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April 30, 2019

By ECF

Hon. Paula Xinis
United States District Judge
District of Maryland, Southern Division
United States Courthouse
6500 Cherrywood Lane, Suite 400
Greenbelt, Maryland 20770

Re: *U.S. ex rel. Fadlalla, et al. v. DynCorp International, LLC, et al*.
Case No. 8:15-cv-01806-PX

Dear Judge Xinis:

Together with this letter, Plaintiffs/Relators today are filing four oppositions to the five motions to dismiss filed by Defendants Global Linguist Solutions, LLC, ("GLS"), DynCorp International, LLC ("DI"), AECOM National Security Programs, Inc. ("AECOM"), Thomas Wright, Inc ("T/WI"), and KMS Solutions, Inc. ("KMS"). In order to conserve space, we have endeavored to make each argument only once, incorporating it by reference in the other opposition memoranda as applicable. In that regard, as our opposition to the GLS motion is the longest and most comprehensive, we respectfully suggest that it should be read first. Following the GLS opposition, our suggested order of review is: DI opposition; AECOM opposition; and T/WI-KMS opposition. For ease of reference, I attach hereto the Table of Contents of each memorandum.

Respectfully,

Charles S. Fax

Charles S. Fax
One of Counsel to Plaintiffs/Relators

Attachments
cc.: All counsel (by ECF)

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

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

OPPOSITION OF PLAINTIFFS/RELATORS ELGASIM MOHAMED FADLALLA, *et al.*, TO DEFENDANT GLOBAL LINGUIST SOLUTIONS LLC'S MOTION TO DISMISS

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April 30, 2019

OPPOSITION TO GLS'S MOTION TO DISMISS
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I. SUMMARY OF FACTS

Plaintiffs/Relators ("Relators") are U.S. citizens who served as foreign language translators and interpreters ("linguists") for U.S. military and intelligence-gathering operations based out of Kuwait. Among their many tasks, Relators accompanied U.S. combat forces into fire-fights as liaisons between U.S. troops and foreign civilians and military forces, translated captured enemy documents, intercepted electronic signals, and assisted in the interrogation of prisoners.

Their work was done pursuant to two government contracts (W911W4-08-D-0002, "Contract 1," and W911W4-11-D-0004, "Contract 2") between Defendant Global Linguist Solutions, LLC ("GLS") and the U.S. Army Intelligence & Security Command ("INSCOM").[1] Defendants Thomas/Wright, Inc. ("T/WI") and KMS Solutions, LLC ("KMS"), both federally certified small businesses, were purported subcontractors on Contract 1 – a small business set-aside contract governed by U.S. Small Business Administration regulations ("SBA set-aside contract").[2]

The First Amended Complaint ("FAC") describes how GLS and the other defendants unlawfully enriched themselves at the expense of the U.S. government by: (1) misrepresenting that Contract 1 would be performed by small- and minority-owned businesses, when in reality GLS intended to, and did, perform, the entire contract itself, using the small businesses only as shills; (2) billing the U.S. for work allegedly performed by SBA Defendants – including execution of

[1] GLS was a joint venture between Defendants DynCorp International, LLC ("DI") and AECOM National Security Programs, Inc. ("AECOM"). Hereinafter, "GLS" refers collectively to GLS, DI and AECOM.

[2] Three other purported small business subcontractors, TigerSwan, Inc. ("TigerSwan"); Shee Atika Languages, LLC ("Shee Atika") and Invizion, Inc. ("Invizion"), have not moved to dismiss for failure to state a claim. All of the small business defendants are referred to hereinafter as the "SBA Defendants."

personnel and payroll functions respecting Relators and the other linguists – when in reality SBA Defendants performed no work under Contract 1; (3) testifying falsely to U.S. authorities that the SBA Defendants were performing personnel and payroll functions;[3] concealing a corrupt cabal with a Kuwaiti company used by GLS to conceal its violations of Kuwait immigration and employment laws; and (4) engaging in widespread violations of the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. §1589, to minimize costs and maximize profit preventing its Relators and its other employees from leaving the country.

This suit seeks relief for Defendants' flagrant misconduct on Contract 1, which violated the False Claims Act, 31 U.S.C. § 3729 *et seq*. ("FCA"), as well as false claims respecting Contract 2. False claims on Contract 1 included false claims that GLS was in compliance with Contract 1's SBA set-aside contract obligations; false claims for reimbursement for work ostensibly performed by SBA Defendants, when in fact they performed *no* work;[4] false certifications that GLS was not under the control and influence of foreign nationals; express and implied false claims relating to compliance with 18 U.S. Code Chapter 77: "Peonage, Slavery, And Trafficking In Persons;" false claims that GLS was in compliance with Kuwaiti laws; false claims of eligibility for payment under Contract 1; and false claims of eligibility for consideration to bid for and be pay on Contract 2. Relators also state a private right of action pursuant to 18 U.S.C. §§1589 and 1592 for violation of the TVPRA's prohibition of forced labor and documentary servitude.

[3] *See* FAC at ¶¶ 164-176, which details GLS's serial falsehoods to government authorities that the SBA Defendants were performing a scope of work that in fact they were not performing, made in order to conceal GLS's misconduct and assure continued payment under Contract 1.

[4] See fn. 3, *supra*.

Relators have original source knowledge of Defendants' massive SBA fraud.[5] GLS identified the SBA Defendants as subcontractors in its successful bid for Contract 1, which required significant participation by certified small businesses. GLS subverted the intent of the small business requirement, however, by impermissibly converting the SBA Defendants into affiliates. In exchange, the SBA Defendants would share in the total revenue generated by the contract. It is unlawful, in bidding or performing an SBA set-aside contract, to count an affiliate of a non-SBA contractor as a *bona fide* small business. Further, and as Relators know first-hand, the SBA Defendants did not participate at all in the performance of Contract 1, yet GLS billed for work ostensibly performed by them.

DI and GLS engaged in a pattern of deceit to disguise that falsehood, including creation of a paper trail falsely suggesting significant SBA Defendant participation in contract performance. GLS required Relators to execute successive Foreign Service Agreement employment contracts ("FSAs") falsely identifying SBA Defendants as their employers, when in fact they were employed by GLS. All aspects of Relators' employment – including recordation of their hours and processing their payroll – were managed by DI and/or GLS, and not by the SBA Defendants, as GLS falsely represented to government authorities, FAC ¶¶ 164-176. Relators knew first-hand of concealment by DI and GLS of the fact that SBA Defendants did not even process payroll on Contract 1. Based on their first-hand knowledge, Relators are original sources of knowledge that GLS President John Houck testified falsely before the Commission on Wartime Contracting in Iraq and Afghanistan ("CWC") when he stated that "Sixty percent of the linguists we provide are provided through the subcontractors and they are employees of those subcontractors." FAC ¶ 167.

[5] *See* FAC at ¶¶ 59, 67, 69-90, 93-118, 166-77, 190, 193, 196, 210, 217-18, 228, 230-232, 234, 243, 255, 260, 262, 268, 273, 278-79, 283-89, 297-304, 306-12, 323-24, 354, 365-66, 385-90, and 438-39.

U.S. Department of Defense ("DoD") National Industrial Security Program Operating Manual ("NISPOM") regulations required GLS to certify that it was not under foreign influence or control in the performance of Contracts 1 and 2. That requirement protected against the threat of foreign national interference with U.S. intelligence-gathering operations, which were dependent on Relators' interpretation and translation services. GLS violated that requirement by concealing its corrupt arrangement with a Kuwaiti company, Alshora International General Trading and Contracting Company ("Alshora"), pursuant to which Relators were falsely represented to Kuwaiti authorities as Alshora employees.[6] This placed them under the direct control and influence of foreign nationals. Thereafter, Kuwaiti authorities, at the behest of Alshora (which claimed that "its" employees had "absconded" from Alshora's workplace) directed the U.S. military to stop Relators' work, and launched a nation-wide manhunt to "capture" Alshora's "absconding" employees, prosecute them, and expel them from Kuwait. This triggered an abrupt cessation of U.S. intelligence-gathering and military operations throughout the Middle East.[7]

Contracts 1 and 2 required GLS to maintain a minimum number of linguists in the theater at all times. GLS engaged in massive, wholesale violations of the TVPRA in order to meet this requirement.[8] Among other things, in violation of Kuwaiti law, GLS transported Relators into Kuwait illegally; directed certain Relators to work with falsified resident visas and others to work

[6] FAC ¶¶ 119-21, 124, 126-59, 163, 182, 198-200, 206-08, 236-41, 250-52, 256-57, 269-76, 290, 305, 333-36, 338, 341-50, 359-60, 364, 370, 374-75, 392-94, 410-13, 424-34, 466, 472, 503, 570, 576 and 584.

[7] FAC ¶¶ 13, 138-59, 182-83, 206-08, 221-26, 237-41, 272, 275-76, 343-50, 381-83, 411-13, 423-34 and 458-75.

[8] FAC ¶¶ 11-12, 49, 119-59, 163, 182-84, 189-95, 197-201, 204-08, 215-26, 229, 236-41, 245, 248-49, 250-52, 256-57, 265, 267, 269-276, 280-81, 290, 292, 295, 305, 315-16, 318, 325, 333-36, 338, 341-50, 359-60, 364, 370, 373-74, 375, 388, 391-94, 400, 410-13, 416, 419, 424-34, 441, 444-45, 447, 452, 466-72, 503, 570-76, 478, 482, 484, 574 and 580.

illegally with tourist visas; confiscated their passports; refused to withdraw Relators from Kuwait, as required by Kuwaiti law, once Kuwaiti authorities understood that Relators were not Alshora employees; tricked Relators into signing powers of attorney ("POAs") that GLS used to file lawsuits in their names against Alshora without their consent; and failed to disclose to Relators that Alshora filed counterclaims subjecting them to legal jeopardy in the Kuwaiti courts. GLS further abused the law by requiring Relators, without the benefit of independent counsel, to report to the Kuwait Ministry of Justice where they were made to confess to crimes, they did not commit in order to regain their freedom and exit Kuwait. Once Kuwait issued arrest warrants, Relators had to stay on base for fear of arrest; some who left were arrested and imprisoned. By manipulating Relators to remain on base for fear of arrest (and thus meeting its "boots on the ground" contractual obligation), GLS committed a further violation of the TVPRA prohibition of forced labor.

As discussed in detail *infra*, the U.S. has a zero-tolerance policy towards violations of the TVPRA, and the DoD is barred by law from paying contractors who violate its provisions. Had the U.S. known of GLS's TVPRA violations, the concealment of which was a further violation of the FCA, INSCOM would have been barred from paying GLS. Further, under both the FCA and the TVPRA, GLS would have been barred from competing for Contract 2.

II. RELATORS ADEQUATELY PLEAD VIOLATIONS OF THE FCA

This lawsuit is a classic FCA action. *See Universal Health Servs., Inc. v. United States ex rel Escobar*, _U.S._, 136 S. Ct. 1989, 2000-02 (2016). ("Enacted in 1863, the False Claims Act was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.").

The elements of FCA liability are: (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. *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 907 (9th Cir. 2017), *cert. denied sub nom. Gilead Scis., Inc. v. U.S. ex rel. Campie*, 2019 U.S. LEXIS 537 (U.S. Jan. 7, 2019); *Escobar*, 136 S. Ct. at 2000-02. FCA claims must meet the Fed. R. Civ. P. 9(b) heightened pleading standard. *Smith v. Clark/Smoot/Russell, A JV*, 796 F.3d 424, 432 (4th Cir. 2015).

A. Relators Adequately Plead an SBA Set-Aside Contracting FCA Claim

1. Relators' SBA FCA Claims Are Pleaded with Particularity

Relators' "long and detailed complaint" adequately "allege[s] the who, what, when, where and how of the alleged [SBA] fraud." *Smith*, 796 F.3d at 432-34. Further, though Rule 9(b) applies, "a court should hesitate to dismiss a complaint under Rule 9(b) 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." *Id*.

Over the expanse of a 110-page 593-paragraph complaint, the 29 Relators provide an extraordinary amount of detail about the "who" (GLS operating through managers Samuel de Sidmed, Cheryl Robinson, Todd Lawrence, Greg Williams, and GLS Presidents John Houck and Ken Tolleson[9] working with identifiable counterparties at the SBA Defendants[10]); the "what" (the SBA Defendants were not *bona fide* small business subcontractors on Contract 1 and had no role in its performance); the "when" (from June 30, 2006 through 2013); the "where" (GLS's training facilities in Herndon, Virginia and at camps Ali Al-Salem, Arifjan, and Buehring in Kuwait); and the "how" (forming sham contracts with SBA Defendants, who did no work on Contract 1;

[9] FAC ¶¶ 45, 48, 111, 165-77, 195, 199-200, 271, 277, 279, 303, 316-18, 340, 367, 401, 409, 416 and 448-50.

[10] Though the complaint does not name specific personal among SBA Defendants, their identities are disclosed by their counter-signatures on the contracts identified, *e.g.*, Thomas Wright of TigerSwan, FAC ¶ 283; Robert A. Wright of T/WI, *id.* at ¶¶ 284, 286, 297, 323; Robert Arsenault of Shee Atiká, *id.* at ¶ 284; Monica Ortiz-Rivera for Invizion, *see* FAC ¶¶ 298, 385.

fabricating false employment contracts between Relators and SBA Defendants; and testifying falsely to conceal these violations).[11]

Relators, in recounting their experiences at the hands of GLS, realized that they were likely the only source of certain evidence of GLS's pattern of SBA fraud and deceit on Contract 1. In retrospect (and without understanding it at the time), some had been exposed to GLS's SBA fraud early. For example, at his GLS orientation, Relator Salim was herded into a large room together with other linguists recruited and trained by GLS. Color-coded cards were arbitrarily distributed to them. Based on the color of the card he was randomly dealt, Relator Salim was informed that he should consider himself an employee of TigerSwan. After a quick greeting from its purported CEO and the gift of a TigerSwan T-shirt and cap, Relator Salim never saw another TigerSwan employee for the remainder of his employment with GLS. FAC ¶¶ 306-09. GLS later demanded that Relator Salim execute a different FSA employment contract with Shee Atika though he never met anyone from that company. *Id.* at ¶ 310.

Routinely, GLS required Relators to execute successive FSA employment contracts with one or another of the SBA Defendants without any engagement on their part.[12] The SBA Defendants had no role in recruiting or screening Relators (FAC ¶¶ 96-99); recordation of their time and processing their payroll (*id*. at ¶¶ 40, 45, 105, 115, 124, 130-33, 170-71, 177, 301-03, 310, 312); scheduling their travel and paying their travel expenses (*id*. at ¶¶ 100-04, 109); or

[11] FAC ¶¶ 165-77. While certain allegations are based "on information and belief," that is of no moment. *See United States ex rel. Conteh v. IKON Office Solutions, Inc.,* 103 F. Supp. 3d 59, 66 (D.D.C. 2015) ("the *Twombly* plausibility standard . . . does not prevent a plaintiff[/relator] from 'pleading facts alleged upon information and belief' where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible." (Citations omitted) (alterations in original)).

[12] *See* FAC ¶¶ 190, 193, 196, 210, 214, 228, 243, 261-62, 277-79, 283-84, 289, 298, 300, 309-10, 312, 365, 371 and 385-86.

managing them (*id*. at ¶¶ 106, 110-11). The inexplicable experience of being instructed to sign "new" contracts, coupled with assurance that their pay and job responsibilities would not change (*id*. at ¶¶ 261, 278-79, 283, 297, 310, 323, 340), became explicable in light of Relators' subsequent investigations in 2014 that, together with Relators' original source knowledge, led to the realization that Defendants were engaged in a massive scheme to defraud the government.

Defendants absurdly argue that an FCA claim cannot be plausibly pleaded until a complete relators' team has been assembled with members who can testify on personal knowledge about the negotiation of Contract 1 and its implementation; GLS's intent; the details of GLS's claims for payment; the contents of GLS's online certifications; proof of scienter for each GLS submission for payment; the substance and amount of each invoice, and the time period for each; and the names of the individuals who submitted the invoices. GLS Motion to Dismiss ("MTD") at 2, 19, 21-24; *see also* AECOM MTD at 10.

By this measure, only the most senior, hands-on, fully-briefed GLS executive could qualify as a whistle-blower. But "[t]hat goes too far. Rule 9(b) does not inflexibly dictate adherence to a preordained checklist of 'must have' allegations." *United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 125 (D.C. Cir. 2015). "Instead, the point of Rule 9(b) is to ensure that there is sufficient substance to the allegations to both afford the defendant the opportunity to prepare a response and to warrant further judicial process." *Id.* at 125; *see also United States ex rel. Reidel v. Bos. Heart Diagnostics Corp.*, 332 F. Supp. 3d 48, 80 (D.D.C. 2018) ("This Court agrees with its colleagues that requiring a concrete example of the alleged fraud would 'require claimants to essential [*sic*] provide detailed proof of their allegations,' which is not required 'on a 9(b) motion to dismiss.'" (citation omitted)). The D.C. Circuit has squarely addressed GLS's objection that Relators do not have personal knowledge of claims for payment by pointing out that "[t]he federal government

itself already has records of those payments and thus 'rarely if ever needs a relator's assistance to identify claims for payment that have been submitted.'" *Heath*, 791 F.3d at 125 (citations omitted). Instead, the question is better framed as "whether the complaint alleges 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" *Id*. at 126 (citation omitted). The FAC clearly meets that standard.

2. Relators Adequately Allege that Defendants' SBA Claims Were False

As detailed in the FAC and summarized above, Relators have recounted their direct exposure to GLS's SBA contracting fraud, including: GLS converting SBA Defendants into affiliates pursuant to "teaming agreements" prior to contract award and then representing to the U.S. that *bona fide* SBA entities were working on Contract 1; GLS directing Relators to sign successive employment agreements falsely identifying one or another SBA Defendant as their employer to create a false record of SBA participation in Contract 1; GLS testifying falsely to the CWC as to the source of GLS's linguist personnel and that *bona fide* SBAs were working on Contract 1, when in fact they were not; GLS repeating that falsehood throughout its performance of Contract 1; and GLS billing the government for work purportedly performed by the SBA Defendants when they did no work.

As shown in the FAC, GLS's representation throughout that SBA Defendants were *bona fide* subcontractors – a requirement to qualify for Contract 1 – was a sham, and GLS's requests for payment for work fictitiously done by SBA Defendants were fraudulent. These were "objective falsehood[s]" *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 383 (4th Cir. 2015) ("[F]or a claim to be 'false' under the FCA, 'the statement or conduct alleged must represent an objective falsehood.'" (Citation omitted)). That is this case, as the SBA Defendants did not participate in

performance of Contract 1. Thus, GLS's claims submitted for payment for work allegedly done by SBA Defendants were false.

3. Relators Adequately Allege that Defendants' False SBA Claims Were Material

The FCA defines "material" as "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). "While *Escobar* did not rule out the possibility that materiality could be decided on a motion to dismiss, 136 S. Ct. at 2004 n.6, it did not suggest that the issue should be routinely decided at such a stage." *United States ex rel. Brooks v. Stevens-Henager College*, 305 F. Supp. 3d 1279, 1301 (D. Utah 2018). Indeed, the Supreme Court denied *certiorari* in *Gilead*, *supra,* and in so doing, let stand the Ninth Circuit's reversal of a trial court's materiality-based Rule 12 dismissal. The Ninth Circuit explained, "The issues [of materiality] raised by the parties here are matters of proof, not legal grounds to dismiss relators' complaint." *Gilead,* 862 F.3d at 907. *Gilead* sets the standard for materiality as consistent with *Twombly* and *Iqbal*, *i.e.* "relators alleg[ing] more than the mere possibility that the government would be entitled to refuse payment if it were aware of the violations sufficiently pleading materiality at this stage of the case." *Id*.

Relators have pleaded far more than the mere possibility that the U.S. could refuse payment if it were aware of the SBA-fraud committed by Defendants in Contract 1. As the FAC shows, the contract itself is a proper gauge of materiality. Section 3.0, Paragraph 7 of the solicitation stated: "Management of Small Business Sub-Contracting. . . . **[GLS] shall meet standard 100% of the time**." FAC ¶ 67 (emphasis added). Section H.14(a) also made clear that the small business entities had to participate in "performing" the contract. Section H.14(c)(1) specified the minimum level of performance participation, stating that "the following **Small Business Participation is required**: 25% to Small Business[;], 5% to Small Disadvantaged Businesses[;] 5% to Women-

Owned Small Businesses[;]3% to HUBZone Small Businesses[; and] 3% to Service Disabled Veteran Small Businesses." *Id.* at ¶ 69 (emphasis added). Compliance with these SBA set-aside performance mandates was an express condition of payment. Section H.14(c)(2) required:

> Contractor *shall* submit . . . *as a part of any submission for award fee determination* . . . information on subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, women-owned small business concerns, and shall ensure that all US subcontractors agree to submit SF 294.

