IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, *ex rel.*
ELGASIM MOHAMED FADLALLA, *et al.*,

Plaintiffs,

v. Civil Action No. PX-15-1806

DYNCORP INTERNATIONAL, LLC, *et al.*,

Defendants.

STATEMENT OF INTEREST FROM THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to its authority under 28 U.S.C. § 517, which authorizes the Attorney General to attend to the United States' interests in any action in federal or state court. Although the United States has not intervened and is not a formal party, it remains the "'real party in interest in this case.'" *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009) (quoting Fed. R. Civ. P. 17(a)). The United States has a significant interest in the proper interpretation and the correct application of the False Claims Act (FCA), 31 U.S.C. §§ 3729–3733, which plays a central role in the government's efforts to combat fraud against the public fisc, *see* S. Rep. No. 99–345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, and to the pleading standards as applied to an FCA complaint.

ARGUMENT

The motions to dismiss filed by Defendants DynCorp International, LLC ("DynCorp") (ECF 83); Global Linguist Solutions (GLS) (ECF 85); and AECOM National Security Programs, Inc. ("AECOM") (ECF 80) contain various incorrect assertions about the requirements for

pleading FCA violations. Without addressing the sufficiency of the Relators' specific allegations, the United States submits this brief to set forth the proper standards for assessing whether an FCA complaint satisfies Federal Rule of Civil Procedure (Rule) 9(b); states a claim that adequately alleges the elements of falsity, knowledge, and materiality; and meets the FCA's statute of limitations.

I. Rule 9(b) Does Not Require Plaintiffs To Identify Specific Claims Or Individual Actors

Rule 9(b) requires plaintiffs alleging fraud or mistake to do so "with particularity." The rule exists to ensure that defendants have enough information to prepare a defense, limit frivolous lawsuits, protect defendants from undue reputational harm, and winnow out cases where the plaintiff is wholly reliant on discovery to uncover the alleged fraud. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). Rule 9(b) generally requires FCA plaintiffs to "describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 432 (4th Cir. 2015) (internal quotations omitted). Yet a complaint should not be dismissed 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 [the] plaintiff has substantial prediscovery evidence of those facts." *Id.* (quoting *Harrison*, 176 F.3d at 784).

DynCorp and GLS claim in their motions that Rule 9(b) requires FCA complaints to plead specific false claims submitted to the government. (DynCorp motion at 22; GLS motion at 6, 21.) This is not true. In the Fourth Circuit, a complaint satisfies Rule 9(b) so long as it provides "some indicia of reliability . . . that an actual false claim was presented to the government." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457

(4th Cir. 2013). Such indicia of reliability can include specific allegations of fraudulent conduct leading to "the plausible inference" that a defendant submitted false claims. *United States ex rel. Grant v. United Airlines Inc*., 912 F.3d 190, 197-98 (4th Cir. 2018) (explaining that plaintiffs can plead presentment by alleging either specific false claims or "a pattern of conduct" that would necessarily lead to submission of false claims under applicable "billing and payment structure"). Rule 9(b) also permits plaintiffs to plead such facts on information and belief. *See id.* at 199 (finding that allegations "unsupported by precise documentation" but pleaded "upon information and belief" may still satisfy Rule 9(b)).

Rule 9(b) is sometimes described as requiring plaintiffs to allege the "who, what, when, where, and how of the alleged fraud." *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (quotation omitted). But this does not mean, as AECOM and GLS contend, that in order to allege the "who" of the fraud, the complaint must identify the specific individuals within an entity who submitted false claims or records. (AECOM motion at 10; GLS motion at 8.) It is instead sufficient for an FCA plaintiff to identify an entity as the specific actor who submitted false claims or made false statements. *See Smith*, 796 F.3d at 432–33; *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 125 (D.C. Cir. 2015). In *Smith*, for example, the Fourth Circuit held that an FCA complaint satisfied Rule 9(b) by identifying the defendant construction companies as the parties who committed fraud. 796 F.3d at 433.

