No. 14-___

IN THE

Supreme Court of the United States

TRIPLE CANOPY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL. OMAR BADR
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a contractor's knowing failure to comply with a contractual, statutory, or regulatory provision, without payment being conditioned on that provision, results in a false claim that violates section 3729(a)(1)(A) of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, under the "implied certification" theory of liability.

2. Whether "implied certification" is a valid theory of liability under section 3729(a)(1)(A) of the False Claims Act.

3. Whether, given Fed. R. Civ. P. 9(b)'s requirement that all fraud claims be pleaded with particularity, a "false record or statement" claim under section 3729(a)(1)(B) of the False Claims Act obliges a plaintiff to plead actual reliance by the Government on the false record or statement in question.

PARTIES TO THE PROCEEDINGS

Petitioner Triple Canopy, Inc. was the defendant-appellee below. Respondents Omar Badr (the relator) and the United States were the plaintiffs-appellants below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Triple Canopy, Inc., an Illinois company, is not a publicly-traded company, and no publicly held company owns more than 10% of its stock. The parent corporation and sole stockholder of Triple Canopy, Inc. is Constellis Group, Inc., a Delaware corporation. The parent corporation of Constellis Group, Inc. is Constellis Holdings, Inc., a Delaware corporation. Constellis Holding, Inc.'s parent is Constellis Holdings, LLC, a Delaware limited liability company. Constellis Group, Inc., Constellis Holdings, Inc., and Constellis Holdings, LLC are not publicly traded and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CITED AUTHORITIES

TABLE OF CITED AUTHORITIES—Continued

Page(s)

TABLE OF CITED AUTHORITIES—Continued

Page(s)

TABLE OF CITED AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Triple Canopy, Inc. ("TCI") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion is reported at 775 F.3d 628. Pet. App. 1a-20a. The order denying the petition for rehearing en banc is unreported. *Id.* at. 52a-53a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 950 F. Supp. 2d 888. *Id.* at 21a-51a.

STATEMENT OF JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The Court of Appeals filed its opinion on January 8, 2015. It denied petitioners' timely petition for rehearing en banc on March 9, 2015. This court has jurisdiction to review the Court of Appeals' judgment on a writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 31 U.S.C. § 3729 provides, in relevant part:

31 U.S.C. § 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 . . .
>
> 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), plus 3 times the amount of damages which the Government sustains because of the act of that person.

PRELIMINARY STATEMENT

This case squarely presents to this Court for resolution a deep circuit split regarding the fundamental scope of False Claims Act (FCA) liability—an extremely important issue for the thousands of businesses that submit claims for payment to the federal government, particularly in light of the FCA's provisions that allow for treble damages and incentivize relators to bring claims. In the ruling below, the Court of Appeals adopted an extreme variant of the "implied certification" theory, and in doing so, permitted an ordinary breach of contract to violate the FCA, even where the contractor's claim included no objective falsehoods and where the provision allegedly breached was not an express condition of payment. This ruling exposes businesses that submit claims to the federal government to vastly expanded liability under an already expanded theory of liability.

Section § 3729(a)(1)(A) of the FCA is violated where a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." Under an "implied certification" theory of FCA liability, an FCA plaintiff generally alleges that

a defendant *impliedly* made false representations of compliance when it submitted claims for payment to the government, thereby rendering those claims false or fraudulent. Six circuits have limited implied certification liability to circumstances where payment is *expressly* conditioned on compliance with a particular contractual, statutory, or regulatory term that was allegedly breached or violated. *See Mikes v. Straus*, 274 F.3d 687, 699-700 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305-07 (3d Cir. 2011); *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 205 (5th Cir. 2013) ("*Steury II*"); *Chesbrough v. Visiting Physicians Ass'n*, 655 F.3d 461, 468 (6th Cir. 2011); *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168-69 (10th Cir. 2010). In contrast, the Fourth Circuit below joined the D.C. and First Circuits in allowing for implied certification liability where a plaintiff alleges only the contractor's failure to comply with an applicable statutory or regulatory requirement, or any contractual provision. *See United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010); *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 387-88 (1st Cir. 2011). This case warrants this Court's review to resolve this direct and irreconcilable circuit split, which directly impacts the interests of all government contractors. To be clear, because of this split, whether FCA liability attaches under factually identical circumstances – for instance where a government contractor has knowingly breached a contract term – will turn directly on where the complaint alleging those acts is filed. Today, such a claim may survive in Virginia, Massachusetts, and the District of Columbia, along with seven other states and one territory,

but would be dismissed in New York, Texas, and California, along with twenty-five other states and three territories. Further, in an additional thirteen states, there is no specific appellate court authority as to which version (if any) of the implied certification theory applies. Authoritative guidance from this Court on this issue is critical to reign in the ever-expanding limits of the FCA's scope to the reasonable textual limitations that Congress established.

This case also warrants review because it runs contrary to this Court's holding that all fraud-based claims must be pleaded with particularity, as well as the decisions of several circuit courts, which have held that all claims under the FCA are subject to Rule 9(b)'s particularity requirements. The Court of Appeals held that an FCA plaintiff need not plead the element of reliance for claims brought under section 3729(a)(1)(B) of the FCA, which provides for liability for a defendant who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claims." The Court of Appeals' decision thus eviscerates one of the most fundamental protections of Rule 9(b) and allows the government to bring claims under section 3729(a)(1)(B) without demonstrating *any* causal link to a false claim for payment. That is far in excess of anything previously contemplated under the FCA.

These rulings – which will only recur and sow further confusion within the federal court system by producing dramatically different results between jurisdictions – have catastrophic implications for companies doing business with the government and, indeed, for the public that depends on the services provided by those companies. For all of these reasons, as well as

those discussed below, review and clarification from this Court are urgently needed.

STATEMENT OF THE CASE

1.a. The FCA imposes civil liability for, *inter alia*, knowingly presenting a false or fraudulent claim to the government for payment or approval (31 U.S.C. § 3729(a)(1)(A)), and knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(B). As this Court has recognized, the FCA is "essentially punitive in nature." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000). Under the FCA's punitive regime, defendants are subject to treble damages and civil penalties. 31 U.S.C. § 3729.

b. Although the FCA was designed "to reach all types of fraud, without qualification, that might result in financial loss to the Government," *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003), liability under the statute is not limitless. This Court has previously warned against attempts to "expand the FCA well beyond its intended role of combating 'fraud against the Government'" – thus rendering the reach of the FCA as "almost boundless." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 669 (2008). Recognizing these limitations, numerous circuit courts have limited FCA liability under sections 3729(a)(1)(A) and (B) to circumstances that satisfy the basic requirements for fraud claims. *See, e.g., United States ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818, 824 (7th Cir. 2011) ("a mere breach of contract does not give rise to liability under the [FCA]."); *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914,

916 (8th Cir. 2014) ("[b]ecause the FCA is an anti-fraud statute, complaints alleging violations of the FCA must comply" with the particularity requirements of Rule 9(b)).

2. TCI was founded in 2003 by decorated veterans of the United States Army's Special Forces. Today, the company provides mission support, security, and training services to the U.S. government and private clients throughout the world, often in the most unstable environments. In 2009, the Department of Defense chose TCI as one of several awardees of the Theatre-Wide Internal Security Services contract ("TWISS I"). From June 2009 to June 2010, TCI performed TWISS I Task Order 11 ("TO-11"), by which it provided internal security services at Al Asad Airbase in western Iraq.

TO-11 identified twenty itemized responsibilities TCI had with regard to supplementing and augmenting Al Asad's security operations. They included "repel[ing] and control[ling] any unlawful or destructive activity directed toward the [base];" providing "escorts as required" between on-base locations; "searching vehicles and personnel entering and leaving [the base] to ensure only authorized personnel gain access;" "deny[ing] the introduction of contraband;" and "prevent[ing] theft." Pet. App. at 55a-56a. The last of these responsibilities was to "ensure that all employees have received initial training on the weapon that they carry, [and] that they have qualified on a US Army qualification course." *Id.* at 58a The Al Asad guard force also had to meet a number of other general requirements, including that guards be fluent in English and familiar with the local geographical area and customs. *Id.* at 58a. Notably, TO-11 did not expressly condition payment on compliance with any of these responsibilities.