(emphasis added). Finally, Section H.14(c)(3) stated:

> The failure of the Contractor or subcontractor to comply in good faith with its subcontracting plan required by this contract *shall be a material breach of the contract.*

Id. (emphasis added).

Given the explicit requirements of SBA set-aside contracting, the false claims made in this case are at least as material as those in *United States v. Triple Canopy, Inc.*, 857 F.3d 174, 176 (4th Cir. 2017) (explaining that "the marksmanship requirement was a contractual responsibility that Triple Canopy failed to satisfy, instead undertaking a fraudulent scheme . . . to obscure its failure" and noting that "Triple Canopy's own elaborate cover-up suggested that the contractor realized the materiality of the marksmanship requirement.").

GLS asserts that SBA contractor fraud was the subject of the 2009 CWC hearings, and that "the government was aware of these [SBA-fraud] issues and still chose to make payments under the contracts," making such violations immaterial. GLS MTD at 3. This argument fails for at least two reasons. First, SBA contractor fraud was not the subject of the CWC hearings – the hearings focused on GLS contract's high cost and questioned whether outsourcing certain roles to subcontractors, such as payroll, unnecessarily increased the cost.

Second, per *Gilead,* proving that the government knew that Defendants were misrepresenting their SBA compliance is a question of fact that cannot be resolved on Rule 12

motion to dismiss. 862 F.3d at 907. Defendants would have to show, for example, that the government had full knowledge of the fraud notwithstanding GLS President Houck's perjury at the hearings designed to conceal it; that an SBA investigation, compliant with the statutory and regulatory requirements necessary for challenges to an SBA-certified small business's *bona fides*, FAC ¶¶ 165-77, uncovered the fraud; and that the contracting officer's continued payments of Defendants' invoices were not illegal.[13]

Defendants take the myopic view that, under an "essence of the bargain" analysis, the only measure of materiality to the U.S. was "to provide the U.S. military with linguists for its operations in Iraq." *See, e.g.*, AECOM MTD 14-17. But the "benefit of the bargain" is only one consideration in determining materiality. *See United States ex rel. Folliard v. Comstor Corp.*, 2018 U.S. Dist. LEXIS 187828, at *16 (D.D.C. Nov. 2, 2018) (citation omitted); *id.* (essence of the bargain factor is relevant not dispositive to materiality). Many factors "might exhibit materiality and no 'single fact or occurrence' is 'always determinative' of materiality." *Id*. at *15 (quoting *Escobar*, 136 S. Ct. at 2001). Instead, "courts are to conduct a holistic approach to determining materiality in connection with a payment decision . . . ." *Id.* at *16 (internal quotation marks and citation omitted). Here, as discussed above, the strong policy underlying the requirement of SBA-certified *bona fide* small business contractor participation, coupled with the mandate in the contract itself, repeated numerous times, demonstrates the materiality of Defendants' fraudulent claims for

[13] A government employee "cannot authorize a contractor to violate federal law any more than a government employee can ratify a violation of the FCA after the fact." *United States ex rel. Roby v. Boeing Co.*, 100 F. Supp. 2d 619, 644 (S.D. Ohio 2000). This is because, "[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of the law . . . those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Id.*; *see also Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984); *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218, 223 (D. Md. 1995).

payment under Contract 1. Moreover, billing for work performed by a subcontractor who in reality did not perform the work is clearly material. The Court may take judicial notice of the publicly-announced DOJ enforcement actions, listed in Appendix A, against those engaged in small-business contracting fraud.

4. Relators Adequately Allege that Defendants' SBA False Claims Were Made with the Requisite Scienter

Claims under Section 3729(a)(1)(A) and (B) of the FCA require allegations that the false claims were presented "knowingly." The FCA defines "knowingly" to mean "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); *United States ex rel. Harrison v. Westinghouse Savannah River Co*., 352 F.3d 908, 917-18 (4th Cir. 2003). "Unlike the securities fraud cases . . . FCA claims require a relator to show only that the defendant had knowledge of the illegality of its actions, rather than specific intent to defraud." *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 912 F.3d 731, 735 (4th Cir. 2019). Though in "alleging fraud . . . a party must state with particularity the circumstances constituting fraud[,] . . . knowledge, and other conditions of a person's mind may be alleged generally." *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013).

GLS knew that SBA Defendants performed no work under Contract 1, and therefore knew it was submitting false claims for payment for work purported done by SBA Defendants. Additionally, Contract 1 unambiguously required that SBA Defendants participate in the performance of the linguist services. The original-source information revealed by Relators makes clear that Defendants engaged in a deliberate course of conduct designed to *fake* SBA performance participation in the contract. This included the charade of serial contract execution, GLS's false testimony before the CWC, and the fact that the SBA Defendants had no participation in Relators'

performance of their jobs. This conscious behavior by GLS and the other Defendants shows that they *knew* that SBA set-aside contract performance was material to the government, *knew* that there would be repercussions for being found out of compliance with those requirements, *deliberately* engaged in a massive, ongoing scheme to feign compliance with the SBA set-aside requirements, and even committed perjury to hide the truth.

5. Defendants' Statute of Limitations Defense Cannot be Resolved on a Motion to Dismiss

The FAC alleges a massive scheme to conceal Defendants' SBA fraud. The fraudulent concealment scheme included GLS improperly converting each SBA Defendant into a GLS affiliate in the run-up to award of Contract 1, FAC ¶¶ 81-86; GLS deliberately creating a false paper trail of executed contracts that misrepresented SBA Defendants as Relators' employers (when SBA Defendants were never Relators' employers), *id.* at ¶¶ 190, 193, 196, 210, 217-18, 228, 230-32, 234, 243, 255, 260, 262, 268, 273, 278-79, 283-89, 297-304, 306-12, 323-24, 354, 365-66, 385-90, 438 and 439; and GLS President John Houck lying, in his testimony to the CWC, about SBA Defendants' participation in the performance of Contract 1, *id.* at ¶¶ 166-77.

The FAC also alleges a massive scheme to conceal Defendants' TVPRA violations. This prolonged fraudulent concealment scheme included falsifying employment contracts with Alshora to create the appearance that Relators were the employees of this Kuwaiti company, FAC ¶¶ 129, 197-200, and opening accounts at Kuwaiti banks in Relators' names so that money, withdrawn from Relators' GLS paychecks, could be deposited into these Kuwait-based accounts to falsely suggest that Relators were being paid by Alshora, *id.* at ¶¶ 130, 182, 198 and 375. The concealment of the fraudulent relationship with Alshora continued even after that relationship erupted into a stop-work order issued by the Kuwaiti government and GLS fraudulently filed lawsuits in Relators' names against Alshora. *Id.* at ¶¶ 150-57, 182, 251, 256 and 275-76.

Having pleaded the existence of an on-going scheme of concealment, the FAC states, at ¶ 57, that "[a]ny statute of limitations that might otherwise bar any portion of the claims herein is tolled by virtue of Defendants' concealment of their unlawful actions at the time they occurred." Such tolling is wholly consistent with the Supreme Court's determination that the fraudulent concealment tolling doctrine be read into every federal statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 396-7 (1946). As the Fourth Circuit Court of Appeals has made clear:

> The purpose of the fraudulent concealment tolling doctrine is to prevent a defendant from concealing a fraud, or committing a fraud in a manner that it concealed itself until the defendant could plead the statute of limitations to protect it. Thus, pursuant to this doctrine, when the fraud has been concealed or is of such a character as to conceal itself, and the plaintiff is not negligent or guilty of laches, the limitations period does not begin to run until the plaintiff discovers the fraud.

Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 122 (4th Cir. 1995) (internal quotations and citations omitted).[14]

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[14] U.S. District Courts have not hesitated to toll limitations in FCA cases. *See United States v. CFW Const. Co., Inc.*, 649 F. Supp. 616, 619 (D.S.C. 1986) ("fraudulent concealment of the facts giving rise to the plaintiff's cause of action tolls the running of the statute of limitations in False Claims Act cases, and the statute continues to be tolled until such time as the plaintiff knew or should have known of those facts"); *id.*:

> Federal statutes of limitation in fraud cases are universally tolled until the plaintiff knew or should have known of the facts giving rise to its cause of action. This equitable tolling doctrine is read into every statute of limitations, and is based upon a principle deeply rooted in our jurisprudence — that no man may take advantage of his own wrong. The equitable doctrine in fraud cases is specifically applicable where the United States is the party plaintiff, because statutes of limitation sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government.

(Internal citations and quotations omitted); *United States v. Uzzell*, 648 F. Supp. 1362, 1367 (D.D.C. 1986):

> . . . statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government. . . This construction of the statute is consonant with the intent of Congress in enacting the False Claims Act, i.e., to provide the government with an effective tool for recovering monies from claimants who defraud the United States. It would be anomalous and inconsistent

Moreover, Defendants' affirmative defense of limitations cannot be resolved on motion to dismiss at the pleadings stage. "[A] Rule 12(b)(6) motion does not resolve . . . the applicability of defenses." *Butler v. United States*, 702 F.3d 749, 752 (4th Cir. 2012). A plaintiff is not obligated to anticipate a statute of limitations defense by pleading facts that would refute it. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *McMillan v. Jarvis*, 332 F.3d 244, 248 (4th Cir. 2003). The Fourth Circuit, *en banc,* established in *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007), that an affirmative defense may provide the basis for a Rule 12(b)(6) dismissal only "in the relatively rare circumstance [where] all facts necessary to the affirmative defense clearly appear on the face of the complaint." (Internal quotation marks and alteration omitted); *accord Xechem, Inc. v. Bristol–Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004) ("Only when the plaintiff pleads itself out of court—that is, admits all the ingredients of an impenetrable defense—may a complaint that otherwise states a claim be dismissed under Rule 12(b)(6)."). *See also Fed. Deposit Ins. Corp. v. Bank of Am., N.A.*, 308 F. Supp. 3d 197, 205 (D.D.C. 2018) (explaining that a court should "hesitate to dismiss a complaint on statute of limitations grounds unless the defendant has met its heavy burden to show that the complaint is time-barred and there is no dispute as to when the limitations period began" and "[a] plaintiff does not need to plead facts in its complaint to respond to a potential affirmative defense. That a complaint is time-barred is an affirmative defense that defendant must *prove*." (Internal citations and quotations omitted) (emphasis added)).

> with the legislative scheme to allow defendants to avoid liability merely by further concealment of their wrongdoing beyond the six-year period in which the government must bring its suit.

(Internal quotations and citations omitted).

The FAC pleads Defendants' fraudulent concealment with particularity. It is Defendants' burden to plead the affirmative defense of limitations in their answers and either establish the date by which Relators and/or the U.S. were on notice of a claim with sufficient certainty to file a motion for summary judgment, or prove such facts to the finder of fact at trial.[15] *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653-54 (4th Cir. 2006) (reversing a trial court's *sua sponte* statute of limitations dismissal by explaining, in part, that "as a defense waivable by the inaction of a party, the statute of limitations bears the hallmarks of our adversarial system of justice, a system in which the parties are obliged to present facts and legal arguments before a neutral and relatively passive decision-maker."). In any case, each claim for payment to the government by GLS was "its own FCA claim resulting in a separate statute of limitations inquiry." *LW Constr. of Charleston, LLC v. United States,* 139 Fed. Cl. 254, 292 (2018).

[15] On March 19, 2019, the Supreme Court heard oral argument in *Cochise Consultancy Inc. v. United States ex rel. Hunt*, No. 18-315. *Certiorari* was granted to resolve a split in authority on how the statute of limitations under the False Claim Act is to be calculated. The Eleventh Circuit Court of Appeals ruled that an elongated ten-year statute of limitations is extended to both the government (in the event of intervention) and relators (in the event of non-intervention) because "[e]ven in a non-intervened case, the relator brings the suit as the partial assignee of the United States and asserts a claim based on injury suffered by the United States as the victim of the fraud." *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1091 (11th Cir. 2018); *see also id.* at 1097 n.12 ("To be clear, if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, Hunt's claims could still be barred by the statute of limitations. We hold only that at the motion to dismiss stage it was error to dismiss the complaint on statute of limitations grounds."). By contrast, the Fourth Circuit, mischaracterizing a *qui tam* FCA claim as a suit by a "private party" *United States ex rel. Sanders v. North American Bus Indus.*, 546 F.3d 288, 295 (4th Cir. 2008) (and also mischaracterizing a relator as a "private attorney general," *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992); *contra Vermont Agency Nat. Resources v U.S. ex rel. Stevens*, 529 U.S. 765 (2000) ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.")), has ruled that *qui tam* relators do not have the benefit of the FCA's extended statute of limitations where the government has not intervened in the case. The Supreme Court should likely resolve the split in authority during the pendency of this case.

B. Relators Adequately Plead NISPOM-Based FCA Claims Against Defendants

U.S. law prohibits a contractor from performing a government contract that is intelligence-related if that contractor is under foreign influence or control. FAC ¶¶ 160-63. This restriction is explicit in Contract 1 at Section H.1, "Security Requirement," which states that GLS "shall maintain and administer a security program in accordance with the National Industrial Security Program Operations Manual (NISPOM) DoD 5220.22M." FAC ¶ 160. As provided in DoD 5220.22M, National Industrial Security Program, Operating Manual of February 28, 2006:

> A U.S. company is considered under foreign ownership, control or influence ("FOCI") whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable . . . by contractual arrangements or other means, 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. . . .
>
> * * *
>
> A company is required to complete a Certificate Pertaining to Foreign Interests . . . or when significant changes occur to information previously submitted. See http://www.dtic.mil/whs/directives/corres/pdf/522022m.pdf.[3]

Id.

1. Relators' NISPOM FCA Claims are Pleaded with Particularity

The FAC contains detailed allegations about how GLS colluded with Alshora to circumvent Kuwait's strict prohibition on the employment of expatriates by misrepresenting Relators who had Resident Visas in Kuwait ("Resident Visa Relators") as Alshora employees. This misrepresentation placed the Resident Visa Relators under Alshora's influence and control. FAC ¶¶ 120-59, 182. As part of that deception, GLS took money dollars from Relators' pay, converted it to Kuwaiti dinars, and deposited that sum in Kuwait-based bank accounts to create the illusion that Alshora was paying its own employees. *Id.* at ¶¶ 130, 132, 182, 198, 302, 359, 375. Relator Zinnekah discovered that a contract GLS required him to sign represented him to be an Alshora "Light Normal Worker" salaried at 250 Kuwaiti dollars a month. *Id.* at ¶¶ 198-99.

Zinnekah confronted GLS manager Samuel de Sidmed, asking him, "Who is Alshora and why did you have me sign a document that suggests I am an Alshora employee?" *Id.* Relator Abdulghani was arrested on May 6, 2013, at the Kuwait International Airport. *Id.* at ¶ 237. During interrogation by Kuwaiti authorities, he was repeatedly asked, "Why did you abscond from the workplace of your employer Alshora?" and "Why have you not reported to Alshora for thirty days?" They told him that his employer Alshora had "reported you missing," *id.* at ¶ 238, although in fact, he never worked for Alshora. *Id.* at ¶ 239. After seven days, Kuwaiti law enforcement authorities drove him to the airport and expelled him from the country. *Id.* at ¶ 241. Relators also detail how, because GLS put them under Alshora's influence and control, Alshora had the power to petition for, and Kuwaiti law enforcement officials did in fact issue, a stop-work order that denied INSCOM the translation services it desperately needed, and trapped Relators and their fellow linguists in Kuwait as targets of a nation-wide manhunt. *Id.* at ¶¶ 147-48, 163, 381.

2. GLS's NISPOM Certifications Were False

NISPOM regulations required GLS to inform the U.S. of any circumstance that could cause foreign interference with performance of Contract 1. FAC ¶ 162. As described above, GLS colluded with Alshora to misrepresent that Relators were Alshora employees, by: (1) directing Resident Visa Relators to sign Alshora employment contracts; (2) opening Kuwaiti bank accounts for the Resident Visa Relators so that GLS could launder money into their accounts to feign wage payment by Alshora; and (3) paying Alshora fees to compensate for the risk of carrying Resident Visa Relators on its employment roster. GLS failed to inform the U.S. of the representation by GLS and Alshora to the Kuwaiti government that the Resident Visa Relators were Alshora employees. *Id.* at ¶¶ 160-63. GLS never told the U.S. that it had placed these security-cleared translators (who had access to all manner of classified information) under foreign influence and

control. *Id.* GLS NISPOM disclosures were knowingly false. *Id.* Alternatively, they were made with deliberate indifference or reckless disregard as to the impact that GLS's actions – allowing Alshora to exert influence and control over Resident Visa Relators, and how that might play out vis-à-vis the Kuwaiti authorities – had on its NISPOM reporting obligations.

3. False NISOM Representations are Material to the United States

The danger of having intelligence assets – here, security-cleared linguists – placed under foreign influence and control was *actualized* when they were removed from their service to INSCOM. This caused U.S. intelligence-gathering efforts to go deaf. FAC ¶¶ 146-47, 378. Had INSCOM been informed that GLS had placed so many security-cleared linguists under the direct control of foreign nationals, the U.S. would have terminated the contract and stopped paying GLS for the services of such foreign controlled intelligence gatherers. *Id.* at ¶ 534.

4. Relators Adequately Allege that GLS's False NISPOM Claims Were Made with the Requisite Scienter

GLS *knowingly* placed Resident Visa Relators under the direct control of a foreign national company, Alshora, in order to circumvent Kuwaiti immigration and labor laws. GLS *knowingly* deducted money from Relators' pay, converted it into Kuwaiti dinars, and deposited those Kuwaiti dinars into Kuwaiti bank accounts in Relators' names. Neither of these acts was random or accidental. But GLS *never* disclosed any of this to the U.S. FAC ¶¶ 160-63. Scienter is adequately pleaded.

C. Relators Adequately Plead TVPRA Violations Both as an Independent Cause of Action and as a Predicate for an FCA Violations

A defendant is liable under § 1589(a) of the TVPRA when 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;[16] (3) by means of the abuse or threatened abuse of law or legal process;[17] 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. *Lipenga v. Kambalame*, 219 F. Supp. 3d 517, 525 (D. Md. 2016). The Fourth Circuit reaffirmed the extraterritorial reach of Section 1589, *see Roe v. Howard*, 917 F.3d 229 (4th Cir. 2019).[18] While TVPRA allegations need only meet the requirements of Fed. R. Civ. P. 8, Relators have pleaded Defendants' TVPRA violations with the heightened particularity required by Fed. R. Civ. P. 9 because Defendants' TVPRA violations are the basis of a separate FCA claim.[19]

[16] "The term 'serious harm' means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." 18 U.S.C. §1589 (c)(2). "[T]he TVPRA was enacted to encompass more subtle forms of psychological abuse and nonviolent coercion than those previously required to hold perpetrators accountable." *Bistline v. Parker*, 918 F. 3d 849, 871 (10th Cir. 2019).

[17] "The term 'abuse or threatened abuse of law or legal process' means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action." 18 U.S.C. § 1589 (c)(1).

[18] "The 2008 TVPRA further expanded the extraterritorial reach of the TVPA by providing: In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the U.S. have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit

1. Relators' TVPRA Claims are Pleaded with Particularity

As with the SBA FCA claims, Defendants argue that the FCA claims based on Defendants' TVPRA violations lack "the who, what, when, where, and how with respect to the circumstances of the fraud." GLS MTD at 6-8; AECOM MTD at 9-10; DI MTD at 3, 9. Again, in the context of the detailed complaint consisting of 592 paragraphs and 108 pages, Defendants' claim of deficiency is absurd. The FAC does "indeed allege the who, what, when, where and how of the alleged [TVPRA false claims]." *Smith*, 796 F.3d at 432-434. To repeat the Fourth Circuit rule, "a court should hesitate to dismiss a complaint under Rule 9(b) 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." *Id*.

The FAC states "where" Relators were deployed (Camps Ali Al-Salem, Arifjan, and Buehring), using the geographic coordinate system. *Id.* at ¶¶ 185-87. The FAC describes how Contract 1 required GLS to "provide interpretation and translation services . . . up to 24 hours per day, 7 days per week for all operations." *Id.* at ¶ 67. FAC ¶ 575 alleges that if GLS failed to keep the required number of linguists in-country, it would be in breach of contract. FAC ¶¶ 11, 182-83, 191-92, 194, 197, 201, 215, 219-20, 229, 245, 248-49, 265, 267, 272, 280-81, 292, 295, 315-16, 318, 325, 364, 370, 373-74, 388, 391, 400, 408-09, 416, 419, 441, 444-45, 447, 452, 478, 482, 574, and 580 detail how GLS confiscated Relators' passports when they reached Kuwait,. FAC ¶¶ 45, 48, 111, 195, 199-200, 271, 277, 279, 303, 316-18, 340, 367, 401, 409, 416 and 448-50 tell

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an offense) under section . . . 1589 . . . if -- (1) an alleged offender is a national of the United States . . . ." *Roe*, 917 F. 3d at 237.