II. The Defendants Provided An Incorrect Framework For Assessing Falsity

The Supreme Court has held that the terms "false or fraudulent" under the FCA should be construed broadly to reach "all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert–White Co*., 390 U.S. 228, 232 (1968). This comprehensive interpretation is appropriate because "Congress wrote expansively, meaning to reach all types of

fraud, without qualification, that might result in financial loss to the Government." *Cook Cty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003) (quotation omitted). Recently, in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, the Court rejected "a circumscribed view of what it means for a claim to be false or fraudulent" and noted that the FCA's knowledge and materiality requirements are sufficient to alleviate "concerns about fair notice and open-ended liability." 136 S. Ct. 1989, 2002 (2016) (quotation omitted).

Under the FCA, claims and statements may be expressly or impliedly false. *Id.* Within this general framework, courts have recognized various kinds of conduct as actionably false or fraudulent. For example, a claim can be actionable if it is either factually false or fails to comply with a material legal requirement. *E.g. United States v. Sci. Applications Int'l Corp. ("SAIC"),* 626 F.3d 1257, 1266 (D.C. Cir. 2010) (discussing various theories of falsity). Claims are also rendered false when a contract or other government benefit was fraudulently induced through false statements. *Harrison*, 176 F.3d at 787. In addition, "half-truths," or "representations that state the truth only so far as it goes, while omitting critical qualifying information," are actionable under the FCA. *Escobar*, 136 S. Ct. at 2000.

At times, courts have attempted to categorize types of false conduct, including theories of express certification and implied certification, "in an effort to clarify how different behaviors can give rise to a false or fraudulent claim." *United States ex rel. Hutcheson v. Blackstone Med., Inc*., 647 F.3d 377, 385 (1st Cir. 2011). Such categories can sometimes aid analysis, "but they can also create artificial barriers that obscure and distort" the requirements for FCA liability. *Id.*

Here, GLS and AECOM's motions attempt to use various labels of FCA liability to establish unduly restrictive barriers for alleging falsity. The Defendants' atomized approach

garbles the FCA's requirements and should be rejected for one that is based on the FCA's text and applicable case law.

A. Falsity does not require a "certification" and "express false certifications" are simply false statements

An "express false certification" is nothing more than a false statement related to the payment of federal funds. *See, e.g., United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1170 (10th Cir. 2010); *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006). As the Ninth Circuit explained, the use of the word "certification" in FCA liability theories does not have talismanic significance, because "whether it is a certification, assertion, statement, or secret handshake; False Claims Act liability can attach." *Hendow*, 461 F.3d at 1172. Accordingly, the correct approach under the FCA is to assess whether the alleged statements (or "certifications") satisfy the statutory elements of falsity, knowledge, and materiality. *See* 31 U.S.C. § 3729(a)(1)(B).

Nonetheless, GLS attempts to add an additional element for false statement liability by arguing that allegations of an "express false certification" must fail unless the complaint pleads the violation of a specific provision that was designated as a prerequisite to payment. (GLS motion at 16–17.) But a legal requirement need not be labeled a condition of payment to be the basis for FCA liability. In *Escobar*, a case involving implied certification, the Supreme Court explained that the FCA's "clear statutory text" does not support limiting liability to "violations of expressly designated conditions of payment." 136 S. Ct. at 2002. The same analysis should apply here.

GLS's approach also fails to recognize that false statements need not assure compliance with a particular legal requirement to be actionable. *See Lemmon*, 614 F.3d at 1171 (explaining that FCA liability is not precluded merely because a party "certifies compliance with all

contractual requirements"). Although GLS cites to *Harrison*, that Fourth Circuit decision actually undercuts GLS's position, as it describes FCA violations where a government program "required compliance with certain *conditions* . . . and the defendant falsely certified that it had complied with the *conditions*" to obtain the government benefit. 176 F.3d at 787 (emphasis added).

