No. _____

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
HASSAN FOREMAN,

Petitioner,

v.

AECOM, AECOM GOVERNMENT SERVICES, INC.,
AC FIRST, LLC, AND AECOM/GSS LTD. D/B/A
GLOBAL SOURCING SOLUTIONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are as follows:

Is materiality an element of all claims brought under 31 U.S.C. § 3729(a)(1)(A) when neither the common law nor the text of the statute support such a requirement for claims based on factually false statements?

On a motion to dismiss, can the Government's continued payment of claims despite actual knowledge of a defendant's noncompliance be dispositive of materiality when a relator's well-pleaded factual allegations support at least two materiality factors, and there are other plausible reasons that the Government continued payment?

Is a relator permitted to plead a reverse false claim under 31 U.S.C. § 3729(a)(1)(G) as an alternative to a traditional false claim under § 3729(a)(1)(A) when a relator alleges that the defendant has a separate obligation to return money or property to the Government?

PARTIES TO THE PROCEEDINGS

The following list identifies all parties to the proceeding in the court whose judgment is sought to be reviewed:

Petitioner United States ex rel. Hassan Foreman (hereinafter, "Relator" or "Foreman") and Respondents AECOM, AECOM Government Services, Inc., AC FIRST, LLC, and AECOM/GSS Ltd. d/b/a Global Sourcing Solutions, Inc. (hereinafter, "Defendants" or "AECOM").

RELATED PROCEEDINGS

The following cases are proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court:

United States ex rel. Foreman v. AECOM, No. 1:16-cv-01960-LLS, U.S. District Court for the Southern District of New York. Judgment entered June 5, 2020.

United States ex rel. Foreman v. AECOM, No. 20-2756, U.S. Court of Appeals for the Second Circuit. Judgment entered November 19, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner United States ex rel. Hassan Foreman respectfully submits this petition for writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The decision of the court of appeals is published as *United States ex rel. Foreman v. AECOM*, 19 F.4th 85 (2d Cir. 2021), and is reprinted at App. A at 1a–72a. The order of the court of appeals denying rehearing is reprinted at App. D at 115a–116a. The district court's opinion and order dismissing the complaint is published as *United States ex rel. Foreman v. AECOM*, 454 F. Supp. 3d 254 (S.D.N.Y. 2020), and is reprinted at App. C at 84a–114a. The district court's unpublished opinion and order denying Foreman's post-judgment motion to amend is available on Westlaw at *United States ex rel. Foreman v. AECOM*, No. 16 Civ. 1960 (LLS), 2020 WL 4719096 (S.D.N.Y. Aug. 13, 2020), and is reprinted at App. B at 73a–83a.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Second Circuit entered its opinion and judgment on November 19, 2021. Foreman filed a petition for panel rehearing or, in the alternative, rehearing *en banc* on December 3, 2021, which the court of appeals denied on

December 29, 2021. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, OR REGULATORY PROVISIONS INVOLVED

31 U.S.C. § 3729 is reprinted at App. E.

31 U.S.C. § 3730 provides in pertinent part:

> (b) Actions by Private Persons.—
>
> > (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. …
> >
> > (2) … The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. ….
>
> (c) Rights of the Parties to Qui Tam Actions.— …
>
> > (3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. …

48 C.F.R. § 52.215-10 (1997) states in pertinent part:

> (a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because--
>
> > (1) The Contractor or subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data ….
> >
> > (3) Any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. …
>
> (d) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid--
>
> > (1) Simple interest on the amount of such overpayment … ; and

> (2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data that were incomplete, inaccurate, or noncurrent.

48 C.F.R. § 52.215-11 (1997) states in pertinent part:

> (b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, … or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. …
>
> (e) If any reduction in the contract price under this clause reduces the price of items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States at the time such overpayment is repaid--

> (1) Simple interest on the amount of such overpayment … ; and
>
> (2) A penalty equal to the amount of the overpayment, if the Contractor or subcontractor knowingly submitted cost or pricing data that were incomplete, inaccurate, or noncurrent.

48 C.F.R. § 52.232-25 (2003) states in pertinent part:

> (d) Overpayments. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment.

48 C.F.R. § 52.242-3 (2001) states in pertinent part:

> (d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor shall be assessed a penalty equal to--

> (1) The amount of the disallowed cost allocated to this contract; plus
>
> (2) Simple interest ….
>
> (e) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal includes a cost previously determined to be unallowable for that Contractor, then the Contractor will be assessed a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract. …
>
> (h) Payment by the Contractor of any penalty assessed under this clause does not constitute repayment to the Government of any unallowable cost which has been paid by the Government to the Contractor.

48 C.F.R. § 52.245-1 (2007) provides in pertinent part:

> (h) Contractor Liability for Government Property. (1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, damage, destruction, or theft to the Government property furnished or acquired under this contract, except when any one of the following applies-- …
>
> (ii) The loss, damage, destruction, or theft is the result of willful

> misconduct or lack of good faith on the part of the Contractor's managerial personnel. ….

(j) Contractor inventory disposal. …

(2) Predisposal requirements. (i) Once the Contractor determines that Contractor-acquired property is no longer needed for contract performance, the Contractor in the following order of priority--

> (A) May contact the Contracting Officer if use of the property in the performance of other Government contracts is practical;
>
> (B) May purchase the property at the acquisition cost; or
>
> (C) Shall make reasonable efforts to return unused property to the appropriate supplier at fair market value (less, if applicable, a reasonable restocking fee that is consistent with the supplier's customary practices). …

(8) Disposition instructions. … (ii) The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of Contractor inventory as directed by the Plant Clearance Officer. If not returned to the Government, the Contractor shall

> remove and destroy any markings identifying the property as U.S. Government-owned property prior to its disposal. …
>
> (9) Disposal proceeds. As directed by the Contracting Officer, the Contractor shall credit the net proceeds from the disposal of Contractor inventory to the contract, or to the Treasury of the United States as miscellaneous receipts. …

INTRODUCTION

The False Claims Act ("FCA") makes it unlawful to present a "false or fraudulent" claim for payment or reimbursement from the Government. 31 U.S.C. § 3729(a)(1)(A). The text of § 3729(a)(1)(A) imposes no materiality requirement. But, as this Court recognized in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 187 (2016), "the term 'fraudulent' is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud." Thus, the statute imposes a materiality requirement for "fraudulent" claims. *See id.* at 188–93; *see also Neder v. United States*, 527 U.S. 1, 22 (1999) ("[T]he common law could not have conceived of 'fraud' without proof of materiality."). The term "false," on the other hand, carries no such requirement. *See Neder*, 527 U.S. at 23 n.7 ("[T]he term 'false statement' does not imply a materiality requirement.") (citing *United States v. Wells*, 519 U.S. 482, 491 (1997)). Notwithstanding, federal courts are

divided on whether § 3729(a)(1)(A) requires a showing of materiality for *all* "false" claims, including "factually" false claims (i.e., a claim that is untrue on its face).

In *Escobar*, this Court set forth a number of non-dispositive factors relevant to proving materiality under § 3729(a)(1)(A), including whether the Government expressly identifies a provision as a condition of payment, whether the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement, whether the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, whether the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, and whether the defendants' alleged noncompliance was minor or insubstantial. Despite finding that Foreman's allegations supported two of these materiality factors, the courts below determined that the Government's continued payment and extension of the contract at issue was *decisive* and concluded as a matter of law that AECOM's noncompliance was not material to the Government's payment decisions. Federal courts are split on whether this factor is dispositive of materiality under *Escobar*.

The FCA includes a separate provision that makes it unlawful to knowingly conceal or knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to the Government. 31

U.S.C. § 3729(a)(1)(G). This provision is known as the "reverse false claims" statute because it covers claims of money or property *owed* to the Government rather than payments *made* by the Government. The Federal Rules of Civil Procedure permit a plaintiff to state as many separate claims as it has, regardless of consistency, and even if there is factual overlap between the claims. Notwithstanding, courts are divided on whether a reverse false claim under § 3729(a)(1)(G) can turn on the same conduct underlying a traditional false claim under § 3729(a)(1)(A), even when a relator identifies a separate obligation that requires the contractor to return money or property to the Government.

STATEMENT OF THE CASE

Factual Background[1]

AECOM is a major defense contractor for the Government. Relator Hassan Foreman is a former employee of AECOM who worked in its finance department from approximately 2013 to July 2015. He was hired by AECOM as a finance analyst in August 2013 and promoted to supervisor in May 2014. In July 2015, AECOM terminated Foreman shortly after he notified his superiors of numerous compliance issues.

In 2010, the Army awarded AECOM a billion-dollar, multi-year defense contract called the Maintenance & Operational Support Contract

[1] This summary is based on the summary in the Second Circuit's opinion below. *See* App. A at 5a–7a.

(hereinafter, the "MOSC-A Contract"). The MOSC-A Contract required AECOM to provide maintenance and management support services to the Army in Afghanistan. These services included maintaining vehicles and equipment, managing facilities, handling supplies and inventory, and providing transportation services at various locations throughout Afghanistan. In order to ensure that AECOM effectively and efficiently provided its services under the MOSC-A Contract, the contract imposed various obligations on AECOM to properly catalog data regarding labor hours and costs, so-called "man-hour utilization" rates, and required AECOM to acquire and track Government property with specific computer systems.

The MOSC-A Contract had a "cost-plus-fixed-fee" structure, meaning that AECOM was reimbursed for costs that it incurred on the Army's behalf and received an additional negotiated fee that was fixed at the inception of the contract. AECOM obtained a 5% fixed fee that "does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract." This structure incentivized AECOM to maintain — and raise — the level of costs to the Government.

The MOSC-A Contract was originally effective for one year, but it was amended, modified, and extended several times between 2010 and 2018. The vast majority of the amendments and modifications increased the funding for the MOSC-A Contract. The cost of the MOSC-A Contract, with its options to extend, was originally estimated to be $378 million total. But AECOM billed as much as $400 million annually under the contract, and a 2018 amendment

to the contract listed a total dollar amount of at least $1.3 billion. By the time the U.S. military withdrew from Afghanistan at the end of August 2021, the total amount paid to AECOM pursuant to the MOSC-A Contract was approximately $1.9 billion.

Proceedings Below

After Foreman discovered that AECOM had been violating the terms of the MOSC-A Contract in numerous respects, Foreman brought this action against AECOM as a relator under the *qui tam* provisions of the FCA, 31 U.S.C. § 3730(b), in the U.S. District Court for the Southern District of New York. App. A at 15a. Foreman alleged, *inter alia*, that AECOM knowingly submitted false and fraudulent claims to the Government in violation of 31 U.S.C. § 3729(a)(1)(A) and that AECOM knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit property to the Government in violation of 31 U.S.C. § 3729(a)(1)(G). *Id.* at 16a.

Foreman's claim under § 3729(a)(1)(A) was premised on allegations of both "factually false" and "legally false" claims by AECOM. Foreman alleged that AECOM submitted factually false claims to the Government by submitting claims for services that AECOM did not actually provide. For example, AECOM employees billed 154 hours each pay period regardless of the actual number of hours they worked, billed for time they spent sleeping on the job, billed for time they spent during leisure activities, and billed for time despite being unqualified to do the work. *Id.* at 10a; *see also* App. C at 86a. Foreman alleged that AECOM submitted "legally false" claims by making

express and implied false certifications of compliance with the requirements of the MOSC-A Contract related to the documentation of labor, man-hour utilization rates, and acquisition and tracking Government property. App. A at 9a–10a, 11a–14a; App. C at 99a.

Foreman's claim under § 3729(a)(1)(G) was based on AECOM's knowing concealment of and failure to return or remit overpayments made by the Government for services that AECOM did not actually provide under the MOSC-A Contract (exceeding $144 million) and property that AECOM had lost due its failure to use the required tracking systems (which was worth over $16 million). App. A at 13a–14a, 56a; App. B at 79a. Foreman alleged that AECOM was required to return this money and property to the Government. App. C at 111a.

After the Government declined to intervene, AECOM moved to dismiss the operative complaint under Federal Rule of Civil Procedure 12(b)(6). App. C at 84a. The district court granted the motion. *Id.* With respect to Foreman's claim under § 3729(a)(1)(A), the district court concluded that AECOM's violations of the MOSC-A Contract could not be material to the Government's payment decisions because the Government was aware of those violations, but nevertheless continued to pay AECOM and extend the MOSC-A Contract. *Id.* at 101a–106a. With respect to Foreman's claim under § 3729(a)(1)(G), the district court found that the claim was "based on the same labor billing and property violations underlying the direct false claims" and did "not identify a separate

obligation to return overpayments or excess property to the government." *Id.* at 109a–111a.

Foreman moved for reconsideration of the district court's dismissal of the complaint, but the district court denied the motion in a single-page order. App. B at 75a. Although the district court had granted Foreman leave to move for leave to serve an amended complaint, the district court entered final judgment shortly following its denial of Foreman's motion for reconsideration. *Id.*

Foreman filed a motion to alter or amend judgment or, alternatively, for relief from judgment under Federal Rules of Civil Procedure 59(e) and 60(b), in which he requested leave to file an amended complaint. *Id.* The proposed amended complaint specifically alleged that the Government had a plausible reason to continue paying AECOM and extending the MOSC-A Contract because the contract was necessary to support U.S. troops in Afghanistan. *Id.* at 80a. It also alleged that AECOM was required to refund and return overpayments and property pursuant to various Federal Acquisition Regulations ("FAR") incorporated into the MOSC-A Contract, including 48 C.F.R. §§ 52.215-10 (1997), 52.215-11 (1997), 52.232-25 (2003), 52.242-3 (2001), and 52.245-1 (2007). App. A at 20a; App. B at 82a.

The district court denied the motion, finding that allowing an amendment would be futile. App. B at 78a–82a. The district court rejected Foreman's arguments that materiality was not required for all false claims under § 3729(a)(1)(A), that the Government's continued payment and extension of the MOSC-A Contract was not dispositive of

materiality, and that a reverse false claim under § 3729(a)(1)(G) could be pleaded in the alternative to a traditional false claim under § 3729(a)(1)(A). *See id.*

On appeal, the Second Circuit reversed in part, ruling that the district court improperly relied upon extrinsic evidence when determining that the Government had actual knowledge of AECOM's improper billing of labor under the MOSC-A Contract. App. A at 26a–33a. Nevertheless, the court of appeals rejected Foreman's argument that materiality was not a required element under § 3729(a)(1)(A) for all false claims. *Id.* at 22a–26a. It further held that, although Foreman's allegations supported two *Escobar* materiality factors, the Government's continued payment and extension of the MOSC-A Contract, despite actual knowledge of AECOM's noncompliance with the man-hour utilization rate and property acquisition and tracking requirements, was "decisive" of materiality. *Id.* at 53a. Finally, the court held that Foreman could not state a claim for relief under § 3729(a)(1)(G) because his reverse false claim was premised on the same underlying factual allegations as his traditional false claim under § 3729(a)(1)(A). *Id.* at 56a–58a.

The Second Circuit denied Foreman's request for panel rehearing and rehearing *en banc*. App. D at 116a.

REASONS FOR GRANTING THE PETITION

This case presents important legal questions left open by this Court's decision in *Escobar* that have divided federal courts: (1) whether § 3729(a)(1)(A) requires a showing of materiality for all "false" and "fraudulent" claims; (2) whether the Government's continued payment despite actual knowledge of a contractor's noncompliance can be dispositive of materiality when other factors weigh in favor of materiality, and there is a plausible alternative reason that the Government would continue payment; and (3) whether a relator can plead a reverse false claim under § 3729(a)(1)(G) in the alternative to a traditional false claim under § 3729(a)(1)(A). The Court should grant the petition to resolve the confusion created by these open questions.

The Court Should Clarify Whether Materiality Is a Required Element for *All* False Claims Under § 3729(a)(1)(A).

"A successful FCA claim generally occurs in one of three forms: (1) a factually false claim; (2) a legally false claim under an express false certification theory; and (3) a legally false claim under an implied certification theory." App. A at 23a. Scholars have recognized that *Escobar* "failed to clarify whether materiality is required only in suits brought under the implied certification theory or whether it applies to *all* suits under § 3729(a)(1)(A), including garden-variety, factually false allegations." Joan H. Krause, *Reflections on Certification, Interpretation, and the Quest for Fraud that "Counts" Under the False Claims Act*, 2017 U. Ill. L. Rev. 1811, 1835 (2017) (emphasis in original). Similarly, courts have noted, "[s]ince

Escobar, there is uncertainty as to whether the decision's materiality standard applies to all FCA claims brought under § 3729(a)(1)(A), only a subset of claims (*i.e.*, it applies to theories of legal but not factual falsity), or only those claims relying on an implied certification theory." *United States v. Strock*, No. 15-CV-0887-FPG, 2018 WL 647471, at *10 (W.D.N.Y. Jan. 31, 2019).

Consequently, federal courts are divided on these issues. *Compare United States ex rel. Prose v. Molina Healthcare of Ill., Inc.*, 17 F.4th 732, 741–45 (7th Cir. 2021) (requiring a showing of materiality for false certification claims, but not for claims based on factual falsity and fraudulent inducement); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 114 (2d Cir. 2010) (recognizing that false certification claims raise more difficult issues than factually false claims because "the statute does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions"); *United States ex rel. Nedza v. Am. Imaging Mgmt., Inc.*, No. 15 C 6937, 2020 WL 1469448, at *10 (N.D. Ill. Mar. 26, 2020) ("Some courts have found that this difference removes the requirement to plead materiality."); *United States ex rel. McCarthy v. Marathon Techs., Inc.*, No. 11-cv-7071, 2014 WL 4924445, at *4 (N.D. Ill. Sept. 30, 2014) ("[M]ateriality is not relevant in FCA claims in the context of misrepresentations."), *with United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 902–07 (9th Cir. 2017) (applying *Escobar*'s materiality standard to theories of factual falsity, implied false certification, and "promissory fraud" or fraudulent inducement); *United States ex rel. Mitchell*

v. CIT Bank, N.A., No. 4:14-CV-00833, at *9 (E.D. Tex. Mar. 16, 2022) (extending *Escobar*'s materiality requirement to all claims under § 3729(a)(1)(A)); *Strock*, 2018 WL 647471, at *11–12 (same); *United States ex rel. Forcier v. Computer Scis. Corp.*, No. 12 Civ. 1750 (DAB), 2017 WL 3616665, at *7 (S.D.N.Y. Aug. 10, 2017) ("[W]hether asserted on a theory of factual falsity or legal falsity, a false claim must have influenced the government's decision to pay" or "[p]ut differently, the misrepresentation must have been material.").

Citing *Escobar*, the court of appeals below split with its own prior precedent in *Kirk* and joined the courts that have extended *Escobar*'s materiality requirement to all claims under § 3729(a)(1)(A). *See* App. A at 22a–26a. But, because § 3729(a)(1)(A) covers both "false" and "fraudulent" claims for payment, it was the duty of the court "to give effect, if possible, to every clause and word of [the] statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). As this Court recognized in *Escobar*, Congress did not define what makes a claim "false" or "fraudulent." 579 U.S. at 187. Instead, Congress intended to incorporate the well-settled meaning of these common-law terms. *Id.* While *Escobar* analyzed the meaning of "fraudulent" claims, including "misleading omissions," and concluded that they required a showing of materiality, the Court did not separately address the meaning of "false" claims for payment. *Id.* at 186–89. Unlike the common-law meaning of "fraudulent," the term "false" did not "at common law acquire[] any implication of materiality." *Wells*, 519 U.S. at 491. Thus, this Court has required a showing of materiality with respect to liability for "false statements" only when the text of

the statute expressly requires it. *See Neder*, 527 U.S. at 23 n.7 ("[T]he term 'false statement' does not imply a materiality requirement, [but] the word 'material' limits the statutes' scope to material falsehoods.").

Because the text of § 3729(a)(1)(A) does not impose a materiality requirement for "false" claims, one should not be grafted onto the statute. In contrast to § 3729(a)(1)(A), 31 U.S.C. § 3729(a)(1)(B) explicitly requires a showing that a "false record or statement" is "material to a false or fraudulent claim," and the first clause of § 3729(a)(1)(G) requires a showing that a "false record or statement" is "material to an obligation to pay or transmit money or property to the Government." Accordingly, it cannot be assumed that Congress meant to include a similar materiality requirement by implication in § 3729(a)(1)(A) for all "false" claims. Instead, it should be presumed that Congress acted "intentionally and purposefully" when it included the word "material" in § 3729(a)(1)(B) and § 3729(a)(1)(G), but omitted it from § 3729(a)(1)(A). *See Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020).

In addition, a factually "false" claim is fundamentally different from a legally false claim under the FCA. A factually "false" claim covers instances where a "contractor bills for something it did not provide." *See Kirk*, 601 F.3d at 114. In other words, "[a] factually false claim is one that 'is untrue on its face,' such as a claim that 'include[s] an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.'" App. A at 23a. On the other hand, legally false claims "do not involve information that is false

on its own terms, but instead rest[] on a false representation of compliance with an applicable federal statute, federal regulation, or contractual term." *Id.*

False certification claims are "[m]ore difficult to assess" because "the statute does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions." *Kirk*, 601 F.3d at 114. But for a factually "false" claim, the "application of the FCA is fairly straightforward." *Id.* Because factually false claims involve payments for goods or services not actually provided, commentators have recognized that "materiality is not typically an issue in cases involving factually false claims." William A. Escobar & Philip D. Robben, Am. Bar Assoc. Sec. of Litig., The False Claims Act, 13 Bus. & Com. Litig. Fed. Cts. § 138:20 (5th ed. Dec. 2021 Update). Indeed, why should a contractor like AECOM ever receive payment for goods or services that it did not actually provide to the Government?

The Court should grant this petition to clarify whether *Escobar*'s materiality requirement applies to all claims brought under § 3729(a)(1)(A), including factually "false" claims.

The Court Should Clarify Whether Government's Continued Payment Despite Actual Knowledge of Noncompliance Is Dispositive of Materiality.