[19] Defendants repeatedly rely on *Muchira v. Al-Rawaf,* 850 F.3d 605 (4th Cir. 2017). *See* GLS MTD 33, 34; DI MTD 26; AECOM MTD 32, 34-35. But *Muchira* concerned a motion for summary judgment, not to dismiss. *Muchira*, 850 F.3d at 608; *see also Lagayan v. Odeh*, 199 F. Supp. 3d 21, 28-29 (D.D.C. 2016) (rejecting defendant's reliance on *Muchira* at motion to dismiss stage, *inter alia*, because it involved a summary judgment motion). Relators are not required to prove their case at this motion to dismiss stage. *Butler v. U.S.,* 702 F.3d at 752.

the "who" by identifying on-site GLS managers de Sidmed, Robinson, Lawrence and Williams, and GLS President Tolleson, as responsible for the illegal trafficking activities.

FAC ¶¶120-21, 124, 126, 129-30, 163, 182, 198-200, 206, 238-39, 250, 269, 271, 290, 305, 333, 341, 359-60, 364, 370, 392 and 410 describe in detail how GLS abused Kuwaiti employment law by falsifying employment agreements between Relators and Alshora to create the illusion that the "Resident Visa Relators," identified at ¶ 182, were working in low-wage service jobs for a Kuwaiti trading and contracting company. FAC ¶¶ 197-200 provides additional, particularized allegations about the nature of the feigned Alshora contract and ¶ 198 quotes directly from it, making clear that these contracts both faked an employment title and faked pay by Alshora.

FAC ¶¶ 130-31, 182, 198, 359 and 375 describe in detail how GLS further abused Kuwaiti employment law by opening Kuwait-based bank accounts for the Relators and then laundering money into their accounts to create the false appearance that Alshora was paying wages to these "employees." FAC ¶¶136-49, 182, 207 and 272 describe how GLS abused Kuwaiti immigration law when GLS refused to follow protocol for cancelling the fraudulently-issued resident visa that had been issued in Alshora's name. Had the protocol been followed, Resident Visa Relators would have had to return to the U.S. to await issuance of new Visa 18s. *Id.* at ¶¶ 118, 183, 434 and 564.

As detailed at FAC ¶¶ 143-45, 182, 425 and 428-429, GLS further abused Kuwaiti immigration and employment law by bringing additional waves of linguists into Kuwait (called "Non-Resident Visa Relators," *id.* at ¶ 143), and falsely identifying them as "tourists" when they were brought into the country to *work*. FAC ¶¶ 182-83, 208, 221-26, 236-41, 272, 227-31, 343-50, 364, 369-70, 400, 411-12, 451-52 and 512, describe how, after GLS refused to participate in the process of cancelling the Alshora-issued resident visas – which would have required the Visa 18 Relators to return to the U.S. – Relators suffered harm by being the subject of a highly

publicized nationwide manhunt. FAC ¶¶ 583-85 makes clear that GLS had a vested interest in keeping the linguists in constant fear of arrest because doing so would ensure that these linguists would remain on U.S. military bases, and, thus, enable GLS to claim that it was in compliance with its obligations under its contract with INSCOM.

FAC ¶¶ 150-55 alleges further abuses of law in describing how Relators were tricked into signing POAs that enabled GLS to file lawsuits against Alshora in order to protect GLS's interests in Kuwait. FAC ¶ 151 details how GLS threatened those who resisted signing legal documents such as POAs. After GLS secretly filed lawsuits in Relators' names against Alshora, Alshora filed counterclaims against them, subjecting them to further harm. *Id.* at ¶¶ 156, 157. The FAC details how, to resolve Kuwaiti legal proceedings, and as a precondition to regaining their freedom and returning to the U.S., Relators had to confess to crimes they did not commit. *Id.* at ¶¶ 12, 122-23, 158-59, 182-83, 252-54, 296, 364 and 373. Four Relators refused to be coerced into sign false confessions, and were barred from returning to the U.S. (though, months later and after they had obtained U.S. legal counsel, they were released from Kuwait). *Id.* at ¶¶ 159, 253, 257-58 and 350.

The FAC provides detailed, particularized allegations of the harm Relators suffered. As described *supra*, they were held in Kuwait without passports; could not leave; were kept in fear of arrest; and were subject to unjustified legal proceedings. They were inhumanely denied medical care, FAC ¶¶ 186, 320, 322, 346-49; forced to live in overcrowded, unsanitary housing, *id.* at ¶¶182-83, 186-87, 274, 364, 367, 369-70 and 377; and exposed to the harsh elements, *id.* at ¶¶184, 186-87, 274 and 457.

2. Relators Adequately Allege a Claim of Forced Labor under the TVPRA

Contracts 1 and 2 required GLS to maintain a quota of linguists in Kuwait to serve INSCOM. The FAC describes how GLS abused Kuwaiti law to hold Relators there in order to meet the quota requirement. These allegations include GLS's abuse of Kuwaiti immigration laws and its separate abuse of Kuwaiti employment laws – obtaining Resident Visas for certain Relators on the fictious ground that they were Alshora employees, thereby subjecting them to the influence and control of foreign nationals. Further, GLS fraudulently obtained executed POAs from the Relators so that GLS could, unbeknownst to them, file lawsuits against Alshora in their names – which subjected Relators to counterclaims later filed by Alshora. FAC ¶¶ 150-57.

The FAC also makes clear that Relators, who had been stripped of their passports, were confined to base in Kuwait through threats of serious harm should they try to leave. They were threatened with the prospect of arrest; incarceration; deportation; a lifetime ban on re-entry to Kuwait or a Gulf Cooperation country; economic harm from being terminated by GLS; and reputational harm flowing from arrest, trial and deportation. *See Elat v. Ngoubene*, 993 F. Supp. 2d 497, 527 (D. Md. 2014) (the fact that Plaintiff wanted to return to her homeland eventually "is not tantamount to Plaintiff not finding the prospect of returning via deportation proceedings to be threatening.") Thus, they were being effectively held against their will.

3. Relators Adequately Allege Both Knowing Falsity of Defendants' TVPRA Certification and an Implied FCA Violation Based on Defendants' TVPRA-Violative Conduct

a. Defendants are Obligated by Law to Certify TVPRA Compliance, and Relators' Particularized Allegations of TVPRA Violations Establish that Defendants' TVPRA Compliance Certifications Were False

An implied false certification occurs when a claimant makes representations in submitting a claim for payment but omits its violations of statutory, regulatory, or contractual requirements.

Escobar, 136 S. Ct. at 1995, 1999. When contractors submit claims to the government, they impliedly certify compliance with all payment conditions. *Id*. at 1995; 31 U.S.C. § 3729(a). *Escobar* confirmed the existence of this theory of false claims liability. 136 S. Ct. at 1998-2001. The Supreme Court clarified that the implied false certification theory can serve as a basis for liability, at least where the relator shows (i) that "the claim does not merely request payment, but also makes specific representations about the goods or services provided," and (ii) that "the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, 220 F. Supp. 3d 676, 680 (E.D. Va. 2016) (quoting *Escobar*, 136 S. Ct. at 2001); *see also United States v. Kellogg Brown & Root Servs*., 800 F. Supp. 2d 143, 154 (D.D.C. 2011) (in implied false certification cases, omissions can be a basis for liability where certification was a prerequisite to the government action sought); *United States v. DynCorp Int'l, LLC*, 253 F. Supp. 3d 89, 100 (D.D.C. 2017) (a relator "can show falsity by demonstrating that (1) a contractor withheld information about its noncompliance with contractual or regulatory requirements; and (2) those contractual or regulatory requirements were material.").

The FAC alleges that compliance with prohibitions on forced labor is a material condition for payment under the Contract and that GLS falsely certified its compliance, thereby illegally receiving payment from the government. *See* Section II.C.3, *infra*. Relators are not privy to the actual certification statements made by GLS to the U.S. However, (1) Relators know that certification is required under the contract and under the law; (2) Relators know that the government is prohibited from making payments to a contractor that violates the TVPRA (*see* Section II.C.3, *infra*); (3) Relators have plausibly pleaded systemic violations of the TVPRA (*see* Sections II.C.1 and 2, *infra)*; and, thus, (4) under Rule 12, Relators are entitled to the reasonable

inference that GLS's FCA certifications were false. Relators plausibly allege TVPRA violations, failure to comply with that statute, and that compliance was required under the Contracts. FAC ¶¶ 516-17. That GLS sought payment for claims gives rise to the inference that it made false statements concerning or impliedly certified its compliance with TVPRA.

b. Even if GLS did not Make Explicit TVPRA Certifications, it is Liable Under the FCA Because its Actual TVPRA Violations Make it Ineligible to Receive Government Payments Under Executive and Legislative Branch "Zero-Tolerance" Policies

In *Escobar*, the Supreme Court unanimously declared:

> We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability [under the FCA]. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, *but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement*. In these circumstances, liability may attach if the omission renders those representations misleading.
>
> We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. *Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment*.

136 S. Ct. at 1995-96 (emphasis added).

The *Escobar* Court considered Medicaid reimbursement claims made by a counseling center in Massachusetts. 136 S. Ct. at 1997. The counselors were not properly licensed mental health service providers, yet they billed Medicaid using codes reserved for properly licensed counselors. *Id*. "When submitting reimbursement claims, [Defendant] used payment codes corresponding to different services that its staff provided such as 'Individual Therapy' and 'family therapy.'" The Supreme Court determined that "[b]y using payment and other codes . . . .without disclosing [Defendant's] many violations of basic staff and licensing requirements for mental health facilities, [Defendant's] claims constituted misrepresentations." *Id*. 2000-01.

Here, when GLS submitted invoices for Relators' linguist services, it knowingly concealed from INSCOM that it had violated the TVPRA and related laws. Given the government's zero-tolerance for payment to contractors violating anti-trafficking laws – discussed immediately below – FCA liability attaches *via Escobar* even if payment under Contract 1 (or Contract 2) does not turn on whether TVPRA compliance was expressly stated as a condition for payment.

4. Relators Adequately Allege the Materiality of TVPRA Compliance

Violations of certain statutes are, at times, deemed "inherently" material under the FCA. *See, e.g., Reidel*, 332 F. Supp. 3d at 66 ("violations of [the Anti-Kickback Statute] and Stark [Law] can be pursued under the [False Claims Act], since they would influence the Government's decision of whether to reimburse Medicare claims.").[20]

The United States has a "zero tolerance" posture against violations of the TVPA. Under 48 C.F.R. § 52.222-50, "Combating Trafficking in Persons," contractors and their employees are forbidden to "use forced labor in the performance of the contract." The clause applies to all contracts and subcontracts, including those for commercial items. *Id.* at § 22.1705. Failure to comply can trigger termination for default, suspension of contract payments, loss of award fee, and debarment. *Id.* at § 52.222- 50(e).

On September 12, 2012, President Obama signed Executive Order ("EO") 13627, 3 CFR 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts."[21] This EO emphasized, "The U.S. has long had a zero-tolerance policy regarding Government employees

[20] *See also United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 565 F. Supp. 2d 153, 159 (D.D.C. 2008); *United States ex rel. Capshaw v. White*, 2018 U.S. Dist. LEXIS 197495, at *11 (N.D. Tex. Nov. 20, 2018) (holding violation of the Anti-Kickback Statute is "inherently" material under the FCA).

[21] http://www.gpo.gov/fdsys/pkg/DCPD-201200750/pdf/DCPD-201200750.pdf (last visited Apr. 26, 2019).

and contractor personnel engaging in any form of this criminal behavior." The EO made clear that certain behaviors were barred by the TVPA including "(i) using misleading or fraudulent recruitment practices during the recruitment of employees, such as failing to disclose basic information or making material misrepresentations regarding the key terms and conditions of employment, including . . . living conditions and housing (if employer provided or arranged); . . . (iii) destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses . . ."

As another example, in a two-year budgetary appropriation for the *entire U.S. military*, Congress made clear: "*None* of the funds made available [under the DoD Appropriations Act] may be used in contravention" of 18 U.S. Code Chapter 77: "PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS." (emphasis added).[22] This categorical prohibition meant that compliance with the TVPRA was inherently, and automatically, material to payment under Contract 1.

At the least, Relators' allegations of the Government's focus on anti-trafficking laws (FAC ¶¶ 265-70) – *e.g.*, the DoD OIG's audit of over 360 DoD contracts for compliance with anti-trafficking laws, and the Inspector General's 2011 recommendation that a FAR and CentCom anti-trafficking clause be included in all contracts – coupled with its "zero tolerance" pronouncement (FAC ¶ 272) – make it plausible that compliance with TVPRA was inherently material to payment under Contract 1. Defendants' argument contravenes the U.S.'s pronouncements to the contrary.

[22] Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong., § 8115. *See also* National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong., §§ 1703, 1704 (requirements for certification of compliance with anti-trafficking laws by recipients of government contracts and monitoring for compliance); Exec. Order No. 13,627, available at https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe (last visited Feb. 11, 2019) ("The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior."); 48 C.F.R. § 52.222-50 (recognizing government's prohibition of trafficking in persons in government contracts).

The FAC allegations, which give rise to "more than a mere possibility that the government would be entitled to refuse payment," *Campie*, 862 F.3d at 907, due to Defendants' non-compliance with the TVPRA. Defendants' motion to dismiss the TVPRA-based FCA claim should be denied.

5. Relators Adequately Allege that Defendants Acted with the Requisite Scienter

"[S]cienter can be established in any one of three ways (i.e., proof of actual knowledge, deliberate ignorance, or deliberate or reckless disregard) and does not require any 'proof of specific intent to defraud.'" *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 288 (4th Cir. 2002) (citing 31 U.S.C. § 3729(b)). Defendants are estopped to claim ignorance of the TVPRA compliance requirements: Relators have described the government's view on compliance with anti-trafficking laws (*see* Section II.C.4, *supra*), and the government's "zero tolerance" view on human trafficking in the performance of government contracts. *Id.* FAR regulations requiring compliance with anti-trafficking laws were embedded in the Contracts. *See* FAC ¶¶ 77-79. The U.S. has made clear, through Executive branch regulations, Congressional legislation and the Contract provisions, that TVPRA compliance is a *sine qua non* of contracting with the U.S. *See* Section II.C.4, *supra*.

The FAC also provides detailed accounts about how GLS was put on actual or constructive notice of abuses of law that are predicates to trafficking violations. "[A] defendant is liable if it had actual knowledge or if it had constructive knowledge of the falsity of its claims or statements." *United States v. Sci. Applications Int'l Corp.*, 958 F. Supp. 2d 53, 61-62 (D.D.C. 2013). Relators allege in detail a systemic mode of operation whereby GLS violated Kuwaiti immigration and labor laws and engaged in a pattern of abusing the Relators and other workers in violation of TVPRA. This mode of operation, and the repeated false statements or implied certification of compliance with TVPRA, was known to GLS and was institutionalized in the company. The FAC

contains multiple examples of trafficking violations suffered by Relators. FAC ¶¶ 181-487. The FAC identifies specific GLS managers who engaged in and furthered TVPRA violations. For example, GLS Manager Sidmed told Relator Zinnekah that he was on a commercial visa and that permits and work authorizations would be "taken care of." *Id*. ¶ 195. This was a lie: Zinnekah was not authorized to work in Kuwait and was arrested. *Id.* ¶¶ 205-08. Another GLS manager told Relator Magi that he was an employee for T/WI, but this too was a lie, and a scheme to avoid immigration laws requirements, which caused Magi to work illegally and subjected him and other Relators to legal jeopardy. *Id*. ¶¶ 260-61. When Magi questioned GLS manager Sidmed as to the identity of his actual employer, he was told to "leave such matters to GLS." *Id.* ¶ 271. GLS's managers routinely and systemically facilitated and oversaw TVPRA violations.[23] These allegations satisfy the scienter requirement. *See, e.g., United States v. Fadul,* 2013 U.S. Dist. LEXIS 27909, at *29 (D. Md. Feb. 28, 2013) (scienter can be demonstrated by showing that "a particular employee or officer acted knowingly").

GLS knowingly violated TVPRA throughout performance of Contract 1, and GLS employees ranging from managers to employee who submitted claims for payment knew this. *See Fadul*, 2013 U.S. Dist. LEXIS 27909, at *29 (holding that the "employee or officer [who acted knowingly] need not be the same individual who submits the false claims"); *Harrison*, 352 F.3d at 919 (rejecting a "single actor" theory). Even if some GLS employees lacked knowledge of the TVPRA violations and resultant false claims, Relators' allegations of "'actual knowledge

[23] *See* FAC ¶¶ 278-79 (manager shuffled Al-Safar's employment around to avoid immigration requirements); *id.* at ¶ 364 (GLS regional manager acknowledged linguists are slaves); *id.* at ¶ 367 (GLS manager Cheryl Robinson harassed Relator Al-Taie); *id.* at ¶ 448 (GLS President Ken Tolleson confiscated and returned Kabbaj's passport with a "deport" stamp); *id.* at ¶ 450 (Kabbaj complained to Tolleson about mistreatment, and he responded that if there were continued complaints, they would all be fired and returned to the U.S. to "deliver pizzas" – when one non-resident visa holder still demanded to go home, Tolleson refused to allow him to leave Kuwait).

possessed by individual company employees'" suffice. *DynCorp*, 253 F. Supp. 3d at 103 (quoting *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1276 (D.C. Cir. 2010)). Through the conduct of its employees, GLS as a corporate entity had "constructive knowledge of the falsity of its claims or statements." *Sci. Applications Int'l Corp.*, 958 F. Supp. 2d at 62:

> At bottom, Relators' allegations provide an adequate basis for inferring knowledge. *See United States v. Savannah River Nuclear Sols., LLC,* No. 1:16-cv-00825-JMC, 2016 U.S. Dist. LEXIS 168067, at *55-56 (D.S.C. Dec. 6, 2016) (sufficiently pleaded allegations can give rise to an inference of requisite scienter); *United States ex rel. Carmichael v. Gregory*, 270 F. Supp. 3d 67, 70-71 (D.D.C. 2017) (scienter inferred where defendant knew what he was permitted by housing authority to charge for rent, and attempted to charge more than allowed, "thereby confirming his knowledge of the authorized amount"). The scienter requirement is satisfied for motion to dismiss purposes. *See, e.g., United States v. Berkeley Heartlab, Inc.*, 225 F. Supp. 3d 487, 500 (D.S.C. 2016) ("At [the motion to dismiss] stage . . . [relator] need not prove scienter, it need only allege it.").

III. RELATORS ADEQUATELY PLEAD FALSE CLAIMS WITH RESPECT TO AWARD AND PAYMENT UNDER CONTRACT 2

The FCA "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. Thus, any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach." *Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776 (4th Cir. 1999). "The test for False Claims Act liability distilled from the statute and the sources discussed above is (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a 'claim')." *Id*.

The particularized allegations establishing the factual basis for False Claims Act liability for SBA-fraud, NISPOM violations, and TVPRA/Kuwait law violations are the same facts that underlie Relators' assertion that Defendants' fraudulently induced the government to enter into Contract 2. Stated simply, by the time GLS was poised to bid on Contract 2, it was no longer

qualified to be a government contractor and no longer qualified to receive payments from the U.S. Treasury. Had the government known of GLS's perfidy respecting Contract 1, it would not have been allowed to bid on Contract 2.

IV. RELATORS ADEQUATELY PLEAD A REVERSE FALSE CLAIM VIOLATION

A reverse false claim under 31 U.S.C. § 3729(a)(7) "requires proof: (1) that the defendant made, used, or caused to be used a record or statement to conceal, avoid, or decrease an obligation to the United States; (2) that the statement or record was false; (3) that the defendant knew that the statement was false; and (4) that the United States suffered damages as a result." *Pickens v. Kanawha River Towing*, 916 F. Supp. 702,708 (S.D.W.Va. 1996). Relators adequately plead a reverse false claim under the FCA.

The FAC sets forth the succession of lies that GLS told the government to secure compensation under Contracts 1 and 2. Relators' reverse FCA claims under 31 U.S.C. § 3729(a)(7) concern a different genre of lies that GLS propagated, and that Relators, with their original knowledge of GLS's SBA subcontracting fraud, were uniquely positioned to recognize: (1) GLS falsely advised the Defense Auditing Agency that the SBA Defendants were responsible for the GLS payroll function as regards Relators and the other linguists – when in fact, the SBA Defendants performed no payroll function, FAC ¶ 176;[24] and (2) GLS CEO John Houck testified falsely to the CWC that the SBA Defendants were paying the linguists, who were their employees, when in fact, the linguists were being paid by DI/GLS, FAC ¶¶164-75. Had GLS told the truth, it would have had to return to the U.S. Treasury the funds that GLS was paid under Contract 1. That is, these false claims were made, not to take money *from* the U.S., but to avoid having to pay

[24] Relators recorded their time directly into DI's databases. FAC ¶¶ 40, 45, 302-03, 310, 312.

that money *back*. Accordingly, Relators' claims fall squarely within the reverse FCA ambit and adequately plead those claims.