B. Fraudulent inducement is wholly separate from fraud or failure in performance

The fraudulent inducement theory covers both a party making false promises that it intends to break and false statements that induce government action. *United States v. DynCorp Int'l, LLC*, 253 F. Supp. 3d 89, 105 (D.D.C. 2017). GLS contends that a fraudulent inducement claim requires allegations that the defendant did not perform under the contract. (GLS motion at 9-10.) In doing so, GLS suggests that even if it obtained a contract through fraud, it can only be held liable for that misconduct if its performance under the contract was also lacking. GLS is wrong, however, because the fraudulent inducement theory of liability exists to reach false statements used to obtain a contract, grant funding, or program access, regardless of whether the recipient's subsequent conduct was false or improper. *See, e.g. In re Baycol Prod. Litig.*, 732 F.3d 869, 876 (8th Cir. 2013); *Harrison*, 176 F.3d at 788; *United States ex rel. Hedley v. Abhe & Svoboda, Inc.*, 199 F. Supp. 3d 945, 955 (D. Md. 2016).

GLS's cited cases do not show that performing under a contract mitigates or excuses any false promises or fraudulent representations made to obtain a contract. They instead merely stand for the propositions that (a) there is no fraud when a party keeps its promises, and (b) when a party promises to perform, *scienter* is not automatically inferred simply because, at some point in the future, this promise is broken. *See United States ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) ("Generally, there is no inference of fraudulent

intent not to perform the mere fact that a promise made is subsequently not performed"); *see also United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1330 (D.C. Cir. 2005) (discussing *Willard*); *United States ex rel. Tran v. Computer Scis. Corp.*, 53 F. Supp. 3d 104, 132 (D.D.C. 2014) (same). Indeed, the "prompt performance" language that GLS quotes from *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, came from a discussion of whether a defendant had *scienter*, and is properly read as requiring false statements to be knowing, rather than adding an extra element to fraudulent inducement claims. *See* 472 F. Supp. 2d 787, 798–99 (E.D. Va. 2007), *aff'd*, 562 F.3d 295 (4th Cir. 2009).

Therefore, for the fraudulent inducement allegations at issue, the proper question is whether the Relators sufficiently alleged that GLS's assertions about its small business subcontracting practices were false, knowing, and material. GLS's contract performance is thus not relevant, except for the small business subcontracting practices that were the subject of its representations.

C. Performing work intended for, or falsely purporting to be, a small business can be the basis for FCA violations.

GLS and AECOM are incorrect to assert that when a prime contractor essentially performs the function of its purported subcontractor, it is simply a contract dispute or a policy disagreement that is not a suitable basis for an FCA case. (GLS motion at 10-12; AECOM motion at 12-13.) The prevailing precedents state otherwise, as courts have widely found that similar schemes to those alleged here are actionable under the FCA. *See, e.g., United States ex rel. Blaum v. Triad Isotopes, Inc.*, 104 F. Supp. 3d 901, 914–15 (N.D. Ill. 2015); *United States ex rel. Howard v. Harper Constr. Co.*, No. 7:12-CV-215-BO, 2015 WL 13271595, at *1-2 (E.D.N.C. Feb. 20, 2015); *Tran*, 53 F. Supp. 3d at 122-23, 128, 131-132; *United States ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 198–99 (D.D.C. 2011). Companies are likewise subject

to potential FCA liability if they make false or fraudulent representations about their small business status to obtain federal funds. *See, e.g., United States v. Anghaie*, 633 F. App'x 514, 519 (11th Cir. 2015); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 473 (5th Cir. 2009); *United States ex. rel. Scollick v. Narula*, 215 F. Supp. 3d 26, 43–44, 46–47 (D.D.C. 2016).

