department attorney may consider advising the relator that dismissal will be considered if the relator is unable to obtain additional support for the relator's claims by a specified date.

2. *Preventing Parasitic or Opportunistic Qui Tam Actions*

The Department should consider moving to dismiss a *qui tam* action that duplicates a pre-existing government investigation and adds no useful information to the investigation. In these cases, the government should consider whether the relator would receive an unwarranted windfall at the expense of the public fisc because Congress intended for the relator share to incentivize and award the provision of meaningful information and assistance instead of merely providing duplicative information already known to the government. *See* 132 Cong. Rec. 29, 322 (1986) (citing S. Rep. No. 99-345, at 28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5293) (discussing factors relevant to awarding a relator share, including "the significance of the information provided" and whether the government was already aware of the information prior to relator providing it). For example, in *United States ex rel. Amico, et al. v. Citi Group, Inc., et al.*, No. 14-cv-4370 (CS) (S.D.N.Y. August 7, 2015), relators filed a *qui tam* action against Citi Group and its subsidiaries alleging fraud in connection with the marketing and sale of residential mortgage backed securities; however, the Department of Justice had been investigating the same conduct for several years prior to the filing and had engaged in extensive settlement negotiations before relators filed their complaint. The government successfully moved to dismiss the action under section 3730(c)(2)(A) because, among other factors, relators' belated complaint provided no assistance to the government in its pre-existing investigation. *See also United States ex rel. Piacentile v. Amgen Inc.*, No. 04-cv-3983-SJ-RML, 2013 WL 5460640, at *4 (E.D.N.Y. Sept. 30, 2013) (granting government's motion to dismiss *qui tam* complaint filed by serial relator who filed one of ten *qui tams* alleging similar wrongdoing by the same defendant).

3. *Preventing Interference with Agency Policies and Programs*

Dismissal should be considered where an agency has determined that a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs and has recommended dismissal to avoid these effects. For example, in *United States ex rel. Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925 (10th Cir. 2005), relator alleged that a security contractor submitted false claims to the Department of Energy for deficient security services at Rocky Flats, a

radiologically-contaminated nuclear weapons manufacturing facility that was slated to undergo decontamination and closure. The government successfully moved to dismiss the action because, among other things, litigation would delay the clean-up and closure of the facility by diverting agency personnel and resources away from the project. 397 F.3d at 937; *see also United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1146 (concluding that valid government interests supporting dismissal included the Department of Agriculture's desire to "end the divisiveness in the citrus industry" by promulgating new citrus marketing regulations to replace invalidated regulations upon which the relator based its claims); *United States ex rel. Toomer v. TerraPower*, No. 4:16-cv-00226-BLW (D. Idaho) (Under Seal) (seeking dismissal of allegation that defendant's invention constituted government property, based in part on the concern that this allegation would hinder the Energy Department's ability to collaborate with private sector partners). Finally, there may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry. *Cf. United States ex rel. Harmon v. Trinity Indus., Inc.*, 872 F.3d 645 (5th Cir. 2017) (reversing $680 million judgment against highway guardrail manufacturer based on alleged manufacturing defects that agency concluded did not affect eligibility of defendant's claims).

4. *Controlling Litigation Brought on Behalf of the United States*

Relatedly, the Department should consider dismissing cases when necessary to protect the Department's litigation prerogatives. For example, in *In Re Natural Gas Royalties Qui Tam Litigation*, MDL Docket No. 1293 (D. Wyo. October 9, 2002), relator filed separate *qui tam* actions in various districts against more than 300 defendants accused of underpaying royalties owed to the United States in connection with natural gas produced from federal lands. After intervening as to a limited number of defendants, the government sought to dismiss certain declined claims to, among other things, avoid interference with the government's ability to litigate the intervened claims. The court agreed, finding that the interest in avoiding interference with ongoing litigation warranted dismissal of the declined claims. *See also Lion Raisins v. Kagawa, et al.*, No. CV-F-02-5665-REC-LJO (E.D. Cal. Nov. 3, 2003) (granting government's motion to dismiss, concluding that government's desire to avoid interference with pending Federal Torts Claims Act action involving the same parties was a valid government purpose that was rationally related to dismissal). In addition, in *United States ex rel. Wright v. Agip Petroleum Co.*, No. 5:03-264 (E.D. Tex. Feb. 3, 2005), the government moved to dismiss, in part, to avoid the risk of unfavorable precedent. *See id.* Finally, in *United States ex rel. Piacentile*, 2013 WL 5460640, the government moved to dismiss a declined claim that was serving as an obstacle to the settlement of the government's intervened claims. *But cf. United States ex rel. Schweizer v. Oce*, 677 F.3d 1228 (D.C. Cir. 2012) (once the government reaches a settlement with defendant of relator's claims, the dismissal of those claims is governed by section 3730(c)(2)(B), requiring a showing that the settlement is fair, adequate, and reasonable, rather than by section 3730(c)(2)(A)).[3]

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[3] In each of the foregoing cases, in addition to determining that the dismissed claims were interfering with the government's litigation prerogatives, the government's briefs make clear that the government had determined that the claims lacked substantial merit.

5. *Safeguarding Classified Information and National Security Interests*

In certain cases, particularly those involving intelligence agencies or military procurement contracts, we should seek dismissal to safeguard classified information. For example, in *United States ex rel. Fay v. Northrup Grumman Corp.*, No. 06-cv-00581-EWN-MJW, 2008 WL 877180 (D. Colo. Mar. 27, 2008), the relator alleged that a defense contractor defrauded the United States in connection with work performed on a classified contract. After declining to intervene, the Department moved to dismiss the action under section 3730(c)(2)(A), asserting that continued litigation would pose "an unacceptable risk to national security" due to the potential for disclosure of classified information. Applying the *Sequoia Orange* standard, the Court agreed, concluding that the claims and defenses were inextricably tied to classified information and dismissal was rationally related to the valid government interest of preventing the disclosure of such information. *Id.* at * 6-7. *See also United States ex rel. Matseki v. Raytheon Co.*, 634 F. App'x 192 (9th Cir. 2015) (per curiam) (holding that government interest in avoiding disclosure of classified information was sufficient basis for dismissal); *United States ex rel. Schwartz v. Raytheon Co.*,150 F. App'x 627 (9th Cir. 2005) (holding that "federal interest in protecting military and state secrets" was valid basis for dismissal); *United States ex rel. Ridenour*, 397 F.3d at 936-37 ("The Government demonstrated that classified documents required in the litigation would present a risk of inadvertent disclosure, implicating national security."). Finally, it should be noted that the government need not demonstrate that continued litigation *will* result in the disclosure of classified information. In jurisdictions that apply the "rational basis" basis test, the government has a strong argument that the *risk of disclosure*, alone, justifies dismissal. *See United States ex rel. Ridenour,* 397 F.3d at 937 (finding risk of inadvertent disclosure of classified information, "even if theoretically minimal," sufficed to justify dismissal). (In jurisdictions that apply the "unfettered right" standard, no showing by the government is required.)

6. *Preserving Government Resources*

The Department should also consider dismissal under section 3730(c)(2)(A) when the government's expected costs are likely to exceed any expected gain.[4] *See, e.g., Swift v. United States,* 318 F.3d 250, 251 (D.C. Cir. 2003) (the government moved to dismiss the complaint, arguing that the amount of money involved did not justify the expense of litigation even if the allegations could be proven); *United States ex rel. Nicholson v. Spigelman, et al.*, No. 1:10-cv-03361, 2011 WL 2683161, at *2 (N.D. Ill. July 8, 2011) (explaining that the estimated government losses, even with statutory penalties and damages multiplier, were less than the costs of monitoring the litigation and responding to discovery requests) Examples of potential costs may include, among other things, the need to monitor or participate in ongoing litigation, including responding to discovery requests. *See, e.g., United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1146 (holding that district court "properly noted that the government can legitimately consider the burden imposed on taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs"); *United States ex rel. Levine v. Avnet, Inc.*, No. 2:14-cv-17-WOB-CJS, 2015 WL 42359 (E.D. Ky.

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[4] Cost to the government includes the opportunity cost of expending resources on other matters with a higher and/or more certain recovery.

Apr. 1, 2015) (holding that dismissal of *qui tam* complaint "will further [the government's] interest in preserving scare resources" that would otherwise be spent "monitoring [relator's] action"). In some cases, the government may also be liable for the defendant's litigation costs if the defendant prevails in the action. *See, e.g.*, FAR §31.205-47(c).

7. *Addressing Egregious Procedural Errors*

The Department may also seek dismissal of a *qui tam* action pursuant to section 3730(c)(2)(A) based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation. For example, in *United States ex rel. Surdovel v. Digirad Imaging Solutions*, No. 07–cv-0458, 2013 WL 6178987 (E.D. Pa. Nov. 25, 2013), the relator ignored repeated requests from the Office of the U.S. Attorney to serve the *qui tam* complaint and disclose material facts as required by 31 U.S.C. § 3730(b). The Court granted the government's motion to dismiss the action because the "egregious procedural errors completely frustrated the government's ability to investigate the relator's claims." *Id.* at *4. *But cf. State Farm Fire and Cas. Co. v. United States ex rel. Rigsby*, – U.S. –, 137 S.Ct. 436, 440 (2016) (holding that relators' violation of FCA's seal requirement did not mandate automatic dismissal of relators' complaint).

* * *

Several additional points are in order with respect to the use of the government's dismissal authority under section 3730(c)(2)(A). First, while the Department's position has been that the appropriate standard for dismissal under section 3730(c)(2)(A) is the "unfettered" discretion standard adopted by the D.C. Circuit rather than the "rational basis" test adopted by the 9th and 10th Circuits, we should argue that even the latter standard was intended to be a highly deferential one. Moreover, in those jurisdictions where the standard remains unresolved, in many cases the prudent course may be to identify the government's basis for dismissal and to argue that it satisfies any potential standard for dismissal under section 3730(c)(2)(A).

Second, the factors identified above are not mutually-exclusive, and the Department has often relied on multiple grounds for dismissal (for example, lack of merit and need to safeguard classified information). Nor, as noted above, are the factors identified in this memorandum intended to constitute an exhaustive list—there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam* action.

Third, in some cases there may be alternative grounds for seeking dismissal other than section 3730(c)(2)(A), such as the first to file bar, the public disclosure bar, the tax bar, the bar on *pro se* relators, or Federal Rule of Civil Procedure 9(b). Although the Department has sometimes moved to dismiss on these grounds under section 3730(c)(2)(A), we believe the better approach is to assert these grounds separately since they can provide alternative, independent legal bases for dismissal. It may sometimes be appropriate, however, to move for dismissal under section 3730(c)(2)(A) in the alternative based on one or more for the factors listed above.

Fourth, section 3730(c)(2)(A) does not require the government "to proceed in an all or nothing manner." *See Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351–53 (D.D.C.1990) ("The [FCA] nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the qui tam plaintiff's charges wholesale."). In certain situations, it may be appropriate to seek only partial dismissal of some defendants or claims. *See id.* (granting motion for partial dismissal under 3730(c)(2)(A)); *United States ex rel. Grober v. Summit Medical Group, Inc.*, No. 02-177-C (W.D. Ky. July 9, 2004) (same).

Fifth, where a *qui tam* case is a potential candidate for dismissal, Department attorneys should consult closely with the affected agency as to whether dismissal is warranted under any of the factors set forth in this guidance. The agency's recommendation should be obtained in advance of the filing of any request to dismiss. In cases where dismissal under section 3730(c)(2)(A) is opposed by the agency (because, for example, it would require the government to disclose sensitive information or could result in other collateral consequences), there may be alternative ways to address the deficiencies while accommodating the agency's desire to forego seeking dismissal. For example, if the agency views the alleged falsity as immaterial, the United States can provide an agency declaration to that effect. *See Trinity*, 872 F.3d at 664 (holding that district court erred in concluding alleged falsity was material to agency despite agency memorandum stating that there was "an unbroken chain of eligibility for Federal reimbursement" for the allegedly defective product at issue).

Sixth, although a motion to dismiss under section 3730(c)(2)(A) will often be filed at or near the time of declination, there may be cases where dismissal is warranted at a later stage, particularly when there has been a significant intervening change in the law or evidentiary record. However, if one waits until the close of discovery or trial, there is a risk that the court may be less receptive to the request given the expenditure of resources by the court and parties. The court may also be less receptive to a motion filed at a later stage when doing so undercuts a claimed desire to avoid or reduce costs associated with discovery or safeguard information in discovery. Attorneys considering dismissal should therefore allow for sufficient time to consult with the affected agency and, in delegated cases, to provide appropriate notice to the Fraud Section

Finally, attorneys planning to recommend declination or dismissal should, to the extent possible, consider advising relators of perceived deficiencies in their cases as well as the prospect of dismissal so that relators may make an informed decision regarding whether to proceed with the action. In many cases, relators may choose to voluntarily dismiss their actions, particularly if the government has advised the relator that it is considering seeking dismissal under section 3730(c)(2)(A).[5]

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[5] Since January 1, 2012, more than 700 *qui tam* actions have been dismissed by relators after the government elected not to intervene. The frequency with which relators voluntarily dismiss declined *qui tam* actions has significantly reduced the number of cases where the government might otherwise have considered seeking dismissal pursuant to section 3730(c)(2)(A).

court's decision." *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 809 (9th Cir.1988).

[18] Initially, Solomon contends that the district court erred as a matter of law by failing to apply the correct elements for a § 17200 action. In August of 1992, the California legislature amended § 17200 to provide a cause of action for a single act of unfair business practices. *See* Appellant's Request for Judicial Notice; *see also* Appellee's Response to Appellant's Request for Judicial Notice. Prior to that, a party was required to prove ongoing unfair business practices in order to state a valid claim. *See California v. Texaco,* 46 Cal.3d 1147, 1169–70, 252 Cal.Rptr. 221, 762 P.2d 385 (Cal. 1988), *superseded by statute,* § 17200 (August, 1992).

Allianz maintains that since Solomon's claim under § 17200 accrued by June of 1992, the new legislation is not applicable because it is not retroactive. Solomon counters that the tense of the phrase "has engaged" indicates retroactivity, making the new provision applicable. The California Supreme Court has expressly held that legislation is presumed to operate prospectively and "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." *Evangelatos v. Superior Court,* 44 Cal.3d 1188, 1209, 246 Cal.Rptr. 629, 753 P.2d 585 (Cal.1988).

The amendment to § 17200 has no retroactivity provision and there is nothing to indicate that the legislature intended a retroactive application. Further, California courts have suggested that the provision is not to be applied retroactively. *See Hewlett v. Squaw Valley Ski Corp.,* 54 Cal.App.4th 499, 518–19 n. 7, 63 Cal.Rptr.2d 118 (Cal.Ct.App.1997). Even adopting Solomon's analysis regarding the language "has engaged," that alone does not make "very clear" an intent of retroactivity. Thus, the district court did not err in applying the pre-August of 1992 provision. Further, under this provision, the court correctly concluded that Solomon failed to allege the required element of ongoing conduct.

[19] The district court's conclusion that Solomon's motion to amend would cause undue delay and prejudice was not an abuse of discretion. Solomon made the motion on the eve of the discovery deadline. Allowing the motion would have required re-opening discovery, thus delaying the proceedings. The district court did not abuse its discretion in denying the motion to amend at that late date. Further, Solomon's pending motion for judicial notice of § 17200, as amended in August of 1992, and the history thereof is DENIED.

The judgment of the district court is **AFFIRMED**.

UNITED STATES of America, Ex Rel., SEQUOIA ORANGE COMPANY; Lisle Babcock, Plaintiffs–Appellants,

v.

BAIRD–NEECE PACKING CORPORATION; Sunkist Growers Inc.; Sunland Packing House Company; San Joaquin Citrus; Baker Brothers Sunkist Packing House; Dept. of Agriculture, Clayton Yeutter, Secretary of Agriculture; Jack Parnell, Deputy Secretary of Agriculture; Joann Smith, Assistant Secretary of Agriculture; Dan Haley, Administrator, Agricultural Marketing Service; Kaweah Citrus Association; Oxnard Lemon Company; Edward Madigan, Secretary of Agriculture; Mission Citrus Company; Ventura Pacific Company; Saticoy Lemon Association; Dole Citrus, a California corporation aka Blue Goose Growers, Inc., dba Central Valley Citrus; Strathmore Packing House Company; Millwood Packing Inc.; Blue Banner Company Inc.; Ventura County Fruit Growers, Inc.; Limonera Company, Defendants–Appellees.

Kendall L. Nanock, Fresno, California, for Grand View defendants-appellees.

No. 96–15024.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 7, 1997.

Decided June 19, 1998.

Fruit processor and orange grower brought qui tam action, under False Claims Act, against other growers and packinghouses, alleging violations of prorate restrictions and reporting requirements in citrus marketing orders promulgated by federal government. Government was permitted to intervene. The United States District Court for the Eastern District of California, Oliver W. Wanger, J., 912 F.Supp. 1325, granted government's motion to dismiss, and plaintiffs appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) government may obtain dismissal of qui tam action even if action is meritorious; (2) standard governing dismissal is same as that applicable in substantive due process inquiry; (3) dismissal was based on valid purpose; (4) government was not judicially estopped from dismissing cases; and (5) plaintiffs were not entitled to amend complaint.

Affirmed.

1. Federal Courts ⚷776

Court of Appeals reviews de novo issue of statutory interpretation.

2. United States ⚷122

Government may obtain dismissal of qui tam action under False Claims Act, over objections of relators, even if action is meritorious and regardless of whether government intervened initially or later, upon showing of good cause. 31 U.S.C.A. § 3730(c)(2)(A).

3. United States ⚷122

Standard for determining whether government may dismiss qui tam action under False Claims Act, over relator's objections, is standard applicable in substantive due process inquiries, which requires government to show (1) identification of valid government purpose and (2) a rational relation between dismissal and accomplishment of purpose, and, if government satisfies two-step test, burden switches to relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal. 31 U.S.C.A. § 3730(c)(2)(A).

4. United States ⚷122

Government's dismissal of qui tam action brought, under False Claims Act, by fruit processor and orange grower against other growers and packinghouses, which alleged violations of government marketing orders, was based on valid government purpose of eliminating legal battles in the citrus industry and was not based on improper factors. 31 U.S.C.A. § 3730(c)(2)(A).

5. Estoppel ⚷68(2)

The doctrine of judicial estoppel is an equitable doctrine invoked by the district court at its discretion.

6. Federal Courts ⚷813

Court of Appeals reviews for abuse of discretion district court's decision whether to apply judicial estoppel doctrine.

7. Estoppel ⚷68(2)

Judicial estoppel bars a party from taking inconsistent positions in the same litigation.

8. Estoppel ⚷68(2)

Government was not judicially estopped from dismissing False Claims Act cases against citrus growers and packinghouses, in which defendants were alleged to have violated citrus marketing orders, despite earlier statement made during oral argument on government's motion to intervene that government intended to prosecute cases; government's change in policy was result of changed circumstances in industry. 31 U.S.C.A. § 3730(c)(2)(A).

9. Federal Courts ⚷817

Court of Appeals reviews for an abuse of discretion the district court's denial of a motion for leave to amend a complaint.

10. Federal Civil Procedure ⚷834

Relators in qui tam action under False Claims Act (FCA) were not entitled to amend complaint to allege non-FCA claims, after government obtained dismissal of FCA claims, due to extremely late date at which relators first requested leave to amend. 31 U.S.C.A. § 3729(a); Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

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Gerald D. Vinnard, Thomas, Snell, Jamison, Russell and Asperger for defendant-appellee Stark Packing Corp.

Kendall L. Manock, Fresno, California, Robert D. Wilkinson, Douglas M. Larsen, Baker, Manock & Jensen, for defendants-appellees Baird–Neece Packing Corp., Sunland Packing House Co., San Joaquin Citrus Assn., and Dole Citrus.

Appeal from the United States District Court for the Eastern District of California; Oliver W. Wanger, District Judge, Presiding. D.C. Nos. CV–88–00566–OWW, 89–00002–OWW, 89–00050–OWW, 91–00194–OWW, 91–00195–OWW, 91–00196–OWW, 91–00197–OWW, 93–05016–OWW, 94–05287–OWW, 94–05288–OWW, 94–05289–OWW, 94–05290–OWW, 94–05291–OWW.

Before: SNEED, SCHROEDER and BRUNETTI, Circuit Judges.

SCHROEDER, Circuit Judge:

This is a qui tam case under the False Claims Act (FCA). One citrus company seeks damages from other citrus companies, claiming that they made false statements to the government in connection with a citrus marketing program. The government intervened several years after the litigation began and sought dismissal under 31 U.S.C. § 3730(c)(2)(A) because it had decided to abandon the entire marketing program. The case must be seen against the background of a war in the citrus industry related to the administration of that program. The district court granted the government's motion to dismiss, finding that the government's decision to end that war on all fronts, including dismissal of the qui tam claims, was rationally related to a legitimate governmental purpose. *See United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.,* 912 F.Supp. 1325 (E.D.Cal.1995).

The qui tam relators appeal contending that because the false claims actions had some merit, the government cannot seek dismissal. The appeal thus requires us to consider what standard a court should apply when considering the government's motion to dismiss a qui tam action that otherwise would not be dismissed before the litigation was fully resolved. We affirm.

BACKGROUND

Sequoia Orange Company (an orange processor) and Lisle Babcock (an orange grower) filed 34 qui tam actions against a number of citrus industry growers and packinghouses alleging violations of the orange and lemon marketing orders promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. §§ 601–626. The relators began filing the actions in 1988.

The AMAA "authorizes the Secretary of Agriculture to issue marketing orders limit-

ing the quantity of commodities shipped into markets identified by the Secretary, thus protecting prices for producers and maintaining orderly marketing conditions." *Cecelia Packing Corp. v. USDA,* 10 F.3d 616, 618 (9th Cir.1993). The Secretary in 1984 had issued orange and lemon marketing orders that regulated the quantity of oranges and lemons shipped to market by citrus handlers in Arizona and California. *See* 7 U.S.C. § 608c; 7 C.F.R. §§ 907.1, 908.1, 910.1 (1994). Citrus handlers who ship oranges and lemons in excess of their allotment ("prorate") are subject to criminal fines and civil penalties. *See* 7 U.S.C. §§ 608a(5), 608c(14).

The qui tam relators alleged that the defendants had, over the course of approximately ten years, violated the prorate provisions of the orange and lemon marketing orders by over-shipping citrus and failing accurately to report, account and pay assessments for those overshipments. Prior to the expiration of the 60–day seal period, *see* 31 U.S.C. § 3730(b)(2), the government elected to intervene in 10 of the qui tam cases.

As the relators were filing their qui tam complaints, the government was also filing prorate violation claims under the AMAA against citrus industry growers and packinghouses, including Sequoia Orange Company. After discovering growing evidence of widespread prorate violations in the industry, the Secretary concluded that the prorate cheating reflected dissatisfaction with the citrus marketing orders, and that the orders had become divisive. In June 1993 the Secretary formally suspended orange and lemon prorate regulation and invited the citrus industry to propose amendments to the marketing orders.

Simultaneously, the government proposed a settlement of all AMAA and FCA cases alleging prorate violations in order to end industry turmoil. To facilitate the settlement, the government moved to intervene in the remaining 24 qui tam cases pursuant to 31 U.S.C. § 3730(c)(3), which permits the government to intervene in a qui tam action at any time "upon a showing of good cause." The district court granted the motion, over the relators' objections, on the basis of the government's representations that it would litigate the qui tam actions, in conjunction with the AMAA cases, if a settlement could not be reached.

While the settlement negotiations were proceeding, the district court ruled in April 1994 that the 1984 orange marketing orders were unlawfully promulgated and that the prorate provisions of the orange marketing orders were therefore invalid. *See United States v. Sunny Cove Citrus Ass'n,* 854 F.Supp. 669, 697 (E.D.Cal.1994). The *Sunny Cove* case involved the government prosecution of another citrus handler, Sunny Cove, for violations of orange prorate regulations. Sunny Cove successfully defended the prosecution on the ground that the Secretary's reinstatement of prior marketing orders was invalid. That decision made settlement less likely in these qui tam cases because the overwhelming majority of qui tam and AMAA actions were based on the invalidated prorate regulations.

In May 1994, the Secretary announced his decision to terminate the citrus marketing orders, dismiss all pending AMAA actions, and withdraw from the FCA cases. The Secretary justified this decision on the failure of the settlement negotiations, the prospect of more litigation after the *Sunny Cove* decision, and the desire to end the divisiveness in the citrus industry caused by over ten years of litigation. The Secretary concluded that the best way to advance the interests of the industry was to "clean the slate."

At the time of the Secretary's announcement, the government apparently did not believe it had the authority to dismiss the qui tam actions over the relators' objections. After soliciting advice from all parties on the government's authority to dismiss under 31 U.S.C. § 3730(c)(2)(A), the government moved for dismissal in August, 1994, citing six reasons: (1) to end the divisiveness in the citrus industry; (2) to facilitate a new marketing order; (3) to terminate protracted and burdensome litigation; (4) to protect the United States' taxpayers from continuing and escalating litigation expenses; (5) to curtail the drain on private resources resulting from the litigation; and (6) to allow the growers, agricultural cooperatives, handlers and oth-

ers to work together in shaping new marketing tools.