The court of appeals concluded, after "weighing all the[] factors," that the "evidence [of the government's continued payment and extension of the MOSC-A

Contract] proves *decisive*, as the condition of payment and substantiality factors are, at best, marginally probative." App. A at 53a (emphasis added). Yet numerous courts of appeals (including the Second Circuit) have recognized that no one *Escobar* factor is dispositive of materiality. *See United States ex rel. Bibby v. Mortgage Inv. Corp.*, 987 F.3d 1340, 1352 (11th Cir. 2021); *United States v. Strock*, 982 F.3d 51, 59 (2d Cir. 2020); *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1213 (9th Cir. 2019); *United States ex rel. Lemon v. Nurses To Go, Inc.*, 924 F.3d 155, 161 (5th Cir. 2019); *United States ex rel. Prather v. Brookdale Senior Living Cmty., Inc.*, 892 F.3d 822, 834 (6th Cir. 2018); *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 109 (1st Cir. 2016).

The court of appeals' decision below directly conflicts with a number of other circuit court decisions. In *Prose*, the Seventh Circuit recently held that "[s]hould the government decide to pay despite knowing of the party's noncompliance, that would be 'very strong evidence' (*though not dispositive*) that the condition is not material." 17 F.4th at 743 (emphasis added). Thus, the Seventh Circuit recognized that such an "argument is better saved for a later stage, once both sides have conducted discovery." *Id.* at 744. Similarly, the D.C. Circuit recently reversed a district court's dismissal of a complaint on materiality grounds, noting that "[i]t is also plausible that the IRS could have later learned of IBM's fraud and continued to pay for the licenses for any number of reasons that do not render IBM's fraud immaterial." *United States ex rel. Cimino v. IBM Corp.*, 3 F.4th 412, 423–24 (D.C. Cir. 2021). In *Campie*, the Government continued to

pay for the defendants' HIV drugs, but the Ninth Circuit did not consider that fact to be determinative of materiality. Instead, the court also considered that defendants made false statements about their compliance with FDA regulations and that the "fraudulently obtained FDA approval [shouldn't be used] as a shield against liability for fraud." 862 F.3d at 906. The Ninth Circuit reasoned that "there are many reasons the FDA may choose not to withdraw a drug approval, unrelated to the concern that the government paid out billions of dollars for nonconforming and adulterated drugs." *Id.*

While *Escobar* rejected the argument that materiality is too fact intensive for courts to dismiss FCA cases on a motion to dismiss or a motion for summary judgment, materiality cannot be decided as a matter of law at the pleadings stage where, as here, factors weigh both for *and* against materiality. In analogous contexts, this Court has recognized that the materiality "determination requires delicate assessments of the inferences a 'reasonable [person]' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (emphasis added). Thus, a court may decide the issue of materiality as a matter of law in a securities fraud case only if "reasonable minds cannot differ on the question of materiality." *See id.* Materiality under the FCA is no different. *Escobar* instructs that, whether evaluated under the definition of materiality in 31 U.S.C. § 3729(b)(4) or the common-law standard, materiality must be considered from the viewpoint of a reasonable person.

See 579 U.S. at 193 & n.5 (quoting, *inter alia*, Restatement (Second) of Torts § 538 (1977); Restatement (Second) of Contracts § 162(2) & Comment *c* (1979)). Accordingly, the Government has taken the position that "materiality cannot be decided at the pleadings stage unless no reasonable jury considering the[] [*Escobar*] factors in the light most favorable to the plaintiff could conclude that the alleged violation had no 'natural tendency to influence' or was 'not capable of influencing' the government's payment decision." *See* Brief of the United States as Amicus Curiae at 22, *United States ex rel. Rose v. Stephens Inst. d/b/a Academy of Art Univ.*, No. 17-15111 (9th Cir. Aug. 7, 2017), 2017 WL 3699491. Since the court of appeals below concluded that *Escobar* factors weighed both for *and* against materiality, the reasonable juror standard was not met.

In addition, the Government has repeatedly stressed that, even where it has actual knowledge of a contractor's wrongful conduct and continues to pay claims, such action does not necessarily demonstrate a lack of materiality because there are many good reasons why the Government might continue to pay a noncompliant contractor. *See, e.g.*, Statement of Interest of the United States at 10, *United States ex rel. Hamilton v. Yavapai Cmty. College Dist.*, No. CV-12-08193-PCT-GMS (D. Az. Sept. 19, 2017), ECF No. 548; Statement of Interest of the United States at 7, *United States ex rel. Kolchinsky v. Moody's Corp.*, No. 1:12-cv-01399-WHP (S.D.N.Y. May 5, 2017), ECF No. 90; Statement of Interest of the United States at 7–8, *United States ex rel. Prather v. Brookdale Senior Living Cmty., Inc.*, No. 12-cv-00764 (M.D.

Tenn. May 3, 2017), ECF No. 107; Statement of Interest of the United States at 11, *United States ex rel. A1 Procurement, LLC v. Thermcor, Inc.*, No. 15-cv-0015 RBS-DEM (E.D. Va. Apr. 26, 2017), ECF No. 188; Statement of Interest of the United States at 6, *United States ex rel. Beauchamp v. Academi Training Ctr., LLC*, No. 11-cv-00371 TSE-MSN (E.D. Va. Oct. 28, 2016), ECF No. 2014; Statement of Interest of the United States at 7, *United States ex rel. Petratos v. Genentech Inc.*, No. 2:11-cv-03691-DMC-JAD (D.N.J. Oct. 7, 2013), ECF No. 35.[2] These good reasons include, *inter alia*, important public health and safety concerns, national security concerns, logistical complications of switching vendors or contractors, additional expenses involved when new vendors or contractors would need to be brought on board, and a lack of agency resources or resourcefulness.

The legislative history of the FCA is replete with evidence that the "continue to pay" standard is not what was intended by the writers of the FCA. In the

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[2] The Government has also submitted numerous amicus briefs on this point. *See, e.g.*, Brief of the United States as Amicus Curiae at 12–13, *Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (U.S. Nov. 30, 2018), 2018 WL 6305459; Brief of the United States as Amicus Curiae at 22, *United States ex rel. Bibby v. Mortgage Investors Corp.*, No. 19-12736 (11th Cir. Sept. 24, 2019), 2019 WL 4689069; Brief of the United States as Amicus Curiae at 21, *United States ex rel. Prather v. Brookdale Senior Living Cmty., Inc.*, No. 17-5826 (6th Cir. Oct. 18, 2017), 2017 WL 4769476; Brief of the United States as Amicus Curiae at 24, *United States ex rel. Miller v. Weston Educ.*, No. 14-1760 (8th Cir. Sept. 13, 2016), 2016 WL 4975250; Brief of the United States as Amicus Curiae at 24, *United States ex rel. Escobar v. Universal Health Servs., Inc.*, No. 14-1423 (1st Cir. Aug. 22, 2016), 2016 WL 4506190.

1986 FCA amendments, legislators were as concerned about the failures of the government bureaucracy to act against fraud as they were about contractors perpetrating fraud against the taxpayers:

> We need only review the disturbing array of examples from the past several years of fraudulent use of taxpayer dollars to realize our Government is not able — and in too many cases not willing — to adequately protect the money entrusted it by its citizens.

131 Cong. Rec. S10800-01, 1985 WL 720612, at *160–62 (Grassley).

> [Recounting calls from] potential whistleblowers … who were aware of illegal practices, but were not sure what they should do with the information. They were fearful that if they went to the Government or their employers with the information, at best nothing would be done, and at worst, they would be fired.

132 Cong. Rec. H6474-02, 1986 WL 785922 (Berman).

> At a more fundamental level, some people may question whether it is right for the Government to encourage informers and to give them standing to bring suit in court on behalf of the Government. But during my years in Congress, people have told me that they have reported fraud to the proper authorities but that no one seemed

> interested and nothing was done. Even if the authorities are interested, they are overwhelmed by work already. Also, in many cases, the authorities will not prosecute for political reasons.

132 Cong. Rec. H6474-02, 1986 WL 785922 (Bedell).

Moreover, there is no administrative prerequisite to bringing an FCA action. As the Eighth Circuit observed, "Congress intended to allow the government to choose among a variety of remedies, both statutory and administrative, to combat fraud." *United States ex rel. Onnen v. Sioux Falls Indep. Sch. Dist.*, 688 F.3d 410, 414–15 (8th Cir. 2012). Nothing in *Escobar* suggests that the Government must always initiate proceedings to recoup payments previously made in order to establish that certain types of violations are material to payment. "[L]aws against fraud protect the gullible and the careless — perhaps *especially* the gullible and the careless — and could not serve that function if proof of materiality depended on establishing that the recipient of [a] [false] statement would have protected [its] own interests." *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008) (emphasis in original).

The distrust of government bureaucracy voiced by Congress in the 1986 amendments is consistent with the legislative history of the FCA, which was first enacted in 1863 when Abraham Lincoln "recognized both the danger of government contractor profiteering and the need for private persons to become involved in its prevention … [after learning of] contractors selling boxes of sawdust in place of boxes of muskets,

and reselling horses to the cavalry two and three times." 131 Cong. Rec. S10800-01, 1985 WL 720612, at *160; *see also, e.g.*, *United States ex rel. Marcus v. Hess*, 127 F.2d 233, 236 (3d Cir. 1942) (noting that "a large amount of the blame" for Civil War fraud "must go to the horde of government-paid officials who, either through criminal negligence or criminal collusion, permitted or encouraged this robbing of the government treasury"), *rev'd on other grounds*, 317 U.S. 537 (1943).

In this case, Foreman argued (and specifically alleged in his proposed amended complaint) that the Government's continued payment and extension of the MOSC-A Contract was not due to lack of materiality of AECOM's noncompliance, but rather due to the importance of AECOM's services to the Army's war effort. *See* App. B at 80a. There "could hardly be [a contract] more essential to an important government interest than" one "for the procurement of necessary supplies for American troops in an active theater of war," such as the MOSC-A Contract. *See United States v. Public Warehousing Co. K.S.C.*, No. 1:05-CV-2968-TWT, 2017 WL 1021745, at *6 (N.D. Ga. Mar. 16, 2017). But under the rule applied by the court of appeals below, contractors caught substituting sawdust for gunpowder to U.S. troops during wartime would be exempt from all FCA liability as long as the Government continued to pay, no matter the reason for the continued payment.

The Court should grant this petition to clarify whether the Government's continued payment of claims despite actual knowledge of noncompliance is decisive of materiality under *Escobar*.

The Court Should Clarify Whether a Relator May Plead a Reverse False Claim as an Alternative to a Traditional False Claim.

The court of appeals concluded that "a reverse false claim cannot turn on the same conduct underlying a traditional false claim" because, "[c]oncluding otherwise would mean that any time a defendant violated sub-sections (a)(1)(A) and (B) and received payment, the defendant would also necessarily violate sub-section (G) if it failed to repay to the Government the fraudulently-obtained payments." App. A at 56a–57a. But the Federal Rules of Civil Procedure permitted Foreman to plead a reverse false claim in the alternative, "regardless of consistency." *See* Fed. R. Civ. P. 8(d)(2)–(3); *see also United States ex rel. Stepe v. RS Compounding LLC*, 325 F.R.D. 699, 709–10 (M.D. Fla. 2017) ("[T]he Court agrees with the United States that this [reverse false claim cause of action] is not duplicative of the § 3729(a)(1)(A) and (B) claims and is properly pled in the alternative."). The fact that there may be factual overlap in Foreman's allegations does not preclude pleading in the alternative. *See Mizuho Corp. Bank (USA) v. Cory & Assocs., Inc.*, 341 F.3d 644, 651 (7th Cir. 2003) (permitting a plaintiff to plead similar theories in the alternative, even though there was "obvious factual and legal overlap between the two theories"). While Foreman may have been entitled to recover on only one of his claims, he was free to plead them in the alternative. *See Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1151 (D.C. Cir. 1994) ("A plaintiff may recover on one of the two theories based on a single publication, but is free to plead them in the alternative."). Even the Second Circuit held in a

different case that a plaintiff is permitted to plead a claim for relief under two statutes where one claim is "contingent on the rejection of" another. *See Revitalizing Auto Cmtys. Envtl. Response Tr. v. Nat'l Grid USA*, 10 F.4th 87, 105 (2d Cir. 2021).

Contrary to the Second Circuit's ruling below, a violation of § 3729(a)(1)(A) or (B) does not necessarily result in a violation of § 3729(a)(1)(G). Foreman alleged that AECOM had a separate obligation[3] to refund money and property to the Government. *See* 48 C.F.R. §§ 52.215-10 (1997), 52.215-11 (1997), 52.232-25 (2003), 52.242-3 (2001), and 52.245-1 (2007). Unlike AECOM, certain contractors may *not* have a separate obligation to return excess money and property to the Government and thus may be liable under § 3729(a)(1)(A) or (B) and not § 3729(a)(1)(G). *See, e.g.*, *United States ex rel. Herbold v. Doctor's Choice Home Care, Inc.*, No. 8:15-cv-1044-T, 2019 WL 5653459, at *15 (M.D. Fla. 2019) (finding reverse false claim allegations not redundant because government alleged an independent obligation to repay overpayments); *United States ex rel. Schaengold v. Mem'l Health, Inc.*, No. 4:11-CV-58, 2014 WL 6908856, at *21 (S.D. Ga. Dec. 8, 2014) ("[T]he Government has identified obligations that arose independent of the alleged false certifications in Memorial Hospital's cost reports – i.e., obligations to refund payments received for services provided pursuant to prohibited referrals…. As such, the Court finds that the Government's reverse false claim cause of action is not a redundant basis to state an

[3] The term "obligation" is defined by the statute as "an established duty, whether or not fixed, arising from an express or implied contractual relationship." 31 U.S.C. § 3729(b)(3).

affirmative false claim, but rather is a basis for liability independent of the Government's affirmative false claims.").

Conversely, AECOM may be liable for Foreman's reverse false claim but *not* his traditional false claim. Even if AECOM's noncompliance was immaterial to the Government (which Foreman vehemently disputes), and AECOM is not liable under § 3729(a)(1)(A), materiality is *not* a required element of Foreman's claim under § 3729(a)(1)(G). [4] Thus, AECOM should be liable to the Government for its failure to return excess money and property, even if it did not commit a traditional false claim. Further, it may be that AECOM did not knowingly present false claims at the time they were made, but later learned that those claims were false and did not return the money or property to the Government. *See* Joel D. Hesch, *Understanding the Revised Reverse False Claims Provision of the False Claims Act and Why No Proof of a False Claim Is Required*, 53 UIC J. Marshall L. Rev. 461, 467 (2021) ("[T]he *knowing* element may be missing; however, later the company may realize that it should not have obtained the funds. In those settings, the company's retention of funds may not technically fall within any of the 1986 FCA liability provisions, despite the company knowing that it was not entitled to keep the funds.") (emphasis in original). Indeed, Foreman alleges that AECOM attempted to cover up its violations after discovering them by making, *inter alia*, historical revisions to

[4] The statute makes liable anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." § 3729(a)(1)(G).

workers' time sheets. *See, e.g.*, App. A at 11a. In such a circumstance, the reverse false claim statute provides a critical incentive for defendants to return the money or property to the Government since it provides for recovery even if the defendant is later able to disprove materiality or scienter as to the primary liability claim. *See* Hesch, *supra* at 467 ("In 2009, Congress closed this loophole in order to permit the FCA to be a tool in recovering all funds that are knowingly retained by the defendant.").

The Court should grant this petition to clarify whether a relator may plead claims under § 3729(a)(1)(A) and § 3729(a)(1)(G) when the defendant has a separate obligation to return money or property to the Government.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

March 29, 2022

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 19, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM, 2020

Docket No. 20-2756-cv

UNITED STATES OF AMERICA
EX REL. HASSAN FOREMAN,

Plaintiff-Appellant,

UNITED STATES OF AMERICA,

Plaintiff,

v.

AECOM, AECOM GOVERNMENT SERVICES, INC.,
AC FIRST, LLC, AND AECOM/GSS LTD. D/B/A
GLOBAL SOURCING SOLUTIONS, INC.,

*Defendants-Appellees.**

May 21, 2021, Argued
November 19, 2021, Decided

Before: JACOBS, SACK, and CHIN, *Circuit Judges.*

* The Clerk of Court is respectfully directed to amend the caption as set forth above.

Appendix A

SACK, *Circuit Judge*:

This action involves a billion-dollar defense contract entered into between AECOM (a publicly held corporation), AECOM Government Services, Inc., AC FIRST, LLC, and AECOM/GSS Ltd. (collectively, "AECOM") and the United States government, under which AECOM was tasked with providing maintenance and management support services to the United States Army in Afghanistan. In order to ensure that AECOM effectively and efficiently provided such services, the contract imposed various obligations on AECOM to properly catalog data regarding labor hours and costs, so-called "man-hour utilization" rates, and acquisition and receipt of government property into various government tracking systems. AECOM allegedly failed to live up to these contractual obligations.

Plaintiff-appellant Hassan Foreman, on behalf of the United States and himself, therefore filed an action against AECOM in the Southern District of New York, asserting violations of several provisions of the False Claims Act ("FCA"). According to Foreman, AECOM submitted fraudulent claims for payment to the government, falsely certifying that it was in compliance with its obligations under the contract. In reality, AECOM allegedly overstated its man-hour utilization rate, improperly billed the government for labor not actually performed, and failed to properly track government property, resulting in significant financial costs to the government.

AECOM moved to dismiss Foreman's third amended complaint (the "Complaint"), and the district court (Louis

L. Stanton, *Judge*) granted the motion. The district court dismissed Foreman's claims under 31 U.S.C. § 3729(a)(1)(A)-(B), because it concluded that Foreman had failed to adequately plead materiality as required by *Universal Health Services, Inc. v. United States. ex rel. Escobar* ("*Escobar*"), 579 U.S. 176, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016). In reaching this conclusion, the district court considered multiple reports outside of the complaint on the basis that they were either incorporated by reference into, or integral to, the complaint. The district court also dismissed Foreman's FCA conversion claim brought under 31 U.S.C. § 3729(a)(1)(D) because it concluded that the Complaint failed to identify "any specific excess or recoverable item or other property that defendants possessed but failed to deliver to the government." *United States ex rel. Foreman v. AECOM*, 454 F. Supp. 3d 254, 268 (S.D.N.Y. 2020). The district court also dismissed Foreman's reverse false claim brought under 31 U.S.C. § 3729(a)(1)(G),[1] because it concluded that the allegations underlying these claims were identical to those underlying his direct false claims under § 3729(a)(1)(A)-(B). Such

1. In contrast to an affirmative false claim, which involves submitting a false or fraudulent claim to the government for payment, a "reverse false claim" "creates FCA liability for false statements designed to conceal, reduce, or avoid an obligation to pay money or property to the Government." *United States ex rel. Lissack v. Sakura Glob. Cap. Mkts., Inc.*, 377 F.3d 145, 152 (2d Cir. 2004); *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 653 (5th Cir. 2004) ("In a reverse false claims suit, the defendant's action does not result in improper payment by the government to the defendant, but instead results in no payment to the government when a payment is obligated.").

duplicative allegations, the district court concluded, could not state a viable reverse false claim.

Following the district court's dismissal of the Complaint, Foreman moved for reconsideration. The district court denied the motion and entered judgment in favor of AECOM. Foreman subsequently filed a motion to alter or amend the judgment and requested leave to file a fourth amended complaint. The district court denied the motion, concluding that the proposed fourth amended complaint would be futile.

Foreman now appeals, arguing that the district court erred in dismissing the Complaint and entering judgment for the defendants. Foreman argues in the alternative that the district court erred in denying his post-judgment motion to alter the judgment and file a fourth amended complaint.

For the reasons that follow, we conclude that the district court erred in dismissing the Complaint in its entirety and entering judgment for AECOM. In particular, the district court's materiality analysis of Foreman's § 3729(a)(1)(A)-(B) claims premised on the labor billing allegations was flawed because the court improperly relied on material extraneous to the complaint. The court therefore erred in dismissing these claims at the motion-to-dismiss stage. We also conclude that the district court properly dismissed Foreman's other claims and that the "public disclosure bar" does not apply. We therefore vacate the district court's judgment, reverse the dismissal of Foreman's § 3729(a)(1)(A)-(B) claims premised on the labor billing allegations, affirm the dismissal of Foreman›s other

claims, and remand for further proceedings consistent with this opinion.

BACKGROUND

Factual Background[2]

A. The Parties

Defendants-Appellees AECOM (a publicly held corporation), AECOM Government Services, Inc., AC First, LLC, and AECOM/GSS Ltd., d/b/a Global Sourcing Solutions, Inc., (collectively, "AECOM") are a defense contractor and related corporate entities that contracted with the United States Army to provide logistical support to the 401st Army Field Support Brigade in Afghanistan beginning in 2005.

Relator Hassan Foreman is a former employee of AECOM who worked in its finance department from approximately August 2013 to July 2015. He was hired by AECOM as a finance analyst in August 2013 and promoted to supervisor in May 2014. In July 2015, shortly after notifying AECOM of what he saw as compliance issues, he was terminated.

B. The MOSC-A Contract

In 2010, the Army awarded AECOM a billion-dollar, multi-year defense contract called the Maintenance & Operational Support Contract (the "MOSC-A Contract").

2. The facts discussed herein are drawn from the Complaint.

The MOSC-A Contract required the defendants to provide maintenance and management support services to the Army in Afghanistan. These services included maintaining vehicles and equipment, managing facilities, handling supplies and inventory, and providing transportation services at various locations throughout Afghanistan.

The contract had a "cost-plus-fixed-fee" structure, meaning that AECOM was reimbursed for the costs that it incurred on the Army's behalf and received an additional negotiated fee that was fixed at the inception of the contract. In this case, AECOM obtained a 5% fixed fee that "does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract." A.324-25 ¶ 10.[3] Foreman alleges that this cost-plus-fixed-fee structure incentivized AECOM to maintain and increase the level of costs to the government because it would increase the value of the 5% fixed fee.