During TO-11's period of performance, TCI presented twelve monthly invoices to the Government for payment. Among other line items, each invoice identified the number of guards provided in the preceding month. Neither TWISS I, TO-11, nor the invoices themselves defined the term "guard." Nor did TCI certify compliance in the invoices with any of TO-11's terms.

On March 21, 2011, relator Omar Badr filed his Complaint, alleging that TCI violated the FCA at Al Asad and four other locations. On June 25, 2012, the Government intervened only on Mr. Badr's count alleging violations at Al Asad. The Government and Mr. Badr alleged that TCI's Al Asad guard force was not properly weapons qualified, as required by one of TO-11's contractual terms. They also alleged that, on two occasions, TCI employees at Al Asad falsified guards' scorecards to indicate they had passed a weapons qualification course when they had not. Notably, neither the Government nor Mr. Badr alleged that (1) TCI violated any provisions of TO-11 other than the weapons qualification requirement, (2) any of TCI's TO-11 invoices included or were accompanied by any express certifications of compliance with the allegedly violated contract term; (3) payment under TO-11 was expressly conditioned on TCI's compliance with any of the contract terms pertaining to guards; (4) TCI submitted the allegedly falsified scorecards to the Government or that they were reviewed by the Government at any time; or (5) the allegedly falsified scorecards actually caused the government to pay TCI's TO-11 invoices.

a. On June 19, 2013, the district court dismissed all FCA and fraud claims against TCI. With respect to the FCA claims under section 3729(a)(1)(A), the court rejected all of Respondents' theories as to why

Petitioners' invoices were "false or fraudulent." First, the court held that the invoices contained no objective falsehood and therefore were not factually false. Pet. App. at 33a. Second, the court rejected several of the government's alternative theories of falsity, including that (1) DD-250 forms signed by the government constituted false statements by TCI; (2) reference to "guards" in the invoices was false because of their alleged failure to comply with the contract's weapons qualifications requirements; and (3) the guards' services were somehow "worthless." *Id.* at 34a-39a. Finally, the court held that the government's "implied certification" theory of liability failed, because (1) the Fourth Circuit had previously rejected that theory, and (2) the plaintiffs failed to allege that the contract made compliance with the weapons qualification requirement a prerequisite for payment. *Id.* at 39a-41a.

b. The district court also dismissed the plaintiffs' FCA claims for false records or statements under section 3729(a)(1)(B). As a threshold matter, the court held that these claims could not survive under the "double falsity" rule, given the lack of a viable claim under section 3729(a)(1)(A). Pet. App. at 46a-47a. The court further found that the false records claims failed as a matter of law under both the FCA and Fed. R. Civ. P. 9(b) because the government's Complaint did not plead with the requisite specificity that anyone actually viewed the weapons scorecards, when such records were viewed, whether those viewing the records actually relied on the records approving payment, or how (or whether) the scorecards caused the payment of a false claim. *Id.* at 47a-48a.

3. Both the government and the relator appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. On January 8, 2015, the Court of Appeals reversed both of those rulings, holding that FCA claims alleging only knowing and material breaches of contract could proceed pursuant to the theory of "implied certification" and that allegations of actual reliance by the government are not necessary to properly plead a false records claim. Pet. App. at 8a-19a.

a. Regarding implied certification, the Court of Appeals adopted that theory of liability for the first time, and applied it in a manner far outside the bounds of what it – and the majority of other circuits – had previously endorsed. While acknowledging its previous warning "against turning what is essentially a breach of contract into an FCA violation," (Pet. App. at 10a), the court's adoption of the implied certification theory did precisely that. Seizing on TCI's failure to satisfy one of twenty contractual provisions, the court held that "the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'" *Id.* at 12a (citations omitted). Under this version of the implied certification theory, the Court of Appeals held that the government had sufficiently pleaded an FCA claim, because (1) the contract listed the weapons qualification requirement as a "responsibility" for TCI to fulfill, (2) the complaint alleged that TCI supervisors had knowledge of the guards' failure to qualify, and (3) the government had sufficiently alleged that the weapons qualification requirement was material to payment. *Id.* at 14a-16a. Notably, nowhere is its opinion did the Court of Appeals discuss or even mention the view of

implied certification held by the majority of courts of appeals, which requires that compliance with a violated contractual provision must be expressly preconditioned on payment in order to serve as the basis for an FCA claim.

b. The Court of Appeals also held that the government had adequately pleaded its FCA claim under section 3729(a)(1)(B). Although the government did not allege that any government representative – or anyone else for that matter – had actually viewed and relied upon the purportedly false scorecards when approving payment, the court held that such reliance was not necessary, and focused instead on whether the scorecards would have been material to payment. Pet. App. at 16a-19a. Under that standard, the court held that the government's claim was sufficiently pleaded, because "the FCA reaches government contractors who employ false records that are capable of influencing a decision, not simply those who create records that actually do influence the decision." *Id.* at 17a. However, in its discussion of the standard for claims under section 3729(a)(1)(B), the court did not address the requirement for fraud-based claims under Fed. R. Civ. P. 9(b), which requires that fraud must be pleaded with particularity, including that a plaintiff actually relied on false or fraudulent statements or conduct.

c. TCI filed a Petition for Rehearing en Banc on February 23, 2015. On March 9, 2015, the Court of Appeals denied that petition without comment. Pet. App. at 53a. On March 13, 2015, TCI timely filed a motion requesting that the Court of Appeals stay the issuance of its mandate. The court denied that motion on March 30, 2015. TCI then filed an Application to this Court to stay the Court of Appeals' mandate on

March 31, 2015. This Court denied the Application on April 2, 2015.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for three reasons. First, this case squarely presents to this Court for resolution a deep circuit split regarding what constitutes a "false claim" under the FCA. Under the broad, unbounded version of implied certification endorsed by the Court of Appeals, along with the D.C. and First Circuits, an FCA plaintiff need allege only a known contract breach to adequately plead an FCA violation. Therefore, within these circuits, government contractors are exposed to punitive FCA damages and fines for acts that would normally result in a simple breach of contract action, thus subjecting them to virtually unbounded liability in an already-expanded theory of liability. In stark contrast, six circuits (the Second, Third, Fifth, Sixth, Ninth and Tenth) have limited the application of implied certification to circumstances where payment is expressly conditioned on compliance. Contrary to the unbounded, minority view endorsed by the Court of Appeals, this more restrained view of implied certification is in line with both Congress' intent when it passed the FCA and its subsequent amendments, and historical understanding of the FCA within the federal court system. Review is necessary to resolve this direct and irreconcilable circuit split, to provide government contractors with authoritative guidance regarding their potential FCA liability, and to reign in the ever-expanding limits of the FCA's scope to the reasonable textual limitations that Congress established.

Second, the Court of Appeals' decision further entrenches "implied certification" as a category of liability under the FCA. Section 3729(a)(1)(A) of the FCA requires that a plaintiff allege that a defendant "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). In recent years, courts have expanded the scope of liability under that provision from claims implicating an objective falsehood on the face of an invoice or in documents submitted therewith ("factual falsity"), to a more expansive view that more broadly sweeps in what the government perceives as fraudulent conduct. This expanded view of liability, referred to as "legal falsity," has enabled the proliferation of countless creative FCA claims. Implied certification is considered as a variant of the theory of "legal falsity" and is recognized by eight circuits However, five circuits have not yet weighed in on whether they accept the theory of implied certification. Therefore, this case squarely presents the question of whether a "false or fraudulent claim" under the FCA can rest where there is no objective falsehood made by the defendant in a claim for payment or accompanying certification of compliance.

Finally, review is warranted because the Court of Appeals' decision contravenes both this Court's jurisprudence and that of other circuits, which have held that all fraud-based claims, including claims under the FCA, must be pleaded with particularity. By holding that an FCA plaintiff need not plead that false records actually caused payment from the government in alleging a claim under section 3729(a)(1)(B) of the FCA, the Court of Appeals effectively eliminated Fed. R. Civ. P. 9(b)'s requirement that reliance is a necessary element for all claims under the FCA. Review of this pure question of law is necessary to resolve the

confusion created by the Court of Appeals' decision and make clear that Rule 9(b)'s requirements apply to all fraud-based claims. To allow otherwise would permit FCA claims to proceed where a false statement is alleged, but no one is alleged to have read or heard it.

I. The Court of Appeals' Decision Conflicts with Six Other Circuits That Require Plaintiffs to Allege and Prove That Payment Was Expressly Preconditioned on Compliance with a Statutory, Regulatory or Contractual Provision.