After a four-day evidentiary hearing, the district court granted the government's motion to dismiss the qui tam actions, ruling that the government sought dismissal for legitimate government purposes; that the reasons offered by the government were rationally related to these legitimate government purposes; and that the dismissal was not arbitrary or capricious. *See* 912 F.Supp. at 1353. The relators appeal, contending that the district court could not dismiss on the government's motion unless the court found the cases lacked merit.

DISCUSSION

The legal issues turn on the provisions of the False Claims Act as it was amended in 1986. Under the qui tam provisions of the FCA, a private individual, referred to as a relator, may file an action on behalf of the federal government against any individual or company who has knowingly presented a false claim to the government for payment. *See* 31 U.S.C. §§ 3729(a), 3730(b). A successful relator will generally receive a share of the civil fines imposed and be eligible for attorneys' fees and costs. *See* 31 U.S.C. § 3730(d); *United States ex rel. Hall v. Teledyne Wah Chang Albany,* 104 F.3d 230, 233 (9th Cir.1997).

To proceed with a qui tam action, the relator must serve a copy of the complaint on the government 60 days before it is served on the defendant. *See* 31 U.S.C. § 3730(b)(2). During the 60–day period, the government can investigate the complaint's allegations and elect to intervene in the action, in which case the action is conducted by the government. 31 U.S.C. § 3730(b)(4)(A).

When the government chooses not to take over a qui tam action, the relator has the right to conduct the action. 31 U.S.C. § 3730(c)(3). However, even in cases where the government initially elects not to take over the action, the court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3); *United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743, 746 (9th Cir.1993). The government may dismiss the action "notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A); *Kelly,* 9 F.3d at 746.

I.

Dismissal of a Qui Tam Action

[1] The relators' primary contention is that the district court erred by interpreting 31 U.S.C. § 3730(c)(2)(A) to allow the government to dismiss a meritorious qui tam action. The government conceded, for purposes of its motion to dismiss, that the FCA claims against the defendants were meritorious. The issue is one of statutory interpretation which we review de novo. *See United States ex rel. Lujan v. Hughes Aircraft Co.,* 67 F.3d 242, 245 (9th Cir.1995).

[2] Although the statute is silent regarding the circumstances under which the government may dismiss a qui tam action, the decision to dismiss has been likened to a matter within the government's prosecutorial discretion in enforcing federal laws. *See Kelly,* 9 F.3d at 756 (rejecting qui tam defendant's contention that 31 U.S.C. § 3730(c)(2)(A) impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits in the exercise of its prosecutorial authority); *see also United States ex rel. Killingsworth v. Northrop Corp.,* 25 F.3d 715, 724 (9th Cir. 1994) ("The Court will not assume that the qui tam provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General.") (quoting *Juliano v. Federal Asset Disposition Ass'n,* 736 F.Supp. 348, 351 (D.D.C.1990), *aff'd,* 959 F.2d 1101 (D.C.Cir.1992)).

The relators argue that interpreting 31 U.S.C. § 3730(c)(2)(A) to give the government authority to dismiss a meritorious qui tam action is inconsistent with the general framework of the False Claims Amendments Act of 1986, Pub.L. No. 99–562, 100 Stat. 3154, which was intended to provide relators with "increased involvement in suits brought

by the relator but litigated by the Government." S.Rep. No. 99–345, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278; *see also Kelly,* 9 F.3d at 745 ("Congress amended the FCA in 1986 to . . . enlist the aid of the citizenry in combatting the rising problem of 'sophisticated and widespread fraud.' ") (citation omitted).

Before the 1986 amendments, when the government elected to intervene in a qui tam action, the suit was conducted solely by the government. The 1986 amendments allow the relator to continue as a party to the action after the government's intervention. *See* 31 U.S.C. § 3730(c)(1). Although the amendments increased the relator's role in such a case, the government still has "primary responsibility" for the case and now enjoys supervisory powers over the relator. *Id.* The government can limit the relator's participation by restricting the number of the relator's witnesses or the length of their testimony. *See* 31 U.S.C. § 3730(c)(2)(C). The government may also stay the relator's discovery requests if they are likely to interfere with the government's criminal or civil investigation of related matters. *See* 31 U.S.C. § 3730(c)(4). The amended statute allows the government to settle an action, notwithstanding the objections of the relator, as long as the court determines that the proposed settlement is fair. *See* 31 U.S.C. § 3730(c)(2)(B). Most relevant to the present suit, the government has the right to dismiss the action, notwithstanding the relator's objection, if the relator is afforded notice and a hearing. *See* 31 U.S.C. § 3730(c)(2)(A).

The 1986 amendments have also expanded the government's ability to intervene in a qui tam action. The government may move for an extension of the original 60–day period for deciding whether to intervene. *See* 31 U.S.C. § 3730(b)(3). Even after that period has expired, the government now has the right to track the litigation and to intervene at a later date upon a showing of good cause. *See* 31 U.S.C. § 3730(c)(3).

Thus, while we have observed that the False Claims Amendments Act of 1986 provided "increase[d] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government," *Killingsworth,* 25 F.3d at 721, the Act actually increased, rather than decreased, executive control over qui tam lawsuits. This has been accomplished by broadening the government's powers of intervention, and by giving the government the ability to supervise the relator's participation in a qui tam action when the government elects to intervene. Certain of the government's supervisory powers, such as the power to stay the relator's discovery, apply even if the government decides not to intervene. As one court has concluded, "[t]he 1986 version of the False Claims Act continues the evolution of greater executive control over qui tam lawsuits." *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.,* 714 F.Supp. 1084, 1090 (C.D.Cal.1989).

Although the amendments give the relator the right to remain a party after government intervention, the government's power to dismiss or settle an action is broad. The amended statute grants the relators an opportunity for a hearing on the motion to dismiss, but does not specify any conditions under which the relator may block the motion. This court has previously noted that "[i]t is not clear whether in practice this notice and hearing requirement has amounted to much of a hurdle for the government." *Kelly,* 9 F.3d at 753 n. 11.

The relators point to the statement in *Kelly* that 31 U.S.C. § 3730(c)(2)(A) allows the government to "move for dismissal of a case which it believes has no merit." *See id.* at 753. They suggest that this statement means that lack of merit is the exclusive ground upon which the government may seek dismissal. *Kelly* does not so hold.

The legislative history of the 1986 Amendments supports the district court's conclusion that a meritorious suit may be dismissed upon a proper showing. The Senate Report states that the False Claims Amendments Act of 1986 "provides qui tam plaintiffs with a more direct role . . . in acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason." S.Rep. No. 99–345, at 25–26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. This state-

ment reflects congressional intent that the qui tam statute create only a limited check on prosecutorial discretion to ensure suits are not dropped without legitimate governmental purpose.

The relators next contend that even if the government could have dismissed the cases had it intervened initially, it could not move for dismissal after it later intervened for good cause pursuant to 31 U.S.C. § 3730(c)(3). We rejected a similar contention in *Kelly:* "[W]hen the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start." *Kelly,* 9 F.3d at 752. Nothing in § 3730(c)(2)(A) purports to limit the government's dismissal authority based upon the manner of intervention. This court has noted that § 3730(c)(2)(A) may permit the government to dismiss a qui tam action without actually intervening in the case at all. *See Kelly,* 9 F.3d at 753 n. 10 (*citing Juliano v. Federal Asset Disposition Ass'n,* 736 F.Supp. 348 (D.D.C.1990), *aff'd,* 959 F.2d 1101 (D.C.Cir. 1992)).

II.

Standard Governing a Motion to Dismiss Under 31 U.S.C. § 3730(c)(2)(A)

[3] The relators next challenge the district court's choice of standard governing dismissal under 31 U.S.C. § 3730(c)(2)(A). The relators contend that, if the government does have the authority to dismiss a meritorious qui tam action under 31 U.S.C. § 3730(c)(2)(A), the applicable standard is Rule 41(a)(2) of the Federal Rules of Civil Procedure. That rule allows the court to grant a plaintiff's dismissal motion only with appropriate terms and conditions to protect the defendant from prejudice. In this case, because dismissal prejudiced the relators by precluding a qui tam award, the relators claim that dismissal should not have been permitted.

Rule 41 protects defendants from vexatious plaintiffs. *See Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 397, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). In this case, the plaintiffs, or relators, seek protection from the dismissal decision of the real party in interest, the government, under a specific statute establishing unique relationships among the parties. The district court correctly ruled that Rule 41 did not apply.

The qui tam statute itself does not create a particular standard for dismissal. The district court acted reasonably in adopting the following standard: "A two step analysis applies here to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." 912 F.Supp. at 1341. If the government satisfies the two-step test, the burden switches to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* at 1347. The same analysis is applied to determine whether executive action violates substantive due process. *See e.g., Lockary v. Kayfetz,* 917 F.2d 1150, 1155 (9th Cir.1990).

This standard also draws significant support from the Senate Report to the False Claims Amendments Act of 1986, which explained that the relators may object if the government moves to dismiss without reason. S.Rep. No. 99–345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. A hearing is appropriate "if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations." *Id.*

Moreover, such a rational relation test avoids any separation of powers concerns that this court addressed in *Kelly.* There, we rejected a qui tam defendant's contention that 31 U.S.C. § 3730(c)(2)(A) impermissibly grants the judiciary approval authority over government decisions to dismiss qui tam suits in the exercise of its prosecutorial authority. *See United States ex rel. Kelly,* 9 F.3d at 756. We said:

> We conclude that the judicial involvement which the FCA authorizes does not contravene the separation of powers principle. First, in the absence of any meaningful

> indication that [the notice and hearing] requirements pose significant barriers to the Executive Branch's exercise of its prosecutorial authority, we see no reason to construe them as such and thereby heighten constitutional concerns. See note 8. Second, as we noted earlier, ample precedent exists for judicial oversight of the government's decision to dismiss a qui tam action. See note 12.

Id.

Here, the district court has respected the Executive Branch's prosecutorial authority by requiring no greater justification of the dismissal motion than is mandated by the Constitution itself. *See United States v. Redondo–Lemos,* 955 F.2d 1296, 1298–99 (9th Cir.1992) (due process prohibits arbitrary or irrational prosecutorial decisions).

III.

Application of the Rational Relation Standard

[4] The relators contend that the district court misapplied the rational relation standard and that the reasons offered by the government for dismissal were not rationally related to a legitimate government interest. We conclude that the government met its burden.

The relators first argue that elimination of legal battles in the citrus industry is not a legitimate government interest under the AMAA. The statute directs the Secretary to oversee orderly marketing processes. *See* 7 U.S.C. § 602(1). Peace among competitors and regulators facilitates orderly marketing. This is especially true under a statute, which as the Supreme Court has noted, "contemplates a *cooperative* venture among the Secretary, handlers, and producers." *Block v. Community Nutrition Inst.,* 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) (emphasis added).

The relators next assert that the government's dismissal motion was based on improper factors, such as political pressure from the defendants and members of Congress. However, as noted by the district court, citizens are entitled to advocate the passage or enforcement of laws, *see, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 139, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) ("It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."), and members of Congress may seek to influence agency action, *see, e.g., Radio Ass'n on Defending Airwave Rights, Inc. v. United States Dep't of Transp.,* 47 F.3d 794, 808 (6th Cir.1995) ("Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws."). There was no evidence that the defendants engaged in bribery, fraud, or coercion, or otherwise conspired with the government to dismiss the qui tam actions for improper reasons.

Third, the relators contend that the government sought dismissal because Sequoia Orange Company itself was a prorate cheater. The record shows, however, that the government deemed further FCA litigation over prorate violations harmful to the industry as a whole. Dismissal enabled the government to treat all alleged prorate violators equally by dismissing all enforcement actions, including the Secretary's AMAA enforcement action against Sequoia.

Next, the relators contend that the government's concern with litigation costs was irrelevant in light of the fact that the FCA contemplates reliance on private financing for anti-fraud enforcement. The district court, however, properly noted that the government can legitimately consider the burden imposed on the taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs. *See* 912 F.Supp. at 1346.

The relators finally contend that the district court erred by granting the government's motion to dismiss the qui tam actions relating to lemon marketing because the lemon order, unlike the orange order, had not been invalidated by the *Sunny Cove* decision. The government presented evidence that (1) various lemon handlers were under investigation for prorate violations and (2) the lemon

prorate violations were comparable to prorate cheating in the orange industry and potentially as pervasive. The dismissal of the lemon cases was therefore rationally related to the legitimate government interest in preserving the financial stability of the lemon industry.

IV.

Judicial Estoppel

[5, 6] The relators contend that the doctrine of judicial estoppel bars the government from dismissing the qui tam actions in light of the government's earlier declarations, in support of its motion to intervene in the orange qui tam actions, that it would diligently prosecute the FCA claims. The doctrine of judicial estoppel is an equitable doctrine invoked by the district court at its discretion. *See Morris v. California,* 966 F.2d 448, 453 (9th Cir.1992). This court reviews for an abuse of discretion. *See United States v. Ruiz,* 73 F.3d 949, 953 (9th Cir.1996).

[7, 8] Judicial estoppel bars a party from taking inconsistent positions in the same litigation. *See Morris,* 966 F.2d at 452. In support of its motion to intervene in the qui tam actions, the government represented to the district court that it would litigate the FCA claims if no settlement was reached. The relators contend that this representation is inconsistent with the government's later decision to dismiss. In moving to dismiss, however, the government was motivated by events that transpired after its intervention, most notably the decision in *Sunny Cove,* which declared the orange marketing orders invalid. There is no indication that the government acted in bad faith by representing that it would litigate the FCA claims if settlement negotiations fell through. *See Helfand v. Gerson,* 105 F.3d 530, 534 (9th Cir.1997). Rather, the government changed course when it determined that settlement was no longer a reasonable possibility after *Sunny Cove.* This was a rational policy decision that the government was entitled to make under the qui tam provisions. Accordingly, the district court did not abuse its discretion in concluding that there was no equitable reason to apply judicial estoppel.

V.

Amendment of Qui Tam Complaints

[9] This court reviews for an abuse of discretion the district court's denial of a motion for leave to amend a complaint. *See United States v. County of San Diego,* 53 F.3d 965, 969 n. 6 (9th Cir.1995).

[10] After the district court granted the government's motion to dismiss the qui tam actions, the relators informally requested leave to file amended complaints alleging non-FCA claims. The court denied the relators' request on the ground that they had failed to provide reasonable notice and an opportunity for hearing on the request, in violation of Rule 15 of the Federal Rules of Civil Procedure and the Local Rules of the Eastern District of California. Given the extremely late date at which the relators first requested leave to amend, the district court did not abuse its discretion in denying the request. *See* Fed.R.Civ.P. 15(a); *Moore v. Kayport Package Express,* 885 F.2d 531, 538 (9th Cir.1989) (court may consider delay and prejudice when ruling on motion for leave to amend).

CONCLUSION

We conclude that 31 U.S.C. § 3730(c)(2)(A) permits the government to dismiss a meritorious qui tam action over a relator's objections. Where, as here, the government offers reasons for dismissal that are rationally related to a legitimate government interest, the qui tam action may be dismissed.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES EX REL. SCOTT ROSE; MARY AQUINO; MITCHELL NELSON; LUCY STEARNS, *Plaintiffs-Appellees*,	No. 17-15111
v.	D.C. No. 4:09-cv-05966-PJH
STEPHENS INSTITUTE, dba Academy of Art University, *Defendant-Appellant.*	OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief Judge, Presiding

Argued and Submitted December 6, 2017
San Francisco, California

Filed August 24, 2018

Before: Susan P. Graber and N. Randy Smith, Circuit Judges, and Jennifer G. Zipps,* District Judge.

Opinion by Judge Graber;
Dissent by Judge N.R. Smith

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* The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

SUMMARY**

False Claims Act

The panel affirmed the district court's order denying defendant's motion for summary judgment in a qui tam action brought under the False Claims Act.

Relators, former admissions representatives for Academy of Art University, an art school in San Francisco, alleged that the school violated an incentive compensation ban included in its program participation agreement with the Department of Education, through which it qualified for federal funding in the form of federal financial aid to its students under Title IV of the Higher Education Act.

A claim under the False Claims Act requires: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.

In *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010), this court held that the falsity requirement can be satisfied either by express false certification or by implied false certification, which requires a showing that (1) the defendant explicitly undertook to comply with a law, rule, or regulation that was implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with the law, rule, or regulation. In *Universal Health Servs., Inc. v. United*

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

States ex rel. Escobar, 136 S. Ct. 1989 (2016), the Supreme Court held that a showing of implied false certification requires the satisfaction of two conditions: "first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." The panel held that under two post-*Escobar* Ninth Circuit cases, relators must satisfy *Escobar*'s two conditions to prove falsity. The panel concluded that a reasonable trier of fact could conclude that Academy of Art's actions met the *Escobar* requirements for falsity.

In *Escobar*, the Supreme Court also clarified that whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality requirement; therefore, even when a requirement is expressly designated a condition of payment, not every violation of that requirement gives rise to liability. Instead, materiality looks to the effect on the likely or actual recipient of the alleged misrepresentation, meaning the government. The panel concluded that *Escobar* did not overrule *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), which held that, with regard to materiality, the question is whether the false certification was relevant to the government's decision to confer a benefit. Applying the *Escobar* standard of materiality, the panel concluded that a reasonable trier of fact could find materiality because the Department of Education's payment was conditioned on compliance with the incentive compensation ban, because of the Department's past enforcement activities, and because of the substantial size of the forbidden incentive payments.

The panel further held that, on summary judgment, Academy of Art did not show that any violations of the incentive compensation ban fell within the Department of Education's now-repealed safe harbor provision, which required, among other things, that any adjustment in compensation was not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid.

Dissenting in part, Judge N.R. Smith agreed with the majority's opinion through its discussion of falsity. Judge Smith disagreed with the majority's analysis of materiality because the majority failed to recognize that *Hendow*'s materiality holding is no longer good law after *Escobar*; failed to fully articulate the Supreme Court's materiality standard as outlined in *Escobar*; and applied its erroneous legal standard to the facts at hand, reaching an erroneous conclusion. Judge Smith wrote that he would reverse the district court's materiality finding, vacate the judgment, and remand for additional discovery and further briefing.

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OPINION

GRABER, Circuit Judge:

This qui tam action, brought under the False Claims Act, comes to us on interlocutory appeal from the district court's denial of summary judgment so that we can settle questions of law posed in the wake of *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). We affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

Defendant Stephens Institute, doing business as Academy of Art University, is an art school in San Francisco that offers undergraduate and graduate degrees. Defendant receives federal funding—in the form of federal financial aid to its students—through various funding programs available under Title IV of the Higher Education Act. To qualify for that funding, Defendant entered into a program participation agreement with the Department of Education ("Department"), in which it pledged to follow various requirements, including the incentive compensation ban. The incentive compensation ban prohibits schools from rewarding admissions officers for enrolling higher numbers of students. 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22).

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[1] "We review *de novo* the district court's denial of summary judgment. When doing so, we 'must determine whether the evidence, viewed in a light most favorable to the non-moving party, presents any genuine issues of material fact and whether the district court correctly applied the law.'" *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2016) (quoting *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995)). Here, therefore, we view the evidence in the light most favorable to Relators.

In 2006, Defendant's admissions department instituted a new policy to encourage admissions representatives to enroll more students. The policy established an enrollment goal for each admissions representative. If a representative succeeded in enrolling that number of students, he or she would receive a salary increase of up to $30,000. Conversely, a representative could have his or her salary decreased by as much as $30,000 for failing to reach the assigned enrollment goal. Defendant characterized those adjustments as dependent on both quantitative success, meaning a representative's enrollment numbers, and qualitative success, meaning the representative's non-enrollment performance. But, in practice, the employees understood that their salary adjustments rested entirely on their enrollment numbers. Defendant rewarded one team of representatives with an expense-paid trip to Hawaii. The team received that reward solely because of their enrollment numbers.

That enrollment incentive policy remained in place until 2009, when Defendant instituted new enrollment goals and a "scorecard" system for calculating salary adjustments. The scorecard system involved separate salary adjustment calculations for qualitative and quantitative performance. An admissions representative could receive an adjustment of as much as $23,000 for quantitative performance alone; adjustments related to qualitative performance topped out at $6,000. Managers were told not to share those scorecards with admissions representatives because of concerns about compliance with the participation agreement. The scorecard policy remained in effect until 2010.

Relators Scott Rose, Mary Aquino, Mitchell Nelson, and Lucy Stearns, who are former admissions representatives for Defendant, brought this False Claims Act action in 2010, claiming that Defendant violated the incentive compensation ban from 2006 through 2010. Defendant filed a motion for summary judgment, which the district court denied on May 4, 2016. But on June 16, 2016, the Supreme Court decided *Escobar*, in which the Court clarified the law surrounding falsity and materiality in False Claims Act claims. 136 S. Ct. at 1999, 2001. Defendant filed a motion for reconsideration in light of *Escobar*, which the district court likewise denied. But the district court granted in part Defendant's motion for an interlocutory appeal, certifying to this court several questions relating to *Escobar*'s effect on our precedent.[2]

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[2] The three questions certified for interlocutory appeal are:

> (1) Must the "two conditions" identified by the Supreme Court in Escobar always be satisfied for implied false certification liability under the [False Claims Act], or does *Ebeid*'s test for implied false certification remain good law?
>
> (2) Does an educational institution automatically lose its institutional eligibility if it fails to comply [with] the [incentive compensation ban]?
>
> (3) Does *Hendow*'s holding that the [incentive compensation ban] is material under the [False Claims Act] remain good law after *Escobar*?

Although we structure our discussion differently, we have endeavored to answer those questions.

DISCUSSION

A. Legal Background

The Department of Education oversees the grant of Title IV funds to colleges and universities. To qualify for such funds, schools must comply with a number of statutory, regulatory, and contractual requirements. One such requirement is the incentive compensation ban, which is mandated by statute, regulation, and contractual program participation agreements. The incentive compensation ban prohibits schools from providing "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities." 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22). If individuals become aware of a school's violation of the incentive compensation ban, they can bring a qui tam action on behalf of the United States under the False Claims Act. When the Department becomes aware of such violations, it also can take direct action against noncompliant schools by, among other things, mandating corrective action; reaching a settlement agreement; imposing fines; or limiting, suspending, or terminating a school's participation in federal student aid programs.

The False Claims Act imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). We articulated the four elements of a False Claims Act claim in *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), another

case that involved alleged violations of the incentive compensation ban. Under *Hendow*, a successful False Claims Act claim requires: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *Id.* at 1174. But *Escobar* has unsettled the state of this circuit's law with regard to two of those elements: falsity and materiality.

B. Implied False Certification

The falsity requirement can be satisfied in one of two ways. The first is by express false certification, which "means that the entity seeking payment [falsely] certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted." *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). The other is by implied false certification, which "occurs when an entity has *previously* undertaken to expressly comply with a law, rule, or regulation [but does not], and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim." *Id.* (emphasis added).

In *Ebeid*, we clarified that, to establish a claim under the implied false certification theory, a relator must show that "(1) the defendant explicitly undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation." *Id.* Thus, under *Ebeid*, a relator bringing an implied certification claim could show falsity by pointing to

noncompliance with a law, rule, or regulation that is necessarily implicated in a defendant's claim for payment.

The Supreme Court subsequently addressed implied false certification in *Escobar*. There, the Supreme Court held that

> [t]he implied certification theory can be a basis for liability, *at least* where two conditions are satisfied: first, the claim does not merely request payment, but also makes *specific representations* about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

Escobar, 136 S. Ct. at 2001 (emphases added).

We have addressed *Escobar* in two cases that create uncertainty about the ongoing validity of *Ebeid*'s test for falsity in implied false certification cases. First, in *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332 (9th Cir. 2017), we considered only *Escobar*'s two-part test in determining that the plaintiff's implied false certification claim failed; we did not consider whether the claim met the lower standard for falsity enunciated in *Ebeid*. Then, in *United States ex rel. Campie v. Gilead Sciences, Inc.*, we noted that *Escobar* "'clarif[ied] *some* of the circumstances in which the False Claims Act imposes liability' under [an implied false certification] theory." 862 F.3d 890, 901 (9th Cir. 2017) (emphasis added) (quoting *Escobar*, 136 S. Ct. at 1995), *petition for cert. filed*, 86 U.S.L.W. 3519 (U.S. Dec. 26, 2017) (No. 17-936). But we then stated that the

"Supreme Court held that although the implied certification theory can be a basis for liability, two conditions *must* be satisfied." *Id.* (emphasis added) (citing *Escobar*, 136 S. Ct. at 2000).

Were we analyzing *Escobar* anew, we doubt that the Supreme Court's decision would require us to overrule *Ebeid*. The Court did not state that its two conditions were the *only* way to establish liability under an implied false certification theory. But our post-*Escobar* cases—without discussing whether *Ebeid* has been fatally undermined—appear to *require Escobar*'s two conditions nonetheless. We are bound by three-judge panel opinions of this court. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). We conclude, therefore, that Relators must satisfy *Escobar*'s two conditions to prove falsity, unless and until our court, en banc, interprets *Escobar* differently.

On this record, a reasonable trier of fact could conclude that Defendant's actions meet the *Escobar* requirements for falsity. In the Federal Stafford Loan School Certification form, Defendant specifically represented that the student applying for federal financial aid is an "eligible borrower" and is "accepted for enrollment in an eligible program." Because Defendant failed to disclose its noncompliance with the incentive compensation ban, those representations could be considered "misleading half-truths." That is sufficient evidence to create a genuine issue of material fact and, therefore, to defeat summary judgment.