When it was first awarded in 2010, the MOSC-A Contract was to be effective for one year; it was, however, extended several times between 2010 and 2018. The MOSC-A Contract required the government to consider AECOM's previous performance in determining whether to award AECOM additional option years under the contract. From 2010 through 2018, the Army repeatedly amended, modified, or extended the contract, with the vast majority of the amendments and modifications increasing the funding for the MOSC-A Contract.

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3. As used in citations herein, "A" refers to the Joint Appendix submitted on appeal by the parties. Unless otherwise noted, any paragraph numbers cited herein refer to paragraphs in Foreman's Complaint.

The cost of the MOSC-A Contract, with its options to extend, was originally estimated to be $378 million total. But AECOM billed as much as $400 million annually under the contract, and a 2018 amendment to the contract listed a total dollar amount of at least $1.3 billion. By the time the United States military withdrew from Afghanistan at the end of August 2021, the total amount paid to AECOM pursuant to the MOSC-A Contract was approximately $1.9 billion.

C. Alleged Violations of the MOSC-A Contract

Foreman alleges that AECOM and its employees violated the MOSC-A Contract and various federal regulations that were incorporated into it. These alleged violations fall into three principal categories: (1) improper labor billing; (2) inflated reports of the man-hour utilization rate; and (3) improper purchasing, tracking, and returning of government property.[4]

To prevent fraud and ensure accountability, the MOSC-A Contract imposed specific obligations on AECOM with respect to documenting its work and labor costs. For example, the MOSC-A Contract required that

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4. Foreman also alleged that AECOM entered into a "crony contract," and that his termination was unlawful retaliation. The district court dismissed those claims and Foreman does not press them on appeal. Foreman has therefore waived any challenge to the district court's dismissal of those claims. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").

AECOM use the "AWRDS/LMP/MWB" or "SAMS-E/SAMS-IE" system for labor reporting, update those systems daily, and provide weekly reports of labor hours worked and funds expended for parts. In addition, various applicable Federal Acquisition Regulations ("FAR")[5] required AECOM to account for costs, maintain adequate records to demonstrate any costs that have been incurred, and meet specific criteria regarding costs.

The MOSC-A Contract also established a man-hour utilization ("MHU") rate of 85 percent with a goal of 90 percent. An MHU rate is the ratio of time that personnel spend actively engaged in maintenance projects (actual direct labor hours) relative to their overall time on duty. In other words, the MHU rate is calculated by dividing the actual direct labor hours by the direct labor hours available to perform maintenance projects.

AECOM was required to report the MHU rate on a monthly basis. Such reporting allows the Army to review and verify utilization data for tactical field maintenance services and determine whether reductions in contractor personnel should be made. In Performance Work

5. "The FAR are a set of regulations promulgated by the [General Services Administration] to further the uniform regulation and procurement of government contracts." *Rutigliano Paper Stock, Inc. v. U.S. Gen. Servs. Admin.*, 967 F. Supp. 757, 761 (E.D.N.Y. 1997); *see also Irvin Indus. Canada, Ltd. v. U.S. Air Force*, 924 F.2d 1068, 1069, 288 U.S. App. D.C. 111 (D.C. Cir. 1990) ("The Federal Acquisition Regulations System was established in 1983 for the purpose of codifying and publishing uniform practices and procedures for acquisitions by all executive agencies.").

Statements incorporated by reference into the MOSC-A Contract, the Army identified the MHU rate as a critical metric.

The MOSC-A Contract and FAR also imposed specific obligations on AECOM regarding the management and tracking of government property. AECOM was required to have a system in place to manage government property in its possession and to keep detailed records reflecting its acquisition and receipt. It was also required to acquire government property using the government supply system as its first source of supply, and to report its receipt and processing of all property through specified tracking systems, known as SARSS, LMP, and AWRDS/MWB. Performance Work Statements indicate that the Army considered it a "critical metric" that AECOM's inventory accuracy be at least 98 percent and that AECOM ensure, with at least 95 percent accuracy, the entry of correct equipment condition and location codes "into the appropriate Logistics Information System (LIS) (AWRDS, SAMS, SARRSS/LMP, PBUSE, PBUSE AIT) IAW." A.410 ¶ 206. The MOSC-A Contract also required AECOM to track and submit to the Army, through a process known as "recoverables," parts removed from vehicles and other equipment.

1. The Labor Billing Allegations

According to the Complaint, AECOM submitted inaccurate timesheets to the government resulting in payment for work not actually performed. AECOM's timesheets allegedly listed incorrect hour totals, omitted employee numbers, and did not contain the supervisor's

printed name, making it difficult to identify the person who signed the timesheets. In addition, timesheets were signed by supervisors who were not on-site and therefore could not validate employees' work hours. AECOM employees also signed and submitted timesheets for the pay period before work had been performed and, in several cases, submitted multiple timesheets for the same person. On one occasion in 2016, six employees each billed for several hours of work involving the replacement or repair of a single tire. And it was common for employees to fall asleep on the job or not show up for work, while still billing full eleven-hour days.

Foreman alleges that these timesheet errors were the result of explicit AECOM policy. For example, AECOM documents contained instructions to employees to submit their timesheets on the Thursday prior to the end of the two-week pay period. It was also AECOM's policy and practice to bill 154 hours per each two-week pay period regardless of actual hours worked. According to Foreman, the government was unaware that it was AECOM's policy and practice to pre-sign timesheets and bill 154 hours for each pay period because AECOM covered up these practices.

The Complaint also asserts that AECOM billed for work performed by unqualified and uncertified employees in violation of its obligations under the MOSC-A Contract. In order to conceal its non-compliance, AECOM created and utilized its own certifications. AECOM also provided unvetted and uncertified employees with access to U.S. government systems in violation of regulations, statutes, and policies governing security clearances.

In 2012, AECOM performed an internal timekeeping review to assess whether its timekeeping practices complied with its obligations under the MOSC-A Contract. AECOM estimated that it owed the government more than $140 million because of its improper labor billing practices between 2010 and 2014 and calculated a possible settlement amount of $43 million.

Although AECOM allegedly had an obligation to repay or remit more than $140 million in overpayments from the government, AECOM did not notify the government of its findings. Instead, it engaged in a historical timesheet corrections process in an effort to rectify its timesheet deficiencies. Foreman alleges that this corrections process was eventually halted, demonstrating that AECOM only undertook it so that it would be able to "claim that [the timesheet deficiencies] [we]re 'technical errors,' but that the underlying time was legitimate and billable." A.368 ¶ 110.

2. The Man-Hour Utilization Allegations

As noted, AECOM was expected to meet an 85 percent MHU rate and was required to report its MHU rate to the government on a monthly basis. The MHU rate served as a critical metric that the Army could review to determine prospectively whether and where to reduce staff.

AECOM's MHU rate was consistently and significantly below 85 percent. In 2012, for example, AECOM received a corrective action request from the Defense Contract Management Agency ("DCMA"), which reported that AECOM's MHU rate was 26 percent. AECOM

subsequently engaged in discussions with the Army about the methodology for calculating the MHU rate, and it was agreed that AECOM would report] the MHU rate on a monthly basis. Nevertheless, AECOM continued to fall short of the 85 percent requirement.

Foreman alleges that, in order to conceal its failure to meet the requisite MHU rate, AECOM devised its own format for reporting its MHU rate. Instead of doing so through the SAMS-E system as required, it compiled a non-standard report. By reporting outside the SAMS system, AECOM allegedly "avoided having a direct tie to actual hours in the system, allowing essentially made-up labor to be counted." A.400 ¶ 188. This also allowed for manipulation of the MHU rate because "'indirect hours' not connected to a specific assignment" could be misapplied "to 'direct hours' of work performed." *Id.* Foreman alleges that the government was unaware that AECOM failed to use the SAMS-E system to track its MHU rate as required.

According to Foreman, it was in AECOM's interest to overstate its MHU rate because this "allowed it to keep its workforce high, increasing costs and corresponding profits on th[e] [MOSC-A] cost-plus contract." A.401 ¶ 190.

3. The Property Allegations

Foreman also alleges that AECOM failed to properly track and account for parts and equipment ordered during the performance of the MOSC-A Contract. While AECOM was required to order parts through the SAMS-E system

in order to minimize duplicative ordering or ordering of parts that were already available, employees instead frequently ordered items through unauthorized "parts-only" work orders. Parts-only work orders bypass checks and balances built into the procurement system to avoid excessive ordering and ensure accountability for labor charges and parts, and, as a result, do not provide for proper tracking of equipment. For example, if tires were properly ordered through the SAMS-E system pursuant to an established vehicle program or work order, the system would trigger an alert if the number of tires did not match the number of trucks for which they were destined or the expected tire usage. A parts-only work order, by contrast, could not be monitored in this fashion because "it would not tie" to an actual work order. A.414. ¶ 216. Foreman alleges that AECOM intentionally utilized parts-only work orders to bypass the SAMS-E system. And an internal AECOM memorandum identified over 6,000 parts, worth over $16 million, that had incomplete records in the SAMS-E system.

In addition, AECOM employees frequently purchased redundant parts, sometimes buying the same items twice by ordering goods through the government supply system while simultaneously purchasing them on the commercial market. For example, in an August 28, 2016, email, an AECOM supervisor explained that in one work order, nine parts were ordered when only four were needed and noted that this was a "systematic issue that has happened since the inception according to system log[]s, oil amounts, parts ordered and not needed etc. leading to some of the excess parts issues we have run across." A.421 ¶ 234.

AECOM also failed to track and return to the Army "recoverables," which are items removed from vehicles and other equipment. Because the SAMS-E system was not being properly used, work order records were not "created, closed or audited, resulting in recoverable items not being returned or duplicates not being controlled." A.425-26 ¶ 243. AECOM allegedly concealed its failure to properly track and turn in recoverables by not sending mandatory daily interfaces to the Army's Logistical Information Warehouse — a database intended to allow the Army to order parts. According to an internal AECOM memorandum, although AECOM was aware of this problem, it did not inform the government because it "did not intend fraud, and . . . the risk of the issue being brought to light was minimal or not at all." A.426 ¶ 246.

In a 2015 internal corrective action report, AECOM characterized its failure to properly turn in recoverable items through government systems as "Severity: Major," and noted that it could result in "failure of proper credit" to the government and "significant liability" to AECOM. A.427 ¶ 252. A March 2015 system query identified $15-16 million in improper or undocumented recoverables. Foreman alleges that AECOM subsequently instructed a supervisor to remove records regarding recoverables from its system.

Appendix A

Procedural History

On March 16, 2016, Foreman filed a *qui tam*[6] complaint alleging that AECOM submitted false and fraudulent claims to the government for payment in violation of the FCA. Foreman's original complaint remained under seal while the government investigated and decided whether to intervene. In November 2018, while the government's investigation was pending, Foreman filed a second amended complaint.

Over the course of the government's investigation, AECOM turned over many documents to the government. On May 28, 2019, the government submitted a letter to the district court, notifying the court that it did not intend to intervene in the action. On July 29, 2019, prior to the onset of formal discovery, AECOM completed its production to Foreman of all the documents that it had turned over to the government during the investigation.

In August 2019, AECOM filed a pre-motion letter

6. "[The False Claims Act] creates a right of action under which private parties may, on behalf of the federal government, bring lawsuits alleging fraud. The actions go by the hoary Latin term '*qui tam*' (short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning 'who as well for the king as for himself sues in this matter[)].'" *United States ex rel. Prose v. Molina Healthcare of Illinois, Inc.*, 10 F.4th 765, 772 (7th Cir. 2021) (internal citation omitted) (quoting Bryan A. Garner, ed., BLACK'S LAW DICTIONARY at 1444 (10th ed. 2014)). "The party seeking to represent the government's interest is called a 'relator.'" *Id.*

outlining the bases for its planned motion to dismiss Foreman's second amended complaint. After reviewing a draft of AECOM's pre-motion letter, which AECOM shared with Foreman in an effort to narrow the issues in dispute, AECOM consented to Foreman's amendment of the second amended complaint to revise the allegations relating to subject-matter jurisdiction, personal jurisdiction, and venue. Foreman did not otherwise seek to amend the allegations in the second amended complaint. The district court granted Foreman leave to amend, and he filed the Complaint in September 2019.

In the Complaint, Foreman asserts that: (1) AECOM knowingly submitted false or fraudulent claims to the government in violation of 31 U.S.C. § 3729(a)(1)(A); (2) AECOM knowingly made, used or caused to be made or used, false records or statements material to false or fraudulent claims to the government in violation of 31 U.S.C. § 3279(a)(1)(B); (3) AECOM had possession, custody or control of property to be used by or on behalf of the government and knowingly delivered or caused to be delivered less than the proper amount of such property to the government in violation of 31 U.S.C. § 3279(a)(1)(D); (4) AECOM knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit property to the government, or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit property to the government, in violation of 31 U.S.C. § 3279(a)(1)(G); (5) AECOM fraudulently induced the government into entering into and extending the MOSC-A Contract in violation of 31 U.S.C. § 3729(a)(1)(A); and

(6) AECOM unlawfully retaliated against Foreman, in violation of 31 U.S.C. § 3730(h), by discharging him for engaging in protected activities.

On October 30, 2019, AECOM moved to dismiss the Complaint. It argued that several of the claims should be dismissed pursuant to the public disclosure bar. In the alternative, AECOM contended that all of Foreman's claims should be dismissed for failure to state a claim.

On April 13, 2020, the district court granted AECOM's motion to dismiss. *United States ex rel. Foreman*, 454 F. Supp. 3d at 258. Although the district court concluded that the public disclosure bar did not apply, *id.* at 260-64, the court nevertheless dismissed Foreman's false claims under § 3729(a)(1)(A)-(B), which were tied to his labor billing, MHU rate, and property allegations, because it concluded that AECOM's allegedly false certifications were not material to the government's payment decision, *id.* at 264-66. The district court reasoned that AECOM's false representations regarding its labor billing practices, MHU rate, and property tracking were not material because the government was aware of AECOM's violations of the MOSC-A Contract, but nevertheless continued to pay AECOM and extend the contract multiple times. *Id.* at 265-66. In reaching this conclusion, the district court relied on documents outside of the Complaint, including a September 2014 evaluation conducted by the Defense Contract Audit Agency ("DCAA"), a July 2012 corrective action plan issued by the DCMA, an October 2012 corrective action request issued by the DCMA, and numerous work order documents, including

an Army memorandum. *See id.* The district court found it appropriate to consider these documents because it concluded that they were either incorporated by reference into, or integral to, the complaint. *Id.* at 265 n.2.

The district court also dismissed Foreman's conversion claim, reverse false claim, and retaliation claim. *Id.* at 267-70. The district court dismissed Foreman's 31 U.S.C. § 3729(a)(1)(D) conversion claim because the allegations in the Complaint "d[id] not identify any specific excess or recoverable item or other property that defendants possessed but failed to deliver to the government." *Id.* at 268. The court also dismissed his 31 U.S.C. § 3729(a)(1)(G) reverse false claims, because the claims were "based on the same labor billing and property violations underlying the direct false claims, which allege that defendants submitted false certifications in their invoices requesting payment and retained those payments." *Id.* The district court explained that the Complaint did not identify a "separate obligation to return overpayments or excess property to the government" and concluded that the allegations — which "essentially boil[ed] down" to the claim that AECOM was receiving payment on false claims and thus retaining government funds to which it was not entitled — did not state viable reverse false claims. *Id.* at 269. Lastly, the district court dismissed Foreman's retaliation claim because it found that he had failed to adequately plead that he engaged in protected conduct or that the defendants were aware of any protected activity. *Id.* at 270.

Although the district court indicated that the dismissal of the Complaint "reflect[ed] the underlying invalidity of the merits of the claims, such as the government's continued disregard of defendants' shortfalls as being insufficiently serious or consequential ('material') to justify either litigation or severance of the relationship," it granted Foreman "leave to move for leave to serve a fourth amended complaint." *Id.*

Following the district court's decision, Foreman moved for reconsideration. On May 19, 2020, the district court denied the motion. On June 5, 2020, the clerk entered judgment for AECOM. Foreman then submitted a letter requesting vacatur of the clerk's judgment so that he could move for leave to amend. The district court denied Foreman's request, explaining that — following its Opinion and Order granting AECOM's motion to dismiss — Foreman had seven weeks to move for leave to amend and yet had failed to do so.

On July 3, 2020, Foreman filed a motion to alter or amend the judgment and requested leave to file a fourth amended complaint. Foreman argued that leave to amend should be freely granted under Rule 15(a), that he did not unduly delay in seeking leave to amend, that he had not acted in bad faith, that he had not repeatedly failed to cure deficiencies by amendments previously allowed, and that the proposed amendments would not be futile. He argued that the proposed amendments satisfied the FCA's materiality requirement. He further argued that his express false claims, including the claim for fraudulent inducement, did not need to pass a materiality test to be

viable. He similarly argued that his conversion and reverse false claims would not be futile because the proposed fourth amended complaint identified both specific excess or recoverable property that AECOM possessed but failed to return to the government and a separate obligation to return overpayments and excess property to the government.

On August 13, 2020, the district court denied Foreman's motion. *United States ex rel. Foreman v. AECOM*, No. 16 CIV. 1960 (LLS), 2020 U.S. Dist. LEXIS 145998, 2020 WL 4719096, at *1 (S.D.N.Y. Aug. 13, 2020). It reasoned that it was not appropriate to grant relief from judgment because Foreman's proposed further amendments "d[id] not remedy the deficiencies of the third amended complaint and would be futile." 2020 U.S. Dist. LEXIS 145998, [WL] at *2. With respect to Foreman's false claims under § 3729(a)(1)(A)-(B), the district court acknowledged that the proposed fourth amended complaint contained additional allegations that AECOM submitted inaccurate timesheets, failed to accurately report its MHU rate, failed to properly track recoverable items, and gave advance notice to employees of audits, but explained that the same allegations formed the basis of the claims in the Complaint which the court had found to be immaterial. 2020 U.S. Dist. LEXIS 145998, [WL] at *3. Moreover, while the district court took note of Foreman's additional allegations that the government was unaware of the scope of AECOM's improper labor billing practices, it found that a September 2014 DCAA report demonstrated that the government had actual knowledge of these alleged violations of the MOSC-A Contract. *Id.* The court also

rejected Foreman's argument that express claims do not need to be material, concluding that this argument was contrary to our holding in *Bishop v. Wells Fargo & Co.*, 870 F.3d 104, 107 (2d Cir. 2017). 2020 U.S. Dist. LEXIS 145998, [WL] at *3 n.1.

The district court similarly concluded that Foreman's amendment to the conversion and false reverse claims would be futile. Regarding Foreman's conversion claim, the court decided that the fourth amended complaint still failed to "identify any specific excess or recoverable item or other property that defendants possessed but failed to deliver to the government." 2020 U.S. Dist. LEXIS 145998, [WL] at *4. With respect to Foreman's reverse false claim, the district court found that the fourth amended complaint's "new allegation that defendants have a separate obligation to return overpayments and excess property to the government does not cure the deficiency . . . [that] the reverse false claim is based on the same labor billing and property violations underlying the direct false claims, which were dismissed due to a lack of materiality." *Id.* (internal quotation marks omitted).

Foreman filed a notice of appeal.

DISCUSSION

I. Standard of Review

"This Court review[s] *de novo* the grant of a motion to dismiss under Rule 12(b)(6), accepting as true the factual allegations in the complaint and drawing all inferences

in the plaintiff's favor." *Mirkin v. XOOM Energy, LLC*, 931 F.3d 173, 176 (2d Cir. 2019) (internal quotation marks omitted). "To survive a motion to dismiss, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 176 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

II. False Claims

On appeal, Foreman argues that the district court erred in dismissing his false claims brought pursuant to 31 U.S.C. § 3729(a)(1)(A) because it (1) improperly imported a materiality requirement onto Foreman's express false claims, factually false claims, and fraudulent inducement claims; (2) improperly relied on extrinsic evidence outside of the Complaint in conducting its materiality analysis; and (3) incorrectly dismissed the claims for lack of materiality. For the reasons explained below, we agree that the district court improperly relied on extrinsic evidence and erroneously dismissed Foreman's false claims premised on the labor billing allegations. We conclude, however, that the district court correctly dismissed Foreman's other claims premised on the MHU rate and property tracking allegations.

A. Applicability of Materiality Requirement

Foreman argues first that the district court erred in dismissing all of his false claims because the Supreme Court's decision in *Escobar* only establishes a materiality requirement for "implied" false claims. According to

Foreman, *Escobar*'s materiality requirement therefore does not apply to his "express" false claims, including his fraudulent inducement claim, which he contends is based on AECOM's express — rather than implied — false representations to the government, and his "factually false" claims.[7] This argument is without merit.

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7. "A successful FCA claim generally occurs in one of three forms": (1) a factually false claim; (2) a legally false claim under an express false certification theory; and (3) a legally false claim under an implied certification theory. *United States v. Kellogg Brown & Root Servs., Inc.*, 800 F. Supp. 2d 143, 154 (D.D.C. 2011); *see United States ex rel. Lisitza v. Johnson & Johnson*, 765 F. Supp. 2d 112, 125 (D. Mass. 2011).