V. THE PUBLIC DISCLOSURE BAR DOES NOT BAR RELATORS' FCA CLAIMS

Relators incorporate by reference, as if fully stated herein, their argument that the public disclosure bar does not bar Relators' FCA claims, set forth in their Memorandum in Opposition to Defendant DynCorp International, LLC's Motion to Dismiss. Relators incorporate by reference, as if fully stated herein, their argument that 18 U.S.C. §1592 has extraterritorial effect, set forth in their Memorandum in Opposition to Defendant AECOM National Security Program, Inc.'s motion to dismiss.

VI. CONCLUSION

For the reasons stated above, GLS's motion to dismiss for failure to state a claim should be denied.

Respectfully submitted,

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April 30, 2019

APPENDIX A

Prosecutions/Enforcement Actions Against Those Making False Claims with Respect to SBA Contracting

- DOJ Press Release, April 3, 2018 Announcing "Multiple Defendants Charged in Fraud and Money Laundering Scheme Involving Over $200 Million in Small Business Contracts" (alleging, among other things, "the conspiracy involved operating construction companies with straw owners who qualified as a disadvantaged individual or as a service-disabled veteran, but who did not actually control the companies."), available at https://www.justice.gov/usao-edwi/pr/multiple-defandants-charged-fraud-and-money-laundering-scheme-involving-over-200; (last visited 4/29/2019).

- DOJ Press Release, April 2, 2018 announcing "Utah Construction Contractors Reach Civil Settlement In False Claims Act Case" (alleging "Big-D, a large construction company, entered into a leasing agreement with Creative Times, a small business participant in the SBA programs, under which Big-D provided personnel who performed or substantially performed the work on the contracts. . . . [T]he leasing agreement was improper [because] . . . Creative Times . . . fail[ed] to meet the SBA's regulatory requirement that the small businesses perform a certain percentage of the work under the contracts, thereby causing the small businesses to submit false or fraudulent claims for payments to the United States," and quoting SBA Acting Inspector General Hannibal Ware as stating, "Concealing the true nature of a purported small business contract participation will be met with significant penalties[,]" available at https://www.justice.gov/usao-ut/pr/utah-construction-contractors-reach-civil-settlement-false-claims-act-case; (last visited 4/29/2019).

- DOJ Press Release, August 10, 2017 Announcing "Defense Contractor ADS Inc. Agrees to Pay $16 Million to Settle False Claims Act Allegations" (alleging "ADS, together with several purported small businesses that it controlled, fraudulently induced the government to award certain small business set-aside contracts by misrepresenting eligibility requirements. . . . ADS and its affiliates allegedly concealed the companies' affiliations with ADS . . ."), available at https://www.justice.gov/usao-dc/pr/defense-contractor-ads-inc-agrees-pay-16-million-settle-false-claims-act-allegations; ((last visited 4/29/2019).

- DOJ Press Release, April 25, 2017 announcing "Construction Company Officer Sentenced to Prison for Conspiring to Defraud Government; Defendant Illegally Obtained Federal Contracts Meant for Small, Disadvantaged Businesses" (alleging "[SBA 8(a) company] Cho and MCC understood that MCC would illegally perform all of the work on these contracts and pay three percent of the proceeds to Cho's companies rather than have Cho's companies perform at least 15 percent of the work as required by the SBA 8(a) program."), available at https://www.justice.gov/opa/pr/construction-company-officer-sentenced-prison-conspiring-defraud-government; (last visited 4/29/2019).

- Office of Inspector General (OIG) reports to Congress. See, e.g., General Services Administration Office of Inspector General Semiannual Report to Congress (Oct. 1, 2016-March 31, 2017) at 35, (contractor sentenced to 30 months' imprisonment and forfeiture of over $6.7 million for fraudulently representing himself and his company as a SBA contractor), available at https://www.gsaig.gov/sites/default/files/semiannual-reports/GSA-OIG-SAR-05-2017.pdf (last

visited 4/29/2019).;

- SBA OIG Semiannual Report to Congress Fall 2017 (Apr. 1, 2017- Sept. 30, 2017) at 14 (over $3 million settlement resolution where SBA served as a pass-through for an ineligible company),available at https://www.sba.gov/sites/default/files/oig/SBA_OIG_ Fal_2017_ SAR.pdf; (last visited 4/29/2019).

- SBA OIG Semiannual Report to Congress Fall 2016 (Apr. 1, 2016-Sept. 30, 2016) at 12 (69 months' imprisonment and forfeiture of nearly $1.3 million against Texas man who used father's identity to qualify for SBA-SDVOSB designation), available at https://www.sba.gov/sites/default/files/oig/SAR_Fall_2016_Publication_Draft_-_508.2.pdf (last visited 4/29/2019).

- VA OIG Semiannual Report to Congress Issue 75 (Oct. 1, 2015-March 31, 2016) at 43 ($5 million settlement against corporation that misused warehouse manager's status as a disabled veteran to obtain SDVOSB contracts), available at https://www.va.gov/oig/pubs/sars/vaoig-sar-2016-1.pdf (last visited 4/29/2019).

- VA OIG Semiannual Report Issue 72 (Apr. 1-Sept. 30, 2014) at 56 (discussing multiple SDVOSB cases including one in which $3.9 million was seized and another where a construction company owner received 57 months' sentence and forfeiture order of $1.1 million), available at https://www.va.gov/oig/pubs/sars/VAOIG-SAR-2014-2.pdf; (last visited 4/29/2019).

- SBA OIG Semiannual Report to Congress Fall 2014 (April 1, 2014 – Sept. 30, 2014) at 11 (guilty plea to fraud for making false statements regarding SDVOSB eligibility to obtain $7.4 million in SDVOSB set-aside contracts), available at https://www.sba.gov/oig/semi-annual-report-congress-fall-2014; (last visited 4/29/2019).

- SBA OIG Semiannual Report to Congress Fall 2013 (Apr.1-Sept. Sept. 30, 2013) at 10 (sentencing in criminal prosecution for fraudulently establishing a firm as an SDVO business and receiving over $13.6 million in SDVO set-aside contracts), available at https://www.sba.gov/content/semi-annual-report-congress-fall-2013-0; (last visited 4/29/2019).

- SBA OIG Semiannual Report to Congress Fall 2012 (Apr.1-Sept. Sept. 30, 2012) at 10 (owner of construction company pled guilty for fraudulently claiming SDVOSB status to obtain 11 federal government contracts valued at over $6.8 million, which his company otherwise would not have been entitled to receive), available at https://www.sba.gov/content/semi-annual-report-congress-fall-2012; (last visited 4/29/2019).

- SBA OIG Semiannual Report to Congress Fall 2010 (Apr.1-Sept. Sept. 30, 2010) at 15 (indictment of owner of company for falsely claiming SDVOSB status for his company in obtaining three SDVO set-aside contracts in excess of $10.9 million), available at https://www.sba.gov/content/semiannual-report-congress-fall-2010; (last visited 4/29/2019).

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

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

OPPOSITION OF PLAINTIFFS/RELATORS ELGASIM MOHAMED FADLALLA, *et al.*, TO DEFENDANT DYNCORP INTERNATIONAL, LLC'S MOTION TO DISMISS

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April 30, 2019

OPPOSITION TO DYNCORP'S MOTION TO DISMISS
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I. INTRODUCTION

Plaintiffs/Relators Elgasim Mohamed Fadlalla, *et al.* ("Relators"), by their counsel of record, for their Opposition to the Motion to Dismiss filed by Defendant DynCorp International, LLC ("DI"), state as follows:

Contemporaneously with the filing of this Opposition, Relators are filing oppositions to the Motions to Dismiss ("MTD") filed by Defendants Global Linguist Solutions, LLC, ("GLS"), AECOM National Security Programs, Inc. ("AECOM"), Thomas Wright, Inc ("T/WI"), and KMS Solutions, Inc. ("KMS").[1] Relators incorporate by reference, as though fully stated herein, the statement of facts set forth in their Opposition to GLS's MTD ("GLS Opposition"). Relators also incorporate herein by reference their arguments in their GLS Opposition that: (1) Relators adequately plead False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq*., violations; (2) Relators adequately plead false claims with respect to award and payment under Contract 2; and (3) Relators adequately plead a reverse false claims violation.

This memorandum rebuts DI's arguments that its and GLS's alleged corporate identities shield it from liability for Relators' claims and that the public disclosure bar forecloses Relators' FCA claims.

[1] T/WI and KMS are two of the five SBA-certified purported small business subcontractors sued in this action. Three other purported small business subcontractors, TigerSwan, Inc. ("TigerSwan"); Shee Atiká Languages, LLC ("Shee Atiká") and Invizion, Inc. ("Invizion"), have not moved to dismiss for failure to state a claim. All of the small business defendants are referred to hereinafter as the "SBA Defendants."

II. DI'S AND GLS'S ALLEGED CORPORATE IDENTITY DO NOT SHIELD DI FROM LIABILITY FOR RELATORS' CLAIMS

A. DI is Directly Liable for all of Relators' Claims

Where a parent corporation directly participates in fraudulent claims, it is liable, under the FCA, for false claims made by a subsidiary. *See U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp*., 498 F. Supp. 2d 25, 60 (D.D.C. 2007) ("Relator must be able to demonstrate either that HCA is liable under a veil piercing or alter ego theory, *or that it is directly liable for its own role in the submission of false claims*." (Emphasis added)); *see also United States ex rel. Polansky v. Exec. Health Res., Inc.*, 196 F. Supp. 3d 477, 512 (E.D. Pa. 2016) ("The FCA's provisions on liability for those who cause false claims to be presented 'indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.'" (Citation omitted)). Likewise, anyone who directly participates in violations of the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1589, *et seq.*, ("TVPRA") is liable under that statute. *Id.* at § 1589(a).

DI, based on its direct participation in the FCA and TVPRA violations alleged in this lawsuit, is directly liable for those claims. DI's direct participation in GLS's ongoing unlawful activity saturates the sorry story: DI and GLS shared the same business address, First Amended Complaint ("FAC") ¶ 36; GLS's operating agreement authorized DI to designate managers to oversee the business and affairs of GLS, and DI personnel were responsible for day-to-day management of GLS and all instruction given to GLS employees, *id.* at ¶ 32; DI exercised management control over GLS, *id.* at ¶ 34; in performing Contract 1, DI controlled distribution of the employee handbooks to the SBA Defendants, *id.* at ¶ 38; DI controlled all "back office" support for the linguists, including time recording, expense reimbursement, and per diem reimbursement,

id. at ¶¶ 37, 39, 40, 42, 105, 299; all persons purportedly in the employ of GLS accessed their time through DI systems, *id.* at ¶ 40, which enabled DI to monitor Relators' pay, *id.* at ¶¶ 301, 312; DI hired and fired key GLS personnel, *id.* at ¶ 41; DI developed all training policies for GLS personnel, *id.* at ¶ 44; and DI employees (including Samuel de Sidmed, Todd Lawrence, Cheryl Robinson, Greg Williams and Bader Sultan) directly supervised Relators and oversaw or controlled Relators' visa compliance, *id.* at ¶¶ 45-46, 48, 49, 111, 316, 340.

In sum, DI was inextricably engaged with GPS in – and participated in the direct control of – the manifest frauds, violations and false claims alleged in the FAC. DI's direct participation makes it directly liable as in *Hockett*, 498 F. Supp. 2d at 62-63.[2]

B. DI is Liable as a GLS Joint Venturer

A false premise underlies DI and AECOM's attempt to avoid the joint and several liability that flows from operating a joint venture together. The false premise is that legislatively created limited liability companies, whose formalities are prescribed by statute, are mutually exclusive of traditional, common law joint ventures that are governed by partnership law. They are not.

To be clear, joint ventures and limited liability companies are different business organizations that the State of Delaware (where "GLS, LLC" is registered) recognizes as having independent existence. Delaware Code, Title 6, Section 1-201 (27) describes limited liability companies separately from joint ventures. The Code defines "person" as: "an individual, corporation, business trust, statutory trust, estate, trust, partnership, **limited liability company**, association, **joint venture**, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity." (emphasis added).

[2] As a separate matter, DI's direct participation in the wrongdoing moots its misplaced veil-piercing argument (DI MTD at pp. 11-16). But even assuming *arguendo* that DI did not participate directly, its corporate veil can still be pierced as discussed *infra* at § II(C).

A limited liability company is a statutorily-authorized business entity that may be created only by observing the statutory requisites for limiting the liability of its managers. *See* Delaware Commerce and Trade, Title 6, Chapter 18, "The Limited Liability Company Act" §§ 18-101 *et seq*. Among the formalities necessary to acquire the limitation of liability that characterizes a limited liability company is the intentional use of the words "limited liability company" or "LLC." *Id.* at §18-102.

Contrary to this requirement, a significant number of Relators' Foreign Service Employment Agreements ("FSAs") were entered into with GLS with no reference to "Global Linguist Solutions, LLC" or any other conspicuous notice that GLS was a limited liability company. *See* FAC ¶ 27; *see also C&M Cafe v. Kinetic Farm, Inc.*, 2016 U.S. Dist. LEXIS 161262, at *13 (N.D. Cal. Nov. 18, 2016) ("Kinetic Farm Inc.'s name, which does not include 'LLC' or 'Limited Liability Company', suggests that it is not organized as an LLC." (Citing Delaware Code Ann. Tit. 6 § 18-102)). Conspicuous public proclamation is not an empty formality, as it provides public notice that the liability for acts and omissions is limited to the statutorily-authorized business form – the very limitation of liability that DI and AECOM seek to obtain through their motions to dismiss.

By contrast, anyone may create a joint venture by mere declaration – there exist no statutory formalities to observe. A joint venture is a default business formation that is governed by general partnership law. In Virginia, where AECOM and DI both have principal places of business (FAC ¶¶ 17-18), "[l]ittle formality is required to establish a joint venture . . ." *Legum Furniture Corp. v. Levine*, 217 Va. 782, 786 (1977), and "the rules of law governing the rights, duties, and liabilities of joint venturers are substantially the same as those which govern partnerships." *Roark v. Hicks*, 362 S.E.2d 711, 714 (Va. 1987) (citation omitted); *see also* FAC ¶ 21. Both general partnership

law and Va. Code Ann. § 50-73.91 provide that the knowledge of general partners is imputed to the partnership and its members. Further, since every partner is an agent of the partnership, the act of every partner for conducting the business of the partnership of which he is a member binds the partnership. *Id.* *See also Kopenhaver v. Morgan*, 2019 U.S. Dist. LEXIS 53324, at *8 (D. Md. Mar. 28, 2019) ("A joint venture is when two or more persons combine in a joint business enterprise for their mutual benefit with an understanding that they will share in profits and losses and have a voice in its management." (Citations and internal quotations omitted)). Because members of a joint venture are jointly and severally liable with respect to tort claims, "a plaintiff may sue one or all of them." *Id.* (citation omitted).

Though the Division of Corporations for the State of Delaware might list "Global Linguist Solutions" as a limited liability company, that does not negate the fact that both DI and AECOM repeatedly and systemically referred to GLS publicly, and in documentation, as a joint venture between them – and used the designation "Global Linguist Solutions" without the denomination "LLC."

In fact, given the opportunity, if not the obligation, to refer to Global Linguist Solutions as a limited liability company, both DI and AECOM *repeatedly* referred to Global Linguist Solutions as a joint venture. Relators have documented DI's repeated description of GLS as a joint venture. FAC at ¶¶ 24-27, 30. AECOM also repeatedly characterized its business activities with DI as a joint venture, and not a limited liability company. Relators have documented how AECOM, through its annually filed SEC 10-K disclosure statements, repeatedly warned its investors of the threat of joint and several liability flowing from its joint ventures such as its "Global Linguists Solutions joint venture." *See* Relators' Opposition to AECOM's MTD at § II(B). Such representations cannot be accidental.

Given these facts, at the very least it would premature to rule on this issue on a motion to dismiss without the benefit of discovery. For the purposes of Fed. R. Civ. P. 12 (b)(6), Relators adequately have pled the existence of a GLS joint venture as has been repeatedly and publicly declared by both DI and AECOM.

C. DI is Liable Pursuant to the Veil-Piercing/Alter-Ego Doctrine

As DI notes, federal common law governs veil-piercing in this case. DI MTD at p. 11, n.15. Generally, "[w]hether a preponderance of the evidence supports the . . . allegations, and whether justice and fairness will ultimately require that the Court pierce the corporate veil, is fact-intensive, and thus an issue to be decided later."[3] *United States ex rel. DeKort v. Integrated Coast Guard Sys*., 705 F. Supp. 2d 519, 547 (N.D. Tex. 2010); *see also In re American Honda Motor Co., Dealerships Realtors Litig*., 941 F. Supp. 528, 551 (D. Md. 1996) (piercing analysis "is a fact-specific inquiry that courts often wait until summary judgment to decide"); *Vitol, S.A. v. Primerose Shipping Co*., 708 F.3d 527, 544 (4th Cir. 2013) ("At its core, the question of whether to pierce the corporate veil is a fact-intensive inquiry, because 'the circumstances necessarily vary according to the circumstances of each case, and every case where the issue is raised is to be regarded as sui generis to be decided in accordance with its own underlying facts.'" (Citation omitted)).

As to the first step in the piercing analysis, courts look to whether "the parent exercised such control over the subsidiary that the subsidiary has become its 'mere instrumentality.'" *Hockett*, 498 F. Supp. 2d at 60 (citation omitted). Relevant factors "include identity of ownership; commonality of officers and directors; the financial relationship between parent and subsidiary;

[3] At the motion to dismiss stage, "[t]he question at bar [in analyzing veil piercing] is not whether plaintiffs' claims will ultimately succeed on their merits, but whether the facts as pled are sufficient to warrant discovery." *See, e.g., Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 471 (D. Del. 2010).

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." *Id.* (citation omitted). The Fourth Circuit has noted that other factors to be considered "include intermingling of funds; overlap in ownership, officers, directors, and other personnel; common office space; the degrees of discretion shown by the allegedly dominated corporation; and whether the dealings of the entities are at arm's length." *Vitol*, 708 F.3d at 544 (citation omitted). *See also Khadim Alkanani v. Aegis Def. Servs., LLC*, 286 F.R.D. 67, 72 (D.D.C. 2012) ("Considerations that factor into this inquiry are the 'nature of the corporate ownership and control; . . . comingling of funds and assets; [and] diversion of one corporation's funds to the other's uses.'" (Citation omitted) (alterations in original)).

The court in *United States ex rel. Powell v. Am. Intercontinental Univ., Inc*., 2016 U.S. Dist. LEXIS 127598, at *26 (N.D. Ga. Sept. 20, 2016), found this first step in the federal piercing test satisfied where allegations included the parent's involvement in the subsidiary's day-to-day operations, which consisted of the parent's employees being "closely involved with, if not entirely in charge of: the hiring, firing, and compensation of [the subsidiary's] admissions staff; organizing trainings for [the subsidiary's] staff; and setting policies and productivity goals for [the subsidiary's] admissions staff."

Here, Relators adequately allege that DI exercised such control over GLS that GLS became a mere instrumentality of DI. As noted above, Relators allege that DI personnel were responsible for the day-to-day management of GLS and all instructions given to GLS employees, FAC ¶¶ 32, 34; DI controlled all "back office" support for the linguists, including time recording, expense reimbursement, and per diem reimbursement, *id.* at ¶¶ 37, 39, 40, 42, 105, 299; DI tracked Relators' pay, *id.* at ¶¶ 301, 312; DI hired and fired key GLS personnel, *id.* at ¶41; DI developed all training policies for GLS personnel, *id.* at ¶ 44; DI employees directly supervised Relators and

oversaw or controlled Relators' visa compliance, *id.* at ¶¶ 45-46, 48, 49, 111, 316, 340. In addition, DI listed the value of Contract 1 in its June 4, 2010 SEC 10-K disclosure statement, and refers therein to GLS as one of its own "segments," *id.* at ¶ 29; DI made a statement in its June 11, 2009 SEC 10-K as to revenue earned and anticipated to be earned from Contract 1 through GLS joint venture, using the terms "our" and "we," *id.* at ¶ 30; at least as of 2009, DI and GLS had consolidated financial statements; *id.* at ¶ 31; DI funded GLS's operating capital, *id.* at ¶ 33; in 2009, DI considered its finances to be so commingled with GLS's finances that DI auditors closely examined GLS internal controls as part of the DI Sarbanes-Oxley ("SOX") audit, *id.* at ¶ 35; at all times relevant to the allegations in the FAC, DI and GLS shared the same business address, *id.* at ¶36; in performing Contract 1, DI controlled distribution of the employee handbooks to SBA Defendants, *id.* at ¶ 38; DI asserted proprietary rights to the content of GLS emails, *id.* at ¶ 43; and, in listing its property assets for the benefit of investors, DI listed "Herndon, VA Offices – GLS recruiting center GLS 11,400 [sq. ft.] [and] San Diego, CA Offices – GLS recruiting center GLS 9,400 [sq. ft.]," *id.* at ¶ 47.