C. Materiality

Under the False Claims Act, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). In *Hendow*, we held that the relators had alleged adequately that the University of Phoenix "engaged in statements or courses of conduct that were *material* to the government's decision with regard to funding." 461 F.3d at 1177. In concluding that the alleged violations of the incentive compensation ban were material, we relied on the fact that the statute, regulation, and program participation agreement all explicitly conditioned payment on compliance with the incentive compensation ban. *Id.* We did not explicitly consider any other factors in determining that the relators properly pleaded the materiality of the university's violations. *Id.* We noted, with regard to materiality, that "the question is merely whether the false certification . . . was relevant to the government's decision to confer a benefit." *Id.* at 1173.

In *Escobar*, the Supreme Court elaborated on what can and cannot establish materiality in the context of the False Claims Act. The Court clarified that "[w]hether a provision is labeled a condition of payment is *relevant* to but not *dispositive* of the materiality inquiry." *Escobar*, 136 S. Ct. at 2001 (emphases added). Therefore, "even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability." *Id.* at 1996. Instead, the Court explained, "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation,"

meaning the government. *Id.* at 2002 (internal quotation marks and brackets omitted).[3]

The Supreme Court then laid out three scenarios that may help courts determine the likely or actual behavior of the government with regard to a given requirement. First, "proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Id.* at 2003. Second, the Court explained that, "if the Government pays a particular claim in full despite its *actual knowledge* that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id.* (emphasis added). Third, "if the Government regularly pays a particular type of claim in full despite *actual knowledge* that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." *Id.* at 2003–04 (emphasis added). The Court further noted that materiality "cannot be found where noncompliance is minor or insubstantial." *Id.* at 2003.

In our view, *Hendow* is not "clearly irreconcilable with the reasoning or theory of" *Escobar* and, therefore, has not been overruled. *Miller*, 335 F.3d at 893. It is true that *Hendow* explicitly considered only the facts that the

[3] The dissent maintains that we have ignored the Supreme Court's assertion that the materiality standard is "rigorous" or "demanding." Dissent at 24–25. Those adjectives, while they give flavor to the Court's discussion, do not establish the *test* that the Court requires us to use. The actual test to be applied is the one that we quote and apply in text: what is the effect of a misrepresentation on the likely or actual behavior of the government. We have, in our view, applied that test rigorously.

defendant had violated a statute, regulation, and contract—by not complying with the incentive compensation ban—and that payment was conditioned on compliance with the ban. 461 F.3d at 1175. But *Hendow* did not state that noncompliance is material in *all* cases. For instance, *Hendow* itself may have been decided differently had there been countervailing evidence of immateriality.[4] After *Escobar*, it is clear that noncompliance with the incentive compensation ban is not material per se. Nor does noncompliance automatically revoke institutional eligibility. Rather, we must examine the particular facts of each case. In other words, we view *Escobar* as creating a "gloss" on the analysis of materiality. But the four basic elements of a False Claims Act claim, set out in *Hendow*, remain valid. *See supra* p. 10.

Applying the *Escobar* standard of materiality to the facts here, we conclude that Defendant has not established as a matter of law that its violations of the incentive compensation ban were immaterial. A reasonable trier of fact could find materiality here because the Department's payment was conditioned on compliance with the incentive compensation ban, because of the Department's past enforcement activities,

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[4] The dissent claims that *Hendow* explicitly rejected "the 'countervailing evidence' [of immateriality] before it" when determining that the incentive compensation ban is material. Dissent at 23. *Hendow* did not do so. The opinion contains no suggestion whatsoever that any countervailing *evidence* existed. Rather, the dissent quotes from a passage in which the opinion considers the parties' *legal* arguments concerning the extent of the enforcement powers of the Department of Education; did "its authority to take 'emergency action' . . . mean[] that the statutory requirements are causally related to its decision to pay out moneys due"? *Hendow*, 461 F.3d at 1175. *Hendow* simply does not discuss the relevance of evidence that, for example, the Department refused to impose sanctions on schools that violated the incentive compensation ban. *Hendow* and *Escobar*, therefore, are not clearly irreconcilable. *Miller*, 335 F.3d at 893.

and because of the substantial size of the forbidden incentive payments.[5]

1. Funds Conditioned on Compliance

We consider first the same factor that *Hendow* did: the government conditioned the payment of Title IV funds on compliance with the incentive compensation ban through statute, regulation, and contract. Had Defendant not certified in its program participation agreement that it complied with the incentive compensation ban, it could not have been paid, because Congress required as much.[6] After *Escobar*, that triple-conditioning of Title IV funds on compliance with the incentive compensation ban may not be sufficient, without

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[5] In concluding that the existing record is insufficient to create an issue of fact as to materiality, the dissent demands more certainty than *Escobar* and general principles governing summary judgment require. For example, the dissent argues that the government's responses to other schools' similar misrepresentations is insufficient to demonstrate that the government "*would* find" the misrepresentations material in this case. Dissent at 27 (emphasis added). But *Escobar* speaks in terms of "likely," as well as "actual," behavior. 136 S. Ct. at 2002. As another example, the dissent states that "[s]ignificant materiality questions remain," the answers to which "are required before liability" can attach. Dissent at 27–28. But the only question that we are called on to answer in this summary judgment appeal is whether there is a genuine issue of material fact; we need not and do not decide whether Relators do or should prevail.

[6] Defendant argues that the incentive compensation ban is expressly identified as a condition of *participation* in the government's Title IV programs, not as a condition of *payment*. We addressed that argument in *Hendow* and concluded that it is "a distinction without a difference." 461 F.3d at 1176. Because no subsequent Supreme Court or Ninth Circuit en banc case has undermined our holding, we cannot, and do not, revisit that determination now.

more, to prove materiality, but it is certainly probative evidence of materiality.

2. Past Department Actions

We next consider how the Department has treated similar violations. We look to the three scenarios bearing on materiality that the Supreme Court enunciated in *Escobar*, though none of them is necessarily required or dispositive. *See Escobar*, 136 S. Ct. at 2003–04 (laying out scenarios that can constitute proof of materiality or immateriality, but noting that such proof "is not necessarily limited to" those scenarios).

First, we ask whether there is "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance" with the incentive compensation ban, because such a showing can help establish that the requirement was material. *Escobar*, 136 S. Ct. at 2003. There is no such evidence in this case and, therefore, that inquiry does not factor into our analysis.

Second, we ask whether the Department has paid "a particular claim in full despite its *actual knowledge* that" the incentive compensation ban was violated, because "that is very strong evidence that [the incentive compensation ban is] not material." *Id.* (emphasis added). The record does not establish that, during the relevant time period, the Department had actual knowledge that Defendant was violating the incentive compensation ban. We cannot, therefore, analyze the Department's behavior here to determine whether

compliance with the incentive compensation ban was material.[7]

Third, we examine whether the Department "regularly pays a particular type of claim in full despite *actual knowledge* that certain requirements were violated, and has signaled no change in position, [because] that is strong evidence that the requirements are not material." *Id.* at 2003–04 (emphasis added). To show that the Department does regularly pay claims in full despite knowing about violations of the incentive compensation ban, Defendant points to two 2010 Government Accountability Office ("GAO") reports. The first report identifies 32 instances in which schools violated the incentive compensation ban between 1998 and 2009, and the second documents the Department's responses to those 32 violations. Because the Department "did not limit, suspend, or terminate any [of those] school[s'] access to federal student aid," Defendant argues, the Department regularly paid claims in full despite actual knowledge of violations of the incentive compensation ban.

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[7] Defendant points to the Department's 2011 program review of Defendant, which took place after Relators filed this action. Defendant argues that the program review, which made no findings regarding the incentive compensation ban and resulted in no action against Defendant for noncompliance, is proof that the incentive compensation ban was not material to the Department. But the letter closing the review cautioned that the review's determination "does not relieve [Defendant] of its obligation to comply with *all* of the statutory or regulatory provisions governing the Title IV, [Higher Education Act] programs," and specifically noted that "compensation *must not* be based in any way on the number of students enrolled." (Emphases added.) Further, at the summary judgment stage, the presence of some contrary evidence does not negate the existence of an issue of fact on materiality.

Defendant's argument does not tell the whole story. Of the 32 schools with substantiated violations, the Department ordered 25 of them to take corrective action, which included terminating bonus payments to recruiters and ending referral fees to students. And 2 of those 25 schools were required to pay fines as a penalty, which together totaled $64,000. The Department also identified a liability of more than $187 million in misspent student aid funds at 1 of the 32 schools, meaning that the Department required the school to repay improperly awarded federal funds. The Department recouped more than $16 million of the total liability. The GAO reports also show that the Department took no further enforcement action at six schools with violations. But, of those six schools, three of them closed, two were terminated for other reasons, and one school's violations fell within a "safe harbor provision." The GAO reports further reveal that the Department reached settlement agreements with 22 additional schools, which allowed it to recoup funds totaling more than $59 million in payments.

There is evidence, then, that the Department *did* care about violations of the incentive compensation ban and did not allow schools simply to continue violating the ban while receiving Title IV funds. And in many cases, through one means or another, the Department recouped many millions of dollars from the violating schools, showing that it was not prepared to pay claims "in full" despite knowing of violations of the incentive compensation ban. The Department can demonstrate that requirements, such as the incentive compensation ban, are material without directly limiting, suspending, or terminating schools' access to federal student aid. A full examination of the Department's past enforcement habits in similar cases, therefore, reveals that a reasonable

trier of fact could find that Defendant's violations of the incentive compensation ban were material.

3. Magnitude of Violation

As mentioned, the Supreme Court also noted in *Escobar* that materiality does not exist "where noncompliance is minor or insubstantial." 136 S. Ct. at 2003. For instance, were a school to offer admissions representatives cups of coffee or $10 gift cards for recruiting higher numbers of students, there would be no viable claim under the False Claims Act. That is not the case here. Under Defendant's 2006–2008 compensation scheme, admissions representatives stood to gain as much as $30,000 and a trip to Hawaii simply by hitting their enrollment goals. And under Defendant's 2009–2010 scorecard compensation scheme, representatives' salaries could be adjusted by as much as $23,000 for meeting their enrollment goals.

Those large monetary awards are quite unlike a small, occasional perk. Rather, those awards are precisely the kind of substantial incentive that Congress sought to prevent in enacting the ban on incentive compensation. Therefore, the tremendous bonuses that Defendant's admissions representatives could receive by achieving their enrollment goals (and the similar decreases that could result from falling short of the targets set by Defendant) also counsel against a finding that Defendant's noncompliance was immaterial.

Overall, then, when we construe the evidence in the light most favorable to Relators, we conclude that a reasonable trier of fact could find that Defendant's noncompliance with the incentive compensation ban was material.

D. Safe Harbor

Finally, Defendant argues that, even if there is a question of fact as to one or more of *Hendow*'s four requirements for claims under the False Claims Act, it should win on summary judgment because any violations of the incentive compensation ban fell within the Department's safe harbor provision. The now-repealed safe harbor provision was in effect from 2003 through 2010. *Compare* Federal Student Aid Programs, 67 Fed. Reg. 67,048-01, 67,072 (Nov. 1, 2002), *with* 34 C.F.R. § 668.14(b)(22)(i)(B). That provision required, among other things, that "any adjustment [in compensation] is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid." Federal Student Aid Programs, 67 Fed. Reg. at 67,072.

Defendant's argument fails, at least on summary judgment. Viewed in the light most favorable to Relators, the record contains evidence that Defendant *did* make compensation adjustments based solely on admissions representatives' enrollment numbers.

AFFIRMED.

N.R. SMITH, Circuit Judge, dissenting in part:

I agree with the Majority's opinion through Section B of the Discussion Section, however we part ways regarding: (1) the validity of *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), in light of the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); and (2) whether, under *Escobar*'s "demanding" and "rigorous" materiality standard, there was sufficient evidence of a "material" violation of the Incentive Compensation Ban (ICB) to defeat summary judgment, *id* at 1996, 2003. Instead, I would reverse the district court's materiality finding, vacate the judgment, and remand for additional discovery and further briefing. Why?

The Majority makes three errors in its analysis. First, it fails to recognize that *Hendow*'s materiality holding is no longer good law after *Escobar*. Second, it fails to fully articulate the Supreme Court's materiality standard as outlined in *Escobar*. Finally, the Majority applies its erroneous legal standard to the facts at hand, reaching an erroneous conclusion. Let me explain.

I. *Escobar* overruled the logic of *Hendow*'s materiality holding.

The Majority erroneously concludes that it can still rely—at least in some regard—on *Hendow*'s materiality holding, because it "may have been decided differently had there been countervailing evidence of immateriality." Maj. Op. at 14–15. *Escobar*, the Majority concludes, merely "creat[ed] a 'gloss' on the analysis of materiality." Maj. Op. at 15. I disagree. Instead, *Escobar* explicitly overruled

Hendow's materiality standard and imposed a new materiality analysis that we must follow and apply.

The Majority's theory that *Hendow* could have reached a different conclusion in light of "countervailing evidence" does not acknowledge *Hendow*'s own reasoning. *Hendow* explicitly rejected the "countervailing evidence" before it: "questions of enforcement power are *largely academic*, because the eligibility of the University under Title IV and the Higher Education Act of 1965 . . . is *explicitly* conditioned, in three different ways, on compliance with the [ICB]." *Hendow*, 461 F.3d at 1175 (last emphasis original). Put another way: the government's enforcement *power*—much less what it actually did with that power—did not matter. Rather, *Hendow* clearly held that "expressly condition[ing] [payment] in three different ways" on compliance with the ICB was sufficient to make compliance with the ICB material. *Id.* at 1177.

However, *Escobar* rejected this *Hendow* materiality standard. In *Escobar*, the First Circuit followed *Hendow* and concluded that the "express and absolute language of the regulation in question, in conjunction with the repeated references to supervision throughout the regulatory scheme, constitute[d] dispositive evidence of materiality." *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504, 514 (1st Cir. 2015) (citations and quotation marks omitted), *vacated and remanded by Escobar*, 136 S. Ct. at 1996. Rejecting that reasoning, the Supreme Court instead held that "the label the Government attaches to a requirement" is not dispositive. *Escobar*, 136 S. Ct. at 1996. Accordingly, the Supreme Court outlined that the proper inquiry is "whether the defendant knowingly violated a requirement that the defendant knows is *material* to the

Government's payment decision." *Id.* at 1996 (emphasis added); *see also id.* at 2001 ("[S]tatutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment."); *id.* at 2003 ("In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive.").

Thus, under *Escobar*, the analysis focuses not on *whether* payment is conditioned on compliance, but *whether* the Government would truly find such noncompliance material to a payment decision. Because *Hendow* does not follow that analysis, the Majority opinion should conclude that *Hendow*'s materiality holding is "clearly irreconcilable with the reasoning and theory of" *Escobar* and explicitly overrule *Hendow* to that extent. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003).

II. The Majority fails to articulate the "demanding" and rigorous" nature of the materiality standard imposed by *Escobar*.

There is no question that the Majority outlines part of the *Escobar* materiality standard. However, it leaves out two very significant aspects, both of which are required to determine whether a misrepresentation is actually material.

First, the Supreme Court stated four times that the materiality test was "rigorous" or "demanding." *Escobar*, 136 S. Ct. at 1996 ("We clarify below how that *rigorous materiality requirement* should be enforced." (emphasis added)); *id.* at 2002 ("[The materiality and scienter] requirements are *rigorous*." (emphasis added)); *id.* at 2003

("The materiality standard is *demanding*." (emphasis added)); *id.* at 2004 n.6 ("The standard for materiality that we have outlined is a familiar *and rigorous one*." (emphasis added)). The Majority states that these descriptors of the analysis merely "give flavor to the Court's discussion," but otherwise ascribes no use to them. Maj. Op. at 14, n.3. Descriptions of *how* the test is to be applied are not just "flavor[ing]," they are the key in conducting the analysis the Supreme Court has instructed us to do. Anything less is insufficient and the Majority's application of *Escobar* reveals its lack of rigor.

Second, the Supreme Court provided a very clear standard for evaluating whether the misrepresentation was "material to the Government's payment decision." *Id.* at 1996; *see also id.* at 2002–03. The Supreme Court stated that the primary inquiry "looks to the effect on the *likely or actual behavior* of the recipient of the alleged misrepresentation." *Id.* at 2002 (emphasis added and quotation marks omitted). To illustrate *what* the inquiry looks like, the Supreme Court then explicitly referenced both tort and contract law materiality standards. These standards require an analysis of what, for example, "a reasonable man would attach importance to . . . in determining his choice of action in the transaction" or whether "the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter in determining his choice of action, even though a reasonable person would not." *Id.* at 2002–03 (quotation marks omitted) (citing Restatement (Second) of Torts § 538 at 80); *see also id.* at 2003 n.5.[1] Again, similar to

[1] Indeed, the Supreme Court's illustrations of the inquiry outline the required specificity. It held that "proof of materiality can include" evidence that: (1) "the defendant *knows* that the Government consistently refuses to pay claims *in the mine run of cases* based on noncompliance

the "demanding" and "rigorous" nature of the inquiry, the Majority does not even mention the contract or tort guideposts provided by the Supreme Court. *Id.* at 1996, 2003.

In sum, though expressly suggesting that payment can be *relevant*, *Escobar* requires that the primary inquiry of whether a misrepresentation is material mandates a "rigorous" and "demanding" inquiry into the "likely or actual behavior" of the Government to determine whether it "would attach importance [to the misrepresentation] in determining [its] choice of action in the transaction." *Id.* at 2002–03 (quotation marks omitted). Stated differently, the evidence (regarding the government's response to a misrepresentation) must be specific or directly analogous to the current alleged misrepresentation. Anything else would not be sufficiently "demanding" or "rigorous" to determine the Government's "likely or actual behavior." *Id.*

III. The Majority erroneously concludes that, on this record, there are sufficient questions of material fact to defeat summary judgment.

The Majority, like the district court, fails to properly apply the "demanding" and "rigorous" *Escobar* standard to the evidence in this case. *Id.* at 2002–03.

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with the *particular* statutory, regulatory, or contractual requirement"; or (2) "the Government pays a particular claim in full despite its *actual knowledge* that certain requirements were violated . . . ." *Escobar*, 136 S. Ct. at 2003–04 (emphasis added). Actual knowledge of regular, repeated nonpayment or actual knowledge of violations are both particular and demanding standards.

First, there is simply no evidence before us regarding *how* the Government would respond to the specific ICB violations alleged against Stephens Institute. At most, the Majority relies on aggregate data regarding the Government's *general* enforcement of the ICB.[2] The Majority concludes that this is sufficient: "There is evidence, then, that the Department *did* care about violations of the incentive compensation ban and did not allow schools simply to continue violating the ban while receiving Title IV funds." Maj. Op. at 17. Certainly, the Majority is correct that this evidence demonstrates that the Government *cares* in a broad sense. But, caring is not enough to make it material under the *Escobar* standard. Whether aggregate data demonstrates that the Government cares is not evidence that, *in this case*, the Government would find these alleged misrepresentations *material*. Significant materiality questions remain, for example: Does a fine for noncompliance represent a "material" aspect? Or, are fines only imposed for minor regulatory violations, which *Escobar* explicitly stated were not material? *Escobar*, 136 S. Ct. at 2003 ("The False Claims Act is not . . . a vehicle for punishing garden-variety breaches of contract or regulatory violations."). If the fines are material, were they imposed for more or less egregious behavior than the alleged Stephens

[2] Plaintiffs establish no more. A plaintiff bears the burden to present sufficient evidence from which a jury could conclude the misrepresentations were material to the government's payment decision. Here, Plaintiffs alleged Stephens Institute knowingly paid significant compensation to recruiters for meeting certain enrollment goals. Yet, the record also indicates that the ICB is only one of many (if not hundreds) of the regulations with which the Department of Education (DOE) requires schools to comply and that the DOE has generally doled out only minor penalties for ICB violations—particularly for several seemingly significant violations. In this light, I think a jury would be left to speculate *how* important the alleged misrepresentations actually are.

Institute behavior? The aggregate data answers none of these questions and yet their answers are required before liability under the "demanding" and "rigorous" *Escobar* standard may be imposed. *Id.* at 2002–03.[3]

Second, with no specific evidence regarding how the Government would respond to the instant allegations, the only "relevant" evidence that remains is the fact that compliance with the ICB is a condition for payment. Indeed, to reach its conclusion, the Majority appears to invoke the all or nothing *Hendow* analysis, which the Supreme Court squarely rejected. And, the Majority steps beyond such evidence being "relevant" and concludes that the Government's triple-conditioning of ICB compliance is "probative evidence of materiality." Maj. Op. at 16–17.

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[3] The Majority faults my dissent for stating that answers to these questions are required before "liability . . . may be imposed." Maj. Op. at 16, n.5. Particularly, it argues that on summary judgment, we must only determine whether there are questions of material fact, not whether "liability . . . may be imposed." The Majority's argument misreads my dissent and confuses the standard. Like we must on summary judgment, I am "view[ing] the evidence in the light *most favorable to the non-moving party*." *Vos. v. City of Newport Beach*, 892 F.3d 1024, 1030 (9th Cir. 2018) (emphasis added) (quoting *Lal v. California*, 746 F.3d 1112, 1115–16 (9th Cir. 2014)). In this case, there is no real dispute about *what* the evidence is, but whether the evidence proffered is—viewed in the light most favorable to the non-moving party—sufficient to even go to trial, i.e., impute liability in the best case Plaintiffs have. Here, the evidence proffered is simply not enough under *Escobar*—there is *no* evidence about *what* the Government would actually do in this case (or even in a similar case). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

However, the sole fact that compliance is a condition of payment is not enough. *Escobar*, 136 S. Ct. at 2003 ("In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but *not automatically dispositive*." (emphasis added)). Yes, certification of compliance with the ICB is required for payment, but so is certification of compliance with a *host* of additional statutes, regulations, and contractual requirements. There is no indication that the Government holds the ICB out as an exceptionally important requirement and, under *Escobar*, misrepresentations regarding compliance "must be material to the Government's payment decision." *Id.* at 1996. Therefore, absent additional evidence demonstrating that in *this* situation, the Government treated a violation as material, and in *that* situation, it did not, conditioning compliance with the ICB is simply not enough to prove materiality. *Id.* at 2003 & n.5 (holding the misrepresentation must go "to the very essence of the bargain" (quoting *Junius Constr. Co. v. Cohen*, 178 N.E. 672, 674 (N.Y. 1931))).

As such, all we have before us is (1) general, aggregate evidence that the Government cares about ICB violations (not that what Stephens Institute is specifically accused of doing is, indeed, material such that it would influence a payment decision by the Government), and (2) the fact that payment is triple-conditioned on compliance with the ICB. This is not enough to meet the "rigorous" and "demanding" inquiry into the "likely or actual behavior" of the Government to determine whether it "would attach importance to [the misrepresentation] in determining [its] choice of action in the transaction." *Id.* at 2002–03 (quotation marks omitted).

IV. Conclusion.

It is apparent from both the district court's order and the parties' briefing that there was confusion regarding the materiality question, particularly the role of *Hendow* in light of *Escobar*. And, there is insufficient evidence to establish that the allegations against Stephens Institute would be considered material. However, the clarification of the interaction between *Hendow* and *Escobar* could change what the parties seek in discovery and the district court's ultimate conclusion. Therefore, in light of the clarified reasoning, I would reverse the district court's denial of Stephens Institute's motion for summary judgment, vacate the judgment, and remand for (1) additional discovery to develop the summary judgment record; (2) additional briefing; and, after that, (3) a re-examination by the district court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 5, 2002 Decided February 11, 2003

No. 01-5312

SUSAN J. SWIFT,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(99cv00145)

Michael D. Kohn argued the cause for appellant. On the briefs was *Susan J. Swift*, appearing pro se.

Douglas Letter, Litigation Counsel, U.S. Department of Justice, argued the cause for appellee. With him on the brief were *Roscoe C. Howard Jr.*, U.S. Attorney, and *David W. Long*, Attorney.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: EDWARDS, HENDERSON, and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: On January 19, 1999, Susan Swift, a former Department of Justice attorney employee, brought a *qui tam* action against one employee and two former employees of the Justice Department's Office of Legal Counsel, claiming that in 1992 and thereafter they had conspired to defraud the government, in violation of the False Claims Act, 31 U.S.C. § 3729(a)(3). For reasons unnecessary to recount, one of the defendants was dropped from the case. Swift alleged that the remaining two defendants had also violated 31 U.S.C. § 3729(a)(1) and (2) by presenting a false claim to the government. The alleged fraud, which dealt with time sheets and leave slips, amounted to $6169.20.

On April 2, 1999, without purporting to intervene, the government moved to dismiss the complaint, arguing that the amount of money involved did not justify the expense of litigation even if the allegations could be proven. Swift opposed dismissal and requested a hearing. She also sought leave to engage in discovery in order to learn the Justice Department's policy about dismissal of *qui tam* actions, and she moved to unseal the record, arguing that this would facilitate her efforts to gather information about the policy. The district court ordered a hearing, but denied Swift's motions for discovery and unsealing. After several delays and the hearing, the court dismissed the complaint, holding that the government had demonstrated that dismissal was rationally related to a valid governmental purpose. As a result, the complaint was never served on the defendants.

Swift's appeal is on the grounds that the government cannot move to dismiss without first intervening, that the government did not justify its decision to dismiss, that dismissal was improper since the government did not investigate her claims, and that the district court erred in denying her discovery and in refusing to unseal the record.