Review of the Court of Appeals' ruling on the implied certification theory is merited for three reasons. First, nine circuits have now weighed in on the permissible scope of this theory of FCA liability, and those decisions have established two stark and irreconcilable positions – a majority view, which requires that a plaintiff allege and prove an express precondition for compliance in exchange for payment, and a minority view, which does not link any such express preconditions to compliance at all. Second, the minority view contravenes both this Court's precedent and that of other circuits, which have warned that FCA liability, while encompassing all forms of fraud, should be limited to avoid turning contractual disputes into actions for fraud. Third, the scope of implied certification is a widely recurring issue, and the split across the circuits on this issue will have ongoing and devastating effects on businesses that fulfill contracts with the government on a daily basis. Review is therefore warranted to address this pure question of law.

A. The Decision Below Widens an Already Deep and Irreconcilable Circuit Split as to the Scope of the Implied Certification Theory.

Through its ruling, the Court of Appeals has further cemented an already deep, mature, and irreconcilable circuit split as to the scope of the implied certification theory. Three circuits, including the Fourth Circuit, now have held that an FCA plaintiff need not allege that payment was expressly conditioned on compliance with a contractual provision, statute, or regulation in order to establish liability under the implied certification theory; instead, these circuits permit a FCA claim to be properly pleaded where only a knowing violation of a material contract term is alleged. In contrast, six circuits have held that implied certification liability is proper only where payment under the contract was expressly conditioned on compliance with a contractual provision, statute or regulation. Such a Circuit split is exactly the type of issue that merits the Court's review, and this Petition provides an excellent vehicle for the Court to authoritatively determine the scope of implied certification. *See* S. Ct. Rule 10.1 (stating that one reason for Supreme Court review is when a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").

The FCA provides for liability where a defendant "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. section 3729(a)(1)(A). In determining when a claim is "false or fraudulent" numerous circuits have recognized that falsity for purposes of section 3729(a)(1)(A) is not limited to "factual falsity" – *i.e.*, objectively false statements on a claim for payment or

documents submitted therewith. Rather, these circuits have also permitted FCA claims to proceed where conduct constituting "legal falsity" is alleged. *See, e.g., United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305 (3d Cir. 2011); *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010); *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1168 (10th Cir. 2010); *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001).

"Implied certification" is one variant of a legal falsity theory,[1] under which FCA liability can arise where a defendant has not complied with terms imposed by statute, regulation, or contract, even though the defendant provided no express certification of compliance with those terms. In its decision, the Court of Appeals held that a false claim is adequately pleaded under the implied certification theory when the Government "alleges that the contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'" Pet. App. at 12a (citations omitted). Under the Court of Appeals' interpretation of implied certification liability, there is no requirement that payment be conditioned on compliance with the relevant contractual term; rather FCA liability can be properly pleaded based solely on an allegation that the defendant knowingly breached a "material" term of the contract.

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[1] The other primary variant of legal falsity is "express certification." Under this theory, "the defendant is alleged to have signed or otherwise certified to compliance with some law or regulation on the face of the claim submitted." *United States ex rel. Hobbs v. MedQuest Associates, Inc.*, 711 F.3d 707, 714 (6th Cir. 2013).

This Court of Appeals' decision directly conflicts with the implied certification decisions of the Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits. All of these circuits have strictly cabined the application of implied certification FCA liability to circumstances where payment under the contract is *expressly* conditioned upon compliance with the allegedly violated contract provision, statute, or regulation.[2] *See Mikes*, 274 F.3d at 699-700; *Wilkins*, 659 F.3d at 305-07; *Steury II*, 735 F.3d at 205; *Chesbrough*, 655 F.3d at 468; *Ebeid*, 616 F.3d at 998-99; *Lemmon*, 614 F.3d at 1168-69. As these circuits have recognized, absent such an express prerequisite for payment, an FCA claim premised on a false implied certification cannot stand.

For example, in *Mikes v. Straus*, which involved allegations of false Medicare claims, the Second Circuit explained that implied certification is "based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal

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[2] In its most recent opinion on the implied certification theory, the Eleventh Circuit continues to take no official position on the issue. *See United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 808 n.1 (11th Cir. 2015) ("We express no opinion as to the viability of [the implied certification] theory."). However, it has twice suggested that if it recognized implied certification, it would limit it to circumstances where compliance is a prerequisite for payment. *See Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1052 (11th Cir. 2015) (discussing false certification theory, and holding that under that theory "the relevant certification of compliance must be both a prerequisite to obtaining a government benefit and a sine qua non of receipt of [government] funding.") (internal citations and quotations omitted); *United States ex rel. Keeler v. Eisai, Inc.*, 568 F. App'x 783, 799 (11th Cir. 2014) ("an implied certification theory . . . recognizes that the FCA is violated where compliance with a law, rule or regulation is a prerequisite to payment but a claim is made when a participant has engaged in a knowing violation.").

rules that are a precondition to payment." 274 F.3d at 699. However, the court warned that "caution should be exercised not to read this theory expansively and out of context" and that "the FCA "was not designed for use as a blunt instrument to enforce compliance . . . ." *Id.* Consequently, it limited application of implied certification to circumstances where "the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid." *Id.* at 700. Applying this analysis, the court held that the plaintiff did not state a claim under the FCA, because the Medicare requirements violated by the defendant were conditions of participation in the Medicare program, and not express conditions of payment. *Id.* at 701-02.

Similarly, in *United States ex rel. Wilkins v. United Health Grp., Inc*., which also involved Medicare violations, the Third Circuit adopted the implied certification theory and held that a plaintiff must "show that compliance with the regulation which the defendant allegedly violated was a condition of payment from the Government." 659 F.3d at 309. Like the Second Circuit in *Mikes,* the Third Circuit warned that implied certification "should not be applied expansively . . . ." *Id.* at 307. The court's application of this analysis to two separate implied certification claims demonstrates that the existence of an express prerequisite for payment is dispositive of such claims. For the first claim, which involved violations of Medicare marketing regulations, the court held that the plaintiff did not adequately plead implied certification because the regulations in question were conditions of participation, and not conditions of payment for services rendered. *Id.* at 309-11. In contrast, plaintiffs' allegations as to violations of the Anti-Kickback Statute satisfied the implied certification theory because plaintiffs "alleged

that compliance with the [Anti-Kickback Statute] was an express condition of payment to which [defendants] agreed when they entered into an agreement with CMS."[3] *Id.* at 313.

The Fifth, Sixth, Ninth and Tenth Circuits have also recognized that the violated provision's status as an express precondition for payment is the *sine qua non* of an implied certification claim.[4] *See Steury II*, 735 F.3d at 205 (while having "not yet adopted the implied

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[3] In addition to the Second and Third Circuits, the Sixth Circuit has held that even contractual or statutory violations of conditions of *participation* in a federal program do not rise to the level of violations of conditions of *payment* for purposes of implied certification analysis, thus demonstrating that the "express condition of payment" requirement sets a strict bar for plaintiffs. *See Hobbs*, 711 F.3d at 715 (implied certification claim failed because Medicare supervising physician requirements were conditions of participation, not conditions of payment); *see also United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc*., 543 F.3d 1211, 1220 (10th Cir. 2008) ("Conditions of participation, as well as a provider's certification that it has complied with those conditions, are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program.")

[4] To be sure, the Fifth Circuit has not yet adopted the theory of implied certification. However, it has repeatedly made clear that, if it were to adopt that theory of liability, it would require that payment is expressly preconditioned on compliance with a contractual or statutory provision at issue. *See Steury II*, 735 F.3d at 205; *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 366 (5th Cir. 2014) (deeming FCA claims "doomed" because relator did not allege that certification of compliance was a prerequisite to receiving payment); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010) ("*Steury I*") (holding that "we need not resolve the issue" of implied certification, but nevertheless finding that plaintiff failed to satisfy it because the basis for the alleged FCA violation at issue was not a prerequisite of payment under the contract).

false certification theory of FCA liability," nonetheless explaining that "any such claim (whether express or implied) must assert that a certification was a 'prerequisite' to the payment sought . . . ."); *Chesbrough*, 655 F.3d at 468 (relators' implied certification failed because relators did not "allege that [defendant] was expressly required to comply with [testing] standards as a prerequisite to payment of claims."); *Ebeid*, 616 F.3d at 997-98 (holding that Second Circuit's analysis of implied certification in *Mikes* is ""persuasive and consistent with our precedent" because "[i]t is the false certification of compliance which creates liability when *certification* is a prerequisite to obtaining a government benefit.'") (citations omitted); *Lemmon*, 614 F.3d at 1168-70 (stating that implied certification "focuses on the underlying contracts, statutes, or regulations themselves to ascertain whether they make compliance a prerequisite to the government's payment" and holding that implied certification claim was adequately pled because "the pertinent contracts explicitly state that if [defendant] fails to live up to all of its contractual obligations the government might refuse or reduce payment.").