DI, in arguing that Relators fail to meet this prong, relies on *United States v. Universal Health Servs*., 2010 U.S. Dist. LEXIS 116432 (W.D. Va. Oct. 31, 2010), and *Vitol, supra*. Both cases are inapposite. The *Universal Health* court noted that "courts routinely refuse to pierce the corporate veil based on allegations limited to the existence of shared office space or overlapping management, allegations that one company is the wholly-owned subsidiary of another, or that companies are to be considered as a whole." 2010 U.S. Dist. LEXIS 116432, at *10 (internal quotations omitted). In that case, "[a]t most, the Government's allegations suggest a close supervisory relationship between . . . the parent company . . . towards the activities of its subsidiaries." *Id.* at *11.

The plaintiff in *Vitol* alleged only that the fleets of the two corporations at issue had similar coloration, that they shared office space and comingled funds (an allegation premised mainly on one corporation having provided loans to the other, loans that were largely repaid). 708 F.3d at 546-48. The Fourth Circuit found that those pleadings, at best, alleged "a close business relationship." *Id.* at 545-48. As evidenced by the litany of facts listed above, Relators do not merely allege supervisory relationship – they allege much more, and thus DI's reliance on *Universal Health* and *Vitol* is misplaced. Furthermore, *Vitol* was not an FCA suit, and thus the defendant was spared the vigorous application of federal common law vindicating federal statutory goals. *See*, *e.g.*, *Lowen v. Tower Asset Management, Inc*., 829 F.2d 1209, 1220 (2d Cir. 1987) ("[I]n determining whether to disregard the corporate form, [the court] must consider the importance of the use of that form in the federal statutory scheme, an inquiry that generally gives less deference to the corporate form than does the strict alter ego doctrine of state law." (Citations omitted)).

Any of the factors considered under the first step of the federal veil-piercing test can be sufficient to show unfairness as to the second step. *Polansky*, 196 F. Supp. 3d at 515. The numerous factors under the first step alleged here, including identity of ownership; financial relationship between parent and subsidiary; shared records, offices and the like; intermingling of funds; overlap of personnel; common office space; and diversion of one corporation's funds to the other's uses – demonstrate the fundamental unfairness that would result if DI were permitted to shield itself from FCA and TVPRA liability.[4]

[4] The cases upon which DI relies to argue that Relators do not satisfy the second prong of the veil-piercing test are inapposite. *See Universal Health*, 2010 U.S. Dist. LEXIS 116432, at *11 (no piercing where analysis rested only on a "close supervisory relationship" without more); *Polansky*, 196 F. Supp. 3d at 517 (noting a conspicuous absence of facts sufficient to support "any" of the veil-piercing factors); *United States ex rel. Kneepkins v. Gambro Healthcare, Inc.*, 115 F. Supp.

Relators sufficiently plead the requisite factors for piercing the corporate veil beyond mere speculation or recitation of the elements. As such, the nature and extent of the dominion and control exercised by DI over GLS is a question of fact, not subject to resolution on a motion to dismiss. DI's motion to dismiss on piercing grounds should be denied.

III. THE PUBLIC DISCLOSURE BAR DOES NOT FORECLOSE RELATORS' FCA CLAIMS

Ascertaining the applicability of the FCA public disclosure bar[5] entails a three-step inquiry. *United States ex rel. Moore v. Cardinal Fin. Co., L.P.*, 2017 U.S. Dist. LEXIS 46983, at *31-34 (D. Md. Mar. 28, 2017). First, the court examines whether the relator's allegations have been publicly disclosed. *Id.* If so, the court next asks whether the lawsuit is "based upon" (or "substantially the same as")[6] the publicly disclosed allegations. *Id.* If it is, the public-disclosure bar precludes the action unless the relator is an original source of the information upon which the

2d 35, 40 (D. Mass. 2000) (finding piercing allegations insufficient where only fact offered in support was that parent company was sole owner of the subsidiary); *United States ex rel. Siewick v. Jamieson Sci. & Eng.'g, Inc.*, 191 F. Supp. 2d 17, 21 (D.D.C. 2002), *aff'd* 322 F.3d 738 (D.C. Cir. 2003) (finding piercing allegations insufficient where veil piercing analysis rested solely on the status of a single individual who served both as the majority shareholder and corporate officer); *Hockett*; 498 F. Supp. 2d at 61 (rejecting piercing on mere allegation that three officers were employees of the parent corporation); *United States ex rel. Raffington v. Bon Secours Health Sys., Inc.*, 285 F. Supp. 3d 759, 769-70 (S.D.N.Y. 2018) (finding the mere allegation that a parent company "oversaw" the subsidiary, without any additional allegations of abuse of corporate separateness, insufficient for piercing); *United States ex rel. Fent v. L-3 Commc'ns Aero Tech LLC*, 2007 U.S. Dist. LEXIS 83193, at *11, 13 (N.D. Okla. Nov. 8, 2007) (the mere allegation that a parent corporation is a minority owner of the subsidiary is insufficient for piercing); *United States ex rel. Pfeifer v. Ela Medical, Inc.*, 2010 U.S. Dist. LEXIS 45656, at *40 (D. Colo. Mar. 31, 2010) (no piercing where no claim of lack of respect for corporate separateness); *United States ex rel. Tillson v. Lockheed Martin Energy Sys., Inc.*, 2004 U.S. Dist. LEXIS 22246, at *95-96 (W.D. Ky. Sept. 29, 2004) (the existence of a performance guarantee provided by parent corporation insufficient for veil piercing).

[5] 31 U.S.C. § 3730(e)(4)(A) (2006), amended by Patient Protection & Affordable Care Act, Pub. L. No. 111-148, tit. X, sec. 10104(j)(2), 124 Stat. 119, 901-02 (2010).

[6] As discussed, *infra*, the "based on" standard applies to allegations of conduct that occurred before March 23, 2010, and the "substantially the same" standard applies to conduct occurring thereafter.

lawsuit is based. *Id.* The 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." *United States ex rel. Beauchamp v. Academi Training Ctr., LLC*, 816 F.3d 37, 43 (4th Cir. 2016) (citation omitted).

As shown below, the public disclosure bar does not apply here because there is no prior disclosure of the fraud alleged by Relators. Further, Relators' claims are not based on or substantially the same as any prior public disclosure, and, even if they were, the bar is nevertheless inapplicable because Relators are original sources.

A. Pre- and Post-2010 Amendment Public Disclosure Bar

Prior to 2010, the public disclosure bar read as follows:

> *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) (2006) (emphasis added). This version of the public disclosure bar was a "jurisdictional limitation, . . . [which] if applicable, divest[s] the district court of subject-matter jurisdiction over the action." *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 737 F.3d 908, 916 (4th Cir. 2013).

Effective March 23, 2010, Congress, through amendment to the FCA, revised the public disclosure bar. It now provides:

> *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) (emphasis added). Post-amendment, the public disclosure bar is a ground for dismissal – an affirmative defense, as to which the defendant bears the burden of proof[7] – rather than a jurisdictional bar. *Beauchamp*, 816 F.3d at 40. Accordingly, "[p]re-amendment, determining whether the public-disclosure bar precludes a plaintiff's claims is decided under Rule 12(b)(1) for lack of subject matter jurisdiction; post-amendment, it is treated as a motion to dismiss pursuant to Rule 12(b)(6)."[8] *See Citynet, LLC v. Frontier W. Va. Inc.*, 2018 U.S. Dist. LEXIS 55049, at *47-48 (S.D.W. Va. Mar. 30, 2018) (citation and footnote omitted).

The 2010 FCA amendments also changed the required connection between the plaintiff's claims and the qualifying public disclosure. Under the pre-amendment version of the statute, an action is barred if it is "based upon" a qualifying public disclosure, 31 U.S.C.S. § 3730(e)(4)(A), a standard that has been interpreted by the Fourth Circuit to mean that the plaintiff must have "actually derived" his knowledge of the fraud from the public disclosure. *United States ex rel. Siller v. Becton Dickinson & Co*., 21 F.3d 1339, 1348 (4th Cir. 1994). As amended, the public-disclosure bar instead applies if substantially the same allegations or transactions were publicly

[7] *See Bryant v. Better Business Bureau*, 923 F. Supp. 720, 738 (D. Md. 1996); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007).

[8] *See*, *e.g.*, *United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 300 (3d Cir. 2016) (acknowledging that in considering a Rule 12(b)(1) challenge for lack of subject matter jurisdiction, the court may determine its own jurisdiction by consideration of evidence outside the pleadings yet "in considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court generally considers *only* the allegations in the complaint, accepting them as true, and the defendant bears the burden of showing that the plaintiff has not stated a claim." (Citations omitted) (emphasis added)).

disclosed. *Radcliffe*, 737 F.3d at 917 (the amended bar "focuses on the similarity of the allegations of fraud rather than the derivation of the knowledge of fraud").

Additionally, the amended FCA "expanded the definition of 'original source.'" *Majestic Blue Fisheries*, 812 F.3d at 300. Under the pre-2010 FCA, an "original source" is 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." 31 U.S.C. § 3730(e)(4)(B) (2006). As defined in the post-2010 FCA, an "original source" is 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.[9]

Thus, under the post-amendment version of 31 U.S.C. § 3730(e)(4)(B)(2), a relator need not possess "direct . . . knowledge" of the fraud to qualify as an original source.

The amended bar is not retroactive, resulting in the application of the pre-2010 amendment public disclosure bar to conduct that occurred before March 23, 2010, and the post-amendment bar to conduct occurring thereafter. *Moore*, 2017 U.S. Dist. LEXIS 46983, at *30. "If a complaint alleges a continuing course of fraud occurring both before and after March 23, 2010, the pre-amendment version governs conduct occurring before that date, and the post-amendment version governs conducts occurring thereafter." *Id.* (citation omitted).

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

B. There is No Prior Public Disclosure of the Fraud Alleged by Relators

A disclosure, to be considered a prior public disclosure of a fraud alleged in an FCA suit, must contain either: "(1) an allegation of fraud; or (2) a false state of facts and a true state of facts from which fraudulent activity may be inferred." *United States ex rel. Davis v. Prince*, 753 F. Supp. 2d 569, 581 (E.D. Va. 2011) (citing cases); *see also United States ex rel. Black v. Health & Hosp. Corp*., 494 Fed. Appx. 285, 291 (4th Cir. 2012) (unpublished) ("where a public disclosure has occurred, 'the critical elements exposing the [alleged fraud]' are already placed in the public domain" (citation omitted)). Without the fraud or its critical elements being publicly disclosed, "'the government [is not] on notice to the possibility of fraud,'" *Davis*, 753 F. Supp. 2d at 581 (citation omitted), and public disclosure bar is inapplicable.

1. *None of Defendants' Alleged Public Disclosures Exposed Relators' Subcontracting-Based FCA Claims*

Relators' SBA-based FCA claims are premised on the fact that the SBA Defendants were not *bona fide* small businesses and performed no work under Contract 1. *See* GLS Opposition § II (A).[10] The purported prior public disclosures cited by Defendants – the August 12, 2009 hearing

[10] *See also* FAC ¶¶ 81-82, 86 (SBA Defendants were affiliates of GLS, and therefore could not be treated as SBA entities under Contract 1); *id.* at ¶ 94 (SBA Defendants did not have *any* meaningful role in the performance of Contract 1); *id.* at ¶ 117 (GLS was performing *all* of the requested work); *id.* at ¶ 116 (GLS usurped the SBA Defendants' subcontract performance); *id.* at ¶ 493 (GLS used SBA Defendants as fronts for services provided directly by GLS, and that the subcontracts with the SBA Defendants were a sham); *id.* at ¶ 494 (GLS rotated the Relators at will among the SBA Defendants, requiring Relators to sign new employment contracts from time to time, to further the illusion that the SBA Defendants employed Relators and were properly performing subcontracting duties); *id.* at ¶ 497 (GLS paid the SBA Defendants for work not performed by them, and then illegally passed that cost on to the U.S. by making false claims for reimbursement).

SBA Defendants did not keep time records, process foreign service employment agreements or process payment for their alleged employees. FAC ¶¶ 105, 107, 170. SBA Defendants did not know, at any given time, which Relators were on their payrolls; the amount of their businesses' revenue; the percentage of work their businesses were ostensibly performing; whether the work

by the Commission on Wartime Contracting in Iraq and Afghanistan ("CWC Hearing"), certain media reports about the CWC Hearing,[11] and the complaint in *Shee Atiká Languages, LLC v. Global Linguist Solutions, LLC*, No. 1:13-cv-850 (E.D. Va. July 12, 2013) [ECF No. 1] as well as an article about that case[12] – do not disclose that fraud or its critical elements. Accordingly, there is no qualifying prior public disclosure of Relators' subcontracting-based FCA claims, and the public disclosure bar is inapplicable to those claims.

The CWC Hearing, which was a "case study" and "not an accusatory proceeding," Aug. 12, 2009, CWC Hearing Transcript ("CWC Transcript"),[13] at p. 1, focused on the high costs of the GLS contract, and questioned whether outsourcing certain roles, such as payroll, to subcontractors, unnecessarily increased the cost of Contract 1.[14] While there were claims that some subcontractors

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was being satisfactorily performed; the status and locales of their work assignments; or what they were owed. *Id.* at ¶ 115. It follows that GLS falsely represented and certified that it was complying with its Small Business Contracting Plan, the FAR, and applicable federal small business statutes. *Id.* at ¶¶ 69-86, 492, 496, 498-502, 526-28, 531, 542-43.

[11] Associated Press, *Feds Question Iraq Interpreter Contract*, NBC NEWS (Aug. 12, 2009, 7:33 PM); Elizabeth Newell Jochum, *Defense Says Extensive Outsourcing on Iraq Linguist Contract is Jacking Up Costs*, GOVERNMENT EXECUTIVE (Aug. 12, 2009); Robert Brodsky, *Panel to Probe Subcontracting Systems, Subcontracting Arrangements,* NEXTGOV (Aug. 11, 2009); Richard Lardner, *Major Problems Cited in Iraq Interpreter Contract*, NEWSDAY (Aug. 12, 2009, 9:05 PM).

[12] Stewart Bishop, *Army Translation Contractor Breached $697M Deal, Suit Says*, LAW360 (July 16, 2013, 8:31 PM).

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

[14] CWC Hearing Transcript, at p. 2 (focus on "policies for determining that subcontracting arrangements are providing value commensurate with costs and our methods for providing effective monitoring of contractor performance"); *id.* at p. 15 ("[I]f you look at the numbers and the functions that are being performed by the subcontractors, one does have to ask what is the value?"); *id.* at p. 21 ("It is a legitimate cost, it is a payroll function. Payroll functions need to be done. Do they need to be done by 12 different subcontractors with their own G&A, with their own profit, their own fee? I think that is a good question to ask.").

were hired just to perform payroll services for their *bona fide* employees that they "leased" to GLS, there was no accusation that a small business subcontractor was contracted to do *nothing*; or was not personally performing the functions for which it was contracted; or that linguists were not *bona fide* employees of the small business subcontractors. *Id.* at p. 15 ("[I]f you look at the . . . *functions that are being performed by the subcontractors* . . ." (Emphasis added)); *id.* at p. 28 ("payroll function sounds like it is actually somewhat meaningful"); *id.* at p. 51 (GLS agreeing that "[e]very one of these subcontractors is performing all of the functions that they have been responsible for performing"); *id.* at p. 54 ("GLS is basically leasing the linguists from these subcontractors"); *id.* ("Sixty percent of the linguist [GLS] provide[s] are provided through the subcontracts and they are employees of those subcontractors."); CWC Hearing Statement of John W. Houck, GM[15] (stating that the functions contracted to the small business subcontractors included personal security administration, human resources administration (benefits, HRIS, employee relations), casualty assistance, financial administration (timekeeping, payroll, invoicing), and direct deposit).

As the case study performed at the CWC Hearing – as well as the news stories about the CWC that Defendants cite – "do[ ] not address any of the allegations of fraud contained in the complaint," *Citynet*, 2018 U.S. Dist. LEXIS 55049, at *55, none is a "public disclosure" barring Relators' subcontracting-based FCA claims. *Id.* (finding that a case study that did not address the fraud allegations in relator's complaint was not a public disclosure within the meaning of the FCA).

The *Shee Atiká* complaint and one news story cited about that case do not allege or imply that the subcontractors performed no functions under Contract 1 or were not *bona fide* small businesses. To the contrary, the *Shee Atiká* complaint alleges that it is a *bona fide* small business

[15] Available at https://cybercemetery.unt.edu/archive/cwc/20110930032235/http://www.wartimecontracting.gov/images/download/documents/hearings/20090812/Mr_John_Houck_GLS_Statement_08-12-09.pdf.

that performed functions under its subcontract. FAC ¶¶ 6, 10, 13, 51-52, 78. Thus, despite being in the public domain, the *Shee Atiká* complaint and the one cited story about it, like the CWC Hearing, did not "put the government on notice of the likelihood of fraudulent activity," *Black*, 2011 U.S. Dist. LEXIS 32220, at *18, and thus is not a prior public disclosure under the FCA.

2. *Defendants' Claimed Public Disclosures Do Not Expose Relators' TVPRA/Kuwaiti Law-Based FCA Claims*

Defendants argue that the following purported public disclosures bar Relators' TVPRA/Kuwaiti law-based FCA claims: news stories about Relators' detention/visa crisis in Kuwait;[16] the complaint in *Alfred Zaklit v. Global Linguist Solutions, LLC*, Case No. 1:14cv314 (E.D. Va. July 18, 2014) [ECF No. 102], and certain news stories about it;[17] and the complaint in *Zinnekah v. Global Linguist Solutions*, Case No. 1:13-CV-1185 (E.D. Va.) [ECF No. 35], and certain news stories about it.[18] As an initial matter, neither the *Zaklit* nor the *Zinnekah* lawsuit is a public disclosure because the government was not a party to either litigation. *See* 31 U.S.C. §3730(e)(4)(A)(i). The only relevant inquiry is whether public disclosures by members of the news media created a "public disclosure." They did not.

[16] Cheryl K. Chumley, *100 Americans Trapped in Kuwait Over Contract Snub*, WASH. TIMES (June 19, 2013), Cristina Corbin, *Captive in Kuwait: Contract Dispute Leaves 100 Americans Stranded on US Army Bases*, FOX NEWS (June 18, 2013).

[17] Dietrich Knauth, *Army Translators Seek Class Cert. In False Imprisonment Suit*, LAW360 (Sept. 2, 2014); Elizabeth Warmerdam, *Linguists Say Dispute Trapped Them in Kuwait*, COURTHOUSE NEWS SERV. (Oct. 8, 2013, 11:55 PM); Karina Basso, *Army Translators File False Imprisonment Class Action Lawsuit*, TOP CLASS ACTIONS (Sept. 5, 2014); Caroline Simson, *Army Translators' Distress Claims Pared in Contractor Dispute*, LAW360 (Sept. 2, 2014, 8:19 PM).

[18] Ryan Abbott, *Workers Claim DynCorp Abandoned Them*, COURTHOUSE NEWS SERV. (Sept. 25, 2013); Yochi Dreazen, *No Exit: The Kafka-esque story of the U.S. Translators Being Held Against their Will in a Kuwaiti Hangar*, FOREIGN POLICY (Oct. 2, 2013); Steven Beardsley, *American Linguists in Kuwait Seek Help from US Courts to Return Home*, STARS AND STRIPES (Oct. 8, 2013).

Relators' TVPRA/Kuwait law-based FCA claims are premised on Defendants fraudulently seeking payment under Contract 1[19] when they were disqualified from contract performance due to their violations of the TVPRA, Kuwaiti law and NISPOM regulations. FAC ¶¶ 7, 126-33, 143, 503, 529, 532-33. There was no prior news media coverage of Relators' allegations that GLS, in contravention of 18 U.S.C. §1592, confiscated Relators' passports;[20] abused Kuwaiti law by misrepresenting Relators as Alshora's low-wage employees; [21] abused Kuwaiti law by having some Relators work illegally without Resident Visas or work permits; [22] abused Kuwaiti and international law by forcing Relators to confess to crimes they had not committed as a condition for exiting Kuwait; [23] abused Kuwaiti law by tricking Relators into signing powers of attorney that GLS had used to file lawsuits against Alshora;[24] threatened Relators who resisted powers of attorney and false confessions;[25]engaged in SBA fraud by misrepresenting SBA Defendants as

[19] GLS also fraudulently sought payment under Contract 2, as it was unqualified to perform that contract due to its violations of federal small business regulations and National Security Program Operations Manual ("NISPOM") regulations.