A factually false claim is one that "is untrue on its face," such as a claim that "include[s] an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *Kellogg Brown & Root Servs., Inc.*, 800 F. Supp. 2d at 154. Legally false claims "do not involve information that is false on its own terms, but instead rest[] on a false representation of compliance with an applicable federal statute, federal regulation, or contractual term." *Id.* (internal quotation marks omitted). "A legally false claim, also known as a 'false certification,' can be either 'express' or 'implied.'" *Id.* "An express false certification occurs when a claimant explicitly represents that he or she has complied with a contractual condition, but in fact has not complied." *Id.* An "implied" false certification claim arises where the defendant submits a claim for payment, impliedly certifying compliance with conditions of payment while omitting its violations of statutory, regulatory, or contractual requirements, and these omissions render the representations misleading. *See Escobar*, 136 S. Ct. at 1995 ("[T]he implied false certification theory can be a basis for liability . . . when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but

In *Escobar*, the plaintiffs filed a *qui tam* suit asserting claims under the FCA pursuant to 31 U.S.C. § 3729(a)(1)(A). *Escobar*, 136 S. Ct. at 1993. The plaintiffs sought to hold the defendant liable under an implied false certification theory of liability. *Id.* at 1993, 1995. The Supreme Court granted *certiorari* to decide whether an implied false certification theory could provide a viable basis for liability and to "clarify some of the circumstances in which the False Claims Act imposes liability." *Id.* at 1995. In concluding that the implied false certification theory could provide a basis for liability, the Court looked to the language of 31 U.S.C. § 3279(a)(1)(A), which "imposes civil liability on 'any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.'" *Id.* at 1999 (quoting 31 U.S.C. § 3279(a)(1)(A)). When interpreting "what makes a claim false or fraudulent," the Court reasoned that Congress intended to incorporate "the well-settled meaning of the common-law terms it uses," and concluded that the use of the term "fraudulent" demonstrated Congress's intent to incorporate the common-law meaning of fraud. *Id.* "Because common-law fraud has long encompassed certain misrepresentations by omission," the Supreme Court held that "'false or fraudulent claims' include more

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knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement . . . [and] the omission renders those representations misleading."); *Kellogg Brown & Root Servs., Inc.*, 800 F. Supp. 2d at 154 ("[A]n implied false certification occurs when the claimant makes no affirmative representation but fails to comply with a contractual or regulatory provision where certification was a prerequisite to the government action sought." (internal quotation marks omitted)).

than just claims containing express falsehoods." *Id.* An implied certification theory may therefore provide a basis for liability where the claim for payment "makes specific representations about the goods or services provided" and the "defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *Id.* at 2001. The Court further held that "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be *material* to the Government's payment decision in order to be actionable under the False Claims Act." *Id.* at 1996 (emphasis added).

Although *Escobar* involved an implied false certification claim, nothing in the opinion suggests that its materiality requirement was intended to be limited to that specific theory of liability. To the contrary, the Court looked to the language of § 3279(a)(1)(A) generally and concluded that it incorporates a common-law materiality requirement and that, absent such a showing, a § 3279(a)(1)(A) claim is not actionable. *See Escobar*, 136 S. Ct. at 1996, 1999-2002. Moreover, we have repeatedly read *Escobar* to impose a materiality requirement on all claims brought under § 3279(a)(1)(A), including express false claims and fraudulent inducement claims. *See Bishop*, 870 F.3d at 106-07 ("[A]lthough *Escobar* was an implied false certification case, it also abrogated *Mikes*'s particularity requirement for express false certification claims. . . . In place of *Mikes*'s requirements, the *Escobar* Court set out a 'familiar and rigorous' materiality standard." (quoting *Escobar*, 136 S. Ct. at 2004 n.6)); *United States v. Strock*, 982 F.3d 51, 60-65

(2d Cir. 2020) (applying *Escobar*'s materiality requirement to fraudulent inducement claim).[8]

We therefore conclude that *Escobar* imposes a materiality requirement on all of Foreman's § 3279(a)(1)(A) claims.

B. Consideration of Material Extraneous to the Complaint

1. Applicable Law

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). "Where a document is not incorporated by reference, the court may never[the]less consider it where the complaint

8. Foreman argues that our decisions in *Bishop* and *Strock* are inconsistent with our prior decision in *United States ex rel. Kirk v. Schindler Elevator Corp.* ("*Kirk*"), 601 F.3d 94 (2d Cir. 2010), *rev'd on other grounds*, 563 U.S. 401, 131 S. Ct. 1885, 179 L. Ed. 2d 825 (2011), and that *Bishop* and *Strock* cannot overrule our prior precedent in *Kirk*. But *Kirk* was decided before *Escobar* and employed the analysis set forth in *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), which was abrogated by *Escobar*. *See Kirk*, 601 F.3d at 113. *Kirk* is therefore no longer good law and *Bishop* properly overruled *Mikes* and its progeny based on *Escobar*. *See Bishop*, 870 F.3d at 107 (overruling *Mikes* because "a panel of this Court may overrule a precedent when 'an intervening Supreme Court decision [(here, *Escobar*)] casts doubt on the prior ruling").

'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint." *Id.* (quoting *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006)). For a document to be considered integral to the complaint, the plaintiff must "rel[y] on the terms and effect of a document in drafting the complaint . . . mere notice or possession is not enough." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). And "even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document," and it must be clear that "there exist no material disputed issues of fact regarding the relevance of the document." *DiFolco*, 622 F.3d at 111 (quoting *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006)).

Where a district court considers material outside of the pleadings that is not attached to the complaint, incorporated by reference, or integral to the complaint, the district court, to decide the issue on the merits, must convert the motion into one for summary judgment. *See Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) ("'[W]hen matters outside the pleadings are presented in response to a 12(b)(6) motion,' a district court must either 'exclude the additional material and decide the motion on the complaint alone' or 'convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material.'" (quoting *Fonte v. Bd. of Managers of Cont'l Towers Condo.*, 848 F.2d 24, 25 (2d Cir. 1988)); *see also* Fed. R. Civ. P. 12(d). This requirement "deters trial courts from engaging in factfinding when ruling on a motion to dismiss

and ensures that when a trial judge considers evidence [outside] the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it." *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006). A district court therefore "errs when it consider[s] affidavits and exhibits submitted by defendants, or relies on factual allegations contained in legal briefs or memoranda in ruling on a 12(b)(6) motion to dismiss." *Friedl*, 210 F.3d at 83-84 (internal quotation marks and citations omitted).

2. Application

Foreman argues that, in conducting its materiality analysis, the district court improperly relied on the following documents which were outside of the complaint: (1) a September 2014 audit report issued by the DCAA (the "September 2014 DCAA Report"), which reported on AECOM's labor billing practices to the Department of Defense; and (2) documents related to Work Order 6HN26S603914, including an Army memorandum. AECOM argues that the district court properly considered the September 2014 DCAA report because it was integral to the complaint, and that the work order-related documents were incorporated by reference because the complaint references and quotes from Work Order 6HN26S603914.

We turn first to the September 2014 DCAA Report, which the district court considered in assessing the materiality of the alleged labor billing violations of the MOSC-A Contract. *See United States ex rel. Foreman*,

454 F. Supp. 3d at 265. AECOM concedes, as it must, that this report was not referenced anywhere in the Complaint, but argues that it was nevertheless proper for the district court to consider because it was integral to the Complaint. It was, AECOM urges, integral to the "plaintiff's ability to pursue his cause of action," even though he omitted it from the Complaint. Appellees' Br. 38 (quotation marks omitted). According to AECOM, the report establishes that the government had knowledge of the alleged violations of the MOSC-A Contract underlying Foreman's labor billing claims. Because the government's knowledge of these alleged violations is critical to determining whether AECOM's allegedly false certifications were material to the government's payment decision (and whether Foreman's claims are therefore actionable), *see Escobar*, 136 S. Ct. at 2003, AECOM contends that the report is integral to the complaint. AECOM also points out that, throughout the Complaint, Foreman references DCAA audits, and argues that, "[g]iven the centrality of DCAA's labor billing audit process to Foreman's complaint," the September 2014 DCAA Report was integral to the Complaint. Appellees' Br. 39. AECOM emphasizes that Foreman had notice of the report because on December 21, 2018, and July 29, 2019, in the wake of the government's investigation into Foreman's claims (and prior to the filing of the Complaint), it produced the report to Foreman. We find these arguments unpersuasive.

As explained above, a document may be considered "integral" to the complaint in a narrow set of circumstances, where the plaintiff relies heavily on the document's terms

and effect in pleading his claims and there is no serious dispute as to the document's authenticity. *See DiFolco*, 622 F.3d at 111. "In most instances where this exception is recognized, the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint." *Glob. Network Commc'ns, Inc.*, 458 F.3d at 157. Accordingly, we have recognized the applicability of this exception where the documents consisted of emails that were part of a negotiation exchange that the plaintiff identified as the] basis for its good faith and fair dealing claim, *see L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011), or consisted of contracts referenced in the complaint which were essential to the claims, *see Chambers*, 282 F.3d at 153 n.4. In securities fraud cases, we have similarly found it appropriate to consider documents filed with the Securities and Exchange Commission ("SEC") when they form the basis for the allegations in the complaint. *See Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) ("When a complaint alleges, for example, that a document filed with the SEC failed to disclose certain facts, it is appropriate for the court, in considering a Rule 12(b)(6) motion, to examine the document to see whether or not those facts were disclosed.").

In contrast to other documents that we have found to be integral to a complaint, the September 2014 DCAA Report was not alluded to, and did not form the basis for, the allegations or claims in the Complaint. While AECOM

did produce the September 2014 DCAA Report to Foreman prior to the filing of the Complaint, the parties agreed that the amendments in the Complaint would be limited to jurisdiction and venue and Foreman did not rely on the report to support, or form the basis for, the allegations in the Complaint. The fact that the September 2014 DCAA Report demonstrates the government's knowledge of some of the alleged MOSC-A Contract violations underlying Foreman's claims (and therefore undermines the strength of Foreman's claims) does not render it integral to the Complaint. If all that is required to render a document integral to the complaint is that it be favorable to the defendant, possibly thwarting the plaintiff's claims, it would be difficult to imagine a document that could not be considered on a motion to dismiss pursuant to the integral-to-the-complaint exception.

Moreover, while the Complaint alleges generally that AECOM was subject to periodic audits by the DCAA and that AECOM sought to conceal its alleged violations of the MOSC-A Contract from DCAA personnel conducting the audits, these allegations do not render the audit process, in and of itself, integral to the Complaint such that any document related to the DCAA audit process is integral. If we were to accept AECOM's argument that these general allegations rendered the audit process (and every document relating to it) integral to the Complaint, again, the exception would swallow the rule. AECOM's approach is inconsistent with the law and our directive that the conversion-to-summary-judgment requirement be "strictly enforced whenever a district court considers extra-pleading material in ruling on a motion to dismiss."

Chambers, 282 F.3d at 154 (internal quotation marks omitted). We therefore conclude that the district court erred in considering the September 2014 DCAA Report. *Cf. Strock*, 982 F.3d at 63 ("[T]he complaint does not rely on the GAO report at all, so it is not 'integral.'").

We next turn to the documents related to Work Order 6HN26S603914, which the district court relied upon in its consideration of the materiality of the alleged property tracking violations of the MOSC-A Contract. *See United States ex rel. Foreman*, 454 F. Supp. 3d at 266. The district court could consider Work Order 6HN26S603914 itself because paragraph 218 of the Complaint explicitly references and quotes from it to support Foreman's property allegations. But the district court went beyond the work order to consider various documents related to it that AECOM submitted as Exhibit 7 in connection with its motion to dismiss. Exhibit 7 includes (1) two documents entitled] "Maintenance Request," which reference Work Order 6HN26S603914; (2) an Army memorandum, which similarly discusses Work Order 6HN26S603914 and the fact that it was a parts-only order; (3) a document entitled "Equipment Inspection and Maintenance Worksheet," which also references Work Order 6HN26S603914; (4) two Work Order Detail documents for Work Order 6HN26S603914; and (5) a document entitled "Workload Accounting Daily Status Sheet," which also mentions that Work Order 6HN26S603914 was a parts-only work order. A.643-51. The Army memorandum regarding Work Order 6HN26S603914 is clearly distinct from the work order and was not incorporated by reference into the Complaint simply because it references Work Order 6HN26S603914.

And it is unclear what the other documents are or whether all or one of those documents reflect a true and correct copy of Work Order 6HN26S603914. Indeed, in connection with its motion to dismiss, AECOM filed an affirmation describing the documents in Exhibit 7 as "work order documents that *appear to relate to* 'WO 6HN26S603914,'" A.515 ¶ 8 (emphasis added), raising questions as to the authenticity and status of these documents. In light of possible disputes as to the answers to these questions, it was error for the district court to consider the work order-related documents in resolving AECOM's motion to dismiss. *See Faulkner*, 463 F.3d at 134 ("[E]ven if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document.").

For the foregoing reasons, the district court erred in relying on the September 2014 DCAA Report and the documents related to Work Order 6HN26S603914 without first converting the motion to dismiss into a motion for summary judgment.

C. Materiality Analysis

As noted, to be actionable under the FCA, "a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act." *Escobar*, 136 S. Ct. at 2002. A plaintiff must therefore plead sufficient facts to plausibly allege materiality. *See id.* at 2004 n.6. Materiality must also "be pleaded with particularity

under Rule 9(b)." *Grabcheski v. Am. Int'l Grp., Inc.*, 687 F. App'x 84, 87 (2d Cir. 2017) (summary order). The materiality standard "is demanding," inasmuch as it serves to protect the FCA from being transformed into "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Escobar*, 136 S. Ct. at 2003.

The FCA defines materiality 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). In assessing materiality, we "'look[] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation' . . . rather than superficial designations." *Strock*, 982 F.3d at 59 (quoting *Escobar*, 136 S. Ct. at 2002). A misrepresentation therefore "cannot be deemed material *merely* because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." *Escobar*, 136 S. Ct. at 2003 (emphasis added). "Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." *Id.* In addition, materiality "cannot be found where noncompliance is minor or insubstantial." *Id.* Instead, when evaluating materiality,

> the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government

> consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 2003-04 (footnote omitted). Accordingly, under *Escobar*, relevant factors in evaluating materiality include: (1) whether the government expressly designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment; (2) the government's response to noncompliance with the relevant contractual, statutory, or regulatory provision; and (3) whether the defendants' alleged noncompliance was "minor or insubstantial." *Id.* at 2003-04; *Strock*, 982 F.3d at 59-65 (analyzing materiality under these three "*Escobar* factors"). "No one factor is dispositive, and our inquiry is holistic." *United States ex rel Lemon v. Nurses To Go, Inc.*, 924 F.3d 155, 161 (5th Cir. 2019); *see also Strock*, 982 F.3d at 59-65.

1. Express Condition of Payment

"The first factor that *Escobar* identifies as relevant to materiality is whether the government 'expressly identif[ied] a provision as a condition of payment.'" *Strock*, 982 F.3d at 62 (quoting *Escobar*, 136 S. Ct. at 2003). Foreman argues that this factor weighs in favor of materiality because the MOSC-A Contract "incorporates by reference, and requires compliance with, the Performance Work Statements . . . and numerous Federal Acquisition Regulations . . . violated by AECOM." Appellant's Reply Br. 3. And FAR 52.216-7 specifies that final payment by the government was expressly conditioned "upon the Contractor's compliance with all terms of this contract." *Id.*; 48 C.F.R. § 52.216-7(h)(1) ("Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (d)(5) of this clause, and upon the Contractor's compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid."). AECOM counters that this factor weighs against a finding of materiality because Foreman fails to identify any provision that specifically identifies any of the contractual or regulatory requirements that AECOM allegedly violated as an express condition of payment. AECOM further argues that interpreting FAR 52.216-7's general statement that the government's final payment is contingent on compliance with all the terms of the MOSC-A Contract (which incorporates by reference all of the Performance Work Statements ("PWS") and FAR) is fundamentally flawed because, under that logic, "every single PWS, and thousands of FAR provisions

would *each* constitute an express condition of payment and thus satisfy *Escobar*'s first factor." Appellees' Br. 25 (emphasis in original) (internal quotation marks omitted).

We think that AECOM has the better of the argument and that this factor, at most, weighs neutrally in the materiality analysis. As AECOM points out, there are no] provisions in the contract or in the federal regulations specifically designating any of the contractual or regulatory requirements that Foreman alleges AECOM violated as an express condition of payment. Instead, there is only a blanket statement in FAR 52.216-7 that final payment is contingent on a contractor's compliance with "all terms" of the contract, which Foreman alleges includes all the PWS and FAR obligations because those were incorporated by reference into the MOSC-A Contract.

Although the Supreme Court in *Escobar* indicated that the government's decision to expressly identify a provision as a condition of payment is relevant, it emphasized that this factor is not "automatically dispositive." *Escobar*, 136 S. Ct. at 2003. The *Escobar* Court also noted that if the government were to "designat[e] every legal requirement an express condition of payment," it would make it difficult for "would-be defendants [to] anticipate and prioritize compliance obligations" because "billing parties are often subject to thousands of complex statutory and regulatory provisions." *Id.* at 2002. While the Court did not suggest that such a designation would necessarily weigh against a finding of materiality, its commentary on the subject suggests that this factor would likely be entitled to less weight where, as here, the government designates every

contractual and regulatory requirement as a condition of payment. Indeed, where the government designates every regulatory and contractual requirement — as opposed to a select few — as conditions of payment, a reasonable person has less reason to know whether a violation of such a requirement will actually be treated as a condition of payment, which would seem to weigh against materiality. *See Escobar*, 136 S. Ct. at 2002-03.

For similar reasons, Foreman's reliance on government manuals and guidance, as well as internal AECOM documents describing the MHU rate, inventory management, and labor billing practices as "critical metrics" or otherwise important, does not weigh heavily in favor of a finding of materiality. For example, Foreman points out that the government designated the MHU rate requirement as well as the "importance of inventory controls and accuracy" as "critical metrics," A.394 ¶ 169, A.410 ¶ 206, and that government manuals and AECOM internal documents emphasized that timekeeping procedures and "accurate recording" of labor were of "utmost concern" and "significant," A.347-48 ¶ 64. Such pronouncements can, under certain circumstances, support an inference that a given contractual or regulatory requirement is material to the government's payment decision. *See United States v. Brookdale Senior Living Cmtys., Inc.*, 892 F.3d 822, 836 n.9 (6th Cir. 2018). However, generic and routine appeals to the importance of a multitude of regulatory requirements or broad goals, such as accurate recordkeeping, do not put a contractor on notice of the importance of a given requirement to the government's payment decision, particularly where,

as here, the government has not expressly designated compliance with that requirement as a condition of payment.

We therefore find that this factor weighs neutrally or has, at most, only limited weight in the analysis of Foreman's materiality pleading.

2. The Government's Response

The second materiality factor "concerns the government's response to noncompliance with the relevant contractual, statutory, or regulatory provision." *Strock*, 982 F.3d at 62. "*Escobar* directs examination of the government's reaction to noncompliance both 'in the mine run of cases,' as well as in the 'particular' case at issue." *Id.* (quoting *Escobar*, 136 S. Ct. at 2003).

Turning first to the government's response to similar noncompliance in other cases, Foreman points out that the Complaint alleges that the government initiated civil and criminal enforcement actions against Northrop Grumman Systems Corporation ("NGSC") for engaging in timesheet fraud similar to the kind allegedly perpetrated by AECOM. The Complaint alleges that NGSC agreed to pay $27.45 million to settle civil allegations that it violated the FCA by overstating the number of hours its employees worked in connection with contracts with the United States Air Force, and agreed to forfeit $4.2 million in a separate agreement to resolve a criminal investigation into fraudulent billing on another government contract. NGSC employees charged 12 to 13.5 hours per day,

seven days a week, despite the fact that employees did not work those hours and, in fact, frequently engaged in leisure activities. As a result, NGSC employees were paid thousands of dollars that they did not earn and NGSC overbilled the United States by more than $5 million at one site alone.

AECOM contends that these allegations have little relevance to the materiality analysis here because the federal government initiated an enforcement action against NGSC based on a very different set of facts. But accepting the allegations in the Complaint as true and drawing all inferences in Foreman's favor as we must, the facts underlying the action against NGSC appear reasonably similar to the labor billing allegations in the Complaint. Similar to NGSC, Foreman alleges that AECOM had a policy of billing 11.5 hours per day, 154 hours per each two-week pay period, regardless of actual hours worked, and that an internal AECOM memo estimated that AECOM is liable for $144,872,000 related to its timesheet fraud.

As we have explained, however, "*Escobar* indirectly indicates that allegations of post hoc prosecutions or other enforcement actions do not carry the same probative weight as allegations of nonpayment":

> *Escobar* emphasized that the materiality standard is demanding, and that the government may not manufacture materiality by alleging it had an option not to pay after the fact. Allowing the government to rely on post hoc enforcement

> efforts to satisfy the materiality requirement would allow the government to engage in just such materiality manufacturing, and at relatively low cost. Unlike mid-contract refusals to pay, engaging in post hoc enforcement does not require the government to risk delay of a project. Instead, the government needs risk only the cost of litigation, a risk that is mitigated by an opportunity to recoup the cost of a completed project. Thus, while purely post hoc enforcement actions can carry some weight in a materiality analysis, they are less probative than allegations that the government actually refuses to make payments once it determines that the [regulatory or contractual] condition has been violated.

Strock, 982 F.3d at 63-64 (internal quotation marks and citations omitted). Accordingly, Foreman's allegations that the government initiated enforcement actions against a different contractor based on labor billing allegations similar to those in the Complaint are "at best only neutral with regard to a finding of materiality, particularly in light of the complaint's failure to allege even a single instance in which the government actually refused to pay a claim or terminated an existing contract] based on a false [labor billing] representation." *Id.* at 64.

With respect to the government's response to the violations alleged here, "though not dispositive, continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the

relator in establishing materiality." *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 663 (5th Cir. 2017). As noted, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Escobar*, 136 S. Ct. at 2003. Foreman concedes that the government has repeatedly renewed and extended the MOSC-A, with the majority of amendments "directed to increased funding," A.325 ¶ 11, but argues that this has limited relevance to the materiality analysis because the "government did not have actual knowledge of the full scope of AECOM's alleged conduct," Appellant's Br. 43.

With respect to Foreman's allegations of MHU fraud, the district court relied on the allegations in the Complaint, as well as a July 2012 DCMA Corrective Action Plan and an October 2012 DCMA Corrective Action Request (both of which were incorporated by reference into the complaint), to conclude that the alleged MHU fraud was not material to the government's payment decision. *See United States ex rel. Foreman*, 454 F. Supp. 3d at 265. We agree with the district court.