The section of the False Claims Act dealing with the government's dismissal of *qui tam* actions provides: "The Government may dismiss [a *qui tam*] action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). As is evident from the quotation, the provision does not say that the government must intervene in order to seek dismissal. Swift concedes as much, but maintains that intervention is required in light of § 3730(b) and § 3730(c)(1).

Section 3730(b)(2) gives the government sixty days, plus any court-ordered extensions, "to elect to intervene and proceed with the action" after receiving the complaint and being informed of the material evidence. At the end of the sixty-day period (unless extended), the government "shall proceed with the action . . . or notify the court that it declines to take over the action." 31 U.S.C. § 3730(b)(4). Swift views § 3730(b)(4) as giving the government but two options: intervene or do not intervene. This is correct, but she misses the point that § 3730(b)(2) makes intervention necessary only if the government wishes to "proceed with the action." Ending the case by dismissing it is not proceeding with the action; to "proceed with the action" means, in the False Claims Act, that the case will go forward with the government running the litigation. *Cf. Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968).

The other provision Swift cites, § 3730(c)(1), reads: "If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the [relator]. [The relator] shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)." Swift's position is that the phrase "subject to the limitations set forth in paragraph (2)" means that the government's dismissal power under § 3730(c)(2) exists only within the context of § 3730(c)(1). So viewed, the government could not move to dismiss unless it had complied with § 3730(c)(1) by intervening and proceeding with the action.

Her interpretation is unwarranted. The phrase "subject to the limitations set forth in paragraph (2)" can signify only that the relator's right to remain a party after the government has intervened is constrained by the government's right to dismiss the action pursuant to § 3730(c)(2). Swift's interpretation requires one to read "subject to" as also having the converse meaning—that § 3730(c)(1) acts as a limit on the operation of § 3730(c)(2). Nothing in § 3730(c)(1) justifies that reading. To support Swift's interpretation, either § 3730(c)(2) would have to be a subsection of § 3730(c)(1)—which it is not—or § 3730(c)(2) would have to contain language stating that it is applicable only in the context of § 3730(c)(1)—which it does not (as highlighted by the fact that § 3730(c)(2) contains two express constraints on the government's ability to dismiss, neither of which is related to § 3730(c)(1)). In other words, the second sentence of § 3730(c)(1) is limited by § 3730(c)(2), but § 3730(c)(2) is independent of § 3730(c)(1).

In any event, the question whether the False Claims Act requires the government to intervene before dismissing an action is largely academic. As Swift conceded at oral argument, if there were such a requirement, we could construe the government's motion to dismiss as including a motion to intervene, a motion the district court granted by ordering dismissal. *See United States ex rel. Neher v. NEC Corp.*, No. 92–2854, slip op. at 30 (11th Cir. Apr. 28, 1995).

Swift has a separate reason why the district court improperly dismissed the case. The district court applied the standard stated in *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1339 (E.D. Cal. 1995), *aff'd sub nom. United States ex rel. Sequoia Orange Co. v. Baird–Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). Under that standard, the government may dismiss a *qui tam* case over the relator's objection if (1) the government shows that the dismissal is rationally related to a valid purpose, and (2) once the government satisfies this burden, the relator fails to show that the decision to dismiss was fraudulent, illegal, or arbitrary and capricious. *Sequoia*, 151 F.3d at 1145.

We hesitate to adopt the *Sequoia* test. It may be that despite separation of powers, there could be judicial review of the government's decision that an action brought in its name should be dismissed. *Cf. United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975). But we cannot see how § 3730(c)(2)(A) gives the judiciary general oversight of the Executive's judgment in this regard. The section states that "The Government"—meaning the Executive Branch, not the Judicial—"may dismiss the action," which at least suggests the absence of judicial constraint. To this must be added the presumption that decisions not to prosecute, which is what the government's judgment in this case amounts to, are unreviewable. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831–33 (1985); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967). Reading § 3730(c)(2)(A) to give the government an unfettered right to dismiss an action is also consistent with the Federal Rules of Civil Procedure. Rule 41(a)(1)(i) permits a plaintiff to dismiss a civil action "without order of the court" if the adverse party has not yet filed an answer or a motion for summary judgment. A dismissal pursuant to Rule 41(a)(1)(i) is not subject to judicial review. *See Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987). In *qui tam* actions, the complaint remains under seal for "at least" sixty days; government dismissal within that period necessarily occurs before the defendant has answered. (If the government tried to have an action dismissed after the complaint had been served and the defendant answered, it might be subject to Rule 41(a)(2), which requires an order of the court "upon such terms and conditions as the court deems proper.")

The relator's right to a hearing, as set forth in § 3730(c)(2)(A), is all that points to a role for the courts in deciding whether the case must go forward despite the government's decision to end it. The *Sequoia* court viewed this provision as authorizing judicial review of the government's reasons for dismissal, 912 F. Supp. at 1338, explaining that this would not "place an additional burden on the executive's exercise of prosecutorial discretion, because the constitution itself prohibits arbitrary or irrational prosecutorial decisions." *Id.* at 1340. This is not an accurate statement of constitution-

al law with respect to the government's judgment not to prosecute. The Constitution entrusts the Executive with duty to "take Care that the Laws be faithfully executed." U.S. CONST., art. II, § 3. The decision whether to bring an action on behalf of the United States is therefore "a decision generally committed to [the government's] absolute discretion" for the reasons spelled out in *Heckler v. Chaney*, 470 U.S. at 831. The government's discretion to dismiss an action it has already brought may not be absolute, but even then courts presume the Executive is acting rationally and in good faith. *See, e.g.*, *Rinaldi v. United States*, 434 U.S. 22, 30 (1977); *see also United States v. Armstrong*, 517 U.S. 456, 464–65 (1996). Nothing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States. The provision neither sets "substantive priorities" nor circumscribes the government's "power to discriminate among issues or cases it will pursue." *Heckler v. Chaney*, 470 U.S. at 833. We therefore conclude that the function of a hearing when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case. While the government conceded at oral argument that there may be an exception for "fraud on the court," no evidence of that sort was presented, and we therefore do not pass on whether this type of exception, or any other, might be consistent with our reading of § 3730(c)(2)(A).

The *Sequoia* court also justified its test on the basis of legislative history of the 1986 amendment to the False Claims Act. The Ninth Circuit quoted statements from a Senate committee report that a relator may object to a government motion to dismiss in order to prevent the government from "dropp[ing] . . . false claims cases without legitimate reasons" and may petition for an evidentiary hearing, which the court should grant "if the relator presents a colorable claim that the . . . dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations." S. REP. NO. 99–345, at 26

(1986). But this portion of the Senate report relates to an unenacted Senate version of the 1986 amendment. That version read: "If the Government proceeds with the action . . . the [relator] shall be permitted to file objections with the court and to petition for an evidentiary hearing to object to . . . any motion to dismiss filed by the Government." *Id.* at 42. The whole point here is that the government has not elected to proceed; it has elected to dismiss the case. Had the Senate version been enacted, the Senate report still would not support the Ninth Circuit's judgment.

Even if *Sequoia* set the proper standard, the government easily satisfied it. The asserted governmental interests were that the dollar recovery was not large enough to warrant expending resources monitoring the case, complying with discovery requests, and so forth, and that spending time and effort on this case would divert scarce resources from more significant cases. Although Swift believes that the costs would be relatively small, the government's goal of minimizing its expenses is still a legitimate objective, and dismissal of the suit furthered that objective. *See Heckler v. Chaney*, 470 U.S. at 831; *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 859 n.17 (1984). In addition, Swift failed to establish that the government's prosecutorial judgment was arbitrary and capricious, illegal, or fraudulent. While she asserted that the government's reasons for dismissal were pretextual, she offered nothing to support the charge.*

Few words are needed to dispose of Swift's remaining arguments. Since the government conceded the truth of Swift's allegations when it sought to dismiss, the fact that the government did not investigate the validity of her charges is of no consequence. As to her claim that she was entitled to

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* The theory is that a relator's standing derives from the injury to the United States and a partial assignment of the government's claim for damages. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000). Dismissal ends the assignment.

discovery, the Supreme Court has stated that a party is not entitled to discovery of information relating to prosecutorial decisions absent a substantial threshold showing. *See Armstrong*, 517 U.S. at 463. As we have said, Swift offered no evidence to support her allegations that the government acted improperly. Nor did the district court abuse its discretion in denying Swift's motion to unseal the case. Swift did not oppose the government's motion to keep the case sealed during the proceedings on dismissal, and although she had many months to file a motion to unseal, her motion came at the eleventh-hour; granting it would have delayed the hearing, which had already been postponed twice at Swift's request. *Cf. Ned Chartering & Trading, Inc. v. Republic of Pakistan*, 294 F.3d 148, 151 (D.C. Cir. 2002).

Affirmed.

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A PRACTICAL AND ECONOMICAL APPROACH TO INTERNAL INVESTIGATIONS

Sandeep Nandivada
Rachael Plymale

November 5, 2019

Topics Covered

1. Should you Investigate?
2. Scope of the Investigation
3. Choosing an Investigator
4. Protecting Privilege
5. Collecting & Preserving Evidence
6. eDiscovery Considerations
7. Concluding the Review

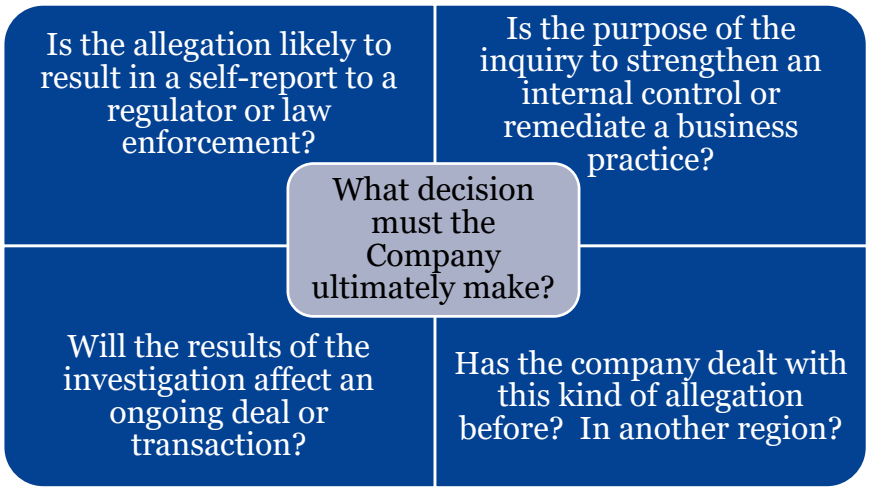
Should You Investigate?

- Short answer: YES!
- Benefits of conducting an internal investigation:
  - Better ability to control scope and cost
  - Control disclosures to regulators and law enforcement
  - Regulators and law enforcement will consider whether the Company's response was comprehensive and rigorous
  - Protects the company's reputation and limits the business's exposure
  - Company must adhere to its own internal codes of conduct and compliance policies
  - Officer and Director obligations/certifications

Scoping the Investigation

- Threshold question → How serious is the allegation?
  - Difficult to assess, especially with limited information, time
  - Answer will drive the Company's response
  - May change as the facts develop
- Key factors to consider:
  - Nature and gravity
    - Should the investigation be privileged?
  - Source
    - Whistleblower cannot be ignored, even if a malcontent
    - Government knowledge/involvement
  - Corroboration
  - Potential consequences
    - Is this potentially an FCA issue?

Scope of the Investigation?



Scoping the Investigation

- Think long term: How big ***might*** this be? How long might this take?
- Appropriately scoping the investigation
  - Ensure litigation holds cover relevant custodians; Revisit periodically
  - Tailor scope of review rather than scope of collection
  - Be creative in collections: network drives, laptop imaging, cell phone imaging, etc.
  - Review with production in mind
- Taking the most narrowly tailored approach may cost more money in the long run
  - Document retention issues
  - Second, third, fourth… reviews of collected documents

Choosing an Investigator

- Typically three options to consider:
  - Non-attorney investigators (Ethics/Compliance, HR, etc.)
  - In-house counsel
  - Outside counsel
- Each option has advantages and disadvantages:
  - Cost and efficiency
  - Availability of resources
  - Scope of expertise
  - Privilege concerns
- Consider a team approach based on the scope of the matter.

Building the Right Team

- Important to right-size the response team and recognize that it may need to change over time
  - Consider geography, language, and range of issues
- Maximize in-house resources
  - Legal & Compliance, Internal Audit, IT, HR, others?
  - Outside counsel as an advisor
- Consider what outside consultants may be necessary
  - Forensic accountants; E-Discovery consultants; subject matter consultants/industry experts; translation services
- Communicate/interact in a way that protects the privilege

Protecting Privilege

- Determine early on whether the investigation needs to be covered by privilege
  - What are the risks of waiving privilege?
- Non-attorney investigators should work at the direction of counsel:
  - Formal, written *Upjohn* memos deputizing non-attorneys and providing instructions for protecting privilege (*Upjohn* warnings, etc.)
  - Discuss work-product format and privilege markings up front
  - Regular check-ins with counsel
  - Training for those regularly involved in internal investigations
- ***Beware***: A non-attorney's "fact work product" – such as purely factual summaries – may be discoverable. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 149 (D.C. Cir. 2015)
- When resource limitations prevent in-house counsel from adequately directing non-attorney investigations, consider involving outside counsel

Protecting Privilege in Disclosures

- Voluntary productions versus compelled productions:
  - No privilege waiver required for compelled productions
  - Voluntary disclosures may result in broad privilege waivers; Ensure confidentiality agreements address privilege
- Does the disclosure outweigh the risk of a potential waiver?
- Key consideration: Is there a possibility the privileged disclosure may later be sought in discovery by *qui tam* or other civil plaintiffs?
  - *United States ex rel. Steven Higgins v. Boston Scientific Corp.*, No. 11-cv-2453 (D. Minn. Aug. 28, 2019).

Collecting the Evidence

- Essential to initiate preservation efforts immediately upon deciding that internal investigation is necessary
  - When **party knows or should have known** that evidence is relevant to pending or future litigation or investigation
- Severe consequences for spoliation
- Preserving evidence
  - Notice
  - Suspending auto-delete
  - Documentation of efforts
- Collecting ESI, hard copy documents, other sources of information
  - Do not forget cell phones: Do your IT policies allow for collection of personal phones used for work purposes?

Document Hold Notice

Document Hold Notice Should:	Summarize subject matter and time period of the investigation
	Instruct custodians (including IT personnel) to preserve all potentially relevant documents
	Inform custodians that document retention/destruction policies are suspended
	Provide a list of relevant documents that must be preserved
	Identify risks of failing to preserve documents
	Provide contact information for person who can answer questions

- Periodically revisit your litigation holds throughout the investigation

eDiscovery Considerations

- Engaging eDiscovery resources early on can save significant time and money in the long run.
  - eDiscovery experts may help identify sources of relevant documents
  - Forensically sound collections protect the Company from spoliation issues
  - Collection vs. processing vs. review: Staging may allow for broad collections at limited costs
- Technology-assisted Review ("TAR")
  - Not just for massive matters
  - Often included in the price of document hosting but rarely used
  - Based on initial expert review, prioritizes and categorizes documents most likely to be relevant
  - Beneficial to government investigators: key documents are identified more quickly; Reduces the number of non-relevant documents

When Are You Done?

- Determination that investigation is "complete"
  - What were the objectives for the investigation as set out in the work plan?
  - Have they been accomplished?
  - Are you confident the scope is appropriate given the findings?
  - Should the scope be supplemented? Is additional fact-finding warranted?
  - What is your standard/burden of proof?

Documenting the Investigation

Written Report	Oral Report
Costly and time-consuming	Less costly and faster to complete
Increased risk of privilege waiver	More easily protected as privileged
Can be provided to third parties, including regulators	Third parties and adversaries cannot request
Viewed as more detailed / professional	May be viewed as less thorough
Company must live with it	Can be less clear or more confusing
More easily understood and analyzed; roadmap for regulators and law enforcement	More difficult to duplicate for additional audiences
Careful consideration of who receives copy and ramifications	May be harder to use it as basis for cooperation credit

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THE NEW EXPORT REGIME AND FOREIGN INVESTMENT RISK

Joe Benkert
Charles Capito

November 4, 2019

Agenda – Government Contracts Takeaways

- Proposed CFIUS Regulations: Broader Scope
  - Impacts on acquisitions and large and small investments by foreign persons
  - Spin-offs to foreign persons
  - Potential impact on joint ventures with foreign partners
- Export controls' increased prominence in national security toolkit
  - Expanded coverage for outbound transfers
  - Potential impact on overseas R&D and manufacturing if it involves U.S.-origin technology
- U.S. Government (USG) actions against Chinese companies on national security grounds
  - Choosing between major Chinese companies and market and U.S. market
  - Inbound restrictions impact supply chain and compliance
- Impacts
  - These national security trends pre-date Trump administration, reflect bipartisan concerns, and will continue beyond the "trade war"

What Is CFIUS?

- The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee of the U.S. government that carries out the President's authority to conduct national security reviews of foreign acquisitions of, or investments in, U.S. businesses.
- If CFIUS identifies national security concerns associated with a transaction, it can **impose conditions to mitigate those concerns**, including limiting the foreign investor's governance or information rights.
- Where national security concerns cannot be mitigated, the President can **block pending transactions, or unwind transactions** that have already closed without CFIUS approval.

CFIUS Reform Legislation: FIRRMA

- In August 2018, the Foreign Investment Risk Review Modernization Act ("FIRRMA") brought significant change to CFIUS' authorities and processes.
  - FIRRMA expanded CFIUS's jurisdiction to include certain **non-controlling "other investments"** in U.S. businesses that involve (1) critical technologies, (2) critical infrastructure, or (3) sensitive **personal data** pertaining to U.S. citizens.
  - CFIUS jurisdiction covers acquisitions or leases of all real estate properties in "close proximity" to U.S. military/government facilities and air/seaports – parameters to be defined in implementing regulations.
  - FIRRMA also provided for **mandatory filing requirements** for certain investments, also to be defined in pending regulations.
- Most of FIRRMA's changes require implementing regulations issued by the Department of the Treasury to be completed by February 2020.
  - As an interim measure, FIRRMA authorized the establishment of one or more **pilot programs** to implement the highest-priority changes to the CFIUS review process.
  - CFIUS implement critical technologies pilot program in November 2018.
- Companion legislation – The Export Control Reform Act ("ECRA") requires a Commerce Department-led process to define and develop controls on "emerging and foundational technologies."

Overview: CFIUS Reform's Impact

- CFIUS still reviews transactions only for their potential risks to U.S. national security

- The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded the scope of transactions subject to review
  - Traditional "Control" Transactions: Result in foreign "control" of a U.S. business
    - Generally, no control if <10% + no board seat + solely for passive investment
  - Non-Control Transactions:
    - CFIUS Critical Technologies Pilot Program: Non-control investments in a limited group of technologies and industries, effective November 2018
    - Proposed Regulations on "TID U. S. Businesses": Expands pilot program logic to critical infrastructure, sensitive personal data as well as critical technologies

- Issues in the new CFIUS landscape:
  - Critical technologies and mandatory filing
  - Proposed regulations expanded scope
  - Investment fund "carve-out"

CFIUS Critical Technologies Pilot Program

- Investments trigger **mandatory filing requirement** if 3 tests met:
  1. **Critical Technologies**: Investment in U.S. business that designs, develops, produces, tests one or more "critical technologies"; AND
  2. **Pilot Program Industry**: These critical technologies are used in the U.S. business's activities in, or specifically designed for, one or more of 27 "Pilot Program Industries"; AND
  3. **Specified Rights**: The investment provides investor with either:
     - Control of the U.S. business for CFIUS purposes
     - Or, if not control, then any one of the following:
     - **Access to any *material nonpublic technical information*** of the U.S. business
       - Non-public info necessary to design/develop/produce critical technologies
       - Does not include financial information on U.S. business's performance
     - **Membership/observer rights on board** or right to nominate
     - **Involvement in any substantive decision-making** of the U.S. business regarding its critical technology, other than through voting of shares
- Note: Even if not triggered, traditional voluntary filing may be advisable
- **"Critical Technologies"** definition a work in progress
  - Commerce-Department led process to define and develop controls on "emerging" and "foundational" technologies important to national security

Proposed CFIUS Regulations Expand Logic of Pilot Program

- As required by FIRRMA, the Treasury Dept. issued new regulations on September 24, 2019 that implement a framework to address national security concerns arising from foreign investment in U.S. businesses with **critical technologies**, **critical infrastructure**, and **personal data** ("TID U.S. Businesses"). New regulations expected to be effective by February 2020
- A "TID U.S. Business" is any U.S. business that:
  - produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies;
  - performs the functions as set forth in an appendix to the new regulations with respect to covered investment critical infrastructure; or
  - maintains or collects, directly or indirectly, sensitive personal data of U.S. citizens
- With respect to this universe of businesses, CFIUS has jurisdiction to review any "covered investment" by a foreign person *even if* the foreign person will not obtain "control" of the U.S. business.
- The critical technologies pilot program remains in effect until superseded by final regulations
- New regulations also cover real estate transactions that do not result in control of U.S. business – but are purchase, lease , concession that:
  - Involves real estate in proximity to listed military and USG facilities, or in air/maritime port, AND
  - Provides foreign person specified rights in the property

Investment Fund "Carve out" and LP Rights

- FIRRMA creates limited jurisdictional carve-out for foreign limited partners (LPs) in funds that invest in covered U.S. businesses – implemented in critical technologies Pilot Program regulations and expanded in draft CFIUS regulations for TID U.S. businesses

- Specifically, "foreign person" LP participation in a fund – and indirect investment in a U.S. business through the fund – is not a covered investment if:
  - Fund is managed exclusively by GP (or equivalent) and the foreign person is not the GP
  - Advisory board (or equivalent committee) on which the LP sits does not have the power to control investment decisions of the fund or decisions made by the general partner;
  - The foreign person LP is not able to control the fund, the GP, or their decisions; *and*
  - The foreign person LP does not have access to "material nonpublic technical information", substantive involvement in decision making of investee companies, or other specific rights

- If an LP makes an investment alongside the Fund, CFIUS would examine that investment and also any control the LP may have over the GP (or of the GP over the LP) to determine whether such interests would constitute a covered investment

- Transaction terms being structured to avoid triggers
  - But a deal structured to evade CFIUS is a covered transaction

Export Controls' Increased Prominence In National Security Toolkit

- Unprecedented, comprehensive USG effort underway to determine national security risks of "emerging" and "foundational" technologies that are not now subject to control, and to identify and establish appropriate controls
- Representative technology areas under review include AI and machine learning, advanced computing technology, robotics, surveillance technologies, biotechnology
- Will result in new controls on technologies not now subject to control, possibly meaning broader export control coverage of U.S.-origin technology
  - Affecting both exports and foreign joint ventures using the technology
  - Likely to be more restrictive in application to some countries (e.g., China) than others (e.g., Japan)

USG Weaponizing The Entity List Affects Non-U.S. Suppliers to China

- USG has broadened application of Entity List to address Chinese companies of national security concern
  - Entity list designation effectively prevents exports to the designated entity of hardware, software, technology that is subject to U.S. export administration regulations
  - USG may place entities on Entity List for activities contrary to U.S. national security interests; historically, proliferation/end-user concerns
  - Now broader concept of activities contrary to national security – e.g., Huawei
- Impacts any suppliers to these entities who have U.S. origin/content

Broader Restrictions on Chinese Tech Companies of National Security Concern

- Defense Authorization Act (NDAA) (Aug 2018): Prohibits USG agencies from procuring equipment or services from five Chinese entities, including Huawei, and from contracting with companies that use equipment from the Chinese entities
- Executive Order (May 2019): Requires a process to prohibit any U.S. entity (not just USG) from transactions that involve communications technology from certain companies in "adversary" countries
  - Country/company not specified but clearly targeted at China
- More actions against Chinese companies likely in light of continuing concerns
  - Surveillance/facial recognition companies
  - Telecommunications and 5G competition

Impacts

- National security trends pre-date Trump administration, reflect bipartisan concerns, and will continue beyond the "trade war"
- Companies with significant business in both China and the U.S. have a balancing act to keep them separate where national security concerns exist
  - "Guardrails" to address personnel/business activities/investments in/with China that may present U.S. national security concerns
- For investments in the U.S., CFIUS is an essential consideration
  - Applicability
  - Structuring transactions
- Non-U.S. joint ventures and commercial arrangements that may involve U.S. technology or content may have U.S. national security considerations, particularly as USG export control regulations emerge


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SUPREME COURT UPDATE

Joe Palmore
Co-Chair, Appellate & Supreme Court Practice Group

November 5, 2019

The Roberts Court by the Numbers

The Rookies

Food Marketing Institute v. Argus Leader Media

Where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of 5 U. S. C. §552(b)(4), the Freedom of Information Act's Exemption 4.

Cochise Consultancy Inc. v. United States, ex rel. Hunt

The limitations period in 31 U.S.C. §3731(b)(2) -- which provides that a False Claims Act action must be brought within three years after the "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than 10 years after the violation -- applies in a qui tam suit in which the federal government has declined to intervene; the relator in a nonintervened suit is not "the official of the United States" whose knowledge triggers §3731(b)(2)'s limitations period.

Lorenzo v. Securities and Exchange Commission

Dissemination of false or misleading statements with intent to defraud can fall within the scope of Securities and Exchange Commission Rules 10b–5(a) and (c), as well as the relevant statutory provisions, even if the disseminator cannot be held liable under Rule 10b–5(b).