In conflict, the D.C. and First Circuits have sided with the Fourth Circuit by allowing implied certification liability regardless of whether compliance with the statute, regulation, or contractual provision existed as an express precondition of payment.[5] For

[5] While not yet accepting the implied certification theory, the Seventh Circuit has recently suggested that, if it did, it would apply it in a manner similar to that of the D.C., First, and Fourth Circuits. *See United States ex rel. Grenadyor v. Ukrainian Village Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014) (holding that the implied certification theory "treats a bill submitted to the government as an implicit assurance that the bill is a lawful

example, in *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) ("*SAIC*"), a government contractor sought payments from the Government for work related to decommissioning and decontaminating buildings, while knowing that it was in violation of contractual provisions (based on Nuclear Regulatory Commission regulations) governing potential conflicts of interest. Nowhere in the contract was payment conditioned on compliance with these conflict of interest provisions. *SAIC*, 626 F.3d at 1261-63. The D.C. Circuit held that FCA liability could reach beyond circumstances implicating preconditions of payment, and thus an FCA plaintiff need only "show that the contractor withheld information about its noncompliance with material contractual requirements." *Id.* at 1269. In other words, the ruling in *SAIC* permits FCA liability where a contractor is aware that it has breached a contractual requirement and does not immediately inform its contracting officer or other government official of that breach.

Similarly, in *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377 (1st Cir. 2011), the First Circuit examined FCA claims against a medical device manufacturer for inducing physicians to use its medical devices in a kickback scheme through which the manufacturer knew that physicians would eventually submit false Medicare claims to the Government. Even though the Medicare Anti-Kickback Statute – the relevant law upon which FCA liability was premised – contained no compliance prerequisite for payment, the court rejected the defendant's argument that "implied conditions of

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claim for payment, an assurance that's false if the firm submitting the bill knows that it's not entitled to payment.").

payment can only be found in statutes and regulations, and that these sources must expressly state the obligation." 647 F.3d at 386. In short, the version of implied certification endorsed by the D.C. and First Circuits allows for FCA liability so long as the defendant knowingly violates a provision of a contract, statute, or regulation, and the Government alleges that the violation was "material" to payment under the contract.

The Court of Appeals' opinion toes this line of jurisprudence. Under its interpretation of the implied certification theory, *any* allegedly knowing breach of a government contract can be pleaded as a violation of the FCA, so long as the government or a relator alleges that such breach was "material" and thus was "capable of influencing" payment. Pet. App. at 14a. Such an approach cannot be squared with the majority view that implied certification must be strictly limited to circumstances where compliance with a particular provision is an express prerequisite for payment. This is because, as the majority view has noted, requiring that compliance be a prerequisite to payment concerns more than materiality. *See, e.g., Mikes*, 274 F.3d at 697 ("[A]lthough materiality is a related concept, our holding is distinct from a requirement imposed by some courts that a false statement or claim must be material to the government's funding decision."). Rather, the prerequisite requirement "ultimately has to do with whether it is fair to find a false certification or false claim for payment in the first place." *Steury I*, 625 F.3d at 269.

By allowing the government to arbitrarily determine which contractual provisions may eventually serve as the basis for an FCA claim, the Court of Appeals' view of implied certification fails to meet that

fairness bar. Those circuits that have limited implied certification have recognized that "the 'blunt[ness]' of the FCA's hefty fines and penalties makes them an inappropriate tool for ensuring compliance . . . ." *Hobbs*, 711 F.3d at 717. This is precisely why the prerequisite requirement exists; it "maintain[s] a 'crucial distinction' between punitive FCA liability and ordinary breaches of contract." *Steury I*, 625 F.3d at 268. Absent a clear boundary between what is an FCA violation and what is not, contractors who have not made any false or fraudulent statements regarding compliance with contractual, regulatory, or statutory provisions may be subject to treble damages liability as a result of a determination of "materiality" after the fact. *See* 1 John T. Boese, Civil False Claims and Qui Tam Actions § 2.03[G], at 2–151 (3d ed. Supp. 2009-2) (noting that the implied certification theory "has the effect of putting words—false ones, at that—into the defendant's mouth, and then penalizing the defendant for those alleged falsities."). Tying implied certification liability to a prerequisite for payment permits the contractor to readily determine whether its claims for payment are in compliance with the FCA at the time they are submitted. The more expansive view of implied certification cannot provide that reasonable certainty for businesses.

Only this Court can resolve this pervasive and irreconcilable split as to the important question of the scope of FCA liability. Given the already significant authority on this issue, allowing further deliberation within the courts of appeals would not resolve the controversy or produce consensus. This Petition, which presents a pure question of law as to implied certification, is an excellent vehicle for the Court to do so.

B. The Unbounded Implied Certification Theory Adopted by the Court of Appeals Impermissibly Expands FCA Liability Well Beyond Anything Contemplated by Congress.

The Court of Appeals' decision also merits review because it endorsed an extreme and virtually boundless version of implied certification liability not contemplated by Congress. This Court has previously warned against such an extra-textual result in the context of the civil FCA. Last month, this Court held that the Wartime Suspension of Limitations Act, which tolls the statute of limitations when the United States is at war, does not apply to civil FCA claims. In so holding, the Court emphasized that "[i]f Congress had meant to make such a change, we would expect it to have used language that made this important modification clear to litigants and courts." *See Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, No. 12-1497, slip op. at 9 (S. Ct. May 26, 2015). And, in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), this Court rejected attempts to "expand the FCA well beyond its intended role of combating 'fraud against the *Government*'" – thus rendering the reach of the FCA as "almost boundless." *Id.* at 669; *see also Mikes*, 274 F.3d at 699 ("to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act's reach."); *Wilkins*, 659 F.3d at 307 ("the implied certification theory of liability should not be applied expansively"); *Conner*, 543 F.3d at 1218 ("[T]he FCA cannot support . . . expansive liability in the absence of an underlying statute or regulation that conditions payment on compliance with the certification . . . .").

That is precisely what the Court of Appeals' version of the implied certification theory does.

By finding that implied certification claims reach any undisclosed violation of a contractual, statutory, or regulatory provision material to or "capable of influencing" the Government's payment decision, the Court of Appeals has now joined the D.C. and First Circuits in adopting an FCA theory of liability that allows any knowing breach of contract to be properly plead as an FCA violation. Now, an FCA plaintiff need only plead that a defendant knowingly breached a contractual provision, and that compliance with such a provision was "material" in the view of the Government. This is not what Congress intended when it passed the FCA. As the Second Circuit recognized in *Mikes*, "the [FCA] was not designed for use as a blunt instrument to enforce compliance . . . ." *Mikes*, 274 F.3d at 699; *see also United States ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 532 (6th Cir. 2012) ("The False Claims Act is not a vehicle to police technical compliance . . . ."); *Steury I*, 625 F.3d at 268 (noting that "[t]he FCA is not a general 'enforcement device' for federal statutes, regulations and contracts."). Accordingly, review is needed to ensure that "a mere breach of contract does not give rise to liability under the [FCA]." *Yannacopoulos*, 652 F.3d at 824; *see also Steury I*, 625 F.3d at 268 ("Not every breach of a federal contract is an FCA problem."). Indeed, the Government already has the ability to bring a breach of contract action for such infractions, and has other remedies – such as suspension or disqualification of the contractor – at its disposal. *See Hobbs*, 711 F.3d at 717 ("compliance may of course be enforced administratively through suspension, disqualification, or other remedy."). Permitting such infractions to be prosecuted as fraud-

based claims under the FCA is simply enforcement overkill.