The allegations in the Complaint, coupled with the reports incorporated by reference, demonstrate that the government had actual knowledge of AECOM's MHU rate violations of the MOSC-A Contract. The July 2012 DCMA Corrective Action Plan, for instance, highlighted a trend of deficiencies related to AECOM's failure to properly enter labor hours data into the SAMS-E system and noted that AECOM had failed to maintain "[a]ccurate Man Hour utilization . . . in SAMS theater

wide." A.395 ¶ 173. And the October 2012 DCMA Corrective Action Request documented AECOM's MHU rate for the preceding month as 26 percent, which it described as "well under the required Utilization Rate of 85%." A.396 ¶ 174. The Complaint alleges that these corrective action reports resulted in open and ongoing discussions between AECOM and the Army about these concerns and how to address them. The Complaint also references and quotes from a March 2010 report from the Department of Defense's Office of Inspector General (also incorporated by reference into the complaint), which reports that AECOM's failure to report reliable MHU rate data "resulted in DOD incurring costs for services that were not required." A.395 ¶ 171. The Complaint further alleges that in response to these findings, the Army prospectively mandated lower staffing levels where appropriate. Despite its knowledge of, and investigation into, AECOM's violations of the MHU rate, the government still extended the MOSC-A Contract. Moreover, the government did not disallow any charged costs; instead, it simply reduced staffing levels. This provides powerful evidence that any misrepresentations AECOM made regarding its compliance with the MHU rate were not material to the government's payment decision. *See, e.g.*, *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034, 427 U.S. App. D.C. 387 (D.C. Cir. 2017) ("[W]e have the benefit of hindsight and should not ignore what actually occurred: the DCAA investigated McBride's allegations and did not disallow any charged costs. . . . This is very strong evidence that the requirements allegedly violated by the maintenance of inflated] headcounts are not material." (internal quotation marks omitted)).

With respect to the allegations of AECOM's property tracking violations of the MOSC-A Contract, Foreman similarly references and quotes government investigations and audits as evidence in support of his claims. The Complaint alleges that "[i]n late 2011 and [the] first quarter of 2012," a DCMA property management system analysis concluded that "AC FIRST's system for control and accounting of Government Property at Bagram Airfield is INADEQUATE." A.430-31 ¶ 264. The analysis noted that AC First was considered "a high risk" and indicated that AECOM's failure to adequately account for government property "affect[ed] the ability of [Department of Defense] officials to rely upon information" produced by the property tracking systems. *Id.* The analysis further stated that "failure to record and manage inventory 'can lead to questions of reasonableness of consumption and verification that property was consumed only in the performance of the contract.'" A.431 ¶ 265. The analysis observed that AECOM "was 'unable to locate over half of the records in the sample.'" *Id.* The Complaint also alleges that many Army corrective action requests "discuss these property concerns over at least a three year period." A.431 ¶ 267. In addition, the Complaint alleges that the Department of Defense's Inspector General Report documented "issues with tracking and accounting for property" in a 2015 performance audit of AECOM. A.409 ¶ 205 n.14. Indeed, the 2015 Inspector General Report — which is incorporated by reference into the Complaint — found that AC First "did not follow applicable Army regulations to initiate property loss investigations," "could not account for more than 400 pieces of nonrolling stock equipment" in February 2014, and did not adequately

maintain property accountability. A.519. Yet, despite being aware of AECOM's violations of its obligations to properly account for and track government property, the government continued to extend and increase funding for the MOSC-A Contract. This provides further support for the conclusion that AECOM's property violations were not material to the government's payment decision.

Notwithstanding this evidence, Foreman argues that the government-response factor is not entitled to much weight, because there were "plausible explanations for why the government did not stop payment or terminate the MOSC-A [Contract], including the fact that . . . the MOSC-A was necessary to support the war effort in Afghanistan." Appellant's Br. 22. In support of this argument, Foreman points to two recent cases from our sister Circuits, *United States ex rel. Prose v. Molina Healthcare of Illinois, Inc.*, 10 F.4th 765 (7th Cir. 2021) and *United States ex rel. Cimino v. International Business Machines Corp.*, 3 F.4th 412 (D.C. Cir. 2021), but these cases are distinguishable.

Notably, in both *Prose* and *Cimino*, the only evidence of the government's alleged knowledge of the contractual violations at issue stemmed from the relator's filing of the complaint. *See United States ex rel. Prose*, 10 F.4th at 777 ("Molina emphasized that the government not only continued paying it after Prose brought this case, but it also renewed its contract with Molina twice during that time."); *United States ex rel. Cimino*, 3 F.4th at 417 (noting that the IRS extended the license agreement in 2015, after Cimino filed his complaint against IBM). At

the motion-to-dismiss stage, "[f]or pleading purposes," the *Prose* court found the defendants' "barebones assertion that the government was aware of all material facts . . . not enough to sweep away the elaborate facts that [the relators] furnished."] *United States ex rel. Prose*, 10 F.4th at 777; *see also United States ex rel. Cimino*, 3 F.4th at 423.

Indeed, it makes sense not to place much weight on the government's response in the wake of such litigation because, prior to discovery and a formal court ruling, the relator's allegations are just that — allegations, and the government may not necessarily have knowledge of all the material facts. At the pleadings stage, such generalized assertions that the government is aware of the relator's lawsuit but nevertheless continued payment under the contract will not suffice to overcome a relator's detailed allegations of materiality. *See United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 112 (1st Cir. 2016) ("[M]ere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance.").

But here AECOM does not simply rest on bald assertions that the government continued to extend and pay claims under the MOSC-A Contract after Foreman brought suit. Relying on reports incorporated by reference into the complaint, AECOM points to documentary evidence demonstrating that the government had actual knowledge of AECOM's failure to meet the MHU rate requirement and to properly track government property, and yet nevertheless not only continued to extend and pay claims under the MOSC-A Contract, but also never

demanded repayment, disallowed any charged costs, or penalized AECOM. And the MOSC-A Contract is an option contract which requires the Army to evaluate whether to extend the contract based on AECOM's performance; notwithstanding its knowledge of AECOM's violations of the MHU rate and property tracking requirements, the Army repeatedly renewed and increased funding for the MOSC-A Contract. This, as mentioned, is strong evidence that these contractual requirements were not material. *See United States ex rel. McBride*, 848 F.3d at 1034 (concluding that the government's response provided strong evidence of lack of materiality where the DCAA investigated the relator's allegations "and did not disallow any charged costs").

There may be circumstances where the government's payment of a claim or failure to terminate a contract despite knowledge of certain alleged contractual violations will not be particularly probative of lack of materiality. *See, e.g.*, *United States ex rel. Prose*, 10 F.4th at 777 ("Many things could explain the government's continued contracting with Molina. It may have expected to purge the underserved NF enrollees from the books; it may have needed time to work out a way not to prejudice Medicaid recipients who had nothing to do with this problem."); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003) ("[W]e can foresee instances in which a government entity might choose to continue funding the contract despite earlier wrongdoing by the contractor. For example, the contract might be so advantageous to the government that the particular governmental entity would rather not contest

the false statement, even if it became aware of the false statement before the subcontractor began its work."). But the plaintiff must plausibly plead facts to support such possible alternative explanations in the complaint (and at a later stage of litigation, must support these allegations with evidence). *See United States ex rel. Mei Ling v. City of Los Angeles*, 389 F. Supp. 3d 744, 761 (C.D. Cal. 2019) ("Because continued payments are relevant only to the extent that they are probative of immateriality, the Government may still maintain an FCA claim if it can muster allegations, taken as true, that explain why continued payments are not probative of immateriality in the circumstances presented by a specific case."). Foreman failed to do so here.

Finally, with respect to Foreman's labor billing allegations, the district court relied upon the September 2014 DCAA Report to conclude that the government had actual knowledge of AECOM's labor billing violations. *See United States ex rel. Foreman*, 454 F. Supp. 3d at 265. But, as discussed above, we conclude that it was error for the district court to consider the September 2014 DCAA Report in connection with AECOM's motion to dismiss. We therefore cannot conclude, for the purpose of determining whether Foreman sufficiently pled materiality, that the government had actual knowledge of AECOM's alleged labor billing violations and continued to pay AECOM's claims notwithstanding them. Rather, "the parties dispute exactly what the government knew and when, calling into question its 'actual knowledge.'" *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 906-07 (9th Cir. 2017). Indeed, Foreman alleges

that AECOM: required employees to bill 11.5 hours per day, 154 hours per each two-week period, regardless of actual hours worked; estimated that it might be liable to the government for more than $144 million resulting from improper labor billing and timesheet violations; failed to notify the government of these timesheet violations; and engaged in a cover up to conceal these violations from the government. In the absence of any evidence suggesting that the government regularly pays this type of claim despite actual knowledge that these requirements were violated, Foreman "allege[s] 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." *United States ex rel. Campie*, 862 F.3d at 907 (internal citation omitted).

3. The Substantiality Factor

In evaluating the final *Escobar* factor, "we examine whether the defendants' alleged noncompliance was substantial." *Strock*, 982 F.3d at 65. Materiality "cannot be found where noncompliance is minor or insubstantial," *Escobar*, 136 S. Ct. at 2003, because material falsehoods are those that go to "the very essence of the bargain." *Id.* at 2003 n.5. This factor looks at the "contracts' purpose" and whether "the defendants' noncompliance deprived the government of [the] intended benefits" of the contract. *Strock*, 982 F.3d at 65 (concluding that contractor's misrepresentation that it was owned by a service-disabled veteran was neither minor nor insubstantial because it went to the "heart" of the purpose of the statutory and regulatory regime — i.e., increasing contracting

opportunities for small businesses owned by veterans with service-related disabilities). Set against the backdrop of complex and voluminous regulatory and contractual requirements, "broad appeals" to the importance of a given regulatory requirement "cannot clear the rigorous materiality hurdle." *United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533, 542 (10th Cir. 2020). We instead look beyond "superficial designations," *Strock*, 982 F.3d at 59, to "whether [the relator] has demonstrated sufficiently widespread deficiencies" in the contractor's performance or identified misrepresentations that go to the heart of the bargain, such that any regulatory, statutory, or contractual violations "would likely affect the Government's payment decision." *United States ex rel. Janssen*, 949 F.3d at 542; *see Strock*, 982 F.3d at 59, 65. Absent such a showing, it cannot be said that any such violations truly go the essence of the bargain.

Here, the purpose of the MOSC-A Contract was to "provide[] maintenance and management support services for the Army," which "included tactical vehicle and equipment maintenance, facilities management and maintenance, supply and inventory management, and transportation services." A.337-38 ¶ 43. Foreman alleges that because of the mission critical nature of these services, it was the expectation of the parties that AECOM "w[ould] strive to maintain (and improve) a high level of responsibility, management, and quality of performance throughout the life of this task order." A.338 ¶ 44. He contends that AECOM's labor billing, MHU rate, and property violations went to the essence of the bargain because AECOM was unable to maintain a high level of responsibility, management, and quality of performance.

It cannot be said, however, that AECOM's violations go to the heart of the bargain in the same way as the alleged misrepresentations in *Strock* did. AECOM's timesheet violations, failure to properly input labor hours and MHU data into the requisite tracking systems, and failure to properly log and track government property — in the abstract — do not necessarily undermine the MOSC-A Contract's core purpose of providing management and support services for the army. We must therefore inquire as to whether these alleged violations are so pervasive that they would affect the government's payment decision.

With respect to the labor billing and property tracking allegations, we conclude that the substantiality factor weighs modestly in favor of a finding of materiality. Foreman alleges that the labor billing and timesheet fraud led to an estimated $140 million in overpayments and liability. In addition, Foreman alleges that AECOM noted in an internal corrective action report that it could face "significant liability" due to its failure to properly track property and credit the government. And Foreman emphasizes that an AECOM supervisor discovered $15 to 16 million in "improper or undocumented turned in recoverables from one system query only." A.428 ¶ 253. The significant financial costs to the government of the alleged labor billing and government property violations tend to weigh in favor of materiality because they suggest that the alleged violations might affect the government's payment decision.

But Foreman fails to point to anything suggesting that AECOM's noncompliance with the MHU rate similarly resulted in significant financial costs to the

government. Based on the allegations in the Complaint, it seems likely that AECOM's MHU rate violations led to some inefficiencies and government waste. But it is not apparent that they affected AECOM's ability to provide maintenance and management support services to the Army or deprived the Army of its expected benefits under the contract. This weighs against a finding of materiality as to his claims premised on AECOM's failure to comply with the MHU rate.

4. Conclusion

In sum, weighing all these factors, we conclude that the district court erred in dismissing Foreman's § 3729(a)(1)(A) claims premised on AECOM's improper labor billing violations. As noted, it was improper for the district court to consider the September 2014 DCAA Report at the motion-to-dismiss stage. There is thus no evidence in the record demonstrating that the government had actual knowledge of AECOM's labor billing violations and nevertheless extended the MOSC-A Contract. Rather, viewing the allegations in the light most favorable to Foreman, the complaint alleges more than the mere possibility that the government would be entitled to refuse payment if it were aware of the labor billing violations. Taken together with the substantiality factor, which also weighs in favor of materiality as to the labor billing allegations, Foreman has sufficiently pled materiality with respect to his claims premised on AECOM's labor billing practices.

We also conclude that the district court correctly dismissed Foreman's § 3729(a)(1)(A) claims premised on the MHU rate and property tracking violations. The allegations in the complaint, coupled with the reports incorporated by reference into the complaint, demonstrate that the government had actual knowledge of AECOM's non-compliance with the MHU rate and failure to properly track government property. Notwithstanding this, the government repeatedly paid AECOM's claims, extended the MOSC-A Contract, and increased funding under the MOSC-A Contract. This provides ample evidence that the MHU rate and tracking of government property requirements were not plausibly material to the government's payment decision. Such evidence proves decisive, as the condition of payment and substantiality factors are, at best, marginally probative. The district court therefore correctly dismissed these claims.[9]

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9. Foreman separately objects to the district court's dismissal of his § 3729(a)(1)(A) fraudulent inducement claim, arguing that the district court erred in dismissing it alongside his other § 3729(a)(1)(A) claims because it is "supported by different facts than his false certification claims." Appellant's Br. 62. Foreman argues that AECOM induced the Army to enter into and extend the MOSC-A Contract by making "misrepresentations to the government regarding its intention and ability to provide internal oversight over its operations, conceal[ing] its fraud from the government, and fraudulently induc[ing] each modification, extension, and award of the MOSC-A [Contract] by stating that it had complied with the requirements of the contract." Appellant's Br. 62-63. According to Foreman, AECOM's misrepresentations about its ability to provide oversight over its operations by efficiently using personnel and equipment and utilizing the required labor and property tracking systems, as well as its assurances to the

III. False Records or Statements

31 U.S.C. § 3729(a)(1)(B) imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." For the same reasons set forth above in connection with Foreman's § 3729(a)(1)(A) claims, we conclude that Foreman has failed to adequately plead materiality with respect to his § 3729(a)(1)(B) claims premised on the MHU rate and government property tracking allegations. The district court therefore correctly dismissed those claims.

With respect to Foreman's § 3729(a)(1)(B) claims premised on the labor billing allegations, however, Foreman has adequately pled materiality at this stage of the case. The district court therefore erred in dismissing Foreman's § 3729(a)(1)(B) claim premised on the labor billing allegations.

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government that it had complied with the MOSC-A Contract, "are distinct from AECOM's false claims of actual compliance with the specific contractual and legal requirements of the MOSC-A" Contract. Appellant's Br. 63-64. We fail to see how. At bottom, Foreman's fraudulent inducement claim and his other § 3729(a)(1)(A) claims rest on the same alleged violations of the MOSC-A Contract. Foreman's fraudulent inducement claim thus rises and falls with his other § 3729(a)(1)(A) claims. However, to the extent the allegations underpinning his fraudulent inducement claim are somehow distinct from his other § 3729(a)(1)(A) claims, these conclusory allegations do not suffice to establish materiality with the required particularity.

IV. Reverse False Claims

"Subsection (a)(1)(G) is referred to as the reverse false claims provision because it covers claims of money *owed* to the government, rather than payments *made* by the government." *United States ex rel. Kester v. Novartis Pharms. Corp.*, 43 F. Supp. 3d 332, 368 (S.D.N.Y. 2014) (emphasis in original) (internal quotation marks omitted). Section 3729(a)(1)(G) imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). Where a complaint "makes no mention of any financial obligation that the [defendants] owed to the government," and "does not specifically reference any false records or statements used to decrease such an obligation," a court should dismiss the reverse false claim. *Wood ex rel. United States v. Applied Rsch. Assocs., Inc.*, 328 F. App'x 744, 748 (2d Cir. 2009) (summary order); *see also United States ex rel. Hussain v. CDM Smith, Inc.*, No. 14 Civ. 9107 (JPO), 2017 U.S. Dist. LEXIS 159538, 2017 WL 4326523, at *9 (S.D.N.Y. Sept. 27, 2017) (dismissing reverse false claim, because the plaintiff "d[id] not identify any existing financial obligation [that CDM] owed to the Government, let alone any specific false record or statement that [CDM] made to avoid such a purported obligation" (internal quotation marks omitted)). Rule 9(b)'s heightened pleading standard applies to reverse false claims. *United States ex rel. Gelbman v. City of New York*, 790 F. App'x 244, 249 (2d Cir. 2019) (summary order).

Foreman contends that he adequately alleged reverse false claims because the Complaint "identifies numerous separate obligations requiring AECOM to return excess money and property to the government." Appellant's Br. 68. Foreman points to allegations in the Complaint that AECOM had received over $144 million in overpayments from the government related to its alleged timesheet fraud and labor billing for "which there was an obligation to repay and/or remit such funds in various applicable regulatory and contractual provisions in force between AECOM and the Army." A.351 ¶ 76. Foreman's reverse false claims thus boil down to the assertion that (1) the reverse false claims provision provides for liability on the part of those who avoid an "obligation" to pay the government, which includes retention of any overpayment; (2) AECOM received overpayments by virtue of its false certifications; and (3) AECOM violated the reverse false claims provision by failing to return those overpayments, even though it was required to do so by the MOSC-A Contract and applicable regulations. His reverse false claims are therefore duplicative of his false claims under § 3729(a)(1)(A) and 3729(a)(1)(B).

Although we have yet to address this issue, several district courts, some of them within this Circuit, have concluded that a reverse false claim cannot turn on the same conduct underlying a traditional false claim. *See, e.g.*, *United States ex rel. Gelbman v. City of New York*, No. 14 Civ. 771 (VSB), 2018 U.S. Dist. LEXIS 169435, 2018 WL 4761575, at *8 (S.D.N.Y. Sept. 30, 2018) ("Relator's reverse false claim allegations — which essentially boil down to various providers allegedly receiving payment

on false claims and thus retaining Government funds to which they were not entitled — are not an adequate basis on which to allege a reverse false claim."), *aff'd*, 790 F. App'x 244 (2d Cir. 2019) (summary order);] *United States v. Mount Sinai Hosp.*, 256 F. Supp. 3d 443, 458 (S.D.N.Y. 2017) ("The same allegations [that] state a claim under sections 3729(a)(1) and (2) [now §§ 3729(a)(1)(A) and (B)] . . . cannot also form the basis for a claim under subsection (a)(7) [now § 3729(a)(1)(G)]." (alterations in original) (internal quotation marks omitted)); *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 313, 339 (S.D.N.Y. 2004) ("Because Taylor's allegations state a claim under sections 3729(a)(1) and (2), they cannot also form the basis for a claim under subsection (a)(7).").

Concluding otherwise would mean that "any time a defendant violated sub-sections (a)(1)(A) or (B) and received payment, the defendant would also necessarily violate sub-section (G) if it failed to repay to the Government the fraudulently-obtained payments." *Mount Sinai Hosp.*, 256 F. Supp. 3d at 458 (quotation marks omitted); *see also Pencheng Si v. Laogai Rsch. Found.*, 71 F. Supp. 3d 73, 97 (D.D.C. 2014) ("Relator attempts to argue that an obligation arose out of Defendants' concealment of their allegedly fraudulent activity. . . . But by this logic, just about *any* traditional false statement or presentment action would give rise to a reverse false claim action; after all, presumably any false statement actionable under § 3729(a)(1)(A) or 3729(a)(1)(B) could theoretically trigger an obligation to repay the fraudulently obtained money." (emphasis in original) (internal citation omitted)); *United States ex rel. Thomas v. Siemens AG*, 708 F. Supp. 2d

505, 514 (E.D. Pa. 2010) ("Congress' purpose in enacting subsection (a)(7) was to ensure that one who makes a false statement in order to avoid paying money owed the government 'would be equally liable under the Act as if he had submitted a false claim to receive money.' Its purpose was not to provide a redundant basis to state a false statement claim under subsection (a)(2)." (internal citation omitted)). Accordingly, "[t]his type of redundant false claim is not actionable under subsection (a)(1)(G)." *United States ex rel. Davern v. Hoovestol, Inc.*, No. 11-CV-6630 (CJS), 2015 U.S. Dist. LEXIS 151589, 2015 WL 6872427, at *9 (W.D.N.Y. Nov. 9, 2015).

Because Foreman's reverse false claims mirror his false claims under § 3729(a)(1)(A) and 3729(a)(1)(B), he fails to state plausible claims.

V. Conversion Claim

The FCA's conversion provision "imposes civil liability on anyone who 'has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property.'" *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 438 (6th Cir. 2016) (quoting 31 U.S.C. § 3729(a)(1)(D)). In 2009, Congress amended the FCA's conversion provision to eliminate its fraud requirement, replacing the "intent to defraud" requirement with a knowledge requirement. *See United States ex rel. Harper*, 842 F.3d at 438-39. "Knowingly" means that a person (1) "has actual knowledge of the information; [(2)] acts in deliberate

ignorance of the truth or falsity of the information; or [(3)] acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). Section 3729(a)(1)(D) is intended to "allow[] the Government to recover losses that are incurred because of conversion of Government assets." S. Rep. 111-10, at 13 (2009).