The Arbitration Court

Lightning Round

- Title VII and discrimination based on sexual orientation and gender identity
- Unwinding DACA
- Is the CFPB unconstitutional?


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United States v. Microsoft: Supreme Court to Resolve Lower-Court Dispute Over U.S. Warrants Seeking Foreign-Stored User Data

John P. Carlin, David A. Newman, and Joseph Roth Rosner

10/17/2017

Appellate + Supreme Court, Global Risk + Crisis Management, and Privacy + Data Security

Client Alert

On Monday, the Supreme Court announced it had granted the government's petition for certiorari in *United States v. Microsoft* and will hear a case this Term that could have lasting implications for how technology companies interact with the U.S government and governments overseas. [1] At issue is a consequential Second Circuit decision from last year that held that warrants issued under the Stored Communications Act (SCA) (18 U.S.C. § 2703) do not reach emails and other user data stored overseas by a U.S. provider.

While no federal appellate court besides the Second Circuit has squarely addressed the issue, multiple district courts outside the Second Circuit have declined to follow the Second Circuit's reasoning in similar fact patterns involving other technology giants. The result is that U.S. law enforcement has different authority to access foreign-stored user data depending on where in the United States a warrant application is made. Google, for example, has expended significant resources to develop new tools to determine the geographic location of its users' data so as to be in accord with the Second Circuit's approach. Yet the company currently faces a hearing on sanctions for its alleged willful noncompliance with law enforcement requests in the Ninth Circuit based on a district court ruling that parted ways with the Second Circuit. [2]

DOJ has gone to great lengths to challenge the *Microsoft* ruling since its issuance, including pushing for *en banc* review and seeking to distinguish it in other federal courts. In its petition for certiorari, DOJ contended that the Second Circuit's decision puts at risk DOJ's ability to access information that could be critical to uncovering and prosecuting serious crimes. DOJ further contended that the Second Circuit's analysis rests on a misreading of the statute because the information sought in the warrant — far from requiring extraterritorial application of the statute — could be accessed by Microsoft's U.S. employees with the click of a mouse. There is also a concern that the Second Circuit ruling will create incentives for "data localization" regimes in which countries insist that data pertaining to their nationals must be stored locally.

To Microsoft and other technology companies, on the other hand, the Second Circuit ruling represented the best reading of the SCA — a 1986 law that did not contemplate the current technology landscape — and afforded a measure of protection against the risk they would find themselves subject to conflicting directives under U.S. law and the law of the country where the data is stored. Microsoft's victory below was embraced by privacy advocates. Microsoft also opposed certiorari on the grounds that to the extent revisions to the SCA were necessary to enable it to apply extraterritorially, the issue was better left to Congress than the courts.

Whatever the Supreme Court decides, the case bears close watching as the Second Circuit ruling continues to have serious implications not just for the government but for the U.S. companies that store data and interact with regulators overseas. The case will likely be argued in early 2018 and decided by the end of June.

[1] *United States (Petitioner) v. Microsoft Corporation*, Supreme Court 17-2 (cert granted Oct. 16, 2017). *See* our Client Alert on *Microsoft Corp. v. United States*, 829 F.3d 197 (2d Cir. 2016).

[2] See our Client Alerts on *In the Matter of the Search of Content that is Stored at Premises Controlled by Google Inc.*, No. 16-mc-80263 (N.D. Cal. Apr. 19, 2017); and *In re Search Warrant No. 16-960-M-01 to Google* , No. 2:16-MJ-01061-TJR, 2017 WL 471564 (E.D. Pa. Feb. 3, 2017).

All or Nothing: Supreme Court Prohibits PTAB From Partially Instituting AIA Petitions Challenging Patents

Matthew I. Kreeger, Mehran Arjomand, Brian R. Matsui, and Shouvik Biswas

04/25/2018

Appellate + Supreme Court, Intellectual Property Litigation, Patent Trial and Appeal Board (PTAB) Litigation, and Patent Litigation

Client Alert

On the same day that patent challengers breathed a sigh of relief once the Supreme Court upheld the constitutionality of inter partes review (IPR) in *Oil States*, [1] the Court also threw a monkey wrench into the way IPRs will be litigated. In a 5-4 decision, the Court held that when the Patent Trial and Appeal Board (PTAB) institutes an IPR, the PTAB must decide the patentability of *all* of the claims that a Petitioner has challenged in its petition. *SAS Institute Inc., v. Iancu*. The Court held that the United States Patent and Trademark Office (USPTO) Director does not have the statutory authority to partially institute a challenge by picking and choosing the claims that will proceed to a full review. Instead, if the PTAB decides to institute an IPR because at least one claim in the challenge has a reasonable likelihood of being invalidated, the PTAB is required to institute as to *all* of the claims challenged in the original petition, and ultimately issue a final written decision on all of the challenged claims. While the Court's decision on the surface appears to make only a procedural adjustment, the decision could have far-reaching impact on cases before the PTAB, as well as before district courts.

Background

In response to the passage of the Leahy-Smith America Invents Act in September 2011, which created IPRs, the USPTO promulgated a series of rules governing how the PTAB was to conduct the newly created IPR proceedings. One of those rules provided that "the Board may authorize the review to proceed *on all or some of the challenged claims* and on *all or some of the grounds of unpatentability* asserted for each claim." 37 CFR § 42.108(a) (emphasis added). Using this rule, the PTAB routinely has instituted IPR proceedings only on patent claims that it felt had a "reasonable likelihood of success" of being found unpatentable. As a result, even if an IPR petition challenged all the claims of a patent, the PTAB often used its discretion to institute a proceeding only on some of those claims, while declining to institute review on the remaining claims. Upon conclusion of the proceeding, the PTAB would render a final written decision addressing only the claims for which it had instituted review.

SAS Institute's Challenge

SAS Institute Inc. (SAS) sought an IPR of U.S. Patent 7,110,936 assigned to ComplementSoft LLC. In its petition, SAS challenged all 16 of the patent's claims on various grounds of invalidity. However, the PTAB instituted an IPR only on claims 1 and 3 through 10, while declining to review the rest of the claims. Ultimately, in a final written decision, the Board found claims 1, 3, and 5 through 10 unpatentable, while upholding claim 4. The Board's final written decision did not address the claims for which review was denied.

SAS appealed, arguing that 35 U.S.C. § 318(a) required the PTAB to decide the patentability of every challenged claim in its final written decision. The Court agreed with SAS. Section 318(a) states that "[i]f an inter partes review is instituted and not dismissed . . . the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of

any patent claim challenged by the petitioner. . . .” In analyzing the text of § 318(a), the Court concluded that by stating that the Board’s final written decision “shall” resolve the patentability of “any patent claim challenged by the petitioner,” Congress meant that the Board must address every claim Petitioner challenged in its petition. Thus, the Court held that the PTAB did not have the statutory authority to only institute proceedings on some of the challenged claims. Instead, if the Board found that any claim had a reasonable likelihood of being successfully invalidated based on the petition, the Board was required to institute review for all of the claims challenged in the petition.

Short Term and Long Term Effects on the PTAB

The Court’s holding will likely have an immediate impact on pending cases before the PTAB in which the Board only partially instituted on the claims raised in the petition. The Board may be forced to revisit its original institution decisions and add non-instituted claims back into pending proceedings in order to comply with the *SAS* decision. Furthermore, the Federal Circuit may also remand cases back to the PTAB in which the Board only partially instituted a petition so that the non-instituted claims can be considered. Petitioners who currently have IPRs pending before the PTAB, or appeals pending before the Federal Circuit from the PTAB, should immediately consider whether to request that the PTAB add non-instituted claims to their IPR proceedings and issue a final written decision as to the non#instituted claims. However, Petitioners should be wary of what they wish for. Asking for claims to be reviewed by the PTAB, which had previously declined to review them, may mean that these claims could be found patentable at the final written decision, thereby triggering estoppel for Petitioners as discussed below. Furthermore, the addition of claims in any proceeding will increase costs for all involved.

The longer-term impacts of the Court’s decision are less clear. While the *SAS* decision holds that if the PTAB decides to institute a proceeding, it must institute with respect to all claims challenged by Petitioner, the Court’s decision left open the question of whether the PTAB will be required to institute on all *grounds* of invalidation set out in a petition. For instance, if a petition challenges a single claim of a patent on multiple grounds of invalidation (i.e., using different combinations of prior references), it is not clear whether the PTAB is required to institute on all grounds contained within the petition. The statutory basis for the Court’s holding, 35 U.S.C. § 318, only addresses claims, and the question presented to the Court was directed only to whether the PTAB must decide all claims. However, the Court’s decision is based in part on its view that the “petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises, not just those the decision maker wish to address” and that “the statute envisions that a petitioner will seek an inter partes review of a particular kind – one guided by a petition describing ‘each claim challenged’ and ‘the grounds on which the challenge to each claim is based.’” Thus, the Court’s decision might also be read to require that, if the Board institutes a challenge, it must institute as to all grounds raised by Petitioner. If that happens, IPRs will become more expensive for all parties involved and the scope of estoppel will be larger for Petitioners as discussed below.

It is unclear how the PTAB will respond to the Court’s decision. The PTAB retains considerable discretion as to whether to institute an IPR proceeding, and institution decisions are largely unreviewable. As a result, the PTAB could elect to control its docket by instituting fewer cases. For example, if a Petitioner files two petitions on the same patent, the Board may opt to institute review only one of the two petitions to reduce its workload while still being true to *SAS*. The PTAB might also opt to issue less thoughtful and complete institution decisions, perhaps stopping once it found that a single claim was likely invalid. Justice Ginsburg, in a dissent to the Court’s majority opinion, contemplated that the PTAB could circumvent the Court’s ruling and narrow proceedings by denying petitions that contain multiple challenges, and noting in its institution decision which grounds the Board felt were unworthy of institution. In Justice Ginsburg’s hypothetical, Petitioners would then be free to file a new petition that removed the challenges that the Board previously had noted were not worthy of

institution. Responding to Justice Ginsburg's hypothetical, the majority suggested a court could invalidate "shenanigans" by the PTAB, but would only consider the issue later.

District Court Impact

Even though the Court's decision applies to IPR proceedings before the PTAB, the case will likely have a significant impact on patent cases before district courts. As a preliminary matter, the Court's decision could mean that a district court would be more likely to grant a stay in a pending patent litigation prior to the PTAB's institution decision, since now only one claim needs to be found likely unpatentable to trigger a final written decision from the Board as to all challenged claims.

The Court's decision will also likely have a significant impact on the estoppel effects triggered by final written decision from the PTAB. Section 315(e)(2) estops a petitioner in an IPR from asserting in district court "that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review." District courts have considered estoppel as to three types of invalidity arguments: (1) grounds that were actually instituted in the IPR ("instituted grounds"); (2) grounds that were included in a petition but not instituted ("non-instituted grounds"); and (3) grounds that not were included in a petition ("non-petitioned grounds"). Many courts had found that estoppel did not apply to category (2) grounds, thus permitting those grounds to be litigated in district court even after a petitioner's unsuccessful IPR.

The Supreme Court's holding in *SAS* may eliminate category (2) entirely if the PTAB no longer is able to institute review only on some of the grounds raised in the petition. Thus, by including a ground in an IPR petition, it may become more likely Petitioner will be estopped from raising the ground in the district court. Therefore, going forward, the estoppel risks associated with filing an IPR petition may increase.

Conclusion

Because of the far-reaching implications that the *SAS* decision may have for IPR proceedings and district court litigation, both Petitioners and Patent Owners will need to reevaluate their strategies in conducting IPRs before the PTAB going forward. Petitioners will need to doubly ensure that the unpatentability analysis, including expert testimony, in their petitions are equally strong for independent and dependent claims. Furthermore, this decision may only allow Petitioners to litigate the invalidity of a patent in one forum (either the PTAB or the district court) due to the new "all or nothing" nature of IPR proceedings and its estoppel impacts. Thus, Petitioners will have to make a strategic decision as to which forum to assert their invalidity challenges. Patent Owners will need to reassess their responses to an IPR petition, taking into account the fact that should the Board decide that even one claim has a reasonable likelihood of being invalidated, the Patent Owner may be required to respond to every claim (and perhaps every ground) that was included in the Petition.

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[1] *See* MoFo Client Alert at https://www.mofo.com/resources/publications/180424-inter-partes-review.html

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U.S. Supreme Court Rules That Location Information Is Protected by the Fourth Amendment

Robert S. Litt

06/25/2018

Appellate + Supreme Court and Privacy + Data Security

Client Alert

In a widely anticipated decision, the Supreme Court held 5-4 that the government must obtain a warrant to acquire customer location information maintained by cellular service providers, at least where that information covers a period of a week or more. The case, *Carpenter v. United States*, has been closely watched by tech companies and privacy experts. The opinion, authored by Chief Justice John Roberts, immediately enshrines greater protections for certain forms of location data assembled by third parties and represents a growing discomfort on the Court with the so-called "third-party doctrine"—a line of cases holding that a person does not have a reasonable expectation of privacy in records that he or she voluntarily discloses to a third party. In the longer run, there will likely be further litigation over whether the same logic should extend Fourth Amendment protections to other types of sensitive information in the hands of third parties as courts grapple with applying these principles in the digital age.

Background

Anytime a cell phone uses its network, it must connect to the network through a "cell site." Whenever cell sites make a connection, they create and record Cell Site Location Information ("CSLI"). Cell phones may create hundreds of data points in a normal day, and providers collect and store CSLI to spot weak coverage areas and perform other business functions.

Obtaining CSLI records is a fairly common law enforcement tool and—until now—such information could typically be obtained by court orders issued under the Stored Communications Act. [1] Those orders require the government to make certain types of showings to a court, but they are not warrants and do not require probable cause.

The Supreme Court's review of this practice stemmed from the arrest and conviction of Timothy Carpenter for (ironically) his involvement in several robberies of cell phone stores. Without obtaining a warrant, the FBI sought and obtained orders directing MetroPCS and Sprint to hand over 152 days of Carpenter's CSLI generated when his phone placed, received, or ended a call, as well as seven days of overall CSLI records. This evidence was used to help convict Carpenter of various robbery charges.

The Ruling

Carpenter's case reached the Supreme Court as part of a broader dispute over whether and in what circumstances an individual's location data is protected by the Fourth Amendment's warrant requirement. In a 2012 decision involving the use of a GPS tracking device affixed to a vehicle, five Justices had suggested that people generally have a reasonable expectation of privacy in information that would reveal their location and movements over time, but the Court's majority opinion in that case had not squarely resolved the issue. [2] The key question in *Carpenter* turned on the applicability of the third party doctrine: Do customers have a reasonable expectation of privacy in their location information when, through their phones, they disclose that information to cellular providers?

The government argued that cell phone users voluntarily "share" their location information by using cell phones that connect with cell sites. As such, it argued that CSLI records should be treated the same way as phone records in the hands of a telephone company or bank records in the hands of a financial institution—both of which the Supreme Court has held can be obtained through a subpoena and without a warrant. [3] The American Civil Liberties Union (ACLU), representing Carpenter, argued that warrantless access to historical CSLI permitted the government to obtain a tremendous amount of revealing information, incomparable to what previous circumstances allowed. The ACLU argued that access to this type of information violates the basic "reasonable expectation of privacy" test.

The Court ruled for Carpenter, holding that individuals have a legitimate expectation of privacy in their locations as captured by CSLI. As such, a warrant based on probable cause is required in order to obtain these records. The opinion made several key observations:

- The Fourth Amendment is not static. As technological changes make some searches easier or lead to entirely new techniques, Fourth Amendment protections must keep pace. For that reason, rules like the third-party doctrine cannot be "mechanically" applied regardless of the circumstances or the type of information that the government seeks to obtain.
- People have a reasonable expectation of privacy in their location as captured by CSLI records. Even though people can expect to be observed as they move about in public, they have an expectation that they are not being continuously monitored. And because almost everyone "compulsively carr[ies] cell phones with them all the time," CLSI offers "near perfect surveillance."
- The third-party doctrine does not apply to CSLI. The Court distinguished CSLI from the types of business records at issue in prior cases, concluding the bank records and phone records do not contain information that is as personal or invasive as continuous location information. The Court also noted that CSLI is not voluntarily shared in any meaningful sense: Just by being on, cell phones continually "ping" cell towers and generate this data.
- The Court stated that its opinion reaches only historical CSLI compiled for a period of at least seven days. It did not address CSLI obtained on a real-time basis, or any other type of information obtained through a subpoena. The Court also noted that existing exceptions to the warrant requirement—such as exigent circumstances—could apply to historical CSLI where appropriate.

Key Takeaways

Most obviously, in light of *Carpenter*, a mobile communications provider should ask to see a warrant if the government requests historical CSLI covering a period of a week or more. (And, undoubtedly, law enforcement agencies will be updating their protocols accordingly.) Slightly less obviously, businesses that possess *other* types of customer location information (e.g., through GPS tracking) may also expect to see a warrant—or may be able to argue that a warrant is required—if they are asked to turn over such information to law enforcement in aid of an investigation. In fact, the *Carpenter* decision generally describes GPS data as more precise and therefore *more* potentially invasive than CSLI.

While the ruling will create some uncertainty, service providers can take some comfort in the fact that the Stored Communications Act precludes plaintiffs from suing providers who comply with court orders or subpoenas. So businesses are unlikely to be successfully sued simply for having complied with a subpoena or court order requesting this type of information.

More broadly, *Carpenter* continues a trend of recent Supreme Court cases adapting Fourth Amendment rules to account for changing technology. A key refrain throughout the opinion is the ease of compiling CSLI records and the sheer volume

of data at stake. The Court's practical focus on the type and volume of data being obtained creates doubts about the third-party doctrine and its application in other circumstances. *Carpenter* suggests that this rule cannot function like an on/off switch, eliminating all expectations of privacy if something is shared with a third party.

Notably, several prominent technology companies similarly advocated in an amicus brief for a more practical and less rigid approach—in part because many types of technology require users to "share" data (including sensitive data) with technology companies in order to function. Although the Court's opinion attempted to limit itself to historical CSLI, emphasizing collection of location information over a week or more at a time, there will almost certainly be future litigation on collections of other types of information, potentially including real-time location information as well as subpoena requests for other types of arguably sensitive data.

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[1] *See* 18 U.S.C. § 2703(c), (d).

[2] *United States v. Jones*, 565 U.S. 400, 413-18 (2012) (Sotomayor, J., concurring); *id.* at 418-31 (Alito, J., concurring).

[3] *Smith v. Maryland*, 442 U.S. 735 (1979) (call records); *United States v. Miller*, 425 U.S. 534 (1976) (bank records).

The Supreme Court Clarifies a Trademark Licensee's Rights After Rejection in Bankruptcy

Jennifer L. Marines and Mark Alexander Lightner

05/21/2019

Appellate + Supreme Court and Business Restructuring + Insolvency

Client Alert

The Supreme Court's recent decision in *Mission Product Holdings, Inc., v. Tempnology, LLC* [1] clarifies that a debtor-licensor's rejection of a trademark license under § 365(a) [2] of the Bankruptcy Code is treated as a breach, and not as a rescission, of that license under § 365(g). [3] The Court held that if a licensee's right to use the trademark would survive a breach outside of bankruptcy, that same right survives a rejection in bankruptcy. The clear import of *Mission Product* is that, absent a specific provision of the Bankruptcy Code to the contrary, a contract counterparty's post-rejection rights will be governed by either the rejected contract itself or applicable non-bankruptcy law.

Background

In 2012, Tempnology, LLC ("Tempnology") entered into a contract with Mission Product Holdings, Inc. ("Mission Product") that granted Mission Product a worldwide license to certain "Coolcore" clothing products that stay cool when used during exercise. The license expired in 2016, but Tempnology filed for chapter 11 in 2015 and moved to reject the contract under § 365(a). The Bankruptcy Court granted Tempnology's request, which allowed Tempnology to stop performing under the contract and gave Mission Product a pre-petition claim for damages related to Tempnology's non-performance.

Tempnology claimed that the effect of the rejection was to terminate the trademark license. Tempnology reasoned that, because several other provisions of § 365 address rights of contract counterparties in the event of rejection under § 365(a), [4] the absence of such a provision in the case of trademark licensees means that trademark licenses, by negative inference, may be terminated upon rejection under § 365(a). The Bankruptcy Court accepted Tempnology's argument, but the Bankruptcy Appellate Panel for the First Circuit (the "BAP") reversed and relied on an opinion issued by the U.S. Court of Appeals for the Seventh Circuit (the "Seventh Circuit") to hold that § 365(g) merely provides that a rejection "constitutes a breach" and does not terminate or extinguish the contract altogether.

The U.S. Court of Appeals for the First Circuit (the "First Circuit") reversed the BAP, endorsing the negative inference approach adopted by the Bankruptcy Court and concluding that trademarks are unique. The First Circuit noted that permitting a trademark licensee to keep the mark would require debtor-licensors to expend valuable estate resources maintaining it, which is contrary to the congressional purpose of freeing debtors from burdensome obligations.

The Supreme Court granted *certiorari* to resolve a split between the First and Seventh Circuits.

The Supreme Court's Decision

By a vote of 8-1, [5] the Court reversed the First Circuit. The Court held that §§ 365(a) and (g) work in tandem to create a general rule that the "[r]ejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach." [6] In other words, the Court said that when contract rejection occurs, "the debtor and counterparty do not go back to their

pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement" in the same manner as if the debtor breached the contract prior to bankruptcy. [7] In respect of trademark licenses, licensees "can continue to do whatever the license authorizes" after breach, and specifically in the case of Mission Product, that includes the use of the mark as permitted in the original contract. [8]

The Court rejected Tempnology's negative inference argument adopted by the First Circuit, concluding that the various provisions of § 365 purporting to give contract counterparties unique rights after rejection were actually enacted by Congress over several decades to correct judicial rulings that departed from the general rule created by §§ 365(a) and (g). [9]

Finally, the Court rejected the argument espoused by Tempnology and adopted by the First Circuit that trademarks are unique as a result of the expenditure of estate resources necessary to maintain the quality of a mark, which could hinder a debtor's reorganization. The Court notably stated that while rejection allows debtors to escape their contractual obligations, the Bankruptcy Code does not allow them to escape all economic burdens of owning property. [10]

Takeaways

The Court's straightforward, textualist application of §§ 365(a) and (g) provides helpful guidance for contract counterparties, including trademark licensees and other licensees of intellectual property not specifically governed by the rejection provisions of § 365. That is, unless otherwise provided for in the Bankruptcy Code, *any* contract rejection under § 365 will be treated as a breach, and a counterparty's post-breach rights (including any right to possession or use post-breach) will be governed by the contract itself or applicable non-bankruptcy law.

Beyond trademarks, however, the decision also highlights the need for debtors to consider the economic burden of preserving the value of their licensed, rented, or loaned property when rejecting an executory contract, and future debtors should be mindful of entering into prepetition contracts that have economic burdens attached to them in the event of rejection (or breach) in a future a bankruptcy case.

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[1] *Mission Product Holdings, Inc. v. Tempnology, LLC*, No. 17-1657, 2019 U.S. LEXIS 3544 (U.S. May 20, 2019).

[2] Section 365(a) of the Bankruptcy Code provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a).

[3] As is relevant here, "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . . immediately before the date of the filing of the petition." 11 U.S.C. § 365(g)(1).

[4] For example, § 365(n) provides *inter alia* that a licensee of "intellectual property," which does not include trademarks, *see* § 101(35A), may treat the rejection as a termination or may retain its rights through the duration of the contract.

[5] Justice Gorsuch dissented, arguing that the Court should not reach the merits of the case because it is unclear whether there is an Article III "Case" or "Controvers[y]" because Mission Product's license has expired.

[6] *Mission Product*, 2019 U.S. LEXIS 3544 at *14.

[7] *Id.* at *17.

[8] *Id.* at *18.

[9] *Id.* at *20-22.

[10] *Id.* at *24-26

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JOINT VENTURES & TRANSACTIONS – HIDDEN RISKS FOR CONTRACTORS

Damien Specht
Alissandra Young

November 5, 2019

Agenda

- ***What We've Learned***: Transferring Contract Vehicles
- ***What We've Found***: Compliance Issues
- ***What You Can (And Can't) Do***: Investing in Small Businesses
- ***What Everyone Seems to Be Doing***: Mentor Protégé Program and Joint Venture Compliance

Sharp Edges In Asset Transactions

- Asset transactions can be more efficient (only buy what you want) and lower risk (leave liabilities behind) than stock transactions.
- But there are significant risks:
  - You only get what you contract for.
  - Need to specifically acquire all assets required for performance of prime contracts.
  - Integration can be challenging.
  - No prime contract transfer is allowed without Government approval.
  - Approval can only be received ***after*** closing.
  - Subcontracts and teaming agreements are more likely to require consent in an asset transaction.