C. The Court of Appeals' Decision Presents a Federal Issue of Exceptional Importance.

Finally, the Court of Appeals' decision presents a federal issue of exceptional importance, in that application of the implied certification theory will continue to recur and thus produce confusion and disparate results in the federal court system. Regardless of its merits, unbounded implied certification is now the law in three circuits, and therefore, federal courts in 11 states. Consequently, FCA implied certification claims involving factual circumstances identical to those in other jurisdictions will have dramatically different results. In the majority of circuits, a simple knowing breach of a contractual provision, without more, would be dismissed as an FCA violation out of hand. In contrast, in three circuits, the same run-of-the-mill contractual breach subjects the contractor to the spectre of crippling treble damages FCA liability, to say nothing of the larger stigma within the business community that accompanies FCA liability. The continued subsistence of the unbounded implied certification will also subject defendants to different pleading standards, thus providing the government a disparate and unfair advantage in surviving a motion to dismiss, increasing the leverage of the government (or relator) to obtain a favorable settlement, and forcing the contractor to expend significant discovery and trial costs. These outcomes will recur until this Court resolves this substantial and important federal question.

The continuing split in authority will have disastrous results for companies doing business with

the government. Until it is resolved, contractors, including those doing business in all fifty states, will have to structure their contractual and regulatory compliance programs toward a least common denominator approach in order to prevent contractual breaches from turning into FCA violations in the aforementioned jurisdictions. Thus, the fact that the majority of circuits adopt a more restrained view of implied certification will serve as only cold comfort to companies evaluating their own potential FCA exposure. For example, a federal contractor based in California with activities in Virginia faces full liability in one circuit and achieves dismissal on the pleadings in another, based on the same facts. This is now the status quo, and it cries out for review and clarification.

Moreover, as the Court of Appeals itself has previously recognized, increased compliance and litigation costs ultimately accrue to U.S. taxpayers. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 373 (4th Cir. 2008) ("[i[f every dispute involving contractual performance were to be transformed into a *qui tam* FCA suit, the prospect of litigation in government contracting would literally have no end."). Increased costs and fear of the punitive nature of FCA liability being imposed on run-of-the-mill contract breaches could also lead to government contractors curtailing their services to the United States. Such a reduction in providers of goods and services to the government is not in the public interest.[6] *See United States ex rel. Owens v. First Kuwaiti Gen.*

[6] And, to be clear, restricting the scope of the implied certification theory would not leave the government without a remedy where a contractor has breached the terms of its contract. In fact, the Court of Federal Claims was created specifically to

Trading & Contracting Co., 612 F.3d 724, 726-27 (4th Cir. 2010) "Allowing [the FCA] to be used in run-of-the-mill contract disagreements . . . would burden, not help, the contracting process, thereby driving up the costs for the government and, by extension, the American public."). Review by this Court of unbounded implied certification offers contractors – and the public – the certainty of ultimate resolution of this vital issue.

II. The Implied Certification Theory of Liability is Beyond the Scope of the FCA's Purpose.

In addition to the proper scope of implied certification, this Court should also grant review to examine the underlying legitimacy of the implied certification theory of liability itself. To properly state a violation of 31 U.S.C. section 3729(a)(1)(A), a plaintiff must allege that a defendant "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). As discussed above, numerous circuits have distinguished between "factual falsity" and "legal falsity" for purposes of evaluating FCA liability, and have classified implied certification as a variant of the latter. *See supra* at 15. Under theories of legal falsity, FCA plaintiffs need not plead that an invoice or documents accompanying an invoice contained an express misrepresentation.

Eight circuits – the First, Second, Third, Fourth, Sixth, Ninth, Tenth and D.C. Circuits – recognize some form of implied certification. However, five other circuits – the Fifth, Seventh, Eighth, Eleventh and

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allow the government to efficiently litigate such contract-based allegations.

Federal Circuits – have not yet yet weighed in as to whether they officially adopt or endorse it.[7] *See Steury* II, 735 F.3d at 205 (noting that the Fifth Circuit has "not yet adopted the implied false certification theory of FCA liability"); *Grenadyor*, 772 F.3d at 1106 (stating that Seventh Circuit has "treated as unsettled" the implied certification theory); *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 808 n.1 (11th Cir. 2015) ("express[ing] no opinion as to the viability" of the implied certification theory).[8] Courts reluctant to adopt implied certification as a theory of FCA liability have noted their view that a false claim must contain an "objective falsehood." *See, e.g.*, *Yannacopoulos*, 652 F.3d at 836 ("A statement may be deemed 'false' for purposes of the False Claims Act only if the statement represents 'an objective falsehood.'"). This case squarely presents the question of whether a "false or fraudulent claim" under the FCA can rest where there is no objective falsehood made by the defendant in that claim for payment or accompanying certification of compliance. This Court can and should address this important question of federal law.

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[7] As discussed above, *see supra* at 18, the Fifth Circuit has not officially adopted the implied certification theory, but has made clear that, if it were to adopt that theory, it would limit it to circumstances implicating express preconditions of payment.

[8] To date, neither the Eighth Circuit nor the Federal Circuit has discussed implied certification at all.

III. The Court of Appeals' Decision Eliminates the Well-Established Requirement under Rule 9(b) That Reliance Is Necessary for a False Records Claim.

The Court of Appeals' decision also presents an important federal question regarding the applicable pleading standards for FCA claims under 31 U.S.C. § 3729(a)(1)(B). In Count Two, the Government alleges that TCI violated the FCA by making "false records or statements" purportedly material to the Government's approval of claims. By reversing the district court's dismissal of the claim, the Court of Appeals eliminated reliance as a required element for false statements or false records claims under section 3729(a)(1)(B) of the FCA. *See* Pet. App. at 18a (describing the district court's decision as "doubly deficient" in that "it would inappropriately require actual reliance on the false record and import a presentment requirement from § 3729(a)(1)(A) that is not present in § 3729(a)(1)(B)."). That decision contravenes this Court's repeated holding that all fraud claims must be pleaded with particularity under Fed. R. Civ. P. 9(b). It also stands in contrast to the jurisprudence of other circuits, which have held that claims under section 3729(a)(1)(B) must plead reliance by the Government on the record in question. Review is necessary to resolve any confusion among the circuits and make clear that all FCA claims must be pled with particularity, including a specific allegation of actual reliance on statements or records allegedly used to secure payment.

A. The Decision Contravenes This Court's Repeated Holding that Fraud Claims Must Be Pleaded With Particularity.

By holding that the government need not have relied on the allegedly false weapons scorecards – or, rather, that the alleged "false statements" need not have been heard or seen by any government representative – the Court of Appeals' decision plainly contravenes this Court's previous jurisprudence that all fraud claims be pleaded with particularity. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (holding that "Rule 9(b) applies to 'all averments of fraud or mistake'" and "requires that 'the circumstances constituting fraud . . . be stated with particularity . . . .'"). The FCA is clearly a statute aimed at combating fraud. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932 (2009) ("The FCA establishes a scheme that permits either the Attorney General . . . or a private party . . . to initiate a civil action alleging fraud on the Government."). Among Rule 9(b)'s requirements is that plaintiffs alleging fraud must plead reliance on a fraudulent statement that leads to damages. *See, e.g., Swanson v. Citibank, N.A.*, 614 F.3d 400, 406 (7th Cir. 2010) (holding that, under Rule 9(b), "a plaintiff must plead actual damages arising from her reliance on a fraudulent statement."); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 22 (D.C. Cir. 2008) (Rule 9(b) requires that "[a] plaintiff may recover for a defendant's fraudulent statement only if the plaintiff took some action in reliance on that statement.").

Numerous circuits have recognized that Rule 9(b)'s particularity standards encompass all claims under the FCA. *See, e.g., United States v. Bollinger*

Shipyards, Inc., 775 F.3d 255, 260 (5th Cir. 2014) ("To state a claim under the FCA, the plaintiff must meet both the plausibility pleading standard of Fed. R. Civ. P. 8 and the heightened pleading standard of Fed. R. Civ. P. 9(b)."); *United States ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 916 (8th Cir. 2014) ("Because the FCA is an anti-fraud statute, complaints alleging violations of the FCA must comply with Rule 9(b)") (citations omitted); *United States ex rel. Gross v. AIDS Research Alliance–Chicago*, 415 F.3d 601, 604 (7th Cir. 2005) (same). These requirements are particularly important to government contractors, who are subject to treble damages liability under the FCA and, in many cases, whose sole trade depends on their reputation for doing honest business with the government. *See Grenadyor*, 772 F.3d at 1105-06 (explaining that Rule 9(b)'s particularity requirements are necessary in FCA cases because "a public accusation of fraud can do great damage to a firm before the firm is (if the accusation proves baseless) exonerated in litigation . . . .").