D. "Objective" falsity is neither required nor as narrow as the Defendants suggest

GLS and AECOM also contend that claims or statements must contain "an objective falsehood" to satisfy the FCA's falsity requirement. (GLS motion at 11; AECOM motion at 12.) This assertion, however, is at odds with the Supreme Court's ruling in *Escobar*, which recognized that "half-true" statements that fail to disclose material qualifying information are actionable under the FCA. 136 S. Ct. at 2000. For example, following *Escobar*, the Fourth Circuit held that claims for armed guards could be materially false – even where the claims correctly represented the number of guards provided and hours worked – because they failed to disclose that the guards did not know how to use their weapons properly. *United States v. Triple Canopy, Inc*., 857 F.3d 174, 178 (4th Cir. 2017), *cert. dismissed*, 138 S. Ct. 370, 199 L. Ed. 2d 275 (2017). These claims, though accurate on their face, were only "half-true" because of the material information they omitted, and therefore actionable under the FCA. *Id.*

Moreover, GLS and AECOM's arguments do not appear to recognize that claims or statements that are "amenable to judicial construction" can be objectively false. *See United States v. Savannah River Nuclear Sols., LLC*, No. 1:16-CV-00825-JMC, 2016 WL 7104823, at *14 (D.S.C. Dec. 6, 2016) (comparing relevant cases discussing objective falsity). For example, when a contract only required "adequate" maintenance, the Fourth Circuit held that the relator's subjective belief that the defendant's performance was inadequate did not render the defendant's

claims false. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376–77 (4th Cir. 2008). Conversely, a defendant's assurance of compliance with the Stark Law could be false, because the court would be able to ascertain whether the defendant actually complied. *See United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 383–84 (4th Cir. 2015).

III. "Knowing" Conduct Does Not Require Fraudulent Intent And Can Be Pleaded Generally

False claims or statements violate the FCA if they are made "knowingly." 31 U.S.C. §§ 3729(a)(1)(A) and (B). The FCA defines "knowingly" as meaning that a person has actual knowledge, acts in deliberate ignorance of the truth, or acts in reckless disregard to the truth. 31 U.S.C. § 3729(b)(1). The FCA expressly states that conduct can be knowing even if there is no "specific intent to defraud." 31 U.S.C. § 3729(b)(2). Therefore, GLS is wrong when it argues that FCA plaintiffs must plead that a defendant made intentionally false statements as well as "facts supporting an inference of fraudulent intent." (GLS motion at 12–13.)

GLS and AECOM also incorrectly assert that FCA plaintiffs must allege that a specific employee or officer acted knowingly. (GLS motion at 13; AECOM motion at 18.) Under Rule 9(b), "malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Alleging a particular individual acted knowingly is thus not necessary. *See, e.g. Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 432–33 (4th Cir. 2015) (assessing whether allegations satisfied Rule 9(b) without considering particularized knowledge); *Savannah River Nuclear Sols.*, 2016 WL 7104823, at *25 (finding that FCA complaint need not identify "the individuals directing or engaging a corporation's fraudulent activities"); *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 685 F. Supp. 2d 129, 139 (D.D.C. 2010) (explaining that as "Rule 9(b) permits knowledge to be plead generally, there is no basis for dismissal for failure to plead knowledge with particularity").

The cases cited by GLS and AECOM are inapplicable because they concern what an FCA plaintiff needs to *prove*, rather than plead. In *United States v. Fadul*, the court denied the government's motion for summary judgment because it found that the issue of *scienter* should be decided by a jury. No. CIV.A. DKC 11-0385, 2013 WL 781614, at *8–12 (D. Md. Feb. 28, 2013). Similarly, *United States v. Sci. Applications Int'l Corp.* vacated a judgment in favor of the government because the jury instruction regarding collective knowledge "allowed the jury to impose liability for what is essentially negligence or mistake by another name." 626 F.3d 1257, 1276–77 (D.C. Cir. 2010).[1]

Finally, DynCorp is wrong to claim that the government's knowledge meant that DynCorp could not have had *scienter* with respect to the second linguist contract. (DynCorp motion at 24–25.) This argument rests on the theory that a defendant did not act knowingly if it understood that the government knew the full truth about the defendant's conduct and had no objection. *E.g. United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 263 (5th Cir. 2014); *Skinner v. Armet Armored Vehicles, Inc.*, No. 4:12-CV-00045, 2015 WL 2238941, at *11 (W.D. Va. May 12, 2015). When, for instance, a defendant told the government repeatedly that it did not have a conflict of interest, the defendant could not later assert that the government actually had full knowledge of its conflict. *United States ex rel. Harrison v. Westinghouse Savannah River Co. (Harrison II)*, 352 F.3d 908, 920 (4th Cir. 2003).