The district court dismissed Foreman's conversion claim, reasoning that the allegations in the Complaint failed to "identify any specific excess or recoverable item or other property that defendants possessed but failed to deliver to the government."] *United States ex rel. Foreman*, 454 F. Supp. 3d at 268. Foreman contends that the district court erred because the allegations in the Complaint "mentioned specific work orders for property that AECOM did not return to the government." Appellant's Br. 66. AECOM counters that Foreman "cannot point to any allegation of a specific piece of property that [it] supposedly converted (let alone that [it] did so 'knowingly')." Appellees' Br. 55.

The Complaint alleges that AECOM utilized parts-only work orders to "bypass[] the property accounting and tracking systems required by the MOSC-A Contract." A.409-10 ¶¶ 204-06, A.412 ¶ 209. These parts-only work orders allegedly violated Performance Work Statements and FAR incorporated into the MOSC-A Contract, and "bypassed checks and balances built into the procurement system to avoid excessive ordering, and to make sure that the contractor was accountable to the Army . . . for the parts themselves." A.414 ¶ 216. Concerns about this practice surfaced in 2013, with inquiries being made to supervisors to determine whether there was some

exception in place allowing parts-only work orders. In an email dated December 14, 2013, for example, Joseph Cox — the Training and Development Supervisor of AC First — explained that parts-only work orders were "not authorized" and that "all parts must either be ordered through the supply process, or through offline transaction." A.412-13 ¶ 210. The Complaint further indicates that in January 2014, AECOM personnel instructed other employees that parts-only work orders "would not be appropriate." A.413 ¶ 212. The third complaint lists several specific parts-only work orders that were nevertheless placed by AECOM employees, thereby violating the Army's accountability standards. A.414-15 ¶¶ 217-18. Nowhere in the Complaint, though, does Foreman identify any specific piece of property obtained through those work orders that was not delivered to the government.

Instead, the Complaint alleges generally, and without specifying particular property, that:

- "AECOM was required to track and turn into the Army certain items that were removed from vehicles and other equipment, through a process known as 'recoverables.'" A.425 ¶ 240. According to Foreman, "[i]f the STAMIS systems were being used properly, items would be identified as recoverables in various ways." A.425 ¶ 242.

- AECOM failed to maintain adequate and complete records, and as a result, "on a wide-scale basis, the work order was not being properly created, closed

or audited, resulting in recoverable items not being returned or duplicates not being controlled." A.425-26 ¶ 243.

- An email from a supervisor explained — in connection with one work order — that nine parts were ordered when only four were needed, and that this was a systematic issue, "leading to some of the excess parts issues we have run across." A.421 ¶ 234.

- An internal corrective action report issued by AECOM stated, "Incorrect disposition has caused recoverable items to be left on AC FIRST SAMSIE database, and failure of proper credit to the USG [U.S. Government] and significant liability to AC FIRST." A.427 ¶ 252.

- In March 2015, an AECOM Logistics Information System — Maintenance ("LISMX") supervisor "detailed $15-16 million of improper or undocumented turned in recoverables from one system query only." A.428 ¶ 253, A.429 ¶ 260.

- AECOM allegedly instructed its employees to "purge recoverable items from the SAMSIE that can be removed without creating a system error." A.428 ¶ 255.

- Senior Management at AECOM held multiple meetings with leadership after the LISMX supervisor raised concerns about AECOM's

> tracking of recoverables, but were allegedly "unable to grasp the full scope [of the problem] due to their limited understanding of the SAMSIE system and operations" and failed to adequately address the LISMX supervisor's concerns regarding AECOM's incomplete recordkeeping processes. A.430 ¶ 262.

These allegations fail to state a plausible conversion claim under § 3729(a)(1)(D). First, as the district court pointed out, Foreman fails to identify "any specific excess or recoverable item or other property that [AECOM] possessed but failed to deliver to the government." *United States ex rel. Foreman*, 454 F. Supp. 3d at 268; *see also United States ex rel. Kasowitz Benson Torres LLP*, 929 F.3d at 728 (affirming dismissal of the plaintiff's conversion claim because the plaintiffs failed to adequately allege that the defendants possessed money or property to be used by the government). Rather, Foreman's allegations describe only general concerns with AECOM's recordkeeping practices, which may have led to inadequate tracking and return of recoverable items to the government.

Moreover, even if these generalized allegations regarding AECOM's failure to track and turn in recoverable items to the government were sufficient to establish that AECOM possessed, and yet failed to deliver, property to be used by the government, Foreman has not plausibly alleged that AECOM did so knowingly. The allegations in the complaint suggest instead that any failure to deliver government property resulted from widespread negligence rather than actual knowledge, deliberate ignorance, or reckless disregard. For example, the

Complaint alleges that AECOM supervisors specifically instructed employees not to utilize parts-only work orders and explained that all parts should be ordered "through the supply process, or through offline transaction." A.412-13 ¶¶ 210, 212. AECOM nevertheless struggled to track and return recoverables because certain employees failed to properly use the required tracking systems. These allegations appear to be indicative of widespread negligence and mismanagement rather than "knowingly" delivering, or causing to be delivered, to the government less than all of their property.

We therefore agree with the district court that Foreman failed to plausibly allege a conversion claim pursuant to § 3729(a)(1)(D).

VI. Public Disclosure Bar

AECOM argues, in the alternative, that even if the district court erred in dismissing any of Foreman's other claims for failure to state a claim, Foreman's claims premised on his labor billing, MHU rate, and property allegations separately fail under the public disclosure bar because these allegations were "contained in reports issued and otherwise disclosed by various Federal agencies."[10] Appellees' Br. 48. We disagree.

10. Foreman contends that it is improper for AECOM to raise this issue on appeal without separately cross-appealing. But "we are free to affirm a decision [dismissing a complaint] on any grounds supported in the record, even if it is not one on which the trial court relied." *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 207 (2d Cir. 2020) (alteration in original) (quoting *Thyroff*

Appendix A

The FCA's public disclosure bar reads:

> The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The public disclosure bar was included in the 1986 amendments to the FCA, which endeavored "to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992).

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v. Nationwide Mut. Ins. Co., 460 F.3d 400, 405 (2d Cir. 2006)). Foreman's argument therefore lacks merit.

The district court concluded that the relevant disclosures were not public because (1) the Department of Defense Inspector General report was the only document that was clearly publicly disclosed, and that report failed to disclose the material elements of the property-related fraud alleged in the Complaint; and (2) the other government documents and communications relied on by AECOM were not disclosed to anyone outside the government and were therefore not public. *United States ex rel. Foreman*, 454 F. Supp. 3d at 261-64. The district court therefore held that it could not conclude as a matter of law, at the motion-to-dismiss-stage, that the public disclosure bar applied. *Id.* at 264. AECOM does not contest the district court's conclusion that the Department of Defense Inspector General report, standing alone, did not sufficiently disclose the material elements of the property-related fraud. Rather, AECOM contends that the district court erred because the other disclosures at issue were public.

Although we have yet to address this issue, "nine courts of appeals have held that the [public disclosure] bar applies only where there has been a disclosure *outside* of the government." *United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 789 (S.D.N.Y. 2017) (emphasis in original) (collecting cases), *rev'd and remanded on other grounds*, 899 F.3d 163 (2d Cir. 2018); *see also United States v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 782 F.3d 260, 268 (6th Cir. 2015) ("[A]ll of the other circuits to [interpret the public disclosure bar] have held that the plain meaning of § 3730(e)(4) requires some affirmative act of disclosure to the public outside the government." (collecting cases));

United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 728 (1st Cir. 2007) ("[A] 'public disclosure' requires that there be some act of disclosure to the public outside of the government. The mere fact that the disclosures are contained in government files someplace, or even that the government is conducting an investigation behind the scenes, does not itself constitute public disclosure."). Regarding *qui tam* actions based only on disclosures of information to the government, the Sixth Circuit reasoned:

> [t]he plain meaning of § 3730(e)(4) "does not bar jurisdiction over *qui tam* actions based on disclosures of allegations or transactions to the government," but "only for actions based on qualifying disclosures made to the public." *Rost*, 507 F.3d at 728. If a disclosure to the government in an audit or investigation would be sufficient to trigger the bar, the term "public" would be superfluous. . . . The public-disclosure bar "clearly contemplates that the information be in the public domain in some capacity and the Government is not the equivalent of the public domain." *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004); *see also United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1518 (9th Cir. 1995) ("[I]nformation that was 'disclosed in private' has not been publicly disclosed.").

Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d at 268-69. We find this reasoning persuasive and agree that disclosures to government officials do not constitute public disclosures for purposes of the public disclosure bar.

Here, as the district court noted, there are no allegations in the Complaint, nor is there any evidence of which we are aware, that the key reports AECOM relies upon "were disclosed outside the government entities of the DCAA, DCMA, and Army." *United States ex rel. Foreman*, 454 F. Supp. 3d at 262. To the contrary, the October 2012 DCMA corrective action request discussing AECOM's low MHU rate is designated as "CONFIDENTIAL," and the September 2014 DCAA report which discloses AECOM's labor billing violations is labeled "FOR OFFICIAL USE ONLY," "CONFIDENTIAL — FOIA Exempt," and "Highly Confidential." A.514, A.551-52, A.615-16.

AECOM contends the public disclosure bar applies nevertheless because, in their view, the information in the reports became public as soon as the government released the reports to AECOM employees. AECOM points to "the fact that Foreman himself was actually able to access nearly all of these disclosures and incorporate them into his FCA complaint" as evidence that once the government released these reports to AECOM, they were accessible by innocent employees who were "strangers to the fraud." Appellees' Br. 50-52. To support its theory, AECOM relies on *John Doe Corp.*, but that case is distinguishable.

There, a former employee of John Doe Corp. contacted the Federal Bureau of Investigation about the company's fraudulent billing practices in connection with services that it performed for the military under various defense contracts. *Id.* at 319. The government subsequently initiated an investigation. *Id.* Several months later, the investigators executed a search of John Doe Corp.'s premises. *Id.* During the search, the agents questioned

John Doe Corp.'s employees and notified them that they were investigating allegations that the company was fraudulently overcharging the government under its defense contracts. *Id.* at 319-20. Many of the employees questioned had no knowledge of John Doe Corp.'s fraudulent billing practices. *Id.* at 320. The government's investigation ultimately targeted a particular employee, Ed Meyerson, who allegedly controlled the falsified records. *Id.* The government eventually granted Meyerson use immunity in exchange for his testimony, and Meyerson admitted that he had personally falsified John Doe Corp.'s records to overcharge the government. *Id.* During Meyerson's testimony, his attorney learned that the government had not yet instituted an FCA suit against John Doe Corp. *Id.* After consulting with his attorney, Meyerson signed a document waiving any interest he might have in the *qui tam* action and waiving the attorney-client privilege. *Id.* Meyerson's attorney then filed suit against John Doe Corp. *Id.* While the complaint was under seal, the government moved as *amicus curiae* to dismiss the suit for lack of subject matter jurisdiction under the FCA's public disclosure bar. *Id.* The district court granted the motion. *Id.* at 320-21.

We affirmed, concluding that the lawsuit was barred because the allegations of fraud had been publicly disclosed. *Id.* at 322-24. In reaching this conclusion, we relied on the Third Circuit's decision in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991), which held that a *qui tam* suit was precluded by the public disclosure bar where an attorney learned of the allegations of fraud through

discovery in litigation and there was no protective order in place limiting the use of such discovery materials. *See id.* at 1157-60. We reasoned that the public disclosure bar was "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator," and therefore, "[p]otential accessibility by those not a party to the fraud [i]s the touchstone of public disclosure." *John Doe Corp.*, 960 F.2d at 322 (quoting *Stinson*, 944 F.2d at 1155-56). This rule, we explained, "distinguishes between information hidden in files or disclosed in private and information produced pursuant to the discovery process which is presumptively, absent a court order, available for filing and general use." *Id.* (quoting *Stinson*, 944 F.3d at 1161).

Applying these principles to the case before us, we concluded that the allegations of fraud in *John Doe Corp.* were public because, in contrast to *Stinson*, "the allegations of fraud were not just *potentially* accessible to strangers, they were *actually* divulged to strangers to the fraud, namely the innocent employees of John Doe Corp." *Id.* (emphasis in original). "[M]any of these individuals knew nothing about defendants' ongoing scheme" and "were neither targets of the investigation nor potential witnesses"; rather, "they were strangers to the fraud." *Id.* at 322-23. And "[w]hen these innocent employees learned of the fraud, they were under no obligation to keep this information confidential." *Id.* at 323. We explained that "[o]nce allegations of fraud are revealed to members of the public with no prior knowledge thereof . . . they are irretrievably released into the public domain." *Id.*

John Doe Corp. does not control where, as here, there is no evidence in the record that the fraud allegations underlying the claims in Foreman's Complaint were disclosed to innocent employees at AECOM or that they were disclosed in the absence of an obligation to keep the information confidential. To the contrary, as mentioned above, the reports on which AECOM relies are designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," suggesting that any disclosures to AECOM employees in connection with the government's audits and investigations were made under an obligation to keep such information secret. And as the district court noted, it "cannot be determined from the [Complaint] that Foreman was an 'innocent' employee or a 'stranger to the fraud'" and it is unclear "how or when Foreman accessed the government reports." *United States ex rel. Foreman*, 454 F. Supp. 3d at 263. Because there is no evidence that the fraud allegations were disclosed to individuals without prior knowledge of the fraud in the absence of a confidentiality obligation, the disclosures were not public and the public disclosure bar does not apply.

This conclusion is reinforced by the negative ramifications of AECOM's proposed public disclosure theory. If we were to adopt it, a relator who had personally observed and investigated fraud would be barred from bringing a FCA claim merely because he obtained access to a confidential government report describing the fraud. And it would also seem that, under AECOM's public disclosure theory, anytime the government has knowledge of the fraud and seeks corrective action from a contractor in connection with a confidential investigative audit or investigation, a *qui tam* action would be barred. But such

a restrictive interpretation of the public disclosure bar is inconsistent with the plain language and purpose of the public disclosure bar, because it would effectively collapse the public disclosure bar into the "government knowledge" standard that Congress eliminated and would undermine Congress's goal "of encouraging private citizens to expose fraud." *John Doe Corp.*, 960 F.2d at 321.

Other courts of appeal to address this question have similarly concluded that disclosures made pursuant to a confidential government investigation or audit do not constitute "public" disclosures within the meaning of the public disclosure bar. *See, e.g.*, *Chattanooga-Hamilton Cty. Hosp. Auth.*, 782 F.3d at 265, 269-70 (rejecting argument that disclosures made to AdvanceMed and Deloitte in connection with confidential government investigation and audit constituted a "public" disclosure); *United States ex rel. Maxwell*, 540 F.3d at 1186 ("The e-mail exchange between Mr. Darouse and Mr. Geissel . . . was subject to confidentiality limitations because it was the product of an on-going government audit. . . . Therefore, the information was not within the public domain and the e-mail exchange was not a 'public disclosure' that would remove jurisdiction over Mr. Maxwell's suit from the courts."); *United States ex rel. Rost*, 507 F.3d at 728 ("The mere fact that the disclosures are contained in government files someplace, or even that the government is conducting an investigation behind the scenes, does not itself constitute public disclosure."). Indeed, allowing private suits when the information underlying the action is known only to government auditors and others involved in a confidential audit or investigation balances Congress's goals in encouraging private citizens with

first-hand knowledge to expose fraud while avoiding civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud. *See United States ex rel. Maxwell*, 540 F.3d at 1186. Allowing such suits is also consistent with Congress's intent to prevent the government from sitting on fraud of which it had knowledge. *Id.*; *see United States ex rel. Rost*, 507 F.3d at 730 (finding that it was Congress's intent, "through the requirement of public disclosure, to help keep the government honest in its investigations and settlements with industry. Once allegations are made public, the government can be forced to act by public pressure").

For all these reasons, the district court correctly concluded that the public disclosure bar is inapplicable.

CONCLUSION

We have considered the parties' remaining arguments on appeal and conclude that they are without merit. We therefore VACATE the judgment, REVERSE the district court's order dismissing the 31 U.S.C. § 3729(a)(1)(A)-(B) claims premised on the labor billing allegations, AFFIRM the dismissal of Foreman's other claims, and REMAND] for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AUGUST 13, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 Civ. 1960 (LLS)

UNITED STATES OF AMERICA
EX REL. HASSAN FOREMAN,

Plaintiff,

v.

AECOM, AECOM GOVERNMENT SERVICES INC.,
AC FIRST LLC, AND AECOM/GSS LTD.,

Defendants.

MEMORANDUM & ORDER

Relator Hassan Foreman brought this *qui tam* action on behalf of the United States of America pursuant to the False Claims Act, 31 U.S.C. §§ 3279-3733 ("FCA"), alleging that defendants submitted false and fraudulent claims to the government for payment. The United States declined to intervene in this action. The Court granted defendants' motion to dismiss the third amended complaint and entered judgment. Relator now moves to alter the judgment pursuant to Fed. R. Civ. P. 59(e) or for relief from the judgment pursuant to Fed. R. Civ. P. 60(b),

and for permission to file a Fourth Amended Complaint. For the following reasons, the motion is denied.

BACKGROUND

Foreman filed the original complaint under seal on behalf of the United States on March 16, 2016. On March 16, 2018, the case was unsealed and Foreman filed an amended complaint. On November 16, 2018, Foreman filed a second amended complaint. On May 28, 2019, the government stated that it "has no plan to move to intervene on any claim at this time." Dkt. No. 47. On September 25, 2019, Foreman filed a third amended complaint, alleging that defendants violated various provisions of the FCA, 31 U.S.C. § 3729(a)(1)(A), (B), (D), (G) and 31 U.S.C. § 3730(h). Those violations were separated into five categories: (1) inaccurate timesheets and improper billing of labor, (2) inflated reports of man-hour utilization ("MHU") rate, (3) improper purchasing, tracking, and returning of government property, (4) entry into a "crony" contract with a payroll processing company, and (5) retaliation against Foreman for reporting other employees' travel violations.

Defendants moved to dismiss the third amended complaint on October 30, 2019, which the Court granted on April 13, 2020 in an Opinion and Order stating,

> Plaintiff's brief requests leave to amend. The reasons for dismissal of the Third Amended Complaint do not turn on points of pleading. They reflect the underlying invalidity of the merits of the claims, such as the government's continued disregard of defendants' shortfalls

> as being insufficiently serious or consequential ("material") to justify either litigation or severance of the relationship.
>
> Nevertheless, plaintiff has leave to move for leave to serve a fourth amended complaint, attaching a copy of the proposed pleading.

Foreman moved for reconsideration of that Opinion and Order on April 27, 2020, which the Court denied on May 19, 2020.

The Clerk entered judgment on June 5, 2020. That same day, Foreman filed a letter motion requesting "that the Court vacate the Clerk's Judgment and Order and permit the Relator to move for leave to serve a fourth amended complaint." The Court denied that request, stating that "Plaintiff had seven weeks in which he could have, but did not, so move."

Foreman now moves to alter judgment or, in the alternative, for relief from judgment, in order to file his proposed Fourth Amended Complaint ("PFAC"). He also seeks to file this motion and the PFAC under seal.

DISCUSSION

Motion to Alter Judgment or for Relief from Judgment

District courts "may alter or amend judgment to correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir.

2004) (citation and internal quotation marks omitted). They may also relieve a party from a final judgment based on "mistake, inadvertence, surprise, or excusable neglect," "newly discovered evidence," or "any other reason that justifies relief." Fed. R. Civ. P. 60(b). "Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986).

"A party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Fed. R. Civ. P. 59(e) or 60(b)." *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008). To "hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991) (citation and internal quotation marks omitted).

> Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint. Of course, in view of the provision in rule 15(a) that "leave [to amend] shall be freely given when justice so requires," *see Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962), it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment.

Id.

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962).

Relator argues that the Court should alter or grant relief from judgment and permit him to file a Fourth Amended Complaint because (1) he did not unduly delay in seeking leave to amend, (2) he has not engaged in bad faith and does not have a dilatory motive, (3) he has not repeatedly failed to cure deficiencies with prior amendments, (4) defendants will not be prejudiced by the amendment, and (5) the amendment is not futile.

Defendants first argue that Foreman already moved to vacate judgment in his June 5, 2020 letter, and that Rule 59(e) "does not authorize successive motions." *Howard v. United States*, No. 04-CR-942 (FB), 2013 U.S. Dist. LEXIS 167431, 2013 WL 6162818, at *1 (E.D.N.Y. Nov. 25, 2013).

Second, defendants argue that Foreman already possessed the documents underlying his new allegations when he filed the third amended complaint, and that he

therefore "unduly delayed in proffering his amended allegations, which can be explained only by gamesmanship, or even bad faith." Defs. Br. at 5. Relator contends, however, that he did not receive the documents supporting his amendments until after he opposed defendants' motion to dismiss, and therefore "had no opportunity to include those documents in any prior version of the complaint." Pl. Reply Br. at 6.

Third, defendants argue that Foreman's proposed amendments would be futile.

Regardless of whether Foreman already moved to vacate judgment or whether his delay in raising new allegations was in bad faith, the proposed amendments in the PFAC do not remedy the deficiencies of the third amended complaint and would be futile. *See Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003) ("it is well established that leave to amend a complaint need not be granted when amendment would be futile.)"