Novation Challenges

- What do you do while waiting on novation?
  - Selling entity must continue to exist and invoice the Government, but the parties need to decide who will perform – and how.
  - Subcontracts pending novation are common, but don't forget Government consent to subcontract, small business limitations on subcontract and cost-accounting issues.
- Novation requirements (FAR 42.1204)
  - Requires novation "arise[] out of the transfer of (1) All the contractor's assets; or (2) The entire portion of the assets involved in performing the contract."
    - What if the contractor has an IDIQ vehicle with no task or delivery order awards?
    - Government is less likely to consent to contract transfer vs. transfer of a division.
  - Requires audited balance sheets from before and after the transaction – but that is almost never feasible.
  - Requires original signatures (even though the FAR does not include that requirement)

Small Business Transfer Issues

- Risk is misidentifying contracts.
  - Many entities are confused as to whether a contract actually was reserved for only small businesses or whether the Government is just claiming credit.
    - Sometimes it is clear from the cover page of a prime contract, while other times it is hidden in list of FAR clauses incorporated by reference
      - FAR 52.219-6, 52.219-17, 52.219-27, 52.219-30, etc.
      - When in doubt, check FPDS.gov.
- Recertification Requirements
  - Size recertification, required as result of merger, sale or stock acquisition, or an approved novation.
  - Also required for pending proposals.
  - Timely notification critical to avoid potential False Claims Act issues

Small Business Transfer Issues Cont'd

- General rule is if the contractor is other than small after recertification, contractor remains *eligible* to continue performance of existing contracts, including options
  - However, acquirer's access to future task orders may be limited if the Contracting Officer requires offerors to recertify size in connection with the future task order proposal.
- Contractors must beware of specific contract language that limits the general rule (and therefore may decrease value of the contract)
  - OASIS
    - Contractors immediately put on "Dormant Status" (i.e. unable to bid on future work) and Off-Ramped after all active task orders completed if no longer small due to novation, merger or acquisition
  - T4NG
    - Government has discretion to Off-Ramp contractors that are no longer small or qualify as SDVOSB or VOSB as the result of novation, merger or acquisition.

Current Trends in Diligence

- Acquirers often focus on profitability and business synergies, but overlook common compliance risks:
  - GSA Schedule/Most Favored Customer Compliance
  - Labor Mapping
  - Small Business Compliance
  - Intellectual Property Tracking
  - Truthful Cost or Pricing Data
  - Cyber/NIST Compliance

Investing In Small Business

- Increasing set-aside awards has led to an increase in investments in small businesses.
- Just because you are a minority owner does not mean you are in the clear.
- Balancing protecting investment with "control."
- Impermissible controls
  - Preventing a quorum or otherwise block action by the board of directors or shareholders.
    - Supermajority requirements for day-to-day actions
    - Control over executive hiring, firing, compensation
  - SDVOSB and 8(a) programs have more restrictive requirements.

Investing in Small Business (cont'd)

- Permissible controls
  - No perfect formula -- Extraordinary actions related to protection of investment
  - OHA recently provided a list of examples in *Southern Contracting Solutions III, LLC*, SBA No. SIZ-5956 (2018):
    - Issuance of additional stock
    - Amendment of charter or bylaws
    - Entry into substantially different lines of businesses
    - Adding new members to a limited liability company
    - Dissolution of the company
- SDVOSB concerns are now limited to an exclusive list of five permissible controls

Mentor-Protégé Program & JV's

- SBA's Mentor-Protégé Program
  - Three years since SBA expanded the program beyond 8(a) firms.
  - Exception to general rule that Joint Venture ("JV") partners are affiliated (can be affiliated based upon other grounds)
  - Benefits to Mentor:
    - Access to set-aside contracts for which Protégé qualifies as small
    - Up to 60% workshare set-aside contracts based on protégé status.
    - May invest up to 40% equity in small business
  - Benefits to Protégé:
    - Financial/Management/Contracting Assistance
    - Past performance of mentor considered for JV proposals
    - Ability to pursue larger contracts
- Currently over ***900 active agreements***
  - 18 months ago, there were only 500

Mentor-Protégé Risks

- Failure to follow SBA regulations= **Affiliation**
  - To benefit from affiliation exception, must obtain SBA approval of Mentor-Protégé Agreement (MPA) ***before*** forming the JV
  - Potential pitfalls
    - Noncompliant MPA or JV agreement
    - Failure by mentor to provide assistance terminates MPA
    - Failure to pre-approve changes to the MPA
    - Failure to get CVE approval for SDVOSB JV
    - Failure to update JV for new opportunities
    - Recertification failures
    - Reporting requirements
- 3-in-2 Rule
- Extensive joint venturing between partners
  - More than 8 JVs with 15 contracts
  - But, task orders do not count as contracts

Key Issues in Operating Agreements

- JV's can be informal or formal partnerships, an LLC, or some other business organization type
  - SBA considers informal JVs as partnerships
    - Consider forming an LLC to avoid associated issues with partnerships
  - If a formal separate legal entity, ***may not*** be populated
- SBA's strictly enforces its list of 12 required provisions. JV/OAs must explicitly:
  - Identify the small business as the managing member with ownership of at least 51% of the JV.
  - Provide protégé with profits commensurate with work performed.
  - Specify responsibilities of the parties
    - Such as negotiation of the contract, source of labor, etc.
    - The small business partner must perform 40% of the work performed by the JV (and must be more than administrative work)
  - Itemize of all major equipment, facilities, and other resources to be provided by each party, with a detailed schedule of cost/value of each, where practical – ***for each contract.***

Key Issues Cont'd

- The Operating Agreement must be updated for each contract.
- What if the JV does not know which contract it will bid on when drafting the agreement?
  - Include a provision that the Agreement will incorporate an addendum delineating responsibilities, equipment, etc. when the JV identifies an opportunity to bid on
  - But remember to actually amend the JV Agreement ***before*** submitting an offer!
  - *Stacqme, LLC*, SBA No. SIZ-5976 (2018) → OHA found an SDVOSB's JV Agreement, which was based on SBA's template agreement, non-compliant, because the JV did not update its agreement with an addendum explaining which tasks each party to the joint venture would perform for the contract it was bidding on.
- Remember performance of work requirements
  - *Sage Acquisitions, LLC*, SBA No. SIZ-5783 (2016) → JV Agreement was non-compliant because although the agreement clearly delineated the work to be performed by the 8(a) member, and that work amounted to 40% of the JV's work, the work was merely administrative because the 8(a) member was only responsible for overseeing the closing process performed by others.

Risks Related to Specific RFP Provisions

- Contractors must carefully review RFP provisions to understand how the Agency will evaluate JV offerors
- GSA's OASIS Small Business Pool 1
  - For Mentor-Protégé JV offerors, where the Mentor was large, the RFP limited the number of past performance references attributable to the Mentor.
    - *Ekagra Partners, LLC*, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83
      - GAO ruled Agencies are only required to *consider* past performance of each partner. SBA's regulations and the Small Business Act do not require any specific degree of consideration.
- T4NG Draft On-Ramp RFP
  - For past performance, "Prime Offerors shall submit up to two (2) instances and major subcontractors shall submit up to one (1) instance of Federal, State or Commercial contracts," while JV offerors "shall submit up to one (1) instance for each of the entities that make up the Joint Venture, as well as up to one (1) instance for the Joint Venture."


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OTHER TRANSACTIONS

Data Rights & Intellectual Property Simplified

Jay DeVecchio
Locke Bell

November 5, 2019

Some Background

- Other Transactions (OTs) — i.e., "transactions (other than contracts, cooperative agreements, and grants)"— first authorized in 1958 for NASA, and subsequently extended to 11 other executive agencies; but their use is greatest today at the DOD.
- OTs started at DOD in 1989, when OTs were authorized for Defense Advanced Research Projects Agency (DARPA) projects and later extended in varying forms for other military departments.
- Section 815 of the FY 2016 NDAA permanently codified DOD's OT prototype authority at 10 U.S.C.A. § 2371b, thus reinvigorating their use within the DOD. The Army is the most active user.

Today's Goals

- Because OTs are perceived as unique substitutes for DOD procurement contracts, there are many questions surrounding OT requirements—in particular their intellectual property (IP) obligations.
- Today's goals are to (1) answer several of the repeatedly raised questions about OTs generally and (2) address the most commonly raised IP issues in OTs at the DOD.
- The overarching purpose is helping to guide you through this area of Government contracting, where confusion is more the rule than the exception.

A Few Basics: Three Categories

- **Research OTs** are authorized for "basic, applied, and advanced research projects." This is work that pushes the state of the art, has dual application (Government and commercial), and has only **incidental** prototype work.
- **Prototype OTs** are used when a program is to create a single prototype that will be delivered to the Government or to acquire a reasonable number of prototypes to test in the field before purchasing in quantity.
- **Production OTs** are what they sound like—to make things. They flow from prototype OTs and can be awarded to a **sole source** if competitive procedures were utilized in awarding the prototype OT, the participant successfully completed the prototype, and the solicitation and original agreement allowed for a follow-on for a production contract or OT.

Eligibility For OTs

- At non-DOD agencies and for research OTs, essentially anyone can be eligible. DOD's prototype OT authority, however, has unique constraints. Under 10 U.S.C.A. § 2371b, a DOD **prototype** project can be conducted only if **one** of four conditions is met:
  (1) one **nontraditional defense contractor** significantly participates in the project;
  (2) all significant participants are small business or nontraditional defense contractors;
  (3) at least one-third of the total cost of the prototype project is provided by non-Government participants; **or**
  (4) the senior procurement acquisition official provides a written justification for using an OT.

Nontraditional Defense Contractors

- These are defined in DFARS 212.001 as "an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards [CAS] prescribed pursuant to [41 U.S.C.A. § 1502] and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement."

- You will know if you qualify: a contract subject to the CAS is in excess of $7.5 million and is subject to the Truth in Negotiations Act. Full coverage occurs with one CAS covered contract of $50M or more or net $50M CAS contracts in last accounting period. This would be hard to miss.

Are OTs Contracts?

- Yes, OTs are contracts. They contain mutual obligations and thus are binding on and enforceable by the parties.
- The real question is what an OT is not: it is **not** a procurement contract, a grant, a cooperative agreement, or a cooperative research and development agreement (CRADA). More on this in a moment.

OTs vs. Procurement Contracts

- Because an OT is not a procurement contract, Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Supplement (DFARS) clauses are inapplicable — or, at least, not necessarily applicable.
- Parties can and do use FAR and DFARS provisions, or minor variations on them — particularly the data rights clauses — because the concepts are familiar to procuring agencies.

What Data Rights Clauses?

- Specifically, the data rights statutes at 10 U.S.C.A. §§ 2320 and 2321 and 41 U.S.C.A. § 2302, as well as their corresponding FAR and DFARS provisions and clauses -- e.g., FAR 52.227-14, "Rights in Data—General"; DFARS 252.227-7013, "Rights in Technical Data—Noncommercial Items"; and DFARS 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation," do **not** apply.

- Nor does the Bayh-Dole Act, which governs patent rights in grants, funding agreements, and procurement contracts.

What Laws Do Apply?

- Although freedom from the FAR and DFARS is liberating, there is always a range of federal laws that apply independent of the procurement regulations. Among them are the ones addressing good conduct as well as social and national security policy.

- OT holders, thus, must remain conscious, among others, of the False Claims Act, False Statements statute, Fair Labor Standards Act, nondiscrimination laws, export control prohibitions, the Anti-Deficiency Act (which prohibits most indemnification clauses), and classification and other national security laws.

Ok, How About The Bid Protest Regulations?

- OTs are not entirely immune from bid protests. Both the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC) will review bid protests alleging an agency is improperly **using** its OT authority under the authorizing OT statute when the agency should be using a procurement contract.

- This is different than whether the OTA award **evaluation decision** itself was proper. The GAO's jurisdiction over the **merits** is based on the Competition in Contracting Act, which does not apply to OTs; while the COFC's Tucker Act jurisdiction must be "in connection with a procurement or proposed procurement."

Flexibility

- In all events, with an OT, a federal agency has "the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments." Office of the Under Sec'y of Defense for Acquisition and Sustainment, Other Transactions Guide at 4 (Version 1.0 Nov. 2018) [OT Guide], available at https://aaf.dau.mil/ot-guide/, which refreshingly replaces the January 2017 Other Transactions Guide for Prototype Projects.

- OTs, therefore, provide companies an opportunity to contract with the Federal Government without requiring familiarity with the nuances and pitfalls of traditional procurement contracting.

Flexibility

- **But my agency is telling me I must follow its standard OT agreement, do I have to?**

- **No**. Because there are essentially no OT terms and conditions fixed by law or regulation, there is no such thing as mandatory "standard" OT agreements or IP clauses, no matter what an agency or a contractor tells you. You might as a practical matter face bureaucratic inertia in trying to vary what an agency claims are its standard terms, but ultimately many agencies will negotiate key provisions.

Administrative Flexibility Too

- Similarly, OTs are not required to be administered by the Defense Contract Management Agency, although the contractor and agency can agree to this.

- OTs also are not subject to Defense Contract Audit Agency (DCAA) audits. If an audit becomes necessary, the Government has the ability to use outside, independent auditors; and the parties should be able to negotiate the scope of the audit.

- If, however, a prototype OT provides for total payments in excess of $5 million, the OT must include a clause that provides the Comptroller General access to records. This is not required for a research OT.

So, Is Almost Everything Negotiable?

- Yes! That is the hidden beauty of OTs, there is almost no constraint on what you can negotiate, other than Agency inertia.
- This might mean work for both sides: everyone has to figure out how best to handle disputes, terminations, and IP. The corollary is OTs offer great flexibility and the ability for both sides to tailor terms to accommodate their real needs rather than "needs" set by regulation.

But Sometimes Familiarity Is Comforting

- Nevertheless, there are benefits to using or slightly modifying certain mandatory FAR and DFARS clauses:
- The "Changes" clause is a good example. Changes happen. Equitable adjustments should too. The question is, what do your people really understand about this clause?
- Terminations are another. The FAR Part 49 termination for convenience provisions are some of the most rational ever written.

IP Terms And Conditions Are Negotiable

- There are no mandatory IP clauses for OTs. But most agencies will start from a variation on the "standard" data rights provisions. This is recognized in the November 2018 OT Guide, which instructs DOD Agreements Officers (AOs) (the Contracting Officer equivalent for OTs) to rely on the Bayh-Dole and DFARS frameworks only as a starting point from which to craft IP clauses that consider "project goals," including:
  - Commercialization
  - Follow on support
  - Balancing the parties' relative risks and investments, past and future

Countervailing Government IP Needs

- The OT Guide also reflects the Government's IP perspective:
- **Licensing**: Avoid restrictions on OT developments that would hinder domestic manufacture or use.
- **Additional Rights**: Consider government rights in the case of inability or refusal of the private party or team to continue to perform.
- **Patents**: Consider the government's needs for patents and patent rights to use the developed technology

Countervailing Government IP Needs

- **Data & Software**: The OT should typically address definitions, allocation of rights, delivery requirements, and restrictive legends. The OT should account for certain emergency or special circumstances in which the Government may need additional rights, such as the need to disclose technical data or computer software.

- Sound familiar? All of this is in the data rights clauses.

Countervailing Government IP Needs

- **Commercial data**: The AO should consider commercial technical data and commercial computer software. The Government typically does not need extensive rights in commercial technical data and software. [Amen]

- However, depending on the project scope and goals, the Government may need to negotiate for greater rights in order to utilize the developed technology. [OT Guide at 51–52.]

This All Sounds Good, But What Will You Really Hear?

- **I am being told by the agency that I am required under OTs to give up ownership of my existing data rights and I must provide broad Government Purpose Rights in them, is that correct?**

- Absolutely not; there is no such requirement.

This All Sounds Good, But What Will You Really Hear?

- **The agency says giving up ownership and providing Government Purpose Rights are consistent with the DOD data rights clauses and principles, is that correct?**

- No. Unfortunately, there are a number of misconceptions within the government and contractors about the basic principles the data rights clauses. This is true not only for OTs, but also for procurement contracts and grants, whose clauses AOs often modify for use in OTs.

- So, let us clear up a few key points to bear in mind when negotiating rights in technical data and computer software under OTs.

Fundamental Data Rights Principles For OTs And Otherwise

- **Almost all contractor rights begin with "development" at "private expense."**

- Rights in technical data do not typically arise when the data (e.g., drawings, specifications, or processes) are developed, as many seem to think, but rather when the item, component, or process to which the technical data **pertain** was developed.
  - Or, for software, when the software modules or subroutines were developed.

Fundamental Data Rights Principles For OTs And Otherwise

- **Development necessarily occurs before the final product**.

- The clauses and decisions define development as being attained when **reasonable people skilled in the applicable** art say there is a **high probability** it will work as intended. Therefore, one can achieve development for purposes of asserting limited or restricted rights before the end product is ready to go or even if the government pays you for further refinement or improvements.

Fundamental Data Rights Principles For OTs And Otherwise

- **Development is analyzed at the lowest component level**.
- In practice, development occurs at component levels: hardware is made of parts and pieces, while software comprises various modules and subroutines. Therefore, in the real world, these components typically are developed separately for data rights purposes—i.e., reasonable people skilled in the art will say there is a high probability the component will work as intended—before the entire item is finished.
- Accordingly, one can and should assert rights at these lowest practicable component levels.

Fundamental Data Rights Principles For OTs And Otherwise

- **Therefore, your rights follow the components or modules.**
- If an item comprises **four** components, and **three** were developed entirely at **private expense** with the fourth being developed with direct (not overhead) funding from the government, the contractor would be entitled to limit or restrict the government's rights in the three components, while the government could assert unlimited rights only in the fourth component.

Fundamental Data Rights Principles For OTs And Otherwise

- **Private expense** means development was paid for entirely with any funds other than direct payment under a Government contract or subcontract. Therefore, if you perform development work **properly charged** to any **indirect** cost account (most commonly IR&D per FAR 31.205-18) or bottom line profit dollars, that is private expense even if the government reimburses a portion of your indirect accounts.

- Funding received under a grant or cooperative agreement also is private expense. *See* Boeing Co., ASBCA No. 60373, 18-1 BCA ¶ 37,112, 60 GC ¶ 269.

Fundamental Data Rights Principles For OTs And Otherwise

- **Other Points** – The Data Rights Clauses:
  - Address only License rights, nothing more
  - License rights are rights of use, not ownership & not exclusive rights
  - So, you own and can use whatever you have developed, no matter who paid for the development.
  - Contain no delivery obligations

Applying These Principles to OTs

- Before you negotiate an OT:
  - Identify each item, component, process, or software that you have developed entirely at private expense at the lowest component level.
  - Identify each of your patents and pending patent applications, whether provisional or not. (USG has licenses only in "subject inventions.")
  - Identify your commercial computer software. Commerciality is defined in the FAR & DFARS and is independent of private expense.

Applying These Principles to OTs

- Unlike procurement contracts, under OTs your **Commercial software can be licensed** under almost all of your "standard" commercial software terms, because most of the commercial terms to which the government takes exception are terms that are contrary to federal procurement law, such as the Contract Disputes Act, which do not apply.

- But recall, the Anti-Deficiency Act (e.g., indemnity clauses & automatic renewals) is not a procurement law.

Watch Out For IP Buzz Words

- Here is a common OT question: ***The draft OT from the agency includes terms such as "Government Purpose Rights," "OMIT Data," "Limited Distribution Rights," "Unrestricted Rights," and other undefined phrases; should I assume these will be interpreted as they are defined in the DFARS?***

- ***Answer*: No**, be careful. Often, OTs use words and phrases that are the same as or similar to those used in the DFARS data rights clauses, but the clauses in which they are used in the OT are different and applied differently. Or, they might not be found at all in the regulations. So, define carefully any of those IP-related terms, including by reference to DFARS clauses.

Are There Sample OTs Available?

- **Yes**. The Defense Advanced Research Projects Agency has a sample "Streamlined Other Transactions for Prototypes" available on the internet. This contains relatively neutral IP terms and conditions that various Government agencies utilize in their OTs. It is currently available at https://www.darpa.mil/attachments/DARPA-BAA-16-08_845%20Sample. pdf.

Embracing OTs

- The DOD is increasingly embracing them; and there's no reason for you to shy from them either.
- Simply remember that essentially EVERYTHING is negotiable under an OT.
- If you hear – "But this is required" – (and you don't like what is "required") your question is "by what?"
  - Not the procurement regulations, not the grant regulations, not the CRADA guidelines, not the statutes.
  - Chances are it only is the agency's preference.
- So, your next question is "Why don't we try something better?"

APPENDIX
SPEAKER BIOS

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Kevin P. Mullen is Co-chair of Morrison & Foerster's Government Contracts & Public Procurement practice. Kevin has broad experience in numerous facets of government contracts matters including agency procurements, subcontracting, teaming and joint venture relationships, contract performance issues, intellectual property, compliance matters, due diligence for mergers and acquisitions, and procurement fraud matters. He represents clients in the preparation and litigation of contract adjustment claims and terminations for both government contracts and construction projects.

Over the course of his 30-year career, Kevin has handled more than 250 bid protest cases, representing both protesters and contract awardees before the U.S. Government Accountability Office, the U.S. Court of Federal Claims, federal district courts and state protest forums.

Kevin is a Council member for the Public Contract Law Section of the American Bar Association, and he has served as a Co-Chair of the Contract Claims and Disputes Resolution Committee and the Bid Protest Committee, and as a Vice-Chair of the Acquisition Reform and Emerging Issues Committee. He also served on the Board of Governors of the U.S. Court of Federal Claims Bar Association.

Kevin has been recognized by *Chambers & Partners USA* and *Legal 500 US* as one of the leading lawyers nationwide in the area of Government Contracts and has been named a "Top Washington Lawyer" in Government Contracts Law by Washingtonian magazine. *Chambers & Partners USA* 2019 included him in their Bid Protest Spotlight table. He was named to the BTI Consulting Group's "Client Service All-Stars 2016" list, a registry of 354 of the legal profession's client service elite.

EDUCATION

University of Virginia (B.A., 1984)

University of Virginia School of Law (J.D., 1988)

RANKINGS

***Chambers USA* 2019**
Sources describe Kevin as *"very experienced, knowledgeable and efficient."*

***Chambers USA* 2018**
Kevin is lauded by sources as a "*very skilled litigator.*" He advises clients on a range of transactional, regulatory and bid protest matters. Clients praise his ability to act as both a "*zealous advocate and realistic counselor.*"

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James Tucker maintains an active practice in bid protests before the Government Accountability Office and contracting agencies and counsels clients in contract disputes and compliance obligations. He has represented contractors in contract terminations, prepared requests for equitable adjustment and contract claims, and has represented clients before the Boards of Contract Appeals.

Jim graduated from the University of Kentucky in 1996, receiving a B.A. in classics and from the Pontifical Gregorian University in Rome in 2000, where he received an S.T.B in theology. In 2012, James earned a J.D. with high honors from the George Washington University Law School, where he was a member of *The George Washington University Law Review*.

While in law school, Jim focused his studies on public procurement law and was an extern at the General Services Administration's Suspension, Debarment, and Contract Remedies Division, where he drafted recommendations to the agency's Suspension and Debarment Official in cases of government contractors being considered for suspension or debarment.

Jim maintains an active pro bono practice, which includes representing victims of human trafficking in civil litigation, administrative actions, and related immigration matters.

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DAVID A. CHURCHILL

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David A. Churchill is a former Co-Chair of Morrison & Foerster's Government Contracts and Public Procurement practice. His practice includes litigation of disputes involving the award, performance and termination of federal contract disputes, including the Court of Federal Claims, the agency boards of contract appeals, and the Government Accountability Office. He has an active counseling practice in contract award-related matters and on issues arising during performance of government contracts and subcontracts. He also is frequently called upon to conduct internal company investigations in connection with government inquiries and/or mandatory disclosures of potential fraud.

Every year since 2005, *Chambers & Partners USA* has named Dave one of the country's leading lawyers in Government Contracts Law. In 2009, he was recognized by *Ethisphere* magazine on its list of "Attorneys Who Matter" in the Government Contracting category. He was also named one of "Washington's Top Lawyers" by *Washingtonian* magazine. Dave is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability.

Dave has served as chair of the Public Contract Law Section of the American Bar Association and president of the U.S. Court of Federal Claims Bar Association. In addition to his legal service, Dave serves as chair of the Governing Council of The Wilderness Society.

Representative matters across the spectrum of government contract law include:

- *McDonnell Douglas et al. vs. United States* (Court of Federal Claims/Federal Circuit/US Supreme Court): Dave represented General Dynamics Corporation in a termination dispute involving a classified

EDUCATION

Cornell Law School (J.D., 1979)

University of Colorado, Boulder (B.A., 1974)

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"*Government contracts guru*" David Churchill "*is a seasoned hand who provides an excellent balance of black letter law guidance blended with practical solutions*," according to clients. He is regularly called upon to handle complex disputes on behalf of high-profile government contractors.

***Who's Who Legal* 2013-2019**
Public Procurement

contract for development and early production of an advanced attack aircraft for the U.S. Navy.

- Served as attorney of record for the contract awardee as intervenor before GAO in the successful defense of the award of a major weapon system contract against a protest brought by a disappointed bidder. The contract for development and early production of a new aircraft system represents one of the largest Defense procurements in a generation.
- *Protest of Honeywell International, Inc.* (Government Accountability Office): Dave was lead counsel to Honeywell in a major bid protest proceeding involving the award of a large NASA contract for space operations management.
- *Protest of United Defense, LP* (General Accounting Office): Dave was lead counsel to General Dynamics Corporation in a large bid protest proceeding involving the award of a U.S. Army contract for development and production of the Stryker armored vehicle.
- *Thomson CSF vs. Lockheed Martin Corporation* (ICC): Dave was lead counsel in an ICC international arbitration brought by a French company against Lockheed Martin involving the development and testing of a short range antiaircraft missile.
- *Norden Systems, Inc. vs. General Dynamics Corporation* (Conn. State court): Dave represented General Dynamics Corporation in a suit brought by a subcontractor involving termination of a large, classified avionics subcontract.