[20] FAC ¶¶ 11, 182-83, 191-92, 194, 197, 201, 215, 219-20, 229, 245, 248-49, 265, 267, 272, 280-81, 292, 295, 315-16, 318, 325, 364, 370, 373-74, 388, 391, 400, 408-09, 416, 419, 441, 444-45, 447, 452, 478, 482, 574 and 580.

[21] *Id.* at ¶¶ 120-21, 124, 126, 129-30, 163, 182, 197-200, 206, 238-39, 250, 269, 271, 290, 305, 333, 341, 359-60, 364, 370, 392, 410.

[22] *Id.* at ¶¶ 143-45, 182, 425, 428-29.

[23] *Id.* at ¶¶ 12, 122-23, 158-59, 182-83, 252-54, 296, 364, 373. Four Relators refused to sign these false confessions and were barred from returning to the United States. *Id.* at ¶¶ 159, 253, 257-58, 350.

[24] *Id.* at ¶¶ 150-57.

[25] *Id.* at ¶ 151.

Relators employers;[26] and abused Kuwaiti law by refusing to expatriate Relators once Kuwaiti authorities learned that Relators were not Alshora employees.[27]

The news stories cited by Defendants do not allege or imply that the sponsorship relationship between GLS and Alshora was illegal or that GLS was violating Kuwaiti law and the TVPRA. Rather, they simply claim that the linguists were trapped in Kuwait as a result of a "business dispute,"[28] and that Alshora (not GLS) confiscated the linguists' passports and was to blame for the linguists' predicament.[29]

C. Relators' Action is not Based on, or Substantially the Same as, a Prior Public Disclosure

1. *Relators' Action Is Not Based on a Prior Public Disclosure*

Relators' action is not precluded under the pre-amendment version of the public disclosure bar because it is not based on a prior public disclosure, *i.e.*, Relators did not "actually derive" their knowledge of Defendants' fraud from a public disclosure. The false claims alleged in the FAC

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[26] *Id.* at ¶¶ 190, 193, 198, 202, 210-18, 232-34, 287-89, 297-98, 311.

[27] *Id.* at ¶ 138.

[28] Yochi Dreazen, *Investigation: No Exit,* FOREIGN POLICY (Oct. 2, 2013, 11:55 PM), https://foreignpolicy.com/2013/10/02/no-exit-3/; Cristina Corbin, *Captive in Kuwait: Contract Dispute Leaves 100 Americans Stranded on US Army Bases*, FOX NEWS (June 18, 2013), https://www.foxnews.com/world/captive-in-kuwait-contract-dispute-leaves-100-americansstranded-on-us-army-bases ("commercial dispute").

[29] Cheryl K. Chumley, *100 Americans Trapped in Kuwait Over Contract Snub*, WASH. TIMES (June 19, 2013), https://www.washingtontimes.com/news/2013/jun/19/100-americans-trapped-kuwait-overcontract-snub/; Cristina Corbin, *Captive in Kuwait: Contract Dispute Leaves 100 Americans Stranded on US Army Bases*, FOX NEWS (June 18, 2013), https://www.foxnews.com/world/captive-in-kuwait-contract-dispute-leaves-100-americansstranded-on-us-army-bases; Karina Basso, *Army Translators File False Imprisonment Class Action Lawsuit,* TOP CLASS ACTIONS (Sept. 5, 2014), https://topclassactions.com/lawsuit-settlements/lawsuit-news/39752-translators-file-false-imprisonment-class-action-lawsuit-gls/.

are predicated on the direct independent knowledge of Relators, which they secured from personal observation and interface with fellow employees of Defendant(s). *See* GLS Opposition § II(A)(1) (discussing grounds for Relators' knowledge of their subcontracting-related FCA allegations prior to March 23, 2010); *id.* at § II(C)(1) (discussing grounds for Relators' knowledge of their TVPRA/Kuwaiti law-related FCA allegations prior to March 23, 2010). Because Relators' allegations are not "actually derived from" from a public disclosure, *Siller*, 21 F.3d at 1348, it is immaterial whether their allegations are "similar (or even identical) to those already publicly disclosed." *Id.* ("[I]t is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.").

As Relators' allegations of fraudulent conduct before March 23, 2010, are not based on a prior public disclosure, the public disclosure bar does not apply to those claims. Likewise, as discussed below, Relators' allegations of fraudulent conduct after March 23, 2010, are not substantially the same as a public disclosure, and thus the bar does not apply to those claims.

2. *Relators' Subcontracting-Based FCA Claims are not Substantially the Same as a Public Disclosure*

As stated above, Relators claim that GLS fraudulently sought payment from the U.S. for work allegedly done by SBA Defendants when, in reality, (i) they did not perform that work, and (ii) they were not *bona fide* SBA entities for purposes of Contract 1. And, as discussed, the prior public disclosures cited by Defendants – the CWC Hearing, certain media reports thereabout, and the *Shee Atiká* complaint as well as one media report thereabout – do not make those allegations. Accordingly, Relators' action is not substantially the same as any of those prior public disclosures, and the public disclosure bar is inapplicable. *See*, *e.g.*, *Citynet*, 2018 U.S. Dist. LEXIS 55049, at *54 ("Although Exhibits B, C, and D are public disclosures under one or both versions of the FCA,

they need not be discussed further inasmuch as they do not contain any allegations or transactions of fraud contained in the complaint.").

3. *Relators' TVPRA/Kuwaiti Law-Based FCA Claims are not Substantially the Same as a Public Disclosure*

As noted, Relators' TVPRA/Kuwait law-based FCA claims are premised on Defendants fraudulently seeking payment under Contract 1[30] when not qualified to perform the contract due to Defendants' conduct violative of the TVPRA, Kuwaiti law and NISPOM regulations. FAC ¶¶ 7, 126-33, 143, 503, 529, 532-33. As detailed above, the news stories cited by Defendants merely state that the linguist were trapped in Kuwait as a result of a "business dispute,"[31] and that Alshora (not GLS) confiscated the linguists' passports and was to blame for the linguists' predicament.[32] Those allegations are not substantially the same as Relators' allegations that the "sponsorship" relationship between GLS and Alshora was illegal and that GLS was violating Kuwaiti law and the TVPRA. Accordingly, they do not bar Relators' TVPRA/Kuwaiti-law based FCA claims.

[30] GLS also improperly sought payment under Contract 2, as it was unqualified to perform that contract due to its violations of federal small business and NISPOM regulations.

[31] Yochi Dreazen, *Investigation: No Exit,* FOREIGN POLICY (Oct. 2, 2013, 11:55 PM), https://foreignpolicy.com/2013/10/02/no-exit-3/; Cristina Corbin, *Captive in Kuwait: Contract Dispute Leaves 100 Americans Stranded on US Army Bases*, FOX NEWS (June 18, 2013),https://www.foxnews.com/world/captive-in-kuwait-contract-dispute-leaves-100-americansstranded-on-us-army-bases ("commercial dispute").

[32] Cheryl K. Chumley, *100 Americans Trapped in Kuwait Over Contract Snub*, WASH. TIMES (June 19, 2013), https://www.washingtontimes.com/news/2013/jun/19/100-americans-trapped-kuwait-overcontract-snub/; Cristina Corbin, *Captive in Kuwait: Contract Dispute Leaves 100 Americans Stranded on US Army Bases*, FOX NEWS (June 18, 2013), https://www.foxnews.com/world/captive-in-kuwait-contract-dispute-leaves-100-americansstranded-on-us-army-bases; Karina Basso, *Army Translators File False Imprisonment Class Action Lawsuit,* TOP CLASS ACTIONS (Sept. 5, 2014), https://topclassactions.com/lawsuit-settlements/lawsuit-news/39752-translators-file-false-imprisonment-class-action-lawsuit-gls/.

The *Zaklit* case, as well as the stories discussing it, claim that GLS violated Kuwaiti immigration laws by failing to obtain sponsorship for the linguists *after* GLS's contract with Alshora expired.[33] These allegations do not assert or imply the fraud alleged by Relators here – that the "sponsorship" relationship with Alshora was illegal, and that as a result of GLS's immigration violations and other acts alleged by Relators in this matter (both before and after GLS terminated its contract with Alshora), GLS was in violation of the TVPRA. Accordingly, Relators' action is not "substantially the same" as *Zaklit* or media reports about that case.

To reiterate, the *Zinnekah* action is not a public disclosure because the government was not a party. 31 U.S.C. §3730(e)(4)(A)(i). Yet, even if – contrary to law – the prior *Zinnekah* action were deemed to be a public disclosure, that action would not preclude this FCA case. That is because Relators were the plaintiffs in that case and the source of the allegations made therein. *See United States ex rel. Carter v. Halliburton Co.*, 973 F. Supp. 2d 615, 629 (E.D. Va. 2013) (explaining that the argument that a relator's own prior lawsuit disqualifies her as a relator is untenable because "the public disclosure bar is designed to eliminate parasitic lawsuits . . . and Defendants in essence argue that [relator] should be treated as a parasite of himself. This is illogical."); *see also United States ex rel. Shea v. Verizon Communs., Inc.*, 160 F. Supp. 3d 16, 28 (D.D.C. 2015) (explaining that a relator's own prior lawsuit cannot preclude an FCA claim because

[33] *Alfred Zaklit v. Global Linguist Solutions, LLC*, Case No. 1:14cv314 (E.D. Va. July 18, 2014) [ECF No. 102], at ¶ 28; Elizabeth Warmerdam, *Linguists Say Dispute Trapped Them in Kuwait*, COURTHOUSE NEWS SERV. (Oct. 8, 2013, 11:55 PM), https://www.courthousenews.com/linguists-say-dispute-trapped-them-in-kuwait/; Caroline Simson, *Army Translators' Distress Claims Pared in Contractor Dispute*, LAW360 (Sept. 2, 2014, 8:19 PM), https://www.law360.com/articles/572639/army-translatorsseek-class-cert-in-false-imprisonment-suit.

the "allegations in the 2007 Complaint came from Shea himself." He did not "opportunistically" rely "on the unsealing of [his own] the 2007 Complaint.").

As no public disclosure is substantially the same as the allegations in the FAC, Relators' action is not foreclosed by the public disclosure bar, and no further analysis is needed. *See Beauchamp*, 816 F.3d at 47 ("Having concluded that no qualifying public disclosure occurred within the meaning of the FCA, [the court need not] address Relators' alternative arguments that they were original sources of the information." (Citation omitted)); *Shea*, 160 F. Supp. 3d at 28 n.4 ("Because the Court concludes that the essential elements of Shea's fraud allegations were not publicly disclosed, it need not consider whether Shea was an 'original source' under § 3730(e)(4)(A).").

D. Relators Are Original Sources Pursuant to the Amended FCA

Even if, *arguendo*, the Court found that Relators' allegations were substantially the same as a prior public disclosure, this action is not foreclosed by the public disclosure bar because Relators are original sources pursuant to the amended FCA – they have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."[34] 31 U.S.C. § 3730(e)(4)(B)(2). *See also United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 2018 U.S. Dist. LEXIS 47857, at *13 (E.D.N.C. Mar. 22, 2018) (finding that plaintiff was an original source where his information "is independent of and materially adds to the publicly disclosed information" by identifying the alleged fraud (citation omitted)); *Citynet*, 2018 U.S. Dist. LEXIS 55049, at *77 ("[T]he court has determined that the information Citynet has obtained from

[34] Contrary to Defendants' assertion, Relators voluntarily provided the information on which this lawsuit is premised to the Government before filing this action. On March 23, 2015, Relators filed an Initial Disclosure Statement with U.S. Department of Justice. Relators complaint was filed under seal nearly three months later on June 19, 2015.

its independent investigation materially adds to the public disclosures such that it qualifies as an original source.").

Knowledge is deemed "independent" where it "is not dependent on public disclosure." *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc*., 221 F.3d 580, 583 (4th Cir. 2000) (citations omitted). "'Further, while a relator does not need to have . . . independent knowledge of all the information on which a qui tam action is based, the relator must have . . . independent knowledge of the facts necessary to plead a plausible fraud claim.'" *Carter*, 973 F. Supp. 2d at 629-630 (quoting *Prince*, 753 F. Supp. 2d at 583).

Here, Relators' knowledge was not dependent on public disclosures; rather, they acquired knowledge of their FCA allegations independently through their employment with Defendants, interactions with fellow employees and their own research. *See United States ex rel. Rostholder v. Omnicare, Inc*., 745 F.3d 694, 700 (4th Cir. 2014) (finding that relator had independent knowledge of the fraud where, among other things, his knowledge was based on "his conversations with other employees in the Toledo building, his personal familiarity with the repackaging operations, and his own independent research"); *see also United States ex rel. DeCarlo v. Kiewit/AFC Enters*., 937 F. Supp. 1039, 1049 (S.D.N.Y. 1996):

> DeCarlo had independent knowledge of Kiewit's allegedly fraudulent conduct, obtaining information and making first-hand observations during the course of his employment on the Project. *See Wang v. FMC Corp*., 975 F.2d 1412, 1417 (9th Cir. 1992) (fact of subsequent public disclosure "does not rob [plaintiff] of what he saw with his own eyes"); *United States ex rel. Barth v. Ridgedale Elec., Inc*., 44 F.3d 699, 703 (8th Cir. 1995) (the "direct" knowledge required under the False Claims Act is knowledge "marked by absence of an intervening agency," "unmediated by anything but [plaintiff's] own labor" and seen by plaintiff "with his own eyes" (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994); *Wang v. FMC Corp*., 975 F.2d at 1417)). DeCarlo is the type of plaintiff envisioned by the qui tam provisions of the False Claims Act.

As in *DeCarlo*, Relators' independent knowledge makes them "the type of plaintiff envisioned by the qui tam provisions of the False Claims Act." *Id.*[35]

As noted, in addition to having independent knowledge, relators, to be original sources, must allege facts that materially add to the publicly disclosed allegations or transactions, that is,

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[35] The case law cited by Defendants in support of their argument that Relators lack independent knowledge is inapposite. In *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), the putative relator attempted to use jurisdiction from one scheme for which he had independent knowledge to confer jurisdiction on a completely different scheme for which he did *not* have independent knowledge given that the events occurred *after his employment with the defendant*. *Rockwell* also concerned the pre-2010 FCA. Under the post-amendment FCA, Relators' knowledge need not be direct. *See*, *supra*, § III(A). *Grayson,* 221 F.3d 580, likewise concerned the pre-2010 FCA, to say nothing of the fact that the putative relators were actually lawyers for one of two companies which filed bid protests and learned of the alleged fraud from the other company's bid protest. *Id.* at 582-83.

United States ex rel. Ackley v. IBM, 76 F. Supp. 2d 654 (D. Md. 1999), besides concerning the pre-2010 FCA, did not address the issue of independent knowledge as the relator was disqualified for having failed to voluntary disclose the information to the Government before filing suit. *See id.* at 666.

United States ex rel. Vuyyuru v. Jadhav, 555 F.3d. 337 (4th Cir. 2009), is inapplicable to this case because the putative relator had sworn, under oath, that he was not an original source. *Id.* at 343. No such facts degrade Relators' claims.

Neither *United States ex rel. Ahumada v. NISH*, 756 F.3d 268 (4th Cir. 2014), or *Citynet*, 2018 U.S. Dist. LEXIS 55049, stands for the proposition that a relator must have direct and independent knowledge of the actual claims process in order to state a FCA claim, as DI argues. DI MTD, at 20-21. In *Ahumada*, the trial court found that the relator had offered "no basis on which he could have known such detailed information directly" because the invoices in question "were issued only after he left" his employment. In *Citynet*, 2018 U.S. Dist. LEXIS 55049, at *68-69, the court found that the relator's allegations of fraud were different from the fraud alleged in specific counts. That court, in reference to the language cited by DI, stated:

> The court cannot say that Citynet has materially contributed to these public disclosures. While Citynet has made allegations pertaining to fraud relating to other parts of the grant application and billing, these do not "materially add" to the Count I and Count V allegations. The public disclosures described above contained information that Frontier and its employees did not plan to build the middle mile network contemplated in the WVEO grant application but instead intended to build and indeed built a last mile network that was inaccessible to competitors.

Id.

that "contribute significant additional information to that which has been publicly disclosed so as to improve its quality." *Majestic Blue Fisheries*, 812 F.3d at 306; *id.* at 307 ("a relator materially adds to the publicly disclosed allegation or transaction of fraud when it contributes information – distinct from what was publicly disclosed – that adds in a significant way to the essential factual background: 'the who, what, when, where and how of the events at issue'" (citation and footnote omitted)).

Relators' allegations in this case materially add to the publicly disclosed allegations or transactions. As for the subcontracting-based fraud, Relators materially add that SBA Defendants performed no role whatsoever under Contract 1 (not even payroll) and that Relators were not *bona fide* employees of the SBA Defendants, which in fact were not *bona fide* SBA subcontractors of GLS for purposes of Contract 1, but rather, GLS affiliates. As for the TVPRA/Kuwaiti law-based fraud, Relators materially add that: (i) GLS's sponsorship relationship with Alshora was illegal, and involved GLS falsifying employment agreements between Relators and Alshora; (ii) GLS brought certain linguists into Kuwait illegally on tourist visas; and (iii) GLS subjected Relators to serial employment contract signings, causing complete confusion as to who was their actual employer. *See Majestic Blue Fisheries*, 812 F.3d at 306-08 (finding that the information that the relator learned through discovery in a wrongful death action, including "information such as what specific individuals were involved in the alleged fraud and how they initiated and perpetrated the alleged transgression," materially added to the public disclosures, and therefore the relator was an original source).[36]

[36] Defendants' cases are inapposite. The AECOM MTD, at 28, cites *Majestic Blue Fisheries*, 812 F.3d 294, in arguing that Relators fail to materially add to the publicly disclosed allegation or transaction of fraud. However, as noted, the court in that case found that the relator's allegations materially added to the publicly disclosures. *Id.* at 306-08. The GLS MTD, at 30, relies on *Moore*, 2017 U.S. Dist. LEXIS 46983. However, the relators in *Moore* acknowledged that the plea

Because Relators are original sources under the amended FCA, their action is not barred by the amended public disclosure bar.

IV. CONCLUSION

For the reasons discussed above, Defendant DI's Motion to Dismiss should be denied. Should the motion be granted, however, it should be without prejudice, and Relators should be granted leave to file a Second Amended Complaint.

Respectfully submitted,

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agreement in a prior criminal case covered all the transactions in the case, *id.* at *30, and the court found that relators proffered no knowledge that is independent of and materially adds to the information contained in the plea agreements. *Id.* at *35. That case is not pertinent here, where, as detailed above, the FAC contributes significant additional information to that which has been publicly disclosed so as to improve its quality. *Majestic Blue Fisheries*, 812 F.3d at 306.

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April 30, 2019

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

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

OPPOSITION OF PLAINTIFFS/RELATORS ELGASIM MOHAMED FADLALLA, *et al.*, TO DEFENDANT AECOM NATIONAL SECURITY PROGRAMS, INC.'S MOTION TO DISMISS

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OPPOSITION TO AECOM'S MOTION TO DISMISS
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I. INTRODUCTION

Plaintiffs/Relators Elgasim Mohamed Fadlalla, *et al.* ("Relators"), by their counsel of record, for their Opposition to the Motion to Dismiss filed by Defendant AECOM National Security Programs, Inc. ("AECOM") state as follows:

Contemporaneously with the filing of this Opposition, Relators are filing oppositions to the Motions to Dismiss ("MTD") filed by Defendants Global Linguist Solutions, LLC, ("GLS"), DynCorp International, LLC ("DI"), Thomas Wright, Inc ("T/WI"), and KMS Solutions, Inc. ("KMS").[1] For their Statement of Facts in this Memorandum, Relators incorporate by reference, as though fully stated herein, facts set forth in their Opposition to GLS's Motion to Dismiss ("GLS Opposition").

This memorandum rebuts AECOM's arguments that its corporate identity shields it from liability for Relators' claims; that Relators have failed to plead a claim for fraudulent inducement; that Relators' claims are preempted by the Defense Base Act; that Relators' amendment of the still-sealed complaint bars their claims against AECOM on statute of limitations grounds; the court lacks jurisdiction over claims of documentary servitude, and that Relators may not claim restitution as a remedy under the Trafficking Victims Protection Reauthorization Act.

[1] T/WI and KMS are two of the five SBA-certified purported small business subcontractors sued in this action. Three other purported small business subcontractors, TigerSwan, Inc. ("TigerSwan"); Shee Atiká Languages, LLC ("Shee Atiká") and Invizion, Inc. ("Invizion"), have not moved to dismiss for failure to state a claim. All of the small business defendants are referred to hereinafter as the "SBA Defendants."