[1] Even after the pleading stage, the Fourth Circuit has cautioned against requiring proof that a single employee was "knowing" with respect to all facets of the violation, as that would mean that companies could effectively immunize themselves against FCA liability merely by compartmentalizing their operations. *United States ex rel. Harrison v. Westinghouse Savannah River Co. (Harrison II)*, 352 F.3d 908, 919 (4th Cir. 2003). The Court of Appeals also decided only that it "need not adopt" the collective knowledge doctrine, rather than reject it outright. *Id.* at 918 n.9.

In a different Fourth Circuit case cited by DynCorp where the defendant acted pursuant to the government's instructions, the court declined to hold the defendant liable "for defrauding the government by following the government's explicit directions." *United States ex rel. Becker v. Westinghouse Savannah River Co*., 305 F.3d 284, 288-89 (4th Cir. 2002). This action is not a case, however, where allegations of explicit government direction or full disclosure by a defendant reveal a lack of scienter on part of the defendant. DynCorp's contention here rests solely on the questions asked and answered during an August 2009 hearing before the Commission on Wartime Contracting, even though the Relators' explicitly alleged that GLS's answers were false. (Relators' First Amended Complaint, ¶¶ 166–77.) Therefore, accepting the Relators' allegations as true, there is no basis in their pleading to conclude that the defendants informed the government of facts sufficient to negate the Defendants' *scienter*. Indeed, the courts have regularly found that government knowledge is not sufficient to negate *scienter* at the motion to dismiss stage. *See Bollinger Shipyards*, 775 F.3d at 264 (citing cases).

IV. Materiality Is A Common Sense, Holistic Inquiry

Under the FCA, materiality is defined 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). Citing to tort and contract principles, the Supreme Court has clarified that under this definition, a matter can be material if either (1) a reasonable person would attach importance to it when determining a choice of action in the transaction, or (2) if the defendant knew or had reason to know that the recipient of the claim or statement would attach importance to this matter, even if a reasonable person would not. *Escobar*, 136 S. Ct. at 2002–03.

The materiality inquiry is thus a holistic assessment without any one determinative factor. *See, e.g., id.* at 2001-04; *United States ex rel. Prather v. Brookdale Senior Living Communities*,

Inc., 892 F.3d 822, 831 (6th Cir. 2018) *cert. denied sub nom. Brookdale Senior Living Communities, Inc. v. United States ex rel. Prather*, No. 18-699, 2019 WL 1231774 (U.S. Mar. 18, 2019) (explaining that "Supreme Court was explicit that none of the factors it enumerated were dispositive"). The Supreme Court further demonstrated that courts making this determination should refrain from an overly technical approach, as *Escobar* provided an example of conduct that was plainly material (supplying the government with guns that could not shoot) regardless of whether the conduct was labeled a "condition of payment." 136 S. Ct. at 2001–02.

For example, when the government alleged that guards failed to meet a contractual marksmanship requirement, the Fourth Circuit held that this alleged deficiency was material, as "common sense strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 637–38 (4th Cir. 2015). The Supreme Court vacated this judgment and remanded it back to the Fourth Circuit for further consideration in light of the *Escobar* decision. *Triple Canopy, Inc. v. U.S. ex rel. Badr*, 136 S. Ct. 2504 (2016). Upon remand, the Fourth Circuit affirmed that common sense indicated that charging the government for security guards who could not shoot was material and that this conclusion was "perfectly" in line with *Escobar* and its practical framework. *United States v. Triple Canopy, Inc*., 857 F.3d 174, 178 (4th Cir. 2017); *cert. dismissed*, 138 S. Ct. 370, 199 L. Ed. 2d 275 (2017).

Not content with the "demanding" approach set forth in *Escobar*, DynCorp, GLS, and AECOM attempt to create their own standards for materiality. In doing so, they gloss over key language and context from *Escobar*, as well as related precedents that contradict their approach.