To permit the Court of Appeals' interpretation to stand would unreasonably expand liability under section 3729(a)(1)(B) of the FCA, thus enabling FCA plaintiffs to plead a false records claim without alleging how purported false records led to payment by the Government. The real-world implications of this result are breathtaking. Under the Court of Appeals' articulation of the law, a false statements claim would exist even where a contractor created a "false record" and then *immediately* destroyed it. Given this Court's previous jurisprudence regarding Rule 9(b) and the recognition by numerous courts that FCA claims require pleading reliance by the Government, this Court should grant the Petition to clarify that reliance

is a required element in pleading an FCA claim under section 3729(a)(1)(B).

B. The Court of Appeals' Decision Presents a Circuit Split as to the Pleading Requirements for an FCA Claim under Section 3729(a)(1)(B).

In addition to contravening this Court's precedent regarding Rule 9(b), the Court of Appeals' decision is now in conflict with three other circuits as to pleading standards for FCA claims under section 3729(a)(1)(B). The Fifth, Eighth, and Eleventh Circuits have all held that reliance is a necessary element of any claim under the FCA, even after amendment of the FCA by the Fraud Enforcement and Recovery Act ("FERA") of 2009. These circuits have made clear that to properly plead the causation element of a false records claim, an FCA plaintiff must specifically allege how the false records *actually caused* the government to pay out money. *See United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 365 (5th Cir. 2014) (discussing "four elements that a relator must satisfy in order to state a cause of action under the FCA generally," including that a false statement "*caused the government to pay out money*") (emphasis added); *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App'x 693, 703-04 (11th Cir. 2014) (holding that to plead an FCA violation, "a relator must identify the particular document and statement alleged to be false, who made or used it, when the statement was made, how the statement was false, and what the defendants obtained as a result."); *United States ex rel. Vigil v. Nelnet, Inc.*, 639 F.3d 791, 799 (8th Cir. 2011) (holding that although the language for a false records claim "has been modified, the new statute still requires a

causal link between the 'false statement or record' and the Government's payment of a false claim.").

The Court of Appeals' rejection of the need to plead reliance for FCA claims under section 3729(a)(1)(B) cannot be reconciled with the rulings of these three circuit courts. By allowing FCA plaintiffs to bring false records claims in the absence of any specific allegation of reliance whatsoever by the government or anyone else at any stage of the payment process, the Court of Appeals has eviscerated the basic protections of Rule 9(b). Only this Court can resolve this deep and irreconcilable split as to the important question of the requirements for pleading and proving all fraud-based claims in the federal system.

CONCLUSION

For the foregoing reasons, Triple Canopy, Inc.'s petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 2015

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed: 01/08/2015

No. 13-2190

UNITED STATES OF AMERICA,
Intervenor / Plaintiff–Appellant,

and

UNITED STATES ex rel. OMAR BADR,
Plaintiff,

v.

TRIPLE CANOPY, INC.,
Defendant–Appellee.

No. 13-2191

UNITED STATES ex rel. OMAR BADR,
Plaintiff–Appellant,

v.

TRIPLE CANOPY, INC.,
Defendant–Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(1:11-cv-00288-GBL-JFA)

Argued: October 30, 2014
Decided: January 8, 2015

Before SHEDD, AGEE, and WYNN, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Shedd wrote the opinion, in which Judge Agee and Judge Wynn joined.

ARGUED: Charles W. Scarborough, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Earl N. Mayfield, III, DAY & JOHNS, PLLC, Fairfax, Virginia, for Appellants. Tara Melissa Lee, DLA PIPER LLP (US), Reston, Virginia, for Appellee. ON BRIEF: Stuart F. Delery, Assistant Attorney General, Joyce Branda, Acting Assistant Attorney General, Michael S. Raab, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Dana J. Boente, Acting United States Attorney, Richard W. Sponseller, Assistant United States Attorney, Peter S. Hyun, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellant United States of America. Paul A. Prados, Milt C. Johns, Christopher M. Day, DAY & JOHNS, PLLC, Fairfax, Virginia, for Appellant Omar Badr. Joseph C. Davis, Reston, Virginia, Paul D. Schmitt, DLA PIPER LLP (US), Washington, D.C., for Appellee.

SHEDD, Circuit Judge:

The Government appeals the district court's dismissal of Counts I and II of its complaint under the False Claims Act (FCA) against Triple Canopy, Inc. Omar Badr, the original relator, also appeals the dismissal of his complaint — including four additional FCA counts (Counts II-V) — against Triple Canopy. For the following reasons, we conclude that the district court

correctly dismissed Counts II-V of Badr's complaint, but erred in dismissing Counts I and II of the Government's complaint.

I.

In June 2009, the Government awarded a firm-fixed price contract to Triple Canopy to provide security services at the Al Asad Airbase, the second largest airbase in Iraq.[1] Triple Canopy was one of several security firms awarded the Theatre-Wide Internal Security Services contract; under that contract, security at specific locations was governed by individual Task Orders. The Task Order for Al Asad was TO-11.

Under TO-11, Triple Canopy agreed to provide "internal security services" at Al Asad and to "supplement and augment security operations." (J.A. 98). These services included "providing internal operations at entry control points, internal roving patrols," and "prevent[ing] unauthorized access" by enforcing "security rules and regulations regarding authorized access to [Al Asad] including internal check points." (J.A. 98). TO-11 identified 20 "responsibilities" Triple Canopy was tasked with in providing these services, including typical security functions such as repelling attacks, providing escorts, performing entrance searches, and preventing theft, as well as ancillary services such as running background checks, checking ammunition lists, and computerizing personnel systems. (J.A. 99). As relevant here, the final responsibility was to

[1] Because this appeal stems from the grant of a motion to dismiss, we accept as true all well-pled facts in the complaint and construe them in the light most favorable to the Government and Badr. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

"ensure that all employees have received initial training on the weapon that they carry, [and] that they have qualified on a US Army qualification course." (J.A. 99) (marksmanship requirement). To satisfy the marksmanship requirement, employees had to score a minimum of 23 rounds out of 40 from a distance of 25 meters. Qualifying scorecards for the guards were to be maintained in their respective personnel files for one year. Nothing in TO-11 expressly conditioned payment on compliance with the responsibilities.

To fulfill TO-11, Triple Canopy hired approximately 332 Ugandan guards to serve at Al Asad under the supervision of 18 Americans. The guards' personnel files indicate that they met the qualifying marksmanship score at a course in Kampala, Uganda. Upon arriving at the base, however, Triple Canopy's supervisors learned that the guards lacked the ability to "zero" their rifles and were unable to satisfy the qualifying score of 23 on the marksmanship course. Thus, shortly after their arrival, Triple Canopy supervisors were aware that the Ugandans could not satisfy the final responsibility of TO-11: the marksmanship requirement. Nonetheless, Triple Canopy submitted its monthly invoices for the guards. After a failed training attempt, a Triple Canopy supervisor directed that false scorecard sheets be created for the guards and placed in their personnel files. Because there was attrition, replacement Ugandan guards arrived at Al Asad during the year. These guards were also unable to satisfy the marksmanship requirement, and consequently additional false scorecards were created.

In May 2010, toward the end of the contract, Triple Canopy attempted to have 40 Ugandan guards qualify in marksmanship before leaving for vacation. None could do so. A Triple Canopy supervisor ordered Omar

Badr, a Triple Canopy medic, to prepare false scorecards for the guards, reflecting scores of 30-31 for male guards and 24-26 for the female guards. Triple Canopy's site manager signed these new scorecards and post-dated them, showing that the guards qualified in June 2010.

TO-11 was in effect for one year, and Triple Canopy presented 12 monthly invoices for guard services during that time. Each invoice listed the number of guards in service for that month; the term "guard" was undefined. Pursuant to TO-11, a contracting officer representative (COR) was "responsible for acceptance of the services [Triple Canopy] performed." (J.A. 41.) The COR was appointed by the Government and confirmed acceptance of Triple Canopy's guard services by filing a Material Inspection and Receiving Report (DD-250) Form. (J.A. 41). The DD-250 required the COR to accept the services if they "conform[ed] to contract" and to sign the form if the services provided "were received in apparent good condition." (J.A. 73). The COR completed twelve DD-250 forms, none of which included any certification or endorsement from Triple Canopy. In total, Triple Canopy submitted invoices totaling $4,436,733.12 for the Ugandan guards—a rate of $1,100 per month for each guard. Triple Canopy did not receive a renewal of TO-11, and the Ugandan guards were thereafter dispatched to four other contract sites around Iraq: Cobra, Kalsue, Delta, and Basra.