II. AECOM IS LIABLE AS A GLOBAL LINGUIST SOLUTIONS JOINT VENTURER

Relators incorporate by reference arguments made in Section II.B. of their opposition to DI's motion to dismiss. As DI's general partner, and operating through its Global Linguist Solutions joint venture, AECOM is charged with all of the acts and omissions by DI and GLS. VA. CODE ANN. §§ 50-73.91, 50-73.96; *see also* FAC ¶ 21. Thus, all of the false claims made by GLS and DI with respect to small business participation in the performance of Contract 1, the extent of foreign influence and control over GLS and its linguists, and GLS's compliance with anti-trafficking laws are chargeable to AECOM.

With specific reference to AECOM, Relators identify documents in the public record as to which the Court may take judicial notice, namely, AECOM's annual 10-K Securities and Exchange Commission disclosures to current and putative shareholders.[2] In those documents, AECOM describes GLS as a joint venture and does not *ever*, during the period 2009-2018, and despite forty-seven references to "Global Linguists Solutions" and "GLS" (and many references to other limited liability companies), describe GLS as a limited liability company.[3] Instead, AECOM warns current and future shareholders of the business risks it has incurred by choosing

[2] As AECOM makes clear, in considering a motion under Rule 12(b)(6), a district court may consider matters of which a court may take judicial notice. AECOM MTD at 5. *See Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 881 (4th Cir. 2014) ("In reviewing the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6), we accept all factual allegations in the complaint as true[;a]nd as did the district court, we take judicial notice of the content of relevant SEC filings and other publicly available documents . . .")

[3] Pursuant to The Sarbanes-Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted July 30, 2002), "the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under either such section of such Act that -- (1) the signing officer has reviewed the report; (2) based on the officer's knowledge, *the report does not contain any untrue statement of a material fact or omit to state a material fact* necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading." (emphasis added).

to do business through joint ventures (as "Global Linguists Solutions" is described) For example, on page 17 of its 2012 10-K Disclosure, AECOM states:

> Approximately 13% of our fiscal 2012 revenue was derived from our operations through joint ventures or similar partnership arrangements, where control may be shared with unaffiliated third parties. As with most joint venture arrangements, differences in views among the joint venture participants may result in delayed decisions or disputes. We also cannot control the actions of our joint venture partners, **and we typically have joint and several liability with our joint venture partners under the applicable contracts for joint venture projects**. These factors could potentially adversely impact the business and operations of a joint venture and, in turn, our business and operations. **Operating through joint ventures in which we are minority holders results in us having limited control over many decisions made with respect to projects and internal controls relating to projects.** Of the joint ventures noted above, approximately 7% of our fiscal 2012 revenue was derived from our unconsolidated joint ventures[4] where we generally do not have control of the joint venture. These joint ventures may not be subject to the same requirements regarding internal controls and internal control over financial reporting that we follow. As a result, internal control problems may arise with respect to these joint ventures, which could have a material adverse effect on our financial condition and results of operations. (emphasis added).[5]

Though this is an accurate description of an informal joint venture, it is absolutely *not* an accurate description of a formally-structured limited liability company. As is well known, "[a]n LLC is primarily a creature of contract, and the parties have wide contractual freedom to structure the company as they see fit." *Seneca Invs. LLC v. Tierney*, 970 A.2d 259, 261 (Del. Ch. 2008)

[4] AECOM's decision to operate through "unconsolidated joint ventures" where AECOM "generally do[es] not have control of the joint venture" results in significant revenue. As Note 8 of AECOM's 2012 consolidated financial statement reveals, "Total revenue of the unconsolidated joint ventures were $2.0 billion, $2.0 billion and $1.9 billion for the years ended September 30, 2012, 2011 and 2010, respectively." *See* Exhibit A.

[5] See AECOM's 2009 10-K containing a similar warning and revealing that 8% of fiscal 2009 revenue was derived from unconsolidated joint ventures (p. 15); AECOM's 10-K: similar warning, 10% of fiscal 2010 revenue derived from unconsolidated joint ventures (p. 15); 2011 10-K: similar warning, unconsolidated joint ventures produced 8% of fiscal 2011 revenue (p.17); 2013 10-K: similar warning, unconsolidated joint ventures produced 6% of fiscal 2013 revenue (p. 18); 2014 10-K, similar warning, unconsolidated joint ventures produced 4% of fiscal 2014 revenue (p. 20). *See also* 2015 10-K at p. 20; 2016 10-K at p. 21; 2017 10-K at p. 20; 2018 10-K at p. 22. AECOM's annual 10-K filings are available at https://www.aecom.com under "Investors."

(emphasis added). Under the Delaware Limited Liability Company Act "the parties have broad discretion to use an LLC agreement to define the character of the company and the rights and obligations of its members. . ." *Obeid v. Hogan*, No. 11900-VCL, 2016 Del. Ch. LEXIS 86, at *13 (Del. Ch. June 10, 2016) (citation omitted). Virtually any management structure may be implemented through the company's governing instrument. *Id*. (citation omitted). Among the powers that may be incorporated into the contract between the members (typically referred to as the "Operating Agreement") is "that the members do not intend to form a partnership or to be partners to one another or as to any third party." *Ken Mills Eng'g Ltd. v. Bulk Handling Sys. & Emerging Acquisitions, LLC*, No. 3-10-1070, 2011 U.S. Dist. LEXIS 15742, at *9 (M.D. Tenn. Feb. 16, 2011).

Given that every time AECOM has communicated with the investing public, the company has described Global Linguist Solutions as a joint venture (for which AECOM has joint and several liability as a matter of law), it would premature to rule on this issue on a motion to dismiss, without the benefit of discovery. For the purposes of Fed. R. Civ. P. 12 (b)(6), Relators adequately have pled the existence of a GLS joint venture as has been repeatedly and publicly declared by both DI and AECOM.

III. AECOM IS LIABLE FOR THE ALLEGED FCA VIOLATIONS

Irrespective of AECOM's role as a joint venturer in GLS and its role as DI's general partner, AECOM is directly liable for false claims alleged in the FAC as it profited from GLS and DI's false claims with knowledge of the falsity of such claims. The FCA creates liability for parties where false claims are presented "knowingly." 31 U.S.C. § 3729(a)(1)(A)-(B). The FCA defines "knowingly" to mean "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); *see also United States v. O'Connell*, 890 F.2d 563, 568 (1st Cir. 1989) ("There is nothing in the language of the Act proscribing vicarious liability. The purposes of the False Claims Act are to make the government whole (restitution) and to deter fraud against the government. The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side and should be interpreted accordingly.") (citations and quotations omitted).

Given that AECOM profited from GLS false claims with at least reckless disregard for the truth or falsity of the claims that GLS was submitting to the government or the truth or GLS's compliance with applicable law, AECOM is liable for the damage done to the public fisc through payments made to GLS – payments that were then funneled to AECOM in the form of profits.

IV. AECOM IS VICARIOUSLY LIABLE FOR THE TVPRA VIOLATIONS

AECOM's liability for the TVPRA harms inflicted upon Relators flows under operation of law. Title 18 U.S.C. § 1589(b) of the TVPRA "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*, No. 17-4020, 2019 U.S. App. LEXIS 7503, at *1 (10th Cir. Mar. 14, 2019); *see also Elat v. Ngoubene*, 993 F. Supp. 2d 497, 531 n.17 (D. Md. 2014) ("Knowingly benefitting from the forced labor of a victim of human trafficking is a violation of 18 U.S.C. § 1589(b) (2008)"); *Ricchio v. McLean*, 853 F.3d 553, 557 (1st Cir. 2017). Under 18 U.S.C. § 1591(e)(6), "venture" is defined as "any group of two or more individuals associated in fact, whether or not a legal entity." AECOM's knowledge is imputed through its partnership with DI and its status as a joint venturer in GLS. Moreover, given the strict prohibitions on violations of U.S. trafficking laws, AECOM demonstrated either "deliberate ignorance of the truth or falsity of the information" provided to the government with

respect to GLS's representations of small business participation in Contract 1, the extent foreign control over GLS, and GLS's compliance with anti-human-trafficking laws – or "reckless disregard of the truth or falsity" thereof. *See* 31 U.S.C. § 3729(b)(1)(A).

Accordingly, AECOM is barred, as a matter of law, from receiving any money from the Department of Defense because it has profited from forced labor. Congress made it unequivocally clear: "None of the funds made available [under the Department of Defense Appropriations Act] may be used in contravention" of 18 U.S. Code Chapter 77: "Peonage, Slavery, And Trafficking In Persons" and the Trafficking Victims Protection Act of 2000. (Emphasis added).[6]

V. RELATORS ADEQUATELY PLEAD FRAUD-IN-THE-INDUCEMENT

AECOM argues that Relators make vague and unsupported allegations that it is liable for FCA violations under a fraudulent inducement theory. AECOM Br. at 8 n.7. That is wrong. The FAC makes specific allegations that GLS engaged in fraudulent misstatements to induce the award of Contract 1 and then, knowing it was unqualified to continue serving as a government contractor or receive payment from the government, made false statements regarding its qualification to bid on and be awarded Contract 2.

Fraudulent inducement claims are cognizable under the FCA. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787, 796 n.14 (E.D. Va. 2007). Liability for fraudulent inducement attaches to all claims "submitted to the government under a contract, when the contract

[6] Consolidated Appropriations Act, 2014, H.R. 3547, 113th Cong., § 8115. *See also* National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong., §§ 1703, 1704 (requirements for certification of compliance with anti-trafficking laws by recipients of government contracts and monitoring for compliance); Exec. Order No. 13,627, available at https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe (last visited Feb. 11, 2019) ("The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior."); 48 C.F.R. § 52.222-50 (recognizing government's prohibition of trafficking in persons in government contracts).

or extension of government benefit was obtained originally through false statements or fraudulent conduct." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 (4th Cir. 1999). "[T]he test for FCA liability on a fraudulent inducement theory is (1) whether there was a false statement . . .; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or forfeit moneys due." *DRC, Inc.*, *supra,* at 797 (internal quotation marks omitted).

Each of these elements for a fraud-in-the-inducement theory of FCA liability is satisfied by the FAC. Because GLS's misconduct is imputed to AECOM, AECOM's argument as to the fraudulent inducement theory of liability should also be rejected.

A. Relators Adequately Allege False Statements

Relators adequately allege that AECOM made false statements in securing Contract 1. Because GLS was a joint venture between AECOM and DI, the acts of GLS, including its false statements with respect to the SBA set-aside requirements are imputed to AECOM. GLS was well aware of the SBA contracting policies and requirements. FAC ¶ 113. Prior to INSCOM awarding Contract 1 to GLS, and during the competition for the award of that contract, GLS entered into Teaming Agreements with the Small Business Defendants so that those entities could be counted as small business participants in order to satisfy the SBA requirements for and pursuant to the contract. FAC ¶ 83. However, under the terms of these teaming agreements, GLS exerted so much control over the SBA Defendants that, prior to being awarded Contract 1, it had converted the SBA Defendants into its affiliates. FAC ¶ 86. By seeking award of Contract 1, GLS falsely represented and certified to the government, *inter alia,* that SBA Defendants were *bona fide* small businesses that satisfied the small business requirements of Contract 1 and that the SBA Defendants would participate in the performance of Contract 1. FAC ¶ 84-87. Not only was the

representation of the SBA defendants as *bona fide* independent small businesses a false statement made to induce award of Contract 1, but the representation that the SBA Defendants would actually participate in the performance of Contract 1 was also a false statement made to induce award of Contract 1 because GLS had no intention, prior to contract award, of allowing the SBA Defendants to actually participate in the performance of Contract 1.

GLS's false statements regarding qualifications for an award of, and to perform under, Contract 1 is the very type of "objective falsehood" that supports a fraudulent inducement claim. *See United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 383 (4th Cir. 2015). But for GLS (and thus DI and AECOM) falsely representing its qualifications to receive an award of Contract 1, it would not have been awarded the contract. *See United States ex rel. Thomas v. Siemens AG*, 991 F. Supp. 2d 540, 569-70 (E.D. Pa. 2014) (citing *Harrison I*, 176 F.3d at 794) ("In other words, to establish FCA liability for fraudulent inducement, the false statement must have "caused" or "induced" the government to enter into a contract, such that but for the misrepresentation, the government would not have awarded the contract and would not have paid the claim."); *see also Harrison I*, 176 F.3d at 794 (relator stated claim for fraud-in-the-inducement where he alleged the defendant made intentional misrepresentations to the government about matters material to the government's decision to grant a subcontract, and these false statements caused the government to pay "claims" at a higher cost than it would have paid absent the fraud).

The FAC's allegation that Defendants' false claims with respect to prospective small business participation in the performance of the contract were material to INSCOM's decision to award Contract 1 to GLS is supported by the public record. GLS had been "advised that award would be based on the proposal offering the best value to the government considering the following evaluation factors: management, past performance, and cost. . . .*With regard to the most important*

factor, management, the solicitation identified the following subfactors: fill rate, experience, sustainment, staffing plan, transition plan and *small business participation*. (emphasis added).[7]

The FAC makes equally sufficient allegations as to false statements in connection with bidding on and receiving the follow-on Contract 2. The particularized allegations establishing the factual basis for FCA liability for SBA-fraud, NISPOM violations, and non-compliance with TVPRA and Kuwaiti law are the same facts that underlie Relators' assertion that Defendants' fraudulently induced the government to enter into Contract 2. GLS failed to disclose its systemic false claims for payment under Contract 1 and failed to disclose in the bid for Contract 2 that it had engaged in violations of the TVPRA. By concealing its false claims and illegal conduct, facts it had an affirmative obligation to disclose, GLS (and thus DI and AECOM by imputation) falsely represented to the government that it was qualified to be a government contractor and receive payments from the government. The concealed information was material to the government, *i.e.*, had the government known of GLS's systemic violations of the FCA and TVPRA, the government *could not* have awarded Contract 2 to GLS.

B. Relators Adequately Allege Scienter

Claims under Section 3729(a)(1)(A) and (B) of the FCA require allegations of "knowing[]" presentation of false claims. The FCA defines "knowingly" to mean "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); *Harrison*, 352 F.3d at 917-18. ". . . FCA claims require a relator to show only that the defendant had knowledge of the illegality of its actions, rather than specific intent to defraud." That is, "knowledge, and other conditions of a

[7] United States Government Accountability Office, Decision, March 29, 2007, page 3, *See* https://www.gao.gov/decisions/bidpro/299317.pdf and https://www.gao.gov/decisions/bidpro/299317.htm.

person's mind may be alleged generally." *United States ex rel. Nathan v. Takeda Pharms. N. Am.*, Inc., 707 F.3d 451, 455 (4th Cir. 2013).

Relators adequately allege that AECOM acted with the requisite scienter in inducing the government to award the initial Contract 1 and the follow-on Contract 2. As above, GLS was a joint venture between AECOM and DI, and thus the acts of GLS and its knowledge (and intent) with respect to the alleged misconduct are imputed to AECOM. *E.g.*, FAC ¶ 21. Accordingly, GLS (and by imputation DI and AECOM), knew of the SBA requirements but failed to comply with them in seeking award of the initial Contract 1. The teaming agreements provide evidence that GLS never intended for SBA Defendants to actually participate in the performance of Contract 1. In fact, the teaming agreements themselves memorialized that SBA Defendants, contrary to the policy goal of government small-business set-aside contract, would not obtain experience through working on this massive contract. However, GLS's presentation of SBA Defendants to INSCOM as *bona fide* small-business contactors gave it the competitive edge it needed to be awarded Contract 1.

GLS (and thus DI and AECOM) also knew about the false claims being submitted for work purportedly done by the SBA defendants – no work was actually being done under Contract 1 by these entities. Defendants feigned SBA participation under Contracts and compliance with the SBA set-aside requirements in order to receive the initial and follow-on contracts. As alleged in the FAC and highlighted in Relators' brief in opposition to GLS's motion to dismiss, GLS (and DI and AECOM by imputation), knew (a) that it was non-compliant with the SBA requirements and (b) of its systemic NISPOM violations and non-compliance with the TVPRA and Kuwaiti law. Thus, in bidding on and accepting Contract 2, GLS falsely represented to the government that it was qualified to be a government contractor, when it knew it was not and that it had not satisfied

the requirements for obtaining and performing under Contract 1, and then bidding on and accepting Contract 2.

Because scienter is satisfied as to GLS (as set forth in more detail in Relators' GLS Opposition), it is satisfied as to AECOM – one of the principal joint venturers in GLS.

VI. RELATORS' TVPRA CLAIMS ARE NOT PREEMPTED BY THE DEFENSE BASE ACT

AECOM argues that Relators' TVPRA claims are "preempted" under the Defense Base Act, 42 U.S.C. § 1651 *et seq*. ("DBA"). AMTD 30 n.27. However, federal statutes do not preempt other federal statutes. *See, e.g., Baker v. IBP, Inc.*, 357 F.3d 685, 688 (7th Cir. 2004); *United States v. General Dynamics Corp.*, 19 F.3d 770, 773 (2d Cir. 1994); *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1226-27 (D.C. Cir. 1991). The correct inquiry is whether the exclusive remedy provision under the DBA bars Relators' TVPRA claims. It does not.

The DBA applies to claims for the "injury or death of any employee," 42 U.S.C. § 1651(a), establishing a workers compensation scheme for civilian government employees and contract workers who are actually injured on overseas military bases. *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 341 (D.C. Cir. 2018). The DBA incorporates parts of the Longshore Act and defines injury to mean "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." *Martin v. Halliburton*, 808 F. Supp. 2d 983, 989 (S.D. Tex. 2011). AECOM cites *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1127 (D.C. Cir. 2015) for its preemption claim. The D.C. Circuit held that the plaintiffs' RICO claims for fraud and delayed payments were barred by the DBA exclusivity provision because the Act "already provides a remedy for . . . [the] false statements" and other conduct that allegedly violated of RICO. The TVPRA is not implicated in this opinion, nor could it be. The forced labor and

associated financial harms suffered by Relators are afforded a remedy under the TVPRA, not the DBA.

VII. AECOM CANNOT CLAIM A UNIQUE CALCULATION OF THE STATUTE OF LIMITATIONS

Relators address the statute of limitations defense in their opposition to GLS's motion to dismiss. However, at page 29 and n.24, AECOM pushes a unique, if not desperate theory for avoiding liability on Relators' claims. It is AECOM's view that because the originally-filed complaint was amended to include AECOM as a defendant on March 25, 2016 – an amendment that occurred while the action was still under seal – "[t]he FAC does not relate back to the original complaint under Rule 15 (c) because AECOM did not receive notice of the suit." However, at the time the underlying complaint was amended, *no defendant was on notice of the suit* because the complaint was still under seal. To the extent that any of the defendants had been put on notice of the complaint by the Court's order of December 5, 2016 partially lifting the seal and granting the United States the authority to "in its discretion. disclose the existence of Relators' *qui tam* complaint and allegations to any and all of the Defendants[,]" the FAC was the operative complaint and AECOM received notice at the exact same time as any other defendant. To the extent that DOJ, in its discretion, did not share the complaint with Defendants, then the notice of the suit, for *all* defendants, was October 16, 2018 Order.

VIII. BECAUSE 18 U.S.C. § 1592 IS PREDICATED ON A VIOLATION OF 18 U.S.C. §1589, CONGRESS INTENDED FOR § 1592 ALSO TO HAVE EXTRATERRITORIAL EFFECT

AECOM and GLS claim that the Court lacks jurisdiction over Relators' Section 1592 claims because that statute does not have extra-territorial application. AECOM MTD 30-31, GMTD 31-32. GLS and AECOM's argument is illogical and would frustrate the will of Congress and the President.

Section 1592(a) of the TVPRA establishes that "[w]hoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person (1) *in the course of a violation of section* . . . 1589 . . . .(2) with *intent to violate* section . . . 1589 . . . shall be fined under this title or imprisoned for not more than 5 years, or both." *See United States v. Dann*, 652 F.3d 1160, 1173 (9th Cir. 2011) ("Document servitude occurs where a defendant knowingly conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document of another person in the course of trafficking, peonage, slavery, involuntary servitude or forced labor. 18 U.S.C. §1592(a)(1).") (internal quotations omitted).