The PFAC contains additional allegations that defendants submitted inaccurate timesheets that billed for hours employees did not work, failed to accurately report their MHU rate, failed to properly track recoverable items, and gave advance notice to employees of audits. Those acts, however, are the same as those alleged in the third amended complaint, which the Court already considered and dismissed as immaterial.[1]

1. Foreman argues again that express false claims certifying compliance with contractual requirements need not be material. That is incorrect. A "misrepresentation about compliance with a

For example, the PFAC alleges that in January of 2014, defendants estimated that they were liable for $144 million due to "timesheet errors including signature errors, incorrect hour totals, and even multiple timesheets for the same person." PFAC ¶ 105. That $144 million figure was revised to $2.3 million to include only "high risk" failures in July of 2014. *Id.* SI 109. The PFAC states that "the Government was completely unaware of Defendants' internal findings related to the timesheet fraud, whether it is the $144M liability finding from January of 2014, or the $2.3M 'high risk' finding of July of 2014." *Id.* ¶ 110.

However, as discussed in the Court's previous opinion, a September of 2014 evaluation conducted by the Defense Contract Audit Agency found that defendants' employees had access to and "the opportunity to edit other employees' timesheets," were "not properly reviewing timesheets for completeness and accuracy," were signing and approving timesheets even though they did not have signatory authority, were not identifying and reporting "idle time associated with labor" on timesheets, were not updating timesheets on a daily basis, were "filling out their timesheets in advance," and were "not properly correcting their timesheets prior to submission." White Aff. (Dkt. No. 69) Ex. 6. *See* April 13, 2020 Opinion and Order (Dkt. No. 88) at 17 (holding that "defendants' misrepresentations

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statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the [FCA]." *Bishop v. Wells Fargo & Co.*, 870 F.3d 104, 107 (2d Cir. 2017) (quoting *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002, 195 L. Ed. 2d 348 (2016) (internal quotation marks omitted)).

about labor, MHU, and property were not material to the government's payment decision" because "The documents and reports cited in the TAC demonstrate that the government investigated and knew about defendants' violations concerning labor billing, MHU rate, and property" but "continued to pay defendants and extend the MOSC contract"); *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2003-04, 195 L. Ed. 2d 348 (2016) ("if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.").

The PFAC states that it is plausible that the government continued to pay defendants because "services contracts in war zones, such as Afghanistan, are inherently difficult to replace." PFAC ¶ 187. That does not change the fact that the government had actual knowledge of defendants' violations yet repeatedly extended and "competitively awarded" the contract to defendants based on "previous performance." *Id.* ¶¶ 48, 51.

The PFAC also alleges that the government was unaware of "the scope of AECOM's failure to comply with these requirements or its cover-up" of violations. PFAC ¶ 99. The Court already addressed that argument, *see* April 13, 2020 Opinion and Order at 20 n.3:

> Foreman argues that the government "did not have the complete picture" of defendants' conduct because it did not know that the

> violations continued after the investigations or that defendants "engaged in a cover-up" to conceal the violations. But those activities are the continuation or "cover-up" of the same labor, MHU, and property violations of which the government was already aware.

The other proposed amendments to establish materiality are the same arguments Foreman already raised in opposition to defendants' motion to dismiss and in his motion for reconsideration. The PFAC alleges that defendants' actions to correct or prevent violations demonstrate materiality. However, as the Court already held, the government's and defendants' recognition that compliance with contractual requirements is important does not meet the "demanding" standard for materiality. *Universal Health*, 136 S. Ct. at 2003. *See* April 13, 2020 Opinion and Order at 16-17; *United States ex rel. Daugherty v. Tiversa Holding Corp.*, 342 F. Supp. 3d 418, 429 (S.D.N.Y. 2018) (finding that allegations of "general policies of the United States Government stating that compliance with grant conditions is important to the Government" are insufficient to show materiality).

Nor do the PFAC's allegations concerning the government's settlement agreement with a different defense contractor or intervention in a separate action against AECOM for claims submitted to the Federal Emergency Management Agency establish materiality; the government's conduct in those cases is not relevant to what it deems material in this action.

Appendix B

The proposed amendments to Foreman's conversion and reverse false claims would also be futile. With respect to the conversion claim, the PFAC alleges again in greater detail that defendants failed to track recoverable items in the required manner and could not account for thousands of pieces of equipment. That does not sufficiently state a conversion claim because, like the third amended complaint, it "does not identify any specific excess or recoverable item or other property that defendants possessed but failed to deliver to the government." April 13, 2020 Opinion and Order at 24.

With respect to the reverse false claim, the new allegation that defendants have a separate obligation to return overpayments and excess property to the government does not cure the deficiency that the Court already identified: the reverse false claim "is based on the same labor billing and property violations underlying the direct false claims," which were dismissed due to a lack of materiality. *Id.* at 25.

Relator has already filed four versions of the complaint. His proposed amendments for a fifth version would be futile, and there is no exceptional circumstance or other valid basis upon which to vacate, alter, amend, or grant relief from the judgment.

Motion to Seal

Relator requests permission to file unredacted versions of this motion, accompanying brief, and PFAC under seal because they contain information that

defendants have designated as confidential pursuant to the parties' protective order. Defendants do not oppose the motion to seal.

The agreement of the parties is immaterial to an application for sealing, which involve policy issues "firmly rooted in our nation's history" and public confidence in the administration of justice. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Sealing "of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Id.* at 124.

No such showing having been made, the unopposed motion for leave to file under seal is denied.

CONCLUSION

Relator's motion to alter or amend judgment or for relief from judgment (Dkt. No. 101) is denied.

Relator's motion to seal (Dkt. No. 99) is denied.

So ordered.

Dated: New York, New York

August 13, 2020

/s/ Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 13, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 Civ. 1960 (LLS)

UNITED STATES OF AMERICA *EX REL.*
HASSAN FOREMAN,

Plaintiff,

- against -

AECOM, AECOM GOVERNMENT SERVICES INC.,
AC FIRST LLC, and AECOM/GSS LTD.,

Defendants.

OPINION & ORDER

Relator Hassan Foreman brought this *qui tam* action on behalf of the United States of America pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), alleging that defendants submitted false and fraudulent claims to the government for payment. The United States declined to intervene in this action. Defendants move to dismiss the Third Amended Complaint for failure to state a claim upon which relief can be granted. For the following reasons, the motion is granted.

Appendix C

BACKGROUND

The following facts are as alleged in the Third Amended Complaint ("TAC") (Dkt. No. 66).

Defendants AECOM, AECOM Government Services Inc., AC First LLC, and AECOM/GSS Ltd. (collectively, "AECOM") are affiliated defense contractors.

In 2010, AECOM entered into a Maintenance & Operational Support ("MOSC") contract with the U.S. Army. Under the contract, AECOM provides vehicle and equipment maintenance, facilities management and maintenance, supply and inventory management, and transportation services in support of the 401st Army Field Support Brigade in Afghanistan. AECOM is required to maintain systems and procedures for tracking labor hours, property, and other assets.

The MOSC contract reimburses AECOM for its costs and pays an additional negotiated fixed fee. The contract was modified and extended multiple times between 2010 and 2018. To date, AECOM continues to perform under the contract and has been paid a total of approximately $1.9 billion.

Relator Hassan Foreman began working at AECOM as a Finance Analyst in August of 2013 and was promoted to Finance Supervisor in May of 2014.

Foreman alleges that AECOM and its employees violated numerous obligations under the MOSC contract

and federal regulations. Those violations are separated into five categories: (1) improper labor billing, (2) inflated reports of man-hour utilization rate, (3) improper purchasing, tracking, and returning of government property, (4) entry into a "crony" contract with Bluefish, a payroll processing company, and (5) travel violations.

Labor Billing

AECOM submitted inaccurate labor timesheets to the government for payment. They listed incorrect hour totals, did not include employee numbers, and did not contain the supervisor's printed name, making it difficult to confirm who signed the timesheets. Instead of on-site supervisors, office-based employees who could not validate the number of hours worked signed the timesheets. AECOM employees submitted and signed timesheets before the two-week pay period was over, reporting work that had not yet been performed.

Employees who slept on the job or engaged in other leisure activities billed full eleven-hour days. AECOM had a policy of billing 154 hours per each two-week period regardless of the actual number of hours worked. On one occasion, six employees billed several hours for replacing and repairing one tire.

AECOM also billed for labor of untrained and uncertified employees when it was required to employ qualified and certified operators to properly track materials and inventory.

When AECOM learned of its billing issues, it attempted to correct old timesheets.

MHU Rate

Under the MOSC contract, AECOM is required to monitor and report on a monthly basis its man-hour utilization ("MHU") rate, which is calculated by dividing the number of actual labor hours worked by the number of labor hours available. AECOM is required to have an MHU rate of 85 percent or greater, but its rate was consistently and significantly below 85 percent. AECOM provided its own non-standard MHU reports instead of reports automatically generated from data in the "SAMS-E" system, which meant "AECOM avoided having a direct tie to actual hours in the system, allowing essentially made-up labor to be counted . . . ." TAC ¶ 188.

Government Property

AECOM employed untrained and uncertified personnel who failed to properly account for and process property.

Employees ordered items through unauthorized "parts only" work orders, which were not tied to particular equipment, and resulted in orders for excess and unused parts. "For example, if tires were properly ordered pursuant to an established vehicle program or work order, the system would trigger an alert if the number of tires did not match the number of trucks or the expected tire usage. A POWO could not be monitored in that fashion because it would not tie to an actual WO." *Id.* ¶ 216.

Employees purchased the same items twice by ordering parts through the government supply system as well as on the commercial market, and requested reimbursement from the government for those duplicative work orders.

AECOM failed to report and return to the Army excess or unused parts and recoverable items, which are used items removed from vehicles and other equipment.

Bluefish Contract

In 2013, Jonathan Nagel, the President and General Manager of AECOM switched AECOM's payroll services provider from Wells Fargo to Bluefish Global Payroll Solutions ("Bluefish"), falsely claiming that Wells Fargo no longer provided the services needed. Nagel had a prior business relationship with Bluefish's owner.

Bluefish's system did not function well and imposed high transaction fees for each money transfer. In response to complaints about the fees, AECOM increased the hourly pay for affected employees by 2.6 percent, which led to a 0.2 percent increase in monthly billings to the government. AECOM also billed the government for the Bluefish training staff who spent "two full days assisting with distribution and activation of the cards as well as account holder questions." *Id.* ¶ 290.

Foreman made a hotline complaint to the Inspector General's office reporting the Bluefish issues and Nagel's relationship with Bluefish's owner.

Appendix C

Travel Violations

Foreman was responsible for various aspects of booking and paying for AECOM employees' air travel. In June of 2015, Foreman learned that Rethinam Rajendran, a Travel Coordinator, had booked a special air travel request for his co-worker and roommate Mahesh Parakandy Thattiyot, a Senior Financial Analyst. That request violated federal regulations for not being the lowest priced airfare available.

Around the same time, Foreman also learned that Saravanan Sankaiah, a Payroll Specialist, did not return from his paid leave as scheduled. When he did return, he did not report to Foreman for duty as required under AECOM policy.

Foreman reported both travel-related issues in June of 2015 to the Finance Manager, John Conrad. After an internal investigation of the issues, AECOM decided not to take disciplinary action. Foreman then reported the issues to the Manager of Employee Relations, John Dearth. Foreman was notified on or about June 29, 2015 that after another investigation, no disciplinary action would be taken. Foreman informed AECOM management that he would report the issues outside the company.

Around the same time or shortly thereafter, Foreman heard rumors that his position at AECOM would be eliminated and that he would be terminated. On or about July 5, 2015, Foreman was terminated, despite receiving a positive performance review immediately prior to reporting the travel violations.

Appendix C

This Action

Foreman filed this action under seal on behalf of the United States on March 16, 2016. On March 16, 2018, the case was unsealed and Foreman filed an amended complaint. On November 16, 2018, Foreman filed a second amended complaint. On May 28, 2019, the government stated that it "has no plan to move to intervene on any claim at this time." Dkt. No. 47.

Foreman filed the TAC on September 25, 2019, alleging violations of various provisions of the FCA, 31 U.S.C. § 3729(a) (1) (A), (B), (D), (G) and 31 U.S.C. § 3730(h). First, Foreman claims that defendants falsely certified to the government in invoices and requests for reimbursement that they were in compliance with contractual and regulatory requirements regarding labor billing and timesheets, MHU rate, government property, and the Bluefish contract. Second, Foreman claims that defendants failed to return property to the government. Third, Foreman alleges that defendants terminated him in retaliation for reporting the travel and Bluefish violations.

Defendants now move to dismiss the TAC.

DISCUSSION

On a motion to dismiss under Rule 12(b) (6), the court accepts "all factual allegations in the complaint as true, drawing all reasonable inferences in favor of the plaintiff." *Kelly-Brown v. Winfrey*, 717 F.3d 295, 304 (2d Cir. 2013). To survive a motion to dismiss, a complaint must plead

"enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

Defendants argue that the TAC should be dismissed because (1) claims related to labor billing, MHU, and property violations are barred by the FCA's "public disclosure bar," (2) claims related to labor billing, MHU, and property violations do not allege materiality, (3) claims related to the Bluefish contract do not allege how the contract was a violation, (4) claims related to a failure to return property do not allege an obligation to return property or any specific property defendants failed to return, and (5) the retaliation claim does not allege that Foreman engaged in protected activity or that defendants were aware of any protected activity.

Public Disclosure Bar

The FCA's public disclosure bar states,

> 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).

With the 1986 amendments, Congress deliberately removed a previous provision that barred jurisdiction whenever the government had knowledge of the allegations or transactions in the relator's complaint. The pre-1986 version of 31 U.S.C. 3730(d) provided that courts had no jurisdiction over qui tam actions "based on evidence or information the Government had when the action was brought." *See LeBlanc*, 913 F.2d at 19 n. 1. In practice, the "government knowledge" bar proved too restrictive of qui tam actions, resulting in under-enforcement of the FCA. *See Prawer*, 24 F.3d at 325-26. Thus, in 1986, Congress shifted the examination away from the information in the government's possession and instead looked to whether there was public disclosure of information given to the government. "Congress thus changed the focus of the jurisdictional bar from evidence of fraud inside the

government's overcrowded file cabinets to fraud already exposed in the public domain." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684, 323 U.S. App. D.C. 61 (D.C. Cir. 1997).

United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 729-30 (1st Cir. 2007). "The 1986 amendments attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992). "One reason for the 1986 amendments was to prod the government into action, rather than allowing it to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." *Id.* at 323.

Defendants argue that their labor billing, MHU, and property violations were publicly disclosed in various government documents and communications that are referred to throughout the TAC: audits and reports completed by the Defense Contract Audit Agency ("DCAA"); corrective action requests, corrective action plans, and reports issued by the Defense Contract Management Agency ("DCMA"); a report written by the Department of Defense Inspector General ("DOD IG"); corrective action requests written by the Army; discussions between AECOM and the DCMA; and discussions between AECOM and the Army.

The DOD IG report is the only document or communication Foreman cites that was clearly publicly

disclosed, as it is accessible on the Department of Defense's website.[1] The report states that defendant AC First LLC failed to "account for more than 400 pieces of nonrolling stock equipment including three drone systems," "did not conduct causative research to determine the events that led to the loss or the location" of missing property, and "did not report the property loss" to the 401st Army Field Support Brigade in Afghanistan. White Aff. Ex. 1.

However, those statements regarding lost or missing equipment do not disclose the material elements of the property-related fraud alleged in the TAC, which include defendants' parts-only work orders, duplicative orders, and failure to return excess parts and recoverable items to the government. *See United States ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc.*, 295 F. Supp. 3d 186, 196-97 (E.D.N.Y. 2018):

> Earlier disclosures will bar a relator's claim if they were "sufficient to set the government squarely upon the trail of the alleged fraud." *EMSL Analytical, Inc.*, 966 F. Supp. 2d at 298 (internal quotations omitted). The bar is triggered if "material elements" of the fraud have been publicly disclosed, and does not require that the alleged fraud, itself, have been disclosed. *See U.S. ex rel. Rosner v. WB/Stellar*

1. Inspector General, U.S. Department of Defense, *Contract Oversight for Redistribution Property Assistance Team Operations in Afghanistan Needs Improvement*, Report No. DODIG-2015-126 (May 18, 2015), https://media.defense.gov/2015/May/18/2001713507/-1/-1/1/DODIG-2015-126.pdf.

> *IP Owner, L.L.C.*, 739 F. Supp. 2d 396, 405 (S.D.N.Y. 2010); *see also Monaghan v. Henry Phipps Plaza W., Inc.*, 531 Fed. Appx. 127, 130 (2d Cir. 2013).

Furthermore, Foreman does not cite the DOD IG report in support of his own fraud allegations; rather, the report's conclusions merely "demonstrate that this is nor the first time AECOM has been cited for serious property acquisition and tracking issues." TAC ¶ 53. Thus, the publicly disclosed information in the DOD IG report is not "substantially the same" as the TAC's allegations. 31 U.S.C. § 3730(e)(4)(A).

With respect to the other government documents and communications, Foreman argues that they were not "publicly disclosed" under the FCA because they were not disclosed to anyone outside the government. *See United States ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 789 (S.D.N.Y. 2017) ("Significantly, nine courts of appeals have held that the bar applies only where there has been a disclosure *outside* of the government.") (emphasis in original).

> These courts have reasoned that "the phrase 'public disclosure' would be superfluous" if "providing information to the government were enough to trigger the bar." *Rost*, 507 F.3d at 729. Equating the terms "government" and "public," they have opined, would also be inconsistent with language elsewhere in the FCA and with the purpose of the public disclosure bar, which

> "clearly contemplates that the information be in the public domain in some capacity[,] and the Government is not the equivalent of the public domain." *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1043 (10th Cir. 2004).
>
> The Second Circuit has not yet opined on this issue.

Id. (declining to follow "the sole court of appeals to conclude that disclosure to a competent public figure, without more, satisfies the 'public disclosure' requirement" and choosing "to follow the persuasive reasoning of the nine other Circuits to address the question"); *see also United States v. Mount Sinai Hosp.*, 256 F. Supp. 3d 443, 454 (S.D.N.Y. 2017) (following *Wood* and holding that defendants' submission of a letter to the Office of the Medicaid Inspector General was "insufficient to invoke the public disclosure bar.").

There is no allegation or evidence that the other documents or communications were disclosed outside the government entities of the DCAA, DCMA, and Army. On the contrary, the DCMA corrective action request discussing AECOM's low MHU rate is designated as "CONFIDENTIAL," White Aff. Ex. 2, and the DCAA report on AECOM's timesheet issues is labeled "FOR OFFICIAL USE ONLY," "Confidential - FOIA Exempt," and "Highly Confidential," *id.* Ex. 6.

Defendants argue that the documents and communications were disclosed outside the government

to AECOM employees such as Foreman. In *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992), a relator filed a *qui tam* action against the defendant for overcharging the government under defense contracts, but the Court of Appeals held that the public disclosure bar applied. Before the relator brought suit, government agencies had already investigated defendant's premises and questioned defendant's employees about the overcharges.

> Here, in contrast to *Stinson*, the allegations of fraud were not just *potentially* accessible to strangers, they were *actually* divulged to strangers to the fraud, namely the innocent employees of John Doe Corp. While the search warrant was being executed, the investigators spoke to numerous employees of John Doe Corp., some of whom knew of the fraud. But, more importantly, many of these individuals knew nothing about defendants' ongoing scheme; they were strangers to the fraud. These people were neither targets of the investigation nor potential witnesses. The government may have hoped that these individuals were potential witnesses, but it is clear that they were not.
>
> When these innocent employees learned of the fraud, they were under no obligation to keep this information confidential. We cannot accept the relator's argument that simply because other members of the public did not have a legal right to pry the allegations of fraud from

> the mouths of these innocent employees, there was no "public disclosure". Were this Congress' intent, we would expect a narrower exception to jurisdiction, one that bars only those actions based on generally accessible government documents and news media accounts. Section 3730(e) (4)(A) is not so circumscribed.

Id. at 322-23. "Once allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations; they are irretrievably released into the public domain. The fact that they may not be widely disseminated does not inure to the benefit of a *qui tam* relator." *Id.* at 323.

Defendants argue that Foreman was an "innocent" employee who learned of the alleged fraud from the government investigation and audit reports. Defendants also argue that because Foreman was able to access the documents, they were potentially accessible to other innocent employees as well. "It is implausible that these reports were not potentially accessible to anyone who went looking for them at AECOM that was similarly situated to Foreman." Defs. Reply Br. at 7-8. *See Doe*, 960 F.2d at 322 (citing Third Circuit holding that "because any diligent member of the public could have gone to court and demanded to see the documents, there was public disclosure. Potential accessibility by those not a party to the fraud was the touchstone of public disclosure.").

It cannot be determined from the TAC that Foreman was an "innocent" employee or a "stranger to the fraud"

like those in *Doe*. It is unknown at this time how or when Foreman accessed the government reports, and there is no evidence that he lacked prior knowledge of the alleged fraud. Rather, he personally observed "multiple wasted hours" and "that timesheets for the two-week period were frequently turned in on the second Wednesday of the period." TAC ¶¶ 84, 163.

Nor is there any evidence or other indication that innocent AECOM employees without prior knowledge of the fraud had either potential or actual access to those reports, or otherwise communicated to the government about the fraud.

It cannot be determined as a matter of law at this stage that the public disclosure bar applies.

False Certifications: Labor, MHU, and Property

Foreman alleges that defendants falsely certified to the government in invoices and requests for reimbursement that they were in compliance with requirements under the MOSC contract. *See Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1993-94, 195 L. Ed. 2d 348 (2016):

> The implied false certification theory can be a basis for FCA liability when a defendant submitting a claim makes specific representations about the goods or services provided, but fails to disclose noncompliance with material statutory, regulatory, or contractual requirements that

> make those representations misleading with respect to those goods or services.

A "misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act." *Id.* at 2002. The FCA states, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4).

"The materiality standard is demanding. The False Claims Act is not 'an all-purpose antifraud statute,' *Allison Engine*, 553 U.S. at 672, 128 S. Ct. 2123 or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health*, 136 S. Ct. at 2003.

> In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain

> requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 2003-04.