Badr eventually instituted a *qui tam* action under the FCA against Triple Canopy in the Eastern District of Virginia. Badr alleged five false claims counts: Al Asad (Count I) and Cobra, Kalsue, Basra, and Delta (Counts II-V). The Government intervened on the Al Asad count and filed an amended complaint alleging that Triple Canopy knowingly presented false claims, in violation of 31 U.S.C. § 3729(a)(1)(A) (Count I), and caused the

creation of a false record material to a false claim, in violation of § 3729(a)(1)(B) (Count II). Specifically, the Government alleged that Triple Canopy knew the guards did not satisfy TO-11's marksmanship requirement but nonetheless "billed the Government the full price for each and every one of its unqualified guards" and "falsified documents in its files to show that the unqualified guards each qualified as a 'Marksman' on a U.S. Army Qualification course." (J.A. 24). The Government also brought several common law claims.

The district court granted Triple Canopy's motion to dismiss the FCA claims. *United States ex rel. Badr v. Triple Canopy, Inc.*, 950 F.Supp.2d 888 (E.D. Va. 2013). The court first dismissed Count I because the Government failed to plead that Triple Canopy submitted a demand for payment that contained an objectively false statement. Next, the court dismissed Count II because the Government (1) failed to allege a false claim and (2) failed to allege that the COR ever reviewed the scorecards. Finally, the court dismissed Counts II-V in Badr's complaint because he failed to plead with particularity the facts giving rise to the claims. The court also dismissed Count I of Badr's complaint, concluding that Badr lacked standing to press that claim because of the Government's intervention. The court later dismissed the Government's remaining common law claims.[2] Both the Government and Badr filed timely appeals.

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[2] The district court dismissed each of these counts without prejudice. We requested the parties to brief whether the orders are appealable under *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1066-67 (4th Cir. 1993) (holding dismissal "without prejudice" is not an appealable order if the "plaintiff could save his action by merely amending his complaint"). *Pursuant to Chao v. Rivendell Woods, Inc.*, 415 F.3d

II.

We review de novo the district court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694, 700 (4th Cir. 2014). To survive a motion to dismiss under the rule, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Facts that are "merely consistent with" liability do not establish a plausible claim for relief. *Id.* (internal quotation marks omitted).

In addition, claims under the FCA "must also meet the more stringent 'particularity' requirement of Federal Rule of Civil Procedure 9(b)." *United States ex rel. Ahumada v. NISH*, 756 F.3d 268, 280 (4th Cir. 2014). Rule 9(b) requires that "an FCA plaintiff must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (internal quotation marks omitted). Imposing this requirement serves to deter "fishing expeditions." *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 789 (4th Cir. 1999) (*Harrison I*).

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342 (4th Cir. 2005), both the Government and Badr have elected to "stand" on their complaints and "waived the right to later amend unless we determine that the interests of justice require[] amendment." *Id.* at 345. Accordingly, we have jurisdiction to hear these appeals.

III.

A.

Section 3729(a)(1)(A) prohibits any person from knowingly "caus[ing] to be presented" to the Government a "false or fraudulent claim for payment." 31 U.S.C. § 3729(a)(1)(A). To prove a false claim, a plaintiff must allege four elements: (1) a false statement or fraudulent course of conduct; (2) made with the requisite scienter; (3) that is material; and (4) that results in a claim to the Government. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003) (*Harrison II*). A false statement is material if it has "a natural tendency to influence, or be capable of influencing," the Government's decision to pay. 31 U.S.C. § 3729(b)(4). Scienter under the FCA encompasses actual knowledge, deliberate indifference, and reckless disregard, but does not require proof of specific intent to defraud. 31 U.S.C. § 3729(b)(1).

The phrase "false or fraudulent claim" should be "construed broadly," *Harrison I*, 176 F.3d at 788, "to reach all types of fraud, without qualification, that might result in financial loss to the Government," *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). Liability thus attaches "any time a false statement is made in a transaction involving a call on the U.S. fisc." *Harrison I*, 176 F.3d at 788.

The district court determined that Count I failed to state a claim because the Government did not allege the first element, a false statement or fraudulent course of conduct. In the court's view, the Government "failed to sufficiently plead that [Triple Canopy] submitted a demand for payment containing an objectively false statement." *Triple Canopy*, 950 F.Supp.2d at 890. The court reached this determination by reasoning that the

Government never alleged that Triple Canopy "invoiced a fraudulent number of guards or billed for a fraudulent sum of money." *Id.* at 896. The Government argues that Triple Canopy submitted false claims because its monthly invoices billed the Government for guard services although the company knew its guards had failed to comply with one of TO-11's responsibilities, the marksmanship requirement.

We have previously recognized that a false claims plaintiff cannot "shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the" FCA. *Wilson*, 525 F.3d at 373. *See also United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) (noting that courts "seek[] to maintain a crucial distinction between punitive FCA liability and ordinary breaches of contract") (internal quotation marks omitted). In *Wilson*, we concluded that two *qui tam* relators failed to plead a false claim when the claim was based on "mere allegations of poor and inefficient management of contractual duties." *Wilson*, 525 F.3d at 377 (internal quotation marks omitted). "An FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision," *id.* at 378, we explained, particularly where the Government never "expressed dissatisfaction" with the contract's performance, *id.* at 377. *See also Harrison I*, 176 F.3d at 792 (noting fraud is limited to "expressions of fact which (1) admit of being adjudged true or false in a way that (2) admit of empirical verification") (internal quotation marks omitted).

We reiterated the line between breaches of contract and FCA claims in *United States ex rel. Owens v. First Kuwaiti General Trading & Contracting Co.*, 612 F.3d 724, 734 (4th Cir. 2010). In *Owens*, we rejected claims from a *qui tam* relator regarding the construction of the

United States embassy in Baghdad. While noting that some of the construction work required remediation, we nonetheless explained that "[t]o support an FCA claim, there needs to be something more than the usual back-and-forth communication between the government and the contractor over this or that construction defect and this or that corrective measure." *Id.* at 729. We summarized the relators' claims as "garden-variety issues of contractual performance" involving "a series of complex contracts pertaining to a construction project of massive scale." *Id.* at 734. We expressly recognized that the purposes of the FCA were not served by imposing liability on "honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights," "particularly when the party invoking [the FCA] is an uninjured third party." *Id.*

While we have guarded against turning what is essentially a breach of contract into an FCA violation, we have also continued to recognize that the FCA is "intended to protect the treasury against the claims of unscrupulous contractors, and it must be construed in that light." *Id.* To satisfy this goal, courts have recognized that "a claim for payment is false when it rests on a false representation of compliance with an applicable . . . contractual term." *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (*SAIC*). Such "[f]alse certifications" are "either express or implied." *Id.* While we label the claim in this case as "implied certification," we note that this label simply recognizes one of the "variety of ways" in which a claim can be false. *Harrison I*, 176 F.3d at 786.[3]

[3] The use of "judicially created formal categories" for false claims is of "relatively recent vintage," and rigid use of such labels can "do more to obscure than clarify" the scope of the FCA. *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377,

"Courts infer implied certifications from silence 'where certification was a prerequisite to the government action sought.'" *SAIC*, 626 F.3d at 1266 (quoting *United States ex rel. Siewick v. Jamison Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000)). Recognizing that claims can be false when a party impliedly certifies compliance with a material contractual condition "gives effect to Congress' expressly stated purpose that the FCA should 'reach all fraudulent attempts to cause the Government to pay [out] sums of money or to deliver property or services,'" *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 306 (3d Cir. 2011) (quoting S.Rep. No. 99–345, at 9 (1986)), a purpose we explicitly recognized in *Harrison I*. An example provided by the D.C. Circuit helps explain the benefits of recognizing this theory:

> Consider a company that contracts with the government to supply gasoline with an octane rating of ninety-one or higher. The contract provides that the government will pay the contractor on a monthly basis but nowhere states that supplying gasoline of the specified

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385 (1st Cir. 2011). Our focus, regardless of the label used, remains on whether the Government has alleged a false or fraudulent claim. In *Harrison I*, we briefly noted the existence of implied certification claims and, while mentioning such claims might be "questionable" in the circuit, reserved ruling on their viability. *Harrison I*, 176 F.3d at 788 n.8. Since *Harrison I*, however, the weight of authority has shifted significantly in favor of recognizing this category of claims at least in some instances. *See United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305-06 (3d Cir. 2011) (collecting cases from the First, Second, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits). For the reasons expressed infra, we agree that contractual implied certification claims can be viable under the FCA in the appropriate circumstances.