GLS and AECOM acknowledge that Section 1589, forced labor, is extra-territorially applied. *Id*. Section 1592 liability is derived from 1589 liability. Thus, Section 1592 has extraterritorial effect as derived from 1589's extraterritorial effect. For Section 1592 to <u>not</u> have extraterritorial effect, Congress would have had to affirmatively expressed a qualification or limitation on Section 1592 (*e.g.*, "except where such violations of occur outside of the United States, . . . whoever knowingly destroys, conceals . . ."). Yet, such a judicial insertion of a jurisdictional limitation on §§1589/1592 combinations clearly "would immunize broad category of conduct and frustrate congressional intent" where "Congress was clearly concerned with international rather than purely domestic matters" and "unduly limiting the TVPA's scope risks frustrating its animating purpose." *Roe v. Howard*, 917 F.3d 229 (4th Cir. 2019) (finding that, notwithstanding the absence of language applying 18 U.S.C. § 1595, "§1595 applies extraterritorially to the extent that the particular predicate offense supporting a specific claim applies extraterritorially."). *See United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004) (concluding that statutes prohibiting inducement of aliens to enter United States illegally

applied extraterritorially because, *inter alia*, they were "fundamentally international" in "focus and effect"); *See also Virginia Intern. Terminals, Inc. v. Edwards*, 398 F.3d 313 (4th Cir. 2005) (holding that, in the Fourth Circuit, it is a "longstanding canon of interpretation [that] adjacent statutory subsections that refer to the same subject matter . . . must be read in *pari materia* as if they were a single statute."); *see also United States v. Srnsky*, 271 F.3d 595, 602 (4th Cir.2001) (holding that the language in adjacent statutory subsections must be read *in pari materia*).

The Court should be guided by the operation of two additional principles of statutory construction. The first is the "harmonious reading canon" whereby "if by any fair course of reasoning [Section 1589 and 1592] can be reconciled, both shall stand." Indeed, pursuant to the harmonious reading canon, absent a clearly expressed congressional intention to the contrary, "when two statutes are capable of coexistence, it is the duty of the courts . . . to regard each as effective." *English v. Trump*, 279 F. Supp. 3d 307, 324 (D.D.C., 2018) (citations, alterations, and internal quotations omitted). Harmonizing Section 1589, which has extraterritorial effect, with Section 1592 which is predicated on a violation of 1589, results in a reasonable reading of 1592 as also having extraterritorial effect. Second, under the "presumption against implied repeals" it is long recognized that repeals or partial repeals "are not to be implied unless the later-enacted statute expressly contradicts the original act or such an inference is absolutely necessary in order that the words of the later statute shall have any meaning at all." *See also Lockhart v. U.S.*, 546 U.S. 142, 149 (2005) (making clear that "absent a clearly established congressional intention, repeals by implication are not favored.").

Given the obvious statutory intent to root out human trafficking abuses, including forced labor and documentary servitude as a predicate offense to forced labor, it is only logical that 18 U.S. § 1592 have extraterritorial effect.

IX. RESTITUTION IS AN AVAILABLE REMEDY FOR VIOLATIONS OF THE TVPRA

By mischaracterizing the holdings of two cases, AECOM suggests to the Court that restitution cannot be a remedy for Relators. However, restitution is absolutely a remedy available for victims of human trafficking. *Lipenga v. Kambalame*, 219 F. Supp. 3d 517, 530 (D. Md., 2016) (ruling, in a civil suit, that "[t]he Court is empowered to order restitution for offenses under the TVPRA. 18 U.S.C. § 1593(a)"). *See also Lagasan v. Al-Ghasel,* 92 F. Supp. 3d 445 (E.D. Va. 2015) (in a civil suit, "the undersigned finds that plaintiff is entitled to restitution damages under the TVPA."); *Ross v. Jenkins*, 325 F. Supp. 3d 1141, 1171 (D. Kan., 2018) (in a civil suit, stating unambiguously, "A victim of human trafficking and forced labor may recover damages under 18 U.S.C. § 1595(a). *In addition to this civil remedy*, § 1593 authorizes mandatory restitution for human trafficking victims.") (emphasis added). Merely because the two cases cited by AECOM, *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012) and *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1164 (9th Cir. 2010), provided restitution in criminal cases does not mean the remedy is not available in civil cases. Perhaps with the hope that an inaccurate read of *Fu Shen Kuo* might lead to a favorable outcome for AECOM, the motion to dismiss disingenuously adds emphasis to suggest that Section 1593 is only a remedy for a *criminal* offense. That is not the holding of *Fu Shen Kuo*. In the context of the ruling by that court, proper emphasis would have been "Section 1593 applies . . . only to cases in which a defendant has been convicted of an offense *under the Trafficking Act.*"). That is so, because the district court ruled that the victim had *not* been a victim under the Trafficking Act.

The actual[8] quote is:

> Section 1593 applies, however, only to cases in which a defendant has been convicted of an offense under the Trafficking Act. *Id*. § 1593(a). **But Defendants**

[8] *See* Maryland State Bar Association Code of Civility, ¶7.

were not convicted of an offense under the Trafficking Act; they were convicted of a violation of 18 U.S.C. § 241. The restitution provisions of the Trafficking Act simply do not apply.

X. CONCLUSION

For the reasons discussed above, Defendant DI's Motion to Dismiss should be denied. Should the motion be granted, however, it should be without prejudice, and Relators should be granted leave to file a Second Amended Complaint.

Respectfully submitted,

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

(Mark one)

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2012

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from to

Commission file number 0-52423

AECOM TECHNOLOGY CORPORATION
(Exact name of Registrant as specified in its charter)

Delaware	**61-1088522**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)

555 South Flower Street, Suite 3700
Los Angeles, California 90071
(Address of principal executive offices, including zip code)

(213) 593-8000
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	**Name of Exchange on Which Registered**
Common Stock, par value $0.01 per share	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act: **None**

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. ☒ Yes ☐ No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. ☐ Yes ☒ No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. ☒ Yes ☐ No

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§ 232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). ☒ Yes ☐ No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☒	Accelerated filer ☐	Non-accelerated filer ☐ (Do not check if a smaller reporting company)	Smaller reporting company ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). ☐ Yes ☒ No

The aggregate market value of registrant's common stock held by non-affiliates on March 31, 2012 (the last business day of the registrant's most recently completed second fiscal quarter), based upon the closing price of a share of the registrant's common stock on such date as reported on the New York Stock Exchange was approximately $2.10 billion.

Number of shares of the registrant's common stock outstanding as of November 7, 2012: 108,078,563

DOCUMENTS INCORPORATED BY REFERENCE

Part III incorporates information by reference from the registrant's definitive proxy statement for the 2013 Annual Meeting of Stockholders, to be filed within 120 days of the registrant's fiscal 2012 year end.

Our business and operating results could be adversely affected by losses under fixed-price contracts.

Fixed-price contracts require us to either perform all work under the contract for a specified lump-sum or to perform an estimated number of units of work at an agreed price per unit, with the total payment determined by the actual number of units performed. In fiscal 2012, approximately 47% of our revenue was recognized under fixed-price contracts. Fixed-price contracts are more frequently used outside of the United States and, thus, the exposures resulting from fixed-price contracts may increase as we increase our business operations outside of the United States. Fixed-price contracts expose us to a number of risks not inherent in cost-plus and time and material contracts, including underestimation of costs, ambiguities in specifications, unforeseen costs or difficulties, problems with new technologies, delays beyond our control, failures of subcontractors to perform and economic or other changes that may occur during the contract period. Losses under fixed-price contracts could be substantial and adversely impact our results of operations.

We conduct a portion of our operations through joint venture entities, over which we may have limited control.

Approximately 13% of our fiscal 2012 revenue was derived from our operations through joint ventures or similar partnership arrangements, where control may be shared with unaffiliated third parties. As with most joint venture arrangements, differences in views among the joint venture participants may result in delayed decisions or disputes. We also cannot control the actions of our joint venture partners, and we typically have joint and several liability with our joint venture partners under the applicable contracts for joint venture projects. These factors could potentially adversely impact the business and operations of a joint venture and, in turn, our business and operations.

Operating through joint ventures in which we are minority holders results in us having limited control over many decisions made with respect to projects and internal controls relating to projects. Of the joint ventures noted above, approximately 7% of our fiscal 2012 revenue was derived from our unconsolidated joint ventures where we generally do not have control of the joint venture. These joint ventures may not be subject to the same requirements regarding internal controls and internal control over financial reporting that we follow. As a result, internal control problems may arise with respect to these joint ventures, which could have a material adverse effect on our financial condition and results of operations.

Misconduct by our employees or consultants or our failure to comply with laws or regulations applicable to our business could cause us to lose customers or lose our ability to contract with government agencies.

As a government contractor, misconduct, fraud or other improper activities caused by our employees' or consultants' failure to comply with laws or regulations could have a significant negative impact on our business and reputation. Such misconduct could include the failure to comply with federal procurement regulations, regulations regarding the protection of sensitive government information, legislation regarding the pricing of labor and other costs in government contracts, regulations on lobbying or similar activities, and anti-corruption, export control and other applicable laws or regulations. Our failure to comply with applicable laws or regulations, misconduct by any of our employees or consultants or our failure to make timely and accurate certifications to government agencies regarding misconduct or potential misconduct could subject us to fines and penalties, loss of government granted eligibility, cancellation of contracts and suspension or debarment from contracting with government agencies, any of which may adversely affect our business.

Our defined benefit plans have significant deficits that could grow in the future and cause us to incur additional costs.

We have defined benefit pension plans for employees in the United States, United Kingdom, Australia, Ireland, and Canada. At September 30, 2012, our defined benefit pension plans had an aggregate deficit (the excess of projected benefit obligations over the fair value of plan assets) of

AECOM TECHNOLOGY CORPORATION

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

8. Joint Ventures and Variable Interest Entities (Continued)

Summary of unaudited financial information of the consolidated joint ventures is as follows:

	Fiscal Year Ended	
	September 30, 2012	September 30, 2011
	(in millions)	
Current assets	$243.2	$262.6
Non-current assets	—	0.1
Total assets	$243.2	$262.7
Current liabilities	$ 43.1	$ 69.4
Non-current liabilities	—	—
Total liabilities	43.1	69.4
Total AECOM equity	145.1	137.9
Noncontrolling interests	55.0	55.4
Total owners' equity	200.1	193.3
Total liabilities and owners' equity	$243.2	$262.7

Total revenue of the consolidated joint ventures were $468.6 million, $557.8 million and $814.7 million for the years ended September 30, 2012, 2011 and 2010, respectively. The assets of the Company's consolidated joint ventures are restricted for use only by the particular joint venture and are not available for the general operations of the Company.

Summary of unaudited financial information of the unconsolidated joint ventures is as follows:

	Fiscal Year Ended	
	September 30, 2012	September 30, 2011
	(in millions)	
Current assets	$598.8	$510.7
Non-current assets	15.2	22.6
Total assets	$614.0	$533.3
Current liabilities	$411.2	$357.8
Non-current liabilities	2.7	9.6
Total liabilities	413.9	367.4
Joint ventures' equity	200.1	165.9
Total liabilities and joint ventures' equity	$614.0	$533.3
AECOM's investment in joint ventures	$ 91.0	$ 71.1

Exhibit A

8. Joint Ventures and Variable Interest Entities (Continued)

Total revenue of the unconsolidated joint ventures were $2.0 billion, $2.0 billion and $1.9 billion for the years ended September 30, 2012, 2011 and 2010, respectively.

	Fiscal Year Ended		
	September 30, 2012	September 30, 2011	September 30, 2010
		(in millions)	
AECOM's equity in earnings of unconsolidated joint ventures:			
Pass through joint ventures	$ 5.2	$ 3.8	$ 2.5
Other joint ventures	43.4	41.0	18.5
Total	$48.6	$44.8	$21.0

9. Pension Plans

In the U.S., the Company sponsors a Defined Benefit Pension Plan (the Pension Plan) which covers substantially all permanent employees hired as of March 1, 1998, subject to eligibility and vesting requirements, and required contributions from participating employees through March 31, 1998. Benefits under this plan generally are based on the employee's years of creditable service and compensation. Effective April 1, 2004, the Company set a maximum on the amount of compensation used to determine pension benefits based on the highest calendar year of compensation earned in the 10 completed calendar years from 1994 through 2003, or the relevant IRS annual compensation limit, $200,000, whichever is lower. Outside the U.S., the Company sponsors various pension plans, which are appropriate to the country in which the Company operates, some of which are government mandated.

During the quarter ended December 31, 2009, the Company adopted an amendment to freeze pension plan benefit accruals for certain U.S. employee plans resulting in a curtailment gain of $1.9 million. During the quarter ended March 31, 2011, the Company adopted an amendment to freeze pension plan benefit accruals for certain U.K. and Ireland employee plans resulting in a curtailment gain of $4.2 million.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

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

OPPOSITION OF PLAINTIFFS/RELATORS ELGASIM FADLALLA, *et al.*, TO DEFENDANTS KMS SOLUTIONS, LLC'S and THOMAS/WRIGHT, INC.'S MOTIONS TO DISMISS

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April 30, 2019

OPPOSITION TO KMS'S AND THOMAS WRIGHT'S MOTIONS TO DISMISS

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I. INTRODUCTION

Plaintiffs/Relators Elgasim Mohamed Fadlalla, *et al.* ("Relators"), by their counsel of record, for their Opposition to the Motions to Dismiss filed by Defendants Thomas Wright, Inc ("T/WI"), and KMS Solutions, Inc. ("KMS"),[1] state as follows:

Contemporaneously with the filing of this Opposition, Relators are filing oppositions to the Motions to Dismiss ("MTD") filed by Defendants Global Linguist Solutions, LLC ("GLS"), DynCorp International, LLC ("DI") and AECOM National Security Programs, Inc. ("AECOM"). Relators incorporate by reference, as though fully stated herein, the statement of facts set forth in their Opposition to GLS's Motion to Dismiss. Relators also incorporate by reference their arguments in their GLS Opposition that Relators Adequately plead False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*., violations and Relators adequately plead a reverse false claim violation. Additionally, Relators incorporate by reference their arguments in their DI Opposition that the public disclosure bar does not bar Relators' FCA claims.

This memorandum also rebuts T/WI's and KMS's arguments that the FAC fails to sufficiently allege liability on their part as to Relators' FCA and Trafficking Victims Protection Reauthorization Act ("TVPRA") claims.

II. KMS AND T/WI ARE LIABLE FOR THE FCA AND TVPRA CLAIMS ALLEGED AS TO CONTRACT 1

A. KMS and T/WI are Liable for Violations of the FCA as to Contract 1

Rule 9(b) requires Relators to specify how KMS and T/WI participated in the SBA fraud-

[1] T/WI and KMS are two of the five SBA-certified purported small business subcontractors sued in this action. Three other purported small business subcontractors, TigerSwan, Inc. ("TigerSwan"); Shee Atiká Languages, LLC ("Shee Atiká") and Invizion, Inc. ("Invizion"), have not moved to dismiss for failure to state a claim. All of the small business defendants are referred to hereinafter as the "SBA Defendants."

based and TVPRA-based FCA claims. *United States. ex rel. Elms v. Accenture LLP*, 341 F.App'x 869, 873 (4th Cir. 2009) (requiring the pleading of the who, what, where, when, and how of the false claims). Given that the core allegation against KMS, T/WI and the other SBA Defendants is that they did nothing in the face of an obligation to do *something* to meet their participation requirements for performance of Contract 1 (and to refrain from profiting from human trafficking), there exists a natural limitation on the various ways of describing "nothing" with particularity.

Nevertheless, Relators' 110-page, 593-paragraph First Amended Complaint ("FAC") provides an extraordinary amount of detail about the scheme employed to falsify KMS and T/WI's participation in the performance of Contract 1 and to hide GLS's violations of the TVPRA – violations from which KMS and T/WI generously profited.[2] The FAC includes particularized allegations about the "who" (GLS operating through managers Samuel de Sidmed, Cheryl Robinson, Todd Lawrence, Greg Williams, and GLS Presidents John Houck and Ken Tolleson, FAC ¶¶ 45, 48, 111, 165-77, 195, 199-200, 271, 277, 279, 303, 316-18, 340, 367, 401, 409, 416, 448-50) who worked cooperatively with easily identifiable contractual counterparties at KMS, T/WI, Shee Atiká, TigerSwan, and Invizion, KMS Solutions on the falsified Foreign Service (employment) Agreements to perpetrate extensive SBA-contracting fraud (the "what"). *Id.* at ¶¶164-76.[3] This massive SBA fraud was perpetrated in Herndon, Virginia and in Kuwait (at camps

[2] GLS was a joint venture between DI and AECOM. Hereinafter, "GLS" refers collectively to GLS, DI and AECOM.

[3] Though the complaint does not name specific personal among SBA Defendants, identities can be easily ascertained by reference to the counter-signatures of the contracts identified, *e.g.*, Thomas Wright of TigerSwan (counter-signatory of Elgasim Fadlalla's contract), FAC ¶ 283; Robert A. Wright of T/WI (counter-signatory of Mahmmoud Luttfi and Tony Antar's contracts), *id.* at ¶¶ 284, 286, 297, 323; Robert Arsenault of Shee Atiká (counter-signatory of Elgasim Fadlalla's contract), *id.* at ¶ 284; Monica Ortiz-Rivera for Invizion (counter-signatory of Nada Malek's and Maryan Mure's contracts), *see* FAC ¶¶ 298, 385.

Ali Al-Salem, Arifjan, and Buehring) (the "where"), *id.* at ¶¶ 185-87, from June 30, 2006, through January 2013 (the "when"), *id.* at ¶¶ 2, 59. This same information provides the "who" and the "where" of KMS's and T/WI's participation in the false certification of TVPRA compliance as this same cadre of people was charged with certifying TVPRA compliance and reporting TVPRA violations occurring at these locations.

KMS and T/WI were active participants in these false claims.[4] They partook in this wrong-doing as evidenced by the "teaming agreements" they entered into with GLS the terms of which had the effect of converting them into GLS's affiliates and surrendering actual participation in the performance of Contract 1, FAC ¶¶ 80-90, and by allowing GLS to generate paperwork that falsely represent them as Relators' employers, *id.* at ¶¶ 190, 193, 196, 210, 214, 228, 243, 261-62, 277-79, 283-84, 289, 298, 300, 309-10, 312, 365, 371 and 385-86. In reality, KMS and T/WI had no role as Relators' "employers" and no role in the performance of Contract 1, not even processing payroll. *Id.* at ¶¶ 93-119.

As the United States District Court for the District of Columbia has made clear, "the FCA's provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 266 F. Supp. 3d 110, 126 (D.D.C. 2017) (internal quotation and citation omitted). In the Fourth Circuit, "the taint of fraud caused by defendants who

[4] KMS ingenuously asserts that only seven of the 593 paragraphs in this complaint apply to it. KMS MTD at 2. In fact, the FAC describes, with exquisite particularity, the small business contracting fraud wherein KMS was one of five small businesses that sold their small business status for use by DI, AECOM, and GLS to bid upon and earn money from Contract 1. *See* FAC at ¶¶ 50-54, 59, 67, 69-90, 93-118, 166-77, 190, 193, 196, 210, 217-18, 228, 230-32, 234, 243, 255, 260, 262, 268, 273, 278-79, 283-89, 297-304, 306-12, 323-24, 354, 365-66, 385-90, 438-39.

knowingly participated in a collusive bidding process entered into every [subsequent] payment made under the contracts that eventually resulted from the bidding process." *Mann v. Heckler & Koch Defense, Inc.*, 639 F. Supp.2d 619 (E.D. Va. 2009); *see also Veridyne Corp. v. United States*, 758 F.3d 1371, 1379 (Fed. Cir. 2014) (making clear that "claims submitted pursuant to a fraudulently obtained contract are FCA violations even if the claims themselves do not contain false statements.").

B. KMS and T/WI are Liable for Violations of the TVPRA

KMS and T/WI are liable for TVPRA violations pursuant to 18 U.S.C. § 1589 (b), as the TVPRA "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*, 2019 U.S. App. LEXIS 7503, at *1 (10th Cir. Mar. 14, 2019);[5] *see also Elat v. Ngoubene*, 993 F. Supp. 2d 497, 531 n.17 (D. Md. 2014) ("Knowingly benefitting from the forced labor of a victim of human trafficking is a violation of 18 U.S.C. § 1589 (b) (2008)[.]").

KMS and T/WI are liable for the pleaded TVPRA violations because they participated in a venture that benefited from the described trafficking activity. Given the materiality of TVPRA compliance, KMS and T/WI's knowledge is established from their reckless disregard of the legality of Relators' presence in Kuwait, especially where they had participated in a venture to falsely represent to the United States that Relators were their own employees. The complete lack of interest in whether or not "their" linguists were being illegally trafficked into Kuwait betrays

[5] The TVPRA defines "venture" as "any group of two or more individuals associated in fact, whether or not a legal entity." 18 U.S.C. §1591 (e)(6).

SBA Contractors' reckless disregard, and therefore KMS and T/WI's knowledge of the TVPRA violations that are the subject of the FAC.

III. CONCLUSION1

For the reasons discussed above, Defendant KMS's and T/WI's Motions to Dismiss should be denied. Should the motions be granted, however, it should be without prejudice, and Relators should be granted leave to file a Second Amended Complaint.

Respectfully submitted,

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