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Kathy Weinberg's practice focuses on government contracts. She handles bid protests, contract claims by and against contractors, and representation of clients in government investigations. Her practice includes representing contractors and subcontractors before the federal courts, board of contract appeals, and state and federal agencies.

Kathy counsels clients on a wide range of government contracting issues, including preparing and negotiating claims and convenience termination settlements, handing internal investigations and responding to government fraud claims, and responding to cure notices and default terminations. She has coauthored six editions of the annual Procurement Review Briefing Papers for Federal Publications, Inc.

Kathy's practice covers all aspects of the Truth in Negotiations Act. She has prepared teaching materials on compliance with TINA and lectured on compliance issues. She also advises clients in connection with TINA issues and has represented contractors in numerous defective pricing appeals.

EDUCATION

Cornell University
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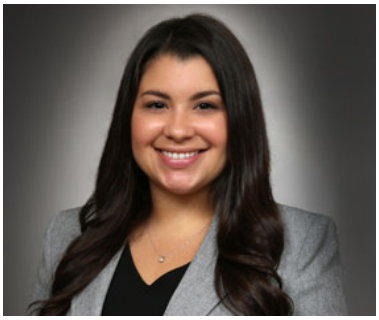

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Prior to joining the firm, Caitlin served as a law clerk for the U.S. Civilian Board of Contract Appeals.

Caitlin graduated from the University of Arizona in 2012, receiving her B.A. in Political Science. In 2017, she earned her J.D. cum laude, from the American University Washington College of Law, where she was an articles editor for the *American University Law Review*. While in law school, Caitlin clerked at a large Washington, D.C. law firm in the government contracts practice group and interned with the U.S. Department of Justice, Federal Tort Claims Act Section and the U.S. Department of Labor, Office of Federal Contract Compliance Programs.

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TINA D. REYNOLDS

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Tina Reynolds is a partner in Morrison & Foerster's Government Contracts practice. She represents a wide variety of government contractors including information technology, defense, biotechnology and pharmaceutical companies, with a focus on general contract counseling, compliance, and litigation.

Tina counsels contractors on compliance with federal acquisition and ethics regulations. She has been involved with numerous internal investigations and compliance reviews, and with voluntary disclosures to agency Inspectors General. Tina routinely advises clients concerning prime-subcontractor relationships, sources of supply, price reductions and price reporting issues, organizational conflicts of interest, the safeguarding of intellectual property and other proprietary interests, the handling of classified materials, and agency suspension and debarment proceedings. She also assists clients with due diligence and other activities related to the acquisition of government contracting concerns, and with the drafting and negotiation of teaming agreements, subcontracts, licensing agreements, and cooperative research and development agreements. Tina has also been at the forefront of understanding ever-expanding federal cyber and data security requirements and advising clients concerning applicable IT and data security controls and systems.

EDUCATION

American University (B.A., 1992)

University of North Carolina (J.D., 1995)

Tina's litigation experience includes government contracts claims litigation in federal courts and before boards of contract appeals, bid protests before the Government Accountability Office and the Court of Federal Claims, and complex disputes in federal courts, including civil fraud and False Claims Act litigation. She has extensive experience with class action defense and multidistrict litigation.

Tina joined Morrison & Foerster in 2012 after serving as counsel at Dickstein Shapiro, where she practiced since 1997. Previously she worked as a trial attorney in the Office of the General Counsel of the Navy, Navy Litigation Office.

Tina is admitted to practice in Virginia, North Carolina, the District of Columbia, and before the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit and the U.S. District Court for the District of Columbia. She is a member of the North Carolina, District of Columbia, Virginia and American Bar Associations.

TINA D. REYNOLDS

REPRESENTATIVE MATTERS

- Led several government contracts compliance reviews for Fortune 50 and smaller companies recommending process improvements and policy changes.
- Negotiated prime contract and major subcontracts related to the Department of Energy's next generation supercomputer program, including extensive IP rights negotiations and negotiation of associated patent rights waivers.
- Assisted multiple clients with voluntary disclosures to various agency Inspectors General of pricing irregularities and regulatory violations.
- Negotiated series of other transaction authority agreements with DARPA and associated subcontracts with more than a dozen research universities on behalf of a firm biotech client, including complex IP rights allocations and material transfer agreements.
- Developed license agreements for software products sold to various government agencies on behalf of multiple clients, including some of the largest federal government contractors.
- Assists clients with data breach reporting and cybersecurity compliance matters.
- Advises clients on Bayh-Dole reporting of inventions.
- Conducts due diligence for major government contract mergers and acquisitions.

PANAGIOTIS C. BAYZ

Of Counsel, Washington D.C., +1 (202) 887-8796, AkiBayz@mofo.com

Aki Bayz has a multidisciplinary practice covering national security regulatory compliance and transactional matters.

National Security. Aki advises clients on compliance with the applicable trade sanctions and economic embargoes administered by the Treasury Department Office of Foreign Assets Control (OFAC), the export control and anti-boycott requirements of the Commerce Department Bureau of Industry and Security (BIS), and military items subject to the jurisdiction of the State Department Directorate of Defense Trade Controls (DDTC). Aki's clients cover a broad range of companies, from multinational corporations engaged in international transactions worldwide to start-up entities exporting for the first time, and across an array of industries and sectors, including information technology, telecommunications, financial services, basic commodities, consumer goods, defense electronics, aerospace, biotechnology, medical devices, and semiconductors.

EDUCATION

Georgetown University (B.S., 1984)

The London School of Economics and Political Science (M.Sc., 1985)

American University Washington College of Law (J.D., 1991)

A significant focus of the national security practice is advising clients on the proposed acquisition of a U.S business by a non-U.S. entity that may implicate the Foreign Investment and National Security Act of 2007 (FINSA) and notifications to the Committee on Foreign Investment in the United States (CFIUS). This involves evaluating the national security implications of a proposed transaction, navigating the CFIUS process, and ongoing compliance with any CFIUS imposed mitigation requirements. To the extent a transaction involves classified activities subject to the National Industrial Security Program Operating Manual (NISPOM), Aki works with clients to negotiate and implement appropriate arrangements to mitigate potential "foreign ownership, control or influence" as required under NISPOM.

Transactional. Aki also has an active transactional practice focused on financial services related transactions, including the purchase and sale of consumer loan and credit portfolios and the establishment of credit programs. Transactional matters also include international and domestic project and commercial finance, acquisitions, joint ventures, and private equity financing.

Antitrust. Another regulatory area of expertise involves antitrust notifications under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 ("HSR Act") and similar international merger control and competition notification requirements. Aki has over 20 years of experience analyzing transactions to determine the HSR Act thresholds are satisfied and whether any exemption applies, advising clients on HSR Act filing requirements, and working with counsel around the world to analyze local notification thresholds and required antitrust notifications.

JOHN P. CARLIN

Partner, Washington D.C., +1 (202) 463-1000, JCarlin@mofo.com

John P. Carlin, former Assistant Attorney General for the U.S. Department of Justice's (DOJ) National Security Division (NSD) and former Chief of Staff to then-FBI Director Robert S. Mueller, III, chairs Morrison & Foerster's Global Risk and Crisis Management practice group and is co-chair of the National Security practice group. John, who served as a top-level official in both Republican and Democratic administrations prior to joining Morrison & Foerster, regularly advises industry-leading organizations in sensitive cyber and other national security matters, internal investigations, and government enforcement actions.

John is routinely called upon to advise leading U.S. and overseas companies across numerous industries—including in the technology, healthcare, energy, defense, finance, fashion, media, pharmaceutical, and telecommunications sectors—regarding crisis management, cyber incident response and preparedness, regulatory strategy, and CFIUS. Clients appreciate John, who served until 2016 as the DOJ's highest-ranking national security lawyer, can offer an insider perspective on their matters and is able to quickly engage the appropriate government actors in the event of a cyberattack or other significant incident affecting their business.

SELECTED SIGNIFICANT REPRESENTATIONS

- **Advised on breach incidents.** Advised global companies, including Fortune 50, in response to cyber incidents.
- **Cybersecurity training.** Advised international consulting companies on their privacy and data security issues and provides onsite training exercises to board and executive members.
- **Breach and ransomware response.** Advised companies on ransomware policy, as well as response to incidents.

EDUCATION

Williams College (B.A., 1995)

Harvard Law School (J.D., 1999)

RANKINGS

***Legal 500 US* 2018**
Recommended for Cyber Law (including Data Protection and Privacy)
Recommended for Dispute Resolution: Corporate Investigations and White-Collar Criminal Defense

Cybersecurity Docket: Global Cybersecurity and Incident Response Report
Selected as one of the Top 30 Data Breach Response Lawyers

Named in Washingtonian's 2018 Top Lawyers list in Cybersecurity.

JOHN P. CARLIN

- **CFIUS strategy.** Advised major foreign investment companies on both their near-term and long-term CFIUS strategy, including about the implications of recently enacted reform legislation that will significantly affect the way CFIUS reviews are conducted.
- **Compliance and risk assessment.** Conducted compliance and risk assessments as well as advised on cybersecurity incidents and legislative issues to global technology firms.
- **Sanctions and Trade.** Consulted on the impact of U.S. sanctions policy to major international corporations.
- **Export Controls.** Conducted investigations and advised on compliance policies and procedures.
- **Crisis incident simulation.** Provided various crisis incident simulations as well as table-top exercises to members of executive teams to international companies.

In his previous role as Assistant Attorney General for National Security, for which John was nominated by the President and overwhelmingly confirmed by the Senate on a bipartisan basis, he oversaw nearly 400 employees responsible for protecting the nation against terrorism, espionage, and cyber and other national security threats. Under his leadership, the NSD:

- Created a threat analysis team to study potential national security challenges posed by the Internet of Things;
- Launched a nationwide outreach effort across industries to raise awareness of national security, cyber, and espionage threats against American companies and encourage greater C-suite involvement in corporate cyber security matters;
- Oversaw DOJ's Counterintelligence and Export Control Section, responsible for investigating and prosecuting espionage cases, cases involving the illegal export of military and strategic commodities, and cases involving certain cyber-related activity;
- Brought an unprecedented indictment against five members of the Chinese military for economic espionage;
- Investigated the attack on Sony Entertainment's computer systems;
- Brought charges, in conjunction with the FBI, against seven Iranians working for Islamic Revolutionary Guard Corps-affiliated entities for conducting a coordinated campaign of cyber attacks against the U.S. financial sector;
- Prosecuted major sanctions and export controls matters, including significant civil and criminal penalties against major global actors and noteworthy cases against malicious cyber actors;
- Oversaw the efforts of the National Security Cyber Specialist Network and the National Security/Anti-Terrorism Advisory Council program;
- Led DOJ's participation on the Committee on Foreign Investments in the United States;
- Disrupted multiple terrorist plots and national security threats, bringing those involved to justice; and

JOHN P. CARLIN

- Prosecuted the Boston Marathon bombing case; and
- Provided legal oversight of the NSA's surveillance activities and represented the government before the Foreign Intelligence Surveillance Court.

Prior to assuming his role in the NSD, John served as Chief of Staff and Senior Counsel to Robert S. Mueller, III, former director of the FBI, where he helped lead the FBI's evolution to meet growing and changing national security threats, including cyber threats. John also held positions as National Coordinator of DOJ's Computer Hacking and Intellectual Property Program and Assistant United States Attorney for the District of Columbia, where he prosecuted cyber, fraud, and public corruption matters, among others, trying more than 40 cases to verdict.

John is an inaugural Fellow of the Harvard Kennedy School's Belfer Center for Science and International Affairs' Homeland Security Project, focused on the unique challenges and choices around protecting the American homeland. He also chairs the Aspen Institute's Cybersecurity and Technology policy program, which provides a cross-disciplinary forum for industry, government, and media to address the rapidly developing landscape of digital threats and craft appropriate policy solutions.

John, who joined DOJ through the Attorney General's Honors Program, is a five-time recipient of the Department of Justice Award for Special Achievement, was awarded the National Intelligence Superior Public Service medal by the Director of National Intelligence, and has drawn bipartisan praise, with U.S. Attorney General Loretta Lynch calling him "a trusted and tireless leader" and former U.S. Attorney General Michael Mukasey calling him "a superb civil servant." He earned his Juris Doctorate from Harvard Law School, where he received the Samuel J. Heyman Fellowship for Federal Government Service and served as Articles editor for the Harvard Journal on Legislation, and earned his Bachelor of Arts degree, magna cum laude, from Williams College, where he was elected to Phi Beta Kappa.

ALEX IFTIMIE

Of Counsel, Washington D.C., +1 (202) 778-1659, Alftimie@mofo.com

Alex Iftimie is of counsel in Morrison & Foerster's National Security practice group. His practice involves advising clients on sensitive cyber and other national security matters, crisis management, internal investigations, transactions before the Committee on Foreign Investment in the United States (CFIUS), and government enforcement actions.

EDUCATION

University of Southern California (B.A., 2007)

Yale University (J.D., 2011)

Prior to joining Morrison & Foerster, Alex held multiple senior positions at the U.S. Department of Justice (DOJ), including Counselor to the Attorney General, Deputy Chief of Staff and Counsel to the Assistant Attorney General for National Security, and Special Assistant United States Attorney in the Eastern District of Virginia. Throughout his time at DOJ, Alex advised Department leadership on national security, intelligence and cyber matters, including policy and legal issues arising in the National Security Council process, foreign investment transactions before CFIUS, complex issues involving the Foreign Agent Registration Act (FARA), and engagements with foreign officials. He also represented the Department on the Export Control Reform Initiative which sought to strengthen national security and the competitiveness of key U.S. manufacturing and technology sectors, and before the Foreign Intelligence Surveillance Court on issues involving novel questions at the intersection of law and technology.

Most recently, as Special Assistant U.S. Attorney in the National Security and Cybercrime Units of the U.S. Attorney's Office for the Eastern District of Virginia, Alex brought the Department's first charges against Russian efforts to interfere in the 2018 midterm elections. During his time at the U.S. Attorney's Office, Alex also investigated and/or prosecuted federal crimes ranging from espionage, trade secret theft, and national security cyber matters to fraud, firearm, and drug offenses.

Alex received the Assistant Attorney General Award for Excellence in 2014 and 2018, and the Assistant Attorney General Award for Distinguished Service in 2014.

Prior to his DOJ service, Alex clerked for Judge Diana Gribbon Motz on the U.S. Court of Appeals for the Fourth Circuit, and in the Office of the White House Counsel.

ALEX IFTIMIE

Alex received his J.D. from Yale Law School, where he was the Editor in chief of the *Yale Journal of International Law* and participated in the Civil Liberties & National Security Clinic. He received his B.A. *summa cum laude* and with Honors from the University of Southern California.

He is the recipient of the Paul & Daisy Soros Fellowship for New Americans and a fellow in the Truman National Security Project.

J. ALEX WARD

Partner, Washington D.C., +1 (202) 887-1574, alexward@mofo.com

J. Alex Ward is co-chair of Morrison & Foerster's Government Contracts and Public Procurement practice. His practice covers a full range of government contracts matters, including bid protests, claims, investigations, corporate transactions, and counseling. In addition, he regularly handles federal and state court litigation and alternative dispute resolution involving government contractors. In all matters, Alex's constant goal is to provide his clients the highest level of efficient, ethical, and effective representation.

EDUCATION

Duke University (A.B., 1989)

Harvard Law School (J.D., 1992)

Alex has served as lead counsel in dozens of bid protests involving military and civilian agency procurements of a wide range of products and services, including all manner of pre- and post-award protests in the GAO, the U.S. Court of Federal Claims, and state tribunals, as well as appeals to the U.S. Court of Appeals for the Federal Circuit and size protests before the SBA's Office of Hearings and Appeals. He has handled all aspects of the claims process, from the initial assessment and drafting of requests for equitable adjustment through litigation in the Boards of Contract Appeals and the Court of Federal Claims. He has represented contractors in internal and external investigations, disclosures to the government, and qui tam litigation, with a great deal of success in reducing or eliminating his clients' exposure through active engagement with the relevant government bodies. His work on transactions involving the purchase, sale, and restructuring of government contractors has ranged from overseeing diligence on the target company's government contracts portfolio to advising on issues such as FOCI and CFIUS review.

Alex's litigation and ADR practice covers the gamut of controversies confronting government contractors, including prime-sub, teaming partner, employer-employee, competitor, and indemnification disputes. His litigation work also includes a variety of *pro bono* engagements, in which he has represented both individual and institutional clients in matters ranging from criminal defense to protection of the environment.

Prior to joining the firm, Alex served in the U.S. Army as a commissioned officer and an Assistant to the General Counsel of the Army. His work for the Army included civil works and international matters.

J. ALEX WARD

REPRESENTATIVE CASES & DECISIONS

- *A-T Solutions, Inc.*, B-410167 (successfully protested scope of work for Army's Asymmetric Integration Training Program and Mission Command Training Program contract, resulting in voluntary corrective action).
- *American Institutes for Research v. State of New Mexico*, No. D-101-CV-2014-00138, slip op. (Sante Fe County, NM, District Court May 31, 2014) (sustaining challenge to state agency's dismissal of protest of Common Core operational assessment testing platform).
- *CACI-WGI, Inc.*, B-408520.2, 2013 CPD ¶ 293, 2013 WL 6729720 (Comp. Gen. Dec. 16, 2013) (intervened to successfully oppose protest of Army's award to client of Asymmetrical Warfare Group support contract).
- *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.,* 533 Fed. App'x 912 (11th Cir. 2013) (denying appeal of summary judgment in favor of client in indemnification dispute and sustaining client's cross-appeal seeking increased damages award).
- *IAP World Servs., Inc.*, B-407917.2 et seq., 2013 CPD ¶ 171, 2013 WL 3817472 (Comp. Gen. July 10, 2013) (successfully protested Navy's award of Patuxent Naval Air Station base operating services contract, with cost recovery and contract award to client after re-evaluation of proposals).
- *Size Appeal of IAP World Servs., Inc.*, SBA No. SIZ-5480 (SBA OHA June 24, 2013) (granting client's size appeal in contract for base operating services).
- *Al-Ghanim v. IAP Worldwide Servs., Inc.*, No. 6:11-cv-467-Orl-19DAB, slip op. (M.D. Fla. Jan. 17, 2012) (successfully opposed suit seeking international discovery from client in connection with Kuwait joint venture dispute).
- *IAP Worldwide Servs., Inc.*, B-407315.1, 2. &.3 (successfully protested Army's award of contract for power services at Camp Leatherneck in Afghanistan, resulting in two rounds of voluntary corrective action and ultimate award of contract to client).
- *Threat Mgm't Group*, B-407766.1 (successfully protested Air Force's award of contract for explosive ordnance disposal support services, resulting in voluntary corrective action and cost recovery for client).
- *IAP World Servs., Inc.*, B-406339.1 (successfully protested Army's award of contract for base operating services at Fort Irwin, resulting in voluntary corrective action).
- *General Dynamics – American Overseas Marine,* B-401874.2 & .5 (successfully protested Navy's award of ship operation and maintenance contract, resulting in voluntary corrective action).
- *O'Gara Training & Servs., LLC*, B-404901.2, 2011 CPD ¶ 171, 2011 WL 3856322 (Comp. Gen. July 28, 2011) (intervened to successfully oppose protest of Navy's award of contract for explosive ordnance disposal training).

J. ALEX WARD

- *IAP Worldwide Servs., Inc. v. Johnson Controls, Inc.*, No. 5:09cv331, slip op., 2011 WL 2181849 (N.D. Fla. June 3, 2011) (granting summary judgment to client for indemnification under stock purchase agreement for acquisition of subsidiary).
- *AAR Mobility Sys.*, B-403888.2 (intervened to successfully oppose protest of Army's award of contract for production of tactical shelters).
- *A-T Solutions, Inc.*, B-404901.1 (successfully protested Navy's award of contract for explosive ordnance disposal training, resulting in voluntary corrective action and award of contract to client).
- *Matt Martin Real Estate Mgm't, LLC v. United States*, 96 Fed. Cl. 106 (2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Pyramid Real Estate Servs., LLC v. United States*, 95 Fed. Cl. 125 (2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.*, No. 509cv331, slip op., 2010 WL 3610449 (N.D. Fla., Sept. 13, 2010) (granting in part client's motion for summary judgment in subcontract dispute).
- *Harrington, Moran, Barksdale, Inc.*, B-401934.2, B-401934.3, 2010 CPD ¶ 231, 2010 WL 3994253 (Comp. Gen. Sept. 10, 2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Homesource Real Estate Asset Servs., Inc. v. United States*, 94 Fed. Cl. 466 (2010) (intervened to successfully oppose protest of HUD's award of contracts for marketing of portfolio of foreclosed homes).
- *Ocean Ships, Inc.*, B-401526.4, 2010 CPD ¶ 106, 2010 WL 1766756 (Comp. Gen. Apr. 21, 2010) (intervened to successfully oppose protest of Navy's award of contract for operation and maintenance of roll-on/roll-off ships).
- *Keystone Sealift Servs., Inc.*, B-401526.3, 2010 CPD ¶ 95, 2010 WL 1514157 (Comp. Gen. Apr. 13, 2010) (intervened to successfully oppose protest of Navy's award of contract for operation and maintenance of roll-on/rolloff ships).
- *ITT Corp., Sys. Div.*, B-310102.6 et al., 2010 CPD ¶ 12, 2009 WL 5447710 (Comp. Gen. Dec. 4, 2009) (intervened to successfully oppose protest of Navy's award of contract for air traffic control services in Southwest Asia).
- *IAP Worldwide Servs., Inc. v. Fluor Intercontinental, Inc.*, No. 509cv331, slip op., 2009 WL 4730509 (N.D. Fla., Dec. 4, 2009) (successfully opposed motion to dismiss client's suit in favor of arbitration).
- *FedSys, Inc.*, B-401453, 2009 CPD ¶ 181, 2009 WL 3018114 (Comp. Gen. Sept. 8, 2009) (intervened to successfully oppose protest of Army's award of counter-improvised explosive device training contract).

J. ALEX WARD

- *Academy Facilities Mgm't v. United States*, 87 Fed. Cl. 441 (2009) (intervened to successfully oppose protest of Navy's award of U.S. Naval Academy facilities service contract).
- *Academy Facilities Management -- Advisory Opinion*, B-401094.3, 2009 CPD ¶ 139, 2009 WL 2217662 (Comp. Gen. May 21, 2009) (intervened to successfully obtain opinion recommending denial of protest award of facilities service contract).
- *Evans Security Solutions, Inc.*, B-311035, 2008 CPD ¶ 58, 2008 WL 746861 (Comp. Gen. Mar. 19, 2008) (intervened to successfully oppose protest of Government Printing Office's award of contract for smart card identification system).
- *Contingency Mgm't Group, LLC and IAP Worldwide Servs., Inc.*, B-309752 et seq., 2008 CPD ¶ 83, 2007 WL 5178258 (Comp. Gen. Oct. 5, 2007) (successfully protested Army's award of $150 billion Logistics Civil Augmentation Program ("LOGCAP") contracts).
- *Kellogg Brown & Root Services, Inc.*, B-298694.7, 2007 CPD ¶ 124, 2007 WL 1932070 (Comp. Gen. June 22, 2007) (intervened to successfully oppose protest of Navy's award of $1 billion global contingency construction contract).
- *Liberty Power Corp.*, No. B-295502, 2005 WL 696284 (Comp. Gen. Mar. 14, 2005) (successfully protested General Services Administration's award of contract for electric power supply to federal facilities).

DANIEL E. CHUDD

Partner, Northern Virginia, +1 (703) 760-7305, DChudd@mofo.com

Daniel Chudd is a government contracts attorney with significant experience in government contracts litigation and dispute resolution and avoidance. Dan's interest in government contracts was sparked during his clerkship with Judge Mary Ellen Coster Williams of the U.S. Court of Federal Claims. That experience, combined with his in-depth industry knowledge, has made Dan an effective advocate for his clients. In addition, a secondment with a major defense contractor gave Dan valuable insight into the everyday challenges facing government contractors. He draws upon these experiences to develop creative and strategically sound approaches to the myriad issues that his clients face.

Litigation Experience

One of Dan's favorite aspects of government contracts litigation is the variety of different disputes and forums in which he has been able to practice. Dan routinely represents clients in bid protests before the Government Accountability Office (GAO) and the U.S. Court of Federal Claims. He also represents clients in qui tam False Claims Act matters at the district court and appellate levels. Dan has also appeared before federal and state courts, administrative bodies, and the Civilian and Armed Services Boards of Contract Appeals. The subjects of these disputes have ranged from contract claims and termination disputes with a government customer to contractor and subcontractor disputes.

Dan is admitted to practice in the District of Columbia and the state of Virginia and before the United States Courts of Appeals for the Federal Circuit and the Fourth Circuit, the United States District Court for the Eastern District of Virginia, and the United States Court of Federal Claims. Dan also holds an active security clearance and has experience with Special Access Programs.

EDUCATION

Georgetown University (B.A., 2000)

Georgetown University Law Center (J.D., 2003)

Georgetown University Law Center (J.D., 2003)

RANKINGS

***JD Supra Readers' Choice Top Author* 2018-2019:**
Government Contracting

***Legal 500* 2019**

Recommended Lawyer for Government Contracts

Washington D.C. Super Lawyers
"Rising Star" Government Contracts

DANIEL E. CHUDD

Counseling and Investigations

In addition to representing clients in litigation, Dan regularly counsels clients on pre-litigation and dispute avoidance matters, contract changes, and requests for equitable adjustment. He advises clients on matters related to the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS), as well as the Truth in Negotiations Act (TINA), Procurement Integrity Act (PIA), and other legal and ethical obligations. Dan also counsels clients on a number of cybersecurity and data security issues that impact government contractors. In addition, Dan represents clients in internal investigations related to government contracts matters.