First, DynCorp claims that, "given the prior public disclosures in the Commission [on Wartime Contracting] hearings [sic] . . . the government was already sufficiently aware" of the alleged subcontracting issues to render them immaterial. (DynCorp motion at 25). But as noted above, the Relators specifically alleged that GLS supplied false information at the August 2009 hearing, so it does not follow that at the motion to dismiss stage it can be determined that the government had the "actual knowledge" that is relevant to the materiality inquiry, as DynCorp simply assumes. *See Escobar*, 136 S. Ct. at 2003-04.

GLS similarly attempts to transform a holistic, practical inquiry into one where materiality is *always* disproved if the government pays claims in full despite its "actual knowledge" of the relevant misconduct. (GLS motion at 14–15.) But *Escobar* only stated that such payments were "very strong" evidence that the underlying conduct was material, and further cautioned that, when assessing materiality, no one factor is "automatically dispositive." 136 S. Ct. at 2003-04. It is thus wrong to contend, as GLS does, that the government's knowing payment is dispositive of the materiality determination. Indeed, various courts have recognized that even if the government pays claims with actual knowledge of misconduct, it does not foreclose a finding of materiality. *See, e.g.*, *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1021–22 (9th Cir. 2018) (describing ways the government could show that noncompliance was material even "without directly limiting, suspending, or terminating schools' access to federal student aid"); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 663 (5th Cir. 2017), *cert. denied sub nom. United States ex rel. Harman v. Trinity Indus., Inc.*, 139 S. Ct. 784 (2019) (drawing "lesson" from various "well considered" FCA decisions that government's continued payment of claims with actual knowledge is not dispositive); *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 906 (9th Cir. 2017), *cert. denied sub nom. Gilead*

Scis., Inc. v. United States ex rel. Campie, 139 S. Ct. 783 (2019) (recognizing that the FDA's conduct alone "cannot preclude False Claims Act liability" as "it is not FDA's purpose to prevent fraud on the government's fisc"); *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 110 (1st Cir. 2016) (noting that the Supreme Court did not state that continued government payments were dispositive in *Escobar*).

Taking an even more aggressive position than GLS, AECOM argues that FCA plaintiffs *must* allege (1) that the government would not have paid had it known the underlying facts and (2) that the alleged misconduct related to the essence of the bargain. (AECOM motion at 13-15, 17.) AECOM's approach is at odds with the holistic, common sense framework set forth in *Escobar*, because while these factors may bear on the materiality analysis, neither is dispositive. *See Prather*, 892 F.3d at 834 (finding that past government action need not be alleged by relator to survive motion to dismiss "when such allegations are relevant, not dispositive" and identifying the "essence of the bargain" as only a relevant factor to consider). To the contrary, *Escobar* reaffirmed that the proper test for determining materiality is the objective assessment of whether the conduct has "a natural tendency to influence" the recipient, rather than the subjective "outcome materiality" standard that some courts had adopted. Moreover, the "essence of the bargain" language stems from a case citation in a footnote in *Escobar* that was used to illustrate that materiality is an objective inquiry. 136 S. Ct. at 2002–03 n.5 (citing *Junius Constr. Co. v. Cohen*, 257 N.Y. 393, 400 (1931)). A misrepresentation relating to the "essence of the bargain" is thus an example of conduct that a reasonable person would consider important, rather than, as AECOM claims, a pleading requirement.

Finally, AECOM's attempt to define the "essence of the bargain" to only cover a key performance requirement is also problematic, as it excludes various types of conduct that would

be patently material. For instance, conspiring to rig the competitive bid process has nothing to do with the work that is performed under a contract, yet such conduct is material nonetheless. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543–44 (1943). False statements about conflicts of interest have also been found to be material in the procurement context, even though they do not necessarily concern contract performance. *See, e.g.*, *Harrison II*, 352 F.3d at 917. Misleadingly incomplete pricing data is similarly divorced from contract performance, but it is still material if it induced the government to enter into contracts with inflated prices. *See Marsteller for use & benefit of United States v. Tilton*, 880 F.3d 1302, 1315 (11th Cir. 2018). Indeed, the mere fact that conduct is capable of causing a recipient to obtain "more money than it should have gotten" is sufficient to show materiality. *E.g. United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 639 (7th Cir. 2016).