Foreman alleges that "AECOM's compliance with applicable legal and contractual requirements was material to the Government's payment decision" because the government "required AECOM to comply with these requirements in order to invoice its labor costs," "emphasized the importance of such requirements in the DCAA Auditor's Manual," and had previously enforced timesheet requirements against another company in a separate action. TAC ¶ 92. He also points to "the substantial size of AECOM's invoices" and "internal AECOM documents and AECOM's public filings" showing that defendants sought to address violations. *Id.* None of those sufficiently demonstrates materiality. *See Universal Health*, 136 S. Ct. at 2003 ("A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment."); *United States ex rel. Daugherty v. Tiversa Holding Corp.*, 342 F. Supp. 3d 418, 429 (S.D.N.Y. 2018) (finding that allegations of "general policies of the United States Government stating that compliance with

grant conditions is important to the Government" are insufficient to show materiality).

Defendants argue that their false certifications of compliance with respect to labor billing and timesheets, MHU rate, and government property were not material to the government's payment decision because the government was aware of those violations but continued to pay defendants and extend the MOSC contract.

The documents and reports cited in the TAC demonstrate that the government investigated and knew about defendants' violations concerning labor billing, MHU rate, and property.[2] Specifically, a 2014 evaluation by the DCAA found that defendants' employees had access to and "the opportunity to edit other employees' timesheets," were "not properly reviewing timesheets for completeness and accuracy," were signing and approving timesheets even though they did not have signatory authority, were not identifying and reporting "idle time associated with labor" on timesheets, were not updating timesheets on a daily basis, were "filling out their timesheets in advance," and were "not properly correcting their timesheets prior to submission." White Aff. Ex. 6.

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2. "When determining the sufficiency of plaintiffs' claim for Rule 12(b) (6) purposes, consideration is limited to the factual allegations in plaintiffs' amended complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

A 2012 corrective action plan by the DCMA discusses defendants' "Failure to enter labor hours data into SAMS," "Failure to track cost of reworked supplies data in SAMS," and "Failure to track and manage shelf life items using SAMS." *Id.* Ex. 3. It also states, "Accurate Man Hour utilization is not being maintained in SAMS theater wide. This issue is the most recent in a trend of deficiencies related to the required use of Logistics Information Systems." *Id.* A 2012 corrective action request by the DCMA states, "Contractor is well under the required Utilization Rate of 85%; Utilization Rate for 1-30Sep12 was 26%." *Id.* Ex. 2. "The 401st did, indeed, mandate lower staffing levels when it became aware of low utilization rates." TAC ¶ 171.

"In late 2011 and first quarter of 2012," a DCMA property management system analysis concluded that "AC FIRST's system for control and accounting of Government Property at Bagram Airfield is INADEQUATE." *Id.* ¶ 264. The analysis "noted that the failure to record and manage inventory 'can lead to questions of reasonableness of consumption and verification that property was consumed only in the performance of the contract,' which suggests the same concerns about theft of property." *Id.* ¶ 265. Corrective action requests by the Army "discuss these property concerns over at least a three year period." *Id.* ¶ 267. Additionally, numerous work order documents, including a memorandum by the Army, mention "parts only" orders, demonstrating the government's knowledge of such orders. White Aff. Ex. 7.

Despite its knowledge of those violations, the government extended the MOSC contract multiple times. *See* TAC ¶ 41:

> The MOSC-A Contract was a cost-plus fixed fee contract, Contract No. W911SE-07-D-0004-BA01, with a period of performance for one base year (January 28, 2010 to January 27, 2011) plus four option years, which could extend the MOSC-A Contract until January 27, 2015. The Army elected to extend the contract through the four option years. The MOSC-A Contract would have expired on January 27, 2015, but a modification extended it for six months on January 16, 2015 until July 27, 2015 with a plan for a further incrementally funded bridge contract. Each option year constituted a new MOSC-A Contract between AECOM and the Army. On information and belief, the MOSC-A Contract was modified as late as June 5, 2018 and is still being performed.

The contract states, "Option Years 1-4: In determining whether to award the option years, the Government will take into account the contractor's previous performance on this task order." *Id.* ¶ 45. There is no indication that the government refused to pay defendants or demanded repayment due to the labor billing, MHU, or property violations. Rather, "From 2010 through 2018, the MOSC-A Contract was amended, modified, or extended a myriad of times with the vast majority of the amendments and modifications being directed to

increasing funding." Id. ¶ 11 (emphasis added). Thus, defendants' misrepresentations about labor, MHU, and property were not material to the government's payment decision.[3]*See United States ex rel. Kolchinsky v. Moody's Corp.*, 238 F. Supp. 3d 550, 559 (S.D.N.Y. 2017) (dismissing action because the Government—and the general public—was on notice of the very facts relied upon to support the fraud alleged here" and "the Government has nonetheless continued to pay Moody's for its credit-ratings products each year"); *United States v. Catholic Health Sys. of Long Island Inc.*, No. 12-CV-4425 (MKB), 2017 U.S. Dist. LEXIS 50696, 2017 WL 1239589, at *23 (E.D.N.Y. Mar. 31, 2017) ("the reimbursement rate provisions of the DOH regulations could not have been 'material' to the DOH's payment decision where the DOH continued to reimburse the Nursing Home despite understanding that the Nursing Home was using an outdated rate."); *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034, 427 U.S. App. D.C. 387 (D.C. Cir. 2017) (affirming grant of defendant's summary judgment motion and stating "we have the benefit of hindsight and should not ignore what actually occurred: the DCAA investigated McBride's allegations and did not disallow any charged costs. In fact, KBR continued to receive an award fee for exceptional performance under Task Order 59 even after the Government learned of the allegations.").

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3. Foreman argues that the government "did not have the complete picture" of defendants' conduct because it did not know that the violations continued after the investigations or that defendants "engaged in a cover-up" to conceal the violations. But those activities are the continuation or "cover-up" of the same labor, MHU, and property violations of which the government was already aware.

Foreman's claims regarding defendants' false certifications of compliance with labor billing, MHU, and property requirements are not material and therefore not actionable under the FCA, and are dismissed.

False Certification: Bluefish Contract

Foreman also claims that defendants falsely certified their compliance with the requirement to "select subcontractors (including suppliers) on a competitive basis" due to the Bluefish contract. TAC ¶ 284. However, the TAC does not allege how Bluefish was not selected on a competitive basis or how the contract was a "crony" contract. *See United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 81 (2d Cir. 2017) ("*Qui tam* complaints filed under the FCA, because they are claims of fraud, are subject to Rule 9(b)," which "ordinarily requires a complaint alleging fraud to (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.") (citation and internal quotation marks omitted).

Besides the conclusory assertion that "There was no competitive bid process for this contract," the TAC alleges that Nagel and the owner of Bluefish "have a prior business relationship," that "AECOM was Bluefish's only customer for these services," and that "when Nagel was questioned about the reason for the switch to Bluefish, he got angry and refused to answer." TAC ¶¶ 283-84. Those allegations are insufficient to support an inference that Bluefish was not selected on a competitive basis.

Although the TAC alleges that Nagel falsely stated that Wells Fargo "no longer provided the needed services," *id.* ¶ 284, a letter from a Wells Fargo Managing Director to AECOM's Senior Vice President states that Wells Fargo "has reviewed the AGS Paycard program and determined that the program exceeds our risk tolerance and will be closed down," and "would work closely with AECOM/AGS management team to ensure a smooth transition to a suitable product for the company's payroll/ disbursement needs." White Aff. Ex. 9.

Foreman's claims regarding defendants' false certification of compliance with the requirement of competitive bidding of contracts is dismissed.

Conversion Claim

Foreman claims that in addition to making false certifications to the government, defendants failed to return property to the government in violation of "the FCA's conversion provision, which imposes civil liability on anyone who 'has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property.'" *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 438 (6th Cir. 2016) (quoting 31 U.S.C. § 3729(a)(1)(D)).

The TAC alleges generally that excess parts and recoverable items were not accounted for or returned to the government. It states, "on a wide-scale basis, the work order was not being properly created, closed or audited,

resulting in recoverable items not being returned or duplicates not being controlled." TAC ¶ 243. It quotes an AECOM supervisor discussing "parts ordered and not needed etc. leading to some of the excess parts issues we have run across," and stating

> Not turning the recoverable items in using the EUM method (no credit for the parts SUPER BAD [tire example 6k etc] and incorrect records for the ones that have any legacy data at all as well as the table stack up 3900 on the front side 10K †† back side risk of discovery during long term audit and not being able to show what the heck we did with the parts or that we did it wrong).

Id. ¶¶ 234, 249. It also cites an internal report that states, "Incorrect disposition has caused recoverable items to be left on AC FIRST SAMSIE database, and failure of proper credit to the USG [U.S. Government] and significant liability to AC FIRST." *Id.* ¶ 252. However, those allegations do not identify any specific excess or recoverable item or other property that defendants possessed but failed to deliver to the government.[4]

Accordingly, the FCA conversion claim is dismissed.

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4. Foreman argues in his brief that defendants also converted money by retaining overpayments from the government, but the TAC's conversion claim does not mention money. *See* TAC ¶¶ 320-22. It "is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss." *O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989).

Appendix C

Reverse False Claim

Foreman also brings a "reverse" false claim under 31 U.S.C. 3729(a) (1) (G), which imposes liability on someone who

> knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

"Subsection (a) (1) (G) is referred to as the 'reverse false claims' provision because it covers claims of money *owed to* the government, rather than payments *made by* the government." *United States ex rel. Kester v. Novartis Pharms. Corp.*, 43 F. Supp. 3d 332, 368 (S.D.N.Y. 2014) (citation and internal quotation marks omitted).

"To prove a claim under subsection (a) (1) (G) , a plaintiff must show: (1) proof that the defendant made a false record or statement (2) at a time that the defendant had a presently-existing obligation to the government—a duty to pay money or property." *Id.* at 367 (citation and internal quotation marks omitted).

Foreman's reverse false claim alleges that defendants retained and failed to return overpayments and property from the government. That claim, however, is based on the same labor billing and property violations underlying the

direct false claims, which allege that defendants submitted false certifications in their invoices requesting payment and retained those payments. *See United States ex rel. Hussain v. CDM Smith, Inc.*, No. 14-CV-9107 (JPO), 2017 U.S. Dist. LEXIS 159538, 2017 WL 4326523, at *9 (S.D.N.Y. Sept. 27, 2017):

> Hussain's reverse false claim allegation boils down this: CDM received payment on its false claims and thus "retain[ed] Government funds to which they were not entitled." (Dkt. No. 34 at 18.) Hussain cites the legislative history of the reverse false claim provision to argue that Congress intended it to be construed broadly, and that a reverse false claim includes "[the] knowing and improper retention of funds without notice to the Government." (*Id.*)
>
> But even if Congress intended the statute to have a broad sweep, this is a sweep too far. "A complaint that 'makes no mention of any financial obligation that the [defendant] owed to the government' and 'does not specifically reference any false records or statements used to decrease such an obligation' must be dismissed." *Wood*, 246 F. Supp. 3d 772, 2017 WL 1233991, at *34 (alteration in original) (quoting *Wood ex rel. United States v. Applied Res. Assocs., Inc.*, 328 Fed. Appx. 744, 748 (2d Cir. 2009)). Hussain does not "identify any existing financial obligation [that CDM] owed to the Government," let alone "any specific

> false record or statement that [CDM] made to avoid such a purported obligation." *Haas v. Gutierrez*, No. 07 Civ. 3623, 2008 U.S. Dist. LEXIS 48762, 2008 WL 2566634, at *5 (S.D.N.Y. June 26, 2008).

The TAC does not identify a separate obligation to return overpayments or excess property to the government. It cites a DCAA instruction that defendants "should have policies and procedures . . . readily identify contract over/underpayments," TAC ¶ 114 (omission in original), but that is not an obligation to pay the government. *See also United States ex rel. Gelbman v. City of New York*, No. 14-CV-771 (VSB), 2018 U.S. Dist. LEXIS 169435, 2018 WL 4761575, at *8 (S.D.N.Y. Sept. 30, 2018), *aff'd*, 790 F. App'x 244 (2d Cir. 2019):

> In support of his reverse false claims, Relator alleges that various providers of health services billed for and received benefits that were "in the form of overpayments known to Defendants." (SAC ¶¶ 182-83.) The SAC, however, is devoid of any factual information to suggest that either Defendant owed a financial obligation to the Government. Relator's reverse false claim allegations—which essentially boil down to various providers allegedly receiving payment on false claims and thus retaining Government funds to which they were not entitled—are not an adequate basis on which to allege a reverse false claim.

Accordingly, the reverse false claim is dismissed.

Appendix C

Retaliation

Foreman claims that he was terminated in retaliation for reporting AECOM employees' two travel violations and the Bluefish contract, in violation of 31 U.S.C. § 3730(h).

"To sustain an action under § 3730(h), a plaintiff must prove (1) that he engaged in conduct protected under the statute, (2) that defendants were aware of his conduct, and (3) that he was terminated in retaliation for his conduct." *United States ex rel. Sarafoglou v. Weill Med. Coll. of Cornell Univ.*, 451 F. Supp. 2d 613, 624 (S.D.N.Y. 2006) (citation and internal quotation marks omitted).

> To determine whether an employee's conduct was protected under the FCA, courts must evaluate whether "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government." *United States ex rel. Uhlig v. Fluor Corp.*, 839 F.3d 628, 635 (7th Cir. 2016) (citation omitted). "[M]ere investigation of an employer's non-compliance with federal regulations is not enough" to constitute protected activity under Section 3730(h)(1). *Fisch v. New Heights Acad. Charter Sch.*, No. 12cv2033 (DLC), 2012 U.S. Dist. LEXIS 131603, 2012 WL 4049959, at *5 (S.D.N.Y. Sept. 13, 2012) (citation omitted). "[A]lthough correcting regulatory problems may be a laudable goal, those problems [are]

> not actionable under the FCA in the absence of actual fraudulent conduct, and so reporting them [falls] outside the purview of the FCA's anti-retaliation provision." *United States ex rel. Booker v. Pfizer, Inc.*, 847 F.3d 52, 60 (1st Cir. 2017) (citation omitted). In other words, "[m]erely grumbling to the employer about job dissatisfaction or regulatory violations does not . . . constitute protected activity." *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 743, 332 U.S. App. D.C. 56 (D.C. Cir. 1998). Rather, the employee's investigation "must be directed at exposing a fraud upon the government." *Fisch*, 2012 U.S. Dist. LEXIS 131603, 2012 WL 4049959, at *5 (citation omitted).

Lawrence v. Int'l Bus. Mach. Corp., No. 12-CV-8433 (DLC), 2017 U.S. Dist. LEXIS 120804, 2017 WL 3278917, at *6 (S.D.N.Y. Aug. 1, 2017).

With respect to the travel violations, Foreman did not engage in protected conduct because the complaints he made about the employees' air travel request and failure to return from leave or report in for duty were not reasonably directed at exposing a fraud upon the government. Those complaints discussed employee violations of a federal regulation and AECOM policy; they were not complaints that the employer, AECOM, engaged in fraudulent conduct actionable under the FCA.

With respect to the Bluefish contract, Foreman complained to the Inspector General's office, but he

does not allege that anyone at AECOM knew about that complaint. Thus, he does not adequately plead that defendants were aware of any protected activity.

Accordingly, the retaliation claim is dismissed.

CONCLUSION

Defendants' motion to dismiss the Third Amended Complaint (Dkt. No. 67) is granted.

Plaintiff's brief requests leave to amend. The reasons for dismissal of the Third Amended Complaint do not turn on points of pleading. They reflect the underlying invalidity of the merits of the claims, such as the government's continued disregard of defendants' shortfalls as being insufficiently serious or consequential ("material") to justify either litigation or severance of the relationship.

Nevertheless, plaintiff has leave to move for leave to serve a fourth amended complaint, attaching a copy of the proposed pleading.

So ordered.

Dated: New York, New York
April 13, 2020

/s/ Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 29, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 20-2756

UNITED STATES OF AMERICA
EX REL. HASSAN FOREMAN,

Plaintiff-Appellant,

UNITED STATES OF AMERICA,

Plaintiff,

v.

AECOM, AECOM GOVERNMENT SERVICES, INC., AC FIRST, LLC, AND AECOM/GSS LTD, DBA GLOBAL SOURCING SOLUTIONS, INC.,

Defendants-Appellees.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of December, two thousand twenty-one.

Appendix D

ORDER

Appellant, United States of America ex rel. Hassan Foreman, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX E — RELEVANT STATUTORY PROVISION

§ 3729. False claims

(a) Liability for Certain Acts.—

(1) In general.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt

> of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
>
> (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
>
> (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

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1. So in original. Probably should be "101–410".

(2) REDUCED DAMAGES.—If the court finds that—

> (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> (B) such person fully cooperated with any Government investigation of such violation; and
>
> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) DEFINITIONS.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or

not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for

Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term ''obligation'' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99–562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103–272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub. L. 111–21, § 4(a), May 20, 2009, 123 Stat. 1621.)

Appendix E

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3729.....	31:231.	R.S. § 3490.

In the section, before clause (1), the words "a member of an armed force of the United States" are substituted for "in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States" and "military or naval service" for consistency with title 10. The words "is liable" are substituted for "shall forfeit and pay" for consistency. The words "civil action" are substituted for "suit" for consistency in the revised title and with other titles of the United States Code. The words "and such forfeiture and damages shall be sued for in the same suit" are omitted as unnecessary because of rules 8 and 10 of the Federal Rules of Civil Procedure (28 App. U.S.C.). In clauses (1)–(3), the words "false or fraudulent" are substituted for "false, fictitious, or fraudulent" and "Fraudulent or fictitious" to eliminate unnecessary words and for consistency. In clause (1), the words "presents, or causes to be presented" are substituted for "shall make or cause to be made, or present or cause to be presented" for clarity and consistency and to eliminate unnecessary words. The words "officer or employee of the Government or a member of an armed force" are substituted for "officer in the civil, military, or naval service of the United States" for consistency in the revised title and with other titles of the Code. The words "upon or against the Government of the United States, or

any department of the United States, or any department or officer thereof" are omitted as surplus. In clause (2), the word "knowingly" is substituted for "knowing the same to contain any fraudulent or fictitious statement or entry" to eliminate unnecessary words. The words "record or statement" are substituted for "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for consistency in the revised title and with other titles of the Code. In clause (3), the words "conspires to" are substituted for "enters into any agreement, combination, or conspiracy" to eliminate unnecessary words. The words "of the United States, or any department or officer thereof" are omitted as surplus. In clause (4), the words "charge", "or other", and "to any other person having authority to receive the same" are omitted as surplus. In clause (5), the words "document certifying receipt" are substituted for "certificate, voucher, receipt, or other paper certifying the receipt" to eliminate unnecessary words. The words "arms, ammunition, provisions, clothing, or other", "to any other person", and "the truth of" are omitted as surplus. In clause (6), the words "arms, equipments, ammunition, clothes, military stores, or other" are omitted as surplus. The words "member of an armed force" are substituted for "soldier, officer, sailor, or other person called into or employed in the military or naval service" for consistency with title 10. The words "such soldier, sailor, officer, or other person" are omitted as surplus.

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (d), is classified generally to Title 26, Internal Revenue Code.

Appendix E

AMENDMENTS

2009—Subsecs. (a), (b). Pub. L. 111–21, § 4(a)(1), (2), added subsecs. (a) and (b) and struck out former subsecs. (a) and (b) which related to liability for certain acts and defined "knowing" and "knowingly", respectively.

Subsec. (c). Pub. L. 111–21, § 4(a)(4), substituted "subsection (a)(2)" for "subparagraphs (A) through (C) of subsection (a)".

Pub. L. 111–21, § 4(a)(2), (3), redesignated subsec. (d) as (c) and struck out heading and text of former subsec. (c). Prior to amendment, text read as follows: "For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."

Subsecs. (d), (e). Pub. L. 111–21, § 4(a)(3), redesignated subsecs. (d) and (e) as (c) and (d), respectively.

1994—Subsec. (e). Pub. L. 103–272 substituted "1986" for "1954".

1986—Subsec. (a). Pub. L. 99–562, § 2(1), designated existing provisions as subsec. (a), inserted subsec. heading, and substituted "Any person who" for "A person not a

member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person" in introductory provisions.

Subsec. (a)(1). Pub. L. 99–562, § 2(2), substituted "United States Government or a member of the Armed Forces of the United States" for "Government or a member of an armed force".

Subsec. (a)(2). Pub. L. 99–562, § 2(3), inserted "by the Government" after "approved".

Subsec. (a)(4). Pub. L. 99–562, § 2(4), substituted "control of property" for "control of public property" and "by the Government" for "in an armed force".

Subsec. (a)(5). Pub. L. 99–562, § 2(5), substituted "by the Government" for "in an armed force" and "true;" for "true; or".

Subsec. (a)(6). Pub. L. 99–562, § 2(6), substituted "an officer or employee of the Government, or a member of the Armed Forces," for "a member of an armed force" and "property; or" for "property."

Subsec. (a)(7). Pub. L. 99–562, § 2(7), added par. (7). Subsecs. (b) to (e). Pub. L. 99–562, § 2(7), added subsecs. (b) to (e).

Appendix E

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–21, § 4(f), May 20, 2009, 123 Stat. 1625, provided that: "The amendments made by this section [amending this section and sections 3730 to 3733 of this title] shall take effect on the date of enactment of this Act [May 20, 2009] and shall apply to conduct on or after the date of enactment, except that—

> "(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and
>
> "(2) section 3731(b) [probably should be section 3731] of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment."

INCREASED PENALTIES FOR FALSE CLAIMS IN DEFENSE PROCUREMENT

Pub. L. 99–145, title IX, § 931(b), Nov. 8, 1985, 99 Stat. 699, provided that: "Notwithstanding section 3729 of title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of $2,000, an amount equal

to three times the amount of the damages the Government sustains because of the act of the person, and costs of the civil action."

[Section 931(c) of Pub. L. 99–145 provided that section 931(b) is applicable to claims made or presented on or after Nov. 8, 1985.]