More about Dan

Dan is active in the American Bar Association's Public Contract Law Section, serving as the co-chair of its Membership Committee and as a vice-chair of its Bid Protest and Cybersecurity, Privacy, and Data Protection Committees. Dan also serves as a member of the firm's Litigation Associate Evaluation Committee and as Secretary of the Board of Directors of Homestretch, a non-profit organization focused on assisting homeless families in the Northern Virginia area.

When he is not practicing law, Dan enjoys spending time with his family, coaching Little League, and playing golf.

REPRESENTATIVE MATTERS

- **Protest of New Mexico State University, B-409566 (GAO 2014)**
  Represented Orbital Sciences Corporation as intervenor in a pre-award protest brought by New Mexico State University concerning the terms of a NASA Solicitation. The GAO sided with the government and Orbital and denied the protest.

- **Protest of Navistar Defense LLC and AM General, LLC, B-407975.2, et al (GAO and Court of Federal Claims 2013)**
  Represented General Dynamics Ordnance and Tactical Systems in a GAO protest brought by Navistar and AM General, and continued by AM General in the Court of Federal Claims, concerning the award by the Air Force of a contract to GD-OTS for Ground Mobility Vehicles. The GAO and the Court of Federal Claims sided with the government and GD-OTS and denied the protests.

- **MorphoTrust USA, Inc. v. Contract Appeals Bd. 115 A.3d 571 (2015)**
  Represented MorphoTrust USA in protesting the terms of a solicitation for the production of drivers' licenses in Washington D.C. After the District of Columbia's Contract Appeals Board denied the Protest, the decision was appealed to the District of Columbia Superior Court and the District of Columbia Court of Appeals. The Court of Appeals found in favor of MorphoTrust and vacated the Contract Appeals Board's initial decision.

- **IAP World Services, Inc., B-407917.2, *et al* (GAO 2013)**
  Represented IAP World Services in its successful protest of the Navy's award of the base operating services

contract for Patuxent River Naval Air Station. Following the protest and re-evaluation of proposals, the Navy awarded the contract to IAP.

- **Fortune 100 Company**
  Represented a Fortune 100 company in a complex, multi-million dollar False Claims Act matter. Following extensive discovery and summary judgment motions, the parties settled the matter favorably for the client.
- **Termination for Cause Dispute (GAO)**
  Represented a government contractor in its appeal at the Civilian Board of Contract Appeals of a Contracting Officer's Final Decision terminating the contract for cause. Following a mediation and additional negotiations prior to trial, the Agency reversed its decision and re-instated the contract.

RACHAEL K. PLYMALE

Associate, Washington D.C., +1 (202) 887-1582, RPlymale@mofo.com

Rachael Plymale represents both large and small government contractors in a full range of contract matters including investigations, bid protests, contract claims and disputes, size determinations, and False Claims Act litigation.

Rachael has assisted clients in a variety of litigation and compliance matters. She has represented contractors in internal and external investigations of all sizes and in disclosures to the government. She has represented clients in both pre- and post-award bid protests before the Government Accountability Office and the Court of Federal Claims as well as contract terminations and requests for equitable adjustments at the Boards of Contract Appeals. Her practice also includes counseling clients on a variety of regulatory and contractual compliance issues, particularly in small business matters such as size determination and appeals at the SBA's Office of Hearings and Appeals and small business contracting.

EDUCATION

University of Kentucky (B.A., 2010)

The George Washington University Law School (J.D., 2014)

Rachael graduated summa cum laude from the University of Kentucky in 2010, receiving a B.A. in History. In 2014, she earned her J.D. with honors from the George Washington University Law School, where she focused her studies on public procurement. Throughout law school, Rachael worked as a law clerk for the Government Contracts group, assisting in a wide range of litigation and counseling matters.

Rachael maintains an active pro bono practice representing victims of human trafficking in immigration matters.

SANDEEP N. NANDIVADA

Associate, Northern Virginia, Washington D.C., +1 (202) 887-1593,

SNandivada@mofo.com

Sandeep Nandivada is an associate in the Litigation Department of Morrison & Foerster's Washington, D.C. office. Sandeep's practice focuses on complex internal investigations and civil litigation, as well as government contracts compliance.

EDUCATION

Cornell University (B.A., 2010)

The George Washington University Law School (J.D., 2013)

Sandeep has extensive experience conducting investigations with False Claims Act, Foreign Corrupt Practices Act, Anti-Kickback Statute, Procurement Integrity Act, and suspension and debarment implications. He has advised clients regarding procurement fraud, anti-corruption, procurement integrity, defective pricing, and export control issues, and has assisted clients with mandatory disclosures required under the Federal Acquisition Regulation (FAR). Sandeep's civil litigation practice focuses on bid protests before the Government Accountability Office and U.S. Court of Federal Claims, as well as contract claims.

In addition to his investigations and litigation practices, Sandeep regularly advises clients on FAR and Defense FAR Supplement (DFARS) compliance issues, including commercial item contracting, Buy American Act and Trade Agreements Act compliance, and organizational conflicts of interest. He also works with clients to evaluate and develop ethics and compliance programs.

Sandeep graduated With Honors from the George Washington University Law School, where he was Editor-In-Chief of The George Washington Journal of Energy and Environmental Law, Vice President of Internal Competitions for the Moot Court Board, a legal writing fellow, and a member of the Alternative Disputes Resolution Board. He received his undergraduate degree from Cornell University with Distinction in all Subjects in History.

Sandeep is admitted to practice in Virginia, the District of Columbia, and before the U.S. Court of Federal Claims and the U.S. District Court for the Eastern District of Virginia.

SANDEEP N. NANDIVADA

REPRESENTATIVE MATTERS (INCLUDES PRIOR LAW FIRM EXPERIENCE):

INVESTIGATIONS

- Conducted internal investigation regarding major defense contractor's accounting and business systems practices, including representing client's interests with the Defense Contract Audit Agency and advising client executives regarding proposed changes and remedial actions.
- Conducted internal investigation concerning allegations of fraudulent billing, including submission of mandatory and supplemental disclosures to agency inspectors general.
- Conducted internal investigation for major defense contractor responding to subpoena from federal agency seeking commercial cost data, including successfully negotiating the scope of the subpoena.
- Conducted internal investigation regarding major defense contractor's compliance with export control laws and regulations.
- Conducted internal investigation for major defense contractor regarding contract performance issues.
- Conducted internal investigation for major defense contractor concerning Procurement Integrity Act compliance.
- Conducted Foreign Corrupt Practices Act investigation for multinational corporation.

LITIGATION

- Successfully protested $87.4 million contract award based on agency's failure to identify organizational conflicts of interest for the awardee.
- Successfully defended award of IDIQ contract for Transformation Twenty-One Total Technology Next Generation procurement.
- Obtained corrective action on behalf of major defense contractor in $1 billion procurement.
- Obtained corrective action on behalf of major defense contractor in $100 million procurement.
- Successfully resolved False Claims Act and Procurement Integrity Act allegations, without litigation, on behalf of government contractor.
- Represented large defense contractor in response to agency show cause letter and in certified claim against agency, and successfully negotiated favorable settlement.

SANDEEP N. NANDIVADA

COMPLIANCE

- Conducted multi-national government contracts compliance review and associated risk assessment for a Global Fortune 500 company, including recommending process improvements and policy changes.
- Conducted multinational compliance review regarding conflicts of interest and anti-kickback policies.
- Counseled major government contractor regarding cybersecurity disclosure obligations.
- Counseled clients regarding compliance with applicable Pay-to-Play, Lobbying, and Revolving Door restrictions.

CHARLES L. CAPITO III

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Charles Capito assists Government Contractors with a variety of litigation issues, with a focus on pre- and post-award bid protests, and contract claims and disputes. He has extensive experience at the Government Accountability Office, the Court of Federal Claims, the boards of contract appeals, and other judicial and administrative tribunals. Charles counsels clients on a variety of Government Contract issues, including prime- and subcontractor disputes, organizational conflicts of interest, small business issues, and compliance with federal procurement regulations.

Charles assists the national security and transactional practices with issues concerning various compliance regimes, including the Export Administration Regulations (EAR), the International Traffic in Arms Regulations (ITAR), the Committee on Foreign Investment in the United States (CFIUS), sanctions administered by the Office of Foreign Assets Control (OFAC), and issues concerning Foreign Ownership, Control, or Influence (FOCI). He has experience in many facets of government contracts mergers and acquisitions.

EDUCATION

Duke University (A.B., 2003)

Washington and Lee University (J.D., 2007)

Charles graduated cum laude from Washington & Lee University School of Law, where he served as senior articles editor of the *Washington & Lee Law Review* and received an award for Outstanding Student Note for his piece on the ITAR's registration requirements. He received his Bachelor of Arts degree from Duke University.

Prior to joining the firm, Charles served as a law clerk to the Honorable Mary Ellen Coster Williams at the United States Court of Federal Claims and worked as an associate at Jenner & Block LLP.

JOSEPH A. BENKERT

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Joseph Benkert is Senior Advisor in Morrison & Foerster's National Security practice group. He advises clients on critical national security matters pertaining to the Committee on Foreign Investment in the United States (CFIUS), export controls, and various regulatory and compliance issues.

Joe previously served as a leading civilian official in the Department of Defense (DoD) from 2003-2009 under both the Bush and Obama administrations, including as Assistant Secretary of Defense for Global Security Affairs after being nominated by President Bush and confirmed by the Senate.

While at the DoD, Joe led the department's involvement in numerous complex matters before CFIUS. He oversaw more than 400 CFIUS cases and represented DoD in CFIUS deliberations determining whether a foreign investment in a U.S. company or its operations represented a national security risk. Joe's responsibilities at DoD also included managing technology security policy, the reform of export control processes, numerous sensitive nonproliferation projects, and a broad range of other defense-related issues. He continues to serve as an advisor on DoD's Threat Reduction Advisory Committee.

More recently, Joe served as a Vice President of a leading global consultancy group, under former Secretary of Defense William Cohen. During his tenure, he advised clients on transactional matters that were subject to CFIUS review.

Joe was a career Navy officer with extensive experience both in operational command and in national security policy formulation and implementation. He was the Executive Director of the Chief of Naval Operations Executive Panel, an advisory group for the Navy's senior uniformed leader, and served in the Office of the Under Secretary of Defense for Policy both as a senior military assistant and as the Director of European Policy. His commands included a frigate, a guided missile cruiser, two destroyer squadrons, and operational groups.

EDUCATION

United States Naval Academy (B.S., 1973)

Harvard Kennedy School of Government (MPP, 1979)

JOSEPH R. PALMORE

Managing Partner, DC, Washington D.C., +1 (202) 887-6940, JPalmore@mofo.com

Joseph R. Palmore is co-chair of the firm's Appellate and Supreme Court Practice Group and Managing Partner for the Washington, D.C. office. Before joining Morrison & Foerster, Joe was an Assistant to the Solicitor General at the United States Department of Justice and the Deputy General Counsel of the Federal Communications Commission (FCC). Joe has argued 10 cases before the U.S. Supreme Court and served as primary author of more than 150 briefs in that Court.

Joe has handled appeals in a variety of areas important to businesses, including class action certification, false advertising, environmental regulation, intellectual property, ERISA, health care, communications, and the Telephone Consumer Protection Act. Joe's win in the Federal Circuit for Immersion Corporation was named among the most significant patent decisions in *Law360*'s Top Patent Cases of 2016: Midyear Report. As one practitioner stated, that victory "saved from the fire tens of thousands of patents that would have gone up in smoke." Joe presented oral argument in In *re GNC Corporation*, in which the Fourth Circuit affirmed dismissal of a false advertising claim against the supplement retailer. *Law360* described that decision as a "first-of its kind ruling by a federal appellate court that attorneys say will fell many such suits in the early pleading stages." Joe's oral argument before the Supreme Court on the preemptive scope of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in *CTS Corp. v. Waldburger* was described in the *National Law Journal* as "brilliant" and a "template for anyone arguing a statutory case before these nine justices in the future."

During his nearly five years in the Solicitor General's Office, Joe had principal responsibility for briefing the constitutionality of the Affordable Care Act's minimum coverage provision, which was upheld in the Supreme Court's landmark decision in *NFIB v. Sebelius*. For his work on that case, Joe received the Attorney General's Award for Exceptional Service (the Department of Justice's highest honor for employee performance). He also received the Environmental Protection Agency General Counsel's medal for his successful defense of the EPA's interstate air pollution rules in *EPA v. EME Homer City Generation*.

EDUCATION

Harvard University (A.B., 1991)

University of Virginia School of Law (M.A., 1998)

University of Virginia School of Law (J.D., 1998)

RANKINGS

***Chambers USA* 2018**
Peers note Joseph Palmore as "a really terrific advocate" and "a very articulate writer."

***Legal 500* 2018**
Joe was named 'an expert in healthcare and telecoms'.

JOSEPH R. PALMORE

Before working for the Department of Justice, Joe spent three years as Deputy General Counsel at the FCC, where he oversaw all litigation involving constitutional, statutory, and administrative-law challenges to the agency's actions and argued 10 cases in the federal courts of appeals. His FCC experience includes virtually all aspects of communications regulation, including broadcast, cable, wireless, wireline, and Internet. In addition, he provided counsel to FCC officials on matters likely to result in litigation.

Before his government service, Joe worked at another international firm, where his practice involved appellate, communications, and health care matters. He clerked for the Hon. Ruth Bader Ginsburg of the Supreme Court of the United States, the Hon. John Gleeson of the U.S. District Court for the Eastern District of New York, and the Hon. Dennis Jacobs of the U.S. Court of Appeals for the Second Circuit in New York. Joe earned his J.D. from the University of Virginia School of Law, his M.A. in legal history from the University of Virginia, and his A.B. magna cum laude from Harvard University.

Joe serves as a member of the Data Security, Privacy, and Intellectual Property Litigation Advisory Committee of the U.S. Chamber Litigation Center. In 2016, he served as one of the 15 "nationally recognized lawyers with substantial trial and appellate practices" who advised the American Bar Association's Standing Committee on the Federal Judiciary on the professional qualifications of the Honorable Merrick Garland to be an Associate Justice of the Supreme Court of the United States. In 2018, he was recommended by *Chambers USA* and *Legal 500 US* for appellate law.

DAMIEN C. SPECHT

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Damien C. Specht is a partner in the firm's Government Contracts & Public Procurement practice. Damien represents clients in all facets of government contracts transactions, as well as regulatory counseling, subcontract and teaming agreement negotiations, contract disputes, size protests, and protests. He is a recognized leader on small business procurement issues, with the National Law Journal explaining that federal lawmakers turn to him when they "need expert advice about small-business policy."

Damien has served as lead counsel in numerous bid protests involving military and civilian agency procurements of a wide range of products and services, including pre- and post-award protests at the GAO, the U.S. Court of Federal Claims, and state tribunals, as well as in size protests and appeals.

Damien has also played a significant role in dozens of government contracts transactions, representing industry leaders, private-equity firms and entrepreneurs. These transactions include representation of:

- CI Capital Partners LLC in its sale of A-T Solutions to PAE.
- L3 Technologies in numerous transactions including the sale of its National Security Solutions business.
- Sagewind Capital in numerous transactions including the acquisition of By Light Professional IT Services, a provider of IT, cloud, cyber and infrastructure solutions.
- Arlington Capital in its acquisition of Integrity Application Incorporated, a leading provider of systems engineering, integrated solutions, technical analysis.
- Arctic Slope Regional Corporation in various transactions including the acquisition of Vistronix Intelligence and Technology Solutions.

EDUCATION

Grinnell College (B.A., 2002)

The George Washington University Law School (J.D., 2007)

RANKINGS

***Chambers USA* 2018**
Clients comment that "He is great at identifying issues and litigating to success in protests at both the federal and state levels."

***Legal 500* 2018**
"Next Generation Lawyer"

***Law360* 2016**
Government Contracts "Rising Star"

***National Law Journal* 2015**
D.C. "Rising Star"

DAMIEN C. SPECHT

Damien holds an active security clearance. He serves as Co-Chair of the ABA Public Contract Law Section Mergers and Acquisitions Committee and as Co-Chair of the American Bar Association Small Business & Other Socioeconomic Programs Committee. Damien has testified about procurement issues before the United States House of Representatives. He is a frequent speaker on government contracts topics including numerous CLE presentations and panel presentations. Damien has been recognized as a leading lawyer by *Chambers USA*, one of the "most accomplished young attorneys in the DC area" by The *National Law Journal*, a "Next Generation Lawyer" by *Legal 500*, a "Rising Star" in Government Contracts by *Law360*, and a Washington, DC "Rising Star" in Government Contracts by *Super Lawyers*.

ALISSANDRA D. YOUNG

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Ali Young is an associate in the Government Contracts practice in Morrison & Forester's Washington, D.C. office.

Prior to joining Morrison & Foerster, Ali practiced government contracts law at a mid-sized law firm. Her practice focused on drafting requests for equitable adjustments and certified claims; litigating bid protests at the General Accountability Office and claims disputes at the Court of Federal Claims and the Armed Services Board of Contract Appeals; and assisting clients with small business procurement matters, including size protests, 8(a) certification, and joint venture agreement compliance. She also counseled clients through Buy American Act, False Claims Act, and cybersecurity compliance investigations.

EDUCATION

University of South Carolina (B.A., 2013)

The George Washington University Law School (J.D., 2017)

Ali graduated from the University of South Carolina in 2013, receiving her B.A., magna cum laude, in Political Science and History. In 2017, she earned her J.D. with honors from the George Washington University Law School, where she received the Patricia A. Tobin Government Procurement Law Award for excellence in the area of government contracts law and served as the editor-in-chief for the International Law in Domestic Courts Journal. Ali was also a Thurgood Marshall Scholar.

While attending law school, Ali clerked at a large Washington, D.C. law firm in the government contracts group, and interned at various international human rights non-profit organizations. .

Ali is admitted to practice in the District of Columbia.

W. JAY DEVECCHIO

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W. Jay DeVecchio is a litigator and former Co-Chair of Morrison & Foerster's Government Contracts and Public Procurement practice. Clients from the aerospace, technology, and health care sectors seek his representation in all facets of government procurement law, from bid protests to complex claims and disputes through suspension and debarment. He also represents clients in related issues such as criminal and civil fraud, qui tam actions, and internal investigations.

Since 2005, Jay has been named a leading national practitioner in Government Contract Law by *Chambers USA*. Quoting from a source, *Chambers USA 2014* called Jay: "The best litigator in the country on government contracts and related matters." He similarly has been named a Top Washington Lawyer in Government Contracts by both *The Washington Business Journal* (2008) and *The Washingtonian*, most recently for 2017. His litigation successes include defeating a major qui tam action in a jury trial, prevailing in one of the largest defective pricing appeals tried to date, enjoining the Department of Defense for an improper debarment, winning the leading case on latent defects in government contracts, and achieving victory in the Eleventh Circuit's decision on false claims immunity for Medicare contractors.

He has been a guest instructor at the University of Virginia and the George Washington University Law School Government Contracts Program, and the American University Washington College of Law. Jay also conducts seminars on diverse subjects including claims, disputes, terminations, and data rights.

PUBLISHED DECISIONS

- *Miltope*, B-416859.2 (Comp. Gen.), B-416859.3, Jan. 8, 2019, 2019 WL 1577738
- *VT Halter Marine, Inc.*, B-415510.3, B-415510.4, Jan. 24, 2018, 2018 CPD ¶ 62

EDUCATION

Duke University (B.A., 1974)

The Catholic University of America Columbus School of Law (J.D., 1978)

RANKINGS

***Chambers USA* 2005–2019**
Public Procurement

***The Washingtonian Magazine Top Lawyer* 2009-2019**
A Top Washington Lawyer in Government Contracts

***Washington DC Super Lawyers* 2013-2019**
Government Contracts

W. JAY DEVECCHIO

- *Glock, Inc.*, B-414401, June 5, 2017 CPD ¶ 180
- *National Government Services, Inc.*, B-412142, (Comp. Gen.), 2016 CPD ¶ 8, 2015 WL 9690358
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- *TrailBlazer Health Enterprises, LLC*, B-406175; B-406175.2, March 1, 2012, 2012 CPD ¶ 78
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- *World Airways, Inc.*, B-402674, June 25, 2010, 2010 CPD ¶ 284
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- Northrop Grumman Space and Missile Systems Corporations; Textron Marine & Land Systems Corporation, B-400837, *et al.*, Feb. 17, 2009, 2009 CPD ¶ 52
- TrailBlazer Health Enterprises, LLC, B-310801.6; B-31801.7; B-310801.10, Oct. 6, 2008, 20013 CPD ¶ 204
- *Femme Comp, Inc., L-3 Services, Inc., et al. v. United States*, 83 Fed. Cl. 704 (2008)
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- *NHIC Corp.*, B-310801; B-310802.2, Feb. 12, 2008, 2008 CPD ¶ 67
- Raytheon Company, Space and Airborne Systems, B-298626.2; B-298626.3, Sep. 27, 2007, 2007 CPD ¶185
- Lockheed Martin Maritime Systems and Sensors, B-299766; B-299766.2, Aug. 10, 2007, 2008 CPD ¶ 158

W. JAY DEVECCHIO

- AM General LLC, ASBCA No. 53610, 07-1 BCA ¶ 33,498
- L-3 Communications Titan Corporation, B-299317, et al., Mar. 29, 2007, 2007 CPD ¶ 66
- *Palmetto GBA, LLC*, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25200
- *U.S. ex rel. Richard Feingold v. Palmetto Gov't Benefits Adm'rs*, 477 F.Supp.2d 1187 (S.D. Fla. 2007), *aff'd*, 278 Fed.Appx. 923 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 1001 (2009)
- Laerdal Medical Corp., B-297321; B-297321.2, Dec. 23, 2005, 2006 CPD ¶12
- *Palmetto GBA, LLC*, B-299154, Dec. 19, 2006, 2006 CPD ¶ 200
- *United States of America ex rel. Elizabeth Drescher v. Highmark, Inc.*, 305 F.Supp.2d 451 (E.D.Pa. 2004)
- *ACS State Healthcare, LLC; PharmaCare Government Services, Inc.; PGBA, LLC; Humana Military Healthcare Services, Inc.*; B-292981 et al., Jan. 9, 2004, 2004 CPD ¶ 57
- Sundstrand Corporation, ASBCA No. 51572, 01-1 BCA ¶ 31,167
- Lockheed Martin Tactical Aircraft Systems, ASBCA Nos. 49530 and 50057, 00-1 BCA ¶ 30,852
- *United States ex rel. Body v. Blue Cross and Blue Shield of Alabama, Inc.*, 156 F.3d 1098 (11th Cir. 1998)
- *United States ex rel. Foust v. Group Hospitalization and Medical Services*, 26 F.Supp.2d 60 (D.D.C. 1998)
- Lockheed Corp., ASBCA Nos. 36420, 37495, and 39195, 95-2 BCA ¶ 27,722
- *United Technologies Corp., Sikorsky Aircraft Division v. United States*, 31 Fed.Cl. 698 (1994)
- Brunswick Defense, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225
- *United Technologies Corp., Sikorsky Aircraft Division v. United States*, 27 Fed.Cl. 393 (1992)
- *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991)
- Lockheed Corp., ASBCA Nos. 36420, 37495, and 39195, 91-2 BCA ¶ 23,903
- Ruffin's A-1 Contracting, Inc., ASBCA No. 38343, 90-3 BCA ¶ 23,243
- *Novicki v. Cook*, 743 F.Supp. 11 (D.D.C. 1990)
- Aries Marine Corp., ASBCA No. 37826, 90-1 BCA ¶ 22,484
- RCA, ASBCA No. 33866, 87-2 BCA ¶ 19,797
- IBM Corp., ASBCA Nos. 28821 and 29106, 84-3 BCA ¶ 17,689
- *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983)

LOCKE BELL

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Locke Bell advises government contractors in every facet of their businesses, with a particular focus on protecting intellectual property, licensing technical data and computer software, and navigating nontraditional acquisition arrangements, such as other transaction agreements, or OTAs. In addition to counseling on a wide variety of matters, ranging from the Small Business Innovation Research (SBIR) program to Federal data security standards, he also has successfully litigated bid protests before the Government Accountability Office and Court of Federal Claims, and claims disputes before the Court and boards of contract appeals.

Locke graduated from the University of Virginia, receiving a B.S. with high honors in mechanical engineering, and while in law school, he worked at the U.S Patent and Trademark Office as a patent examiner specializing in the mechanical arts. He earned his J.D. with honors from the George Washington University Law School, where he was a member of the Public Contract Law Journal and received the Patricia A. Tobin Government Contracts Award for excellence in the area of government contracts law. Locke went on to clerk for Judge Mary Ellen Coster Williams at the Court of Federal Claims.

Locke is actively involved in the American Bar Association, where he serves as co-chair for the Aerospace & Defense Industries Interest Group in the Section of International Law, and the Boards of Contract Appeals Bar Journal, for which he serves as an Associate Editor.

EDUCATION

University of Virginia (B.S., 2011)

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