V. The FCA's Statute Of Limitations Does Not Begin To Run Until A False Claim Is Submitted Or Paid

Under the FCA, a plaintiff may file a complaint either within six years of the violation or within three years of when material facts about the violation were known or reasonably should have been known to the United States official with responsibility to enforce the FCA, so long as it is within 10 years of the violation. 31 U.S.C. §§ 3731(b)(1) and (2). The FCA explicitly states that the applicable period will be "whichever occurs last." 31 U.S.C. § 3731(b)(2).

The FCA's "time limit begins to run on the date the defendant submitted a false claim for payment." *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415–16 (2005); *see also, e.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) (finding that the FCA's statute of limitations runs from the date of the claim, or if paid, on the date of payment). AECOM nonetheless focuses its timeliness argument on the date of GLS' alleged misrepresentations, rather than the date any

resulting false claims were submitted or paid. (AECOM motion at 29.) AECOM bases this argument on the premise that a false statement can trigger the FCA's statute of limitations. *Id.* But this premise is wrong, as the statute of limitations is trigged by false claims rather than statements. *See e.g. United States v. Rivera*, 55 F.3d 703, 708 (1st Cir. 1995); *United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 552 (6th Cir. 1976).

AECOM is also incorrect to argue that the Relators' First Amended Complaint cannot relate back to the original filing because the case was under seal and thus "AECOM did not receive notice of the suit." (AECOM motion at 29, n. 24.) The original complaint's sealed status does not preclude a subsequent amended complaint from relating back. *See United States ex rel. Gohil v. Aventis, Inc.*, No. CV 02-2964, 2017 WL 85375, at *6, n.14 (E.D. Pa. Jan. 10, 2017) (finding no support for argument "that the sealing provision of the FCA should somehow prevent the court from allowing amended complaints to 'relate back'"); *United States ex rel. Cericola v. Fed. Nat. Mortg. Assoc.*, 529 F. Supp. 2d 1139, 1150 (C.D. Cal. 2007) (rejecting notion that FCA complaints filed under seal "are fundamentally incompatible with the relation back doctrine"). The FCA requires relators to file their *qui tam* complaints under seal. 31 U.S.C. § 3730(b)(2). There is nothing in the statute or applicable case law to suggest that amended complaints cannot relate back to the original sealed filing. In fact, when one court held that the sealed nature of the *qui tam* meant that the government's complaint-in-intervention could not relate back for statute of limitation purposes, Congress amended the FCA to overturn this holding. *See* 31 U.S.C. § 3731(c); *United States ex rel. Kolchinsky v. Moody's Corp.*, 162 F. Supp. 3d 186, 199 n.4 (S.D.N.Y. 2016).

Finally, AECOM states that the FCA's tolling provision, 31 U.S.C. § 3731(b)(2), is not available to relators. (AECOM motion at 29–30.) This is not a settled law. In November 2018,

the Supreme Court granted certiorari to resolve this issue in *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1091 (11th Cir. 2018). The United States was not a party, but filed an *amicus* brief and participated in oral argument in which it expressed its view that the equitable provision applies to relators' *qui tam* actions even if the United States declines to intervene in the suit. *See* Brief for the United States as *Amicus Curiae* Supporting Respondent, *Cochise Consultancy, Inc. v. United States ex rel. Hunt* (2019) (No. 18-315), at *11–26. The Court's decision is pending.

CONCLUSION

For the reasons discussed above, the United States respectfully asks the Court not to adopt the Defendants' framework for analyzing the particularity, sufficiency, and timeliness of False Claims Act allegations.

Dated: May 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 1, 2019, I served a copy of the foregoing Statement of Interest from the United States by filing that document with the Clerk of the Court under the Court's CM/ECF system, which electronically transmits a copy to the registered participants as identified on the Notice of Electronic Filing.

/s/
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