> octane is a precondition of payment. Notwithstanding the contract's ninety-one octane requirement, the company knowingly supplies gasoline that has an octane rating of only eighty-seven and fails to disclose this discrepancy to the government. The company then submits pre-printed monthly invoice forms supplied by the government—forms that ask the contractor to specify the amount of gasoline supplied during the month but nowhere require it to certify that the gasoline is at least ninety-one octane. So long as the government can show that supplying gasoline at the specified octane level was a material requirement of the contract, no one would doubt that the monthly invoice qualifies as a false claim under the FCA despite the fact that neither the contract nor the invoice expressly stated that monthly payments were conditioned on complying with the required octane level.

SAIC, 626 F.3d at 1269.

Accordingly, we hold that the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and "withheld information about its noncompliance with material contractual requirements." *Id.*[4] The "pertinent inquiry" is "whether,

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[4] To that end, we note there are several key distinctions between this case and what we viewed as garden-variety breaches of contract in *Owens* and *Wilson*. First, this case does not involve uninjured third parties making claims against their former employers or contracts under which the Government does not "express[] dissatisfaction." To the contrary, the Government has clearly expressed its displeasure with Triple Canopy's actions

through the act of submitting a claim, a payee knowingly and falsely implied that it was entitled to payment." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1169 (10th Cir. 2010). We appreciate that this theory "is prone to abuse" by parties seeking "to turn the violation of minor contractual provisions into an FCA action." *SAIC*, 626 F.3d at 1270.[5] The best manner for continuing to ensure that plaintiffs cannot shoehorn a breach of contract claim into an FCA claim is "strict enforcement of the Act's materiality and scienter requirements." *Id.*; *see also United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 388 (1st Cir. 2011) (same). In

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by prosecuting this action. In addition, this is not a case involving subjective interpretations of vague contractual language. In *Wilson* we noted that the relators "do not claim that the maintenance provisions . . . set forth anything resembling a specific maintenance program." *Wilson*, 525 F.3d at 377. Absent such specific language, the relators could not prove an "objective falsehood." *Id.* Here, the Government has presented an objective falsehood—the marksmanship requirement is a specific, objective, requirement that Triple Canopy's guards did not meet.

[5] Triple Canopy argues that implied representations can give rise to liability only when the condition is expressly designated as a condition for payment. "Of course, nothing in the statute's language specifically requires such a rule," and we decline to impose Triple Canopy's proposed requirement. *SAIC*, 626 F.3d at 1268. In practice, the Government might have a difficult time proving its case without an express contractual provision. Because the FCA violations must be "knowing," the Government must establish that both the contractor and the Government understood that the violation of a particular contractual provision would foreclose payment. In addition, (Continued) because the violation must be material, not every part of a contract can be assumed, as a matter of law, to provide a condition of payment. *Cf. Mann v. Heckler & Koch Def., Inc.*, 630 F.3d 338, 346 (4th Cir. 2010) (finding no fraud or FCA violation even though contractor's actions "may have violated federal bidding regulations").

addition, parties who engage in abusive litigation remain subject to appropriate sanctions, whether in the context of the FCA or otherwise.

B.

Applying these standards, we readily conclude that the Government has sufficiently alleged a false claim for purposes of Rule 12(b)(6) and Rule 9(b). TO-11 lists the marksmanship requirement as a "responsibility" Triple Canopy must fulfill under the contract. The complaint contains an abundance of allegations that Triple Canopy did not satisfy this requirement and, instead, undertook a fraudulent scheme that included falsifying records to obscure its failure. The Government's complaint also properly alleges that Triple Canopy's supervisors had actual knowledge of the Ugandan guards' failure to satisfy the marksmanship requirement and ordered the scorecards' falsification.

Turning to materiality, in implied certification cases this element operates to protect contractors from "onerous and unforeseen FCA liability as the result of noncompliance with any of potentially hundreds of legal requirements" in contracts, because "[p]ayment requests by a contractor who has violated minor contractual provisions that are merely ancillary to the parties' bargain" do not give rise to liability under the FCA. *SAIC*, 626 F.3d at 1271. To establish materiality, the Government must allege the false statement had "a natural tendency to influence, or be capable of influencing," the Government's decision to pay. 31 U.S.C. § 3729(b)(4). "Express contractual language may 'constitute dispositive evidence of materiality,' but materiality may be established in other ways, 'such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at

issue.'" *Hutcheson*, 647 F.3d at 394 (quoting *SAIC*, 626 F.3d at 1269).

The Government has sufficiently pled materiality under this standard. First, common sense strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight. In addition, Triple Canopy's actions in covering up the guards' failure to satisfy the marksmanship requirement suggests its materiality. If Triple Canopy believed that the marksmanship requirement was immaterial to the Government's decision to pay, it was unlikely to orchestrate a scheme to falsify records on multiple occasions.

Like the hypothetical gasoline supplier, Triple Canopy agreed to provide a service that met certain objective requirements, failed to provide that service, and continued to bill the Government with the knowledge that it was not providing the contract's requirements. In addition, Triple Canopy then endeavored to cover up its failure. Distilled to its essence, the Government's claim is that Triple Canopy, a security contractor with primary responsibility for ensuring the safety of servicemen and women stationed at an airbase in a combat zone, knowingly employed guards who were unable to use their weapons properly and presented claims to the Government for payment for those unqualified guards. The Court's admonition that the FCA reaches "all types of fraud, without qualification" is simply inconsistent with the district court's view of the FCA that Triple Canopy can avoid liability because nothing on the "face" of the invoice was objectively false. *Neifert-White*, 390 U.S. at 232.

Accordingly, because the Government has sufficiently alleged that Triple Canopy made a material false statement with the requisite scienter that resulted in payment, we reverse the district court's dismissal of Count I of the Government's complaint.

C.

We also reverse the district court's dismissal of Badr as a party to this claim. The district court, relying on an out-of-circuit district court decision, *United States ex rel. Feldman v. City of New York*, 808 F.Supp.2d 641 (S.D.N.Y. 2011), held that Count I of Badr's complaint, which was "virtually indistinguishable" from the Government's, was "superseded" and "therefore dismissed for lack of standing." *Triple Canopy*, 950 F.Supp.2d at 895 n.1. The FCA does provide that, if the Government elects to participate in a *qui tam* FCA action, it "shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." 31 U.S.C.A. § 3730(c)(1). However, the FCA further provides that the relator "shall have the right to continue as a party to the action," subject to certain limitations. *Id.* We thus conclude that the district court erred in finding that Badr lacked standing to remain as a party on Count I. On remand, the district court is free to decide whether any of the limitations in § 3730(c)(2) apply to Badr.

IV.

A.

We next turn to the district court's dismissal of Count II, the Government's false records claim. Section 3729(a)(1)(B) creates liability when a contractor "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." The district court dismissed the

Government's false records claim for (1) failing to allege a false statement and (2) failing to allege that the COR actually reviewed the falsified scorecards.[6] The district court concluded the scorecards were not material because the Government failed to specifically allege that the COR reviewed them. The court's conclusion, however, misapprehends the FCA's materiality standard.

"[T]he materiality of the false statement turns on whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." *United States ex rel. Berge v. Bd. of Tr. of Univ. of Ala.*, 104 F.3d 1453, 1460 (4th Cir. 1997) (internal quotation marks omitted); *see also* 31 U.S.C. § 3729(b)(4). Materiality focuses on the "potential effect of the false statement when it is made, *not on the actual effect of the false statement when it is discovered*." *Harrison II*, 352 F.3d at 916-17 (emphasis added). *See also United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 96 (2d Cir. 2012) (holding materiality requirement is objective, not subjective, and "does not require evidence that a program officer relied upon the specific falsehoods proven"). In other words, the FCA reaches government contractors who employ false records that are capable of influencing a decision, not simply those who create records that actually do influence the decision. Thus, in *Harrison II*, we rejected the sort of "actual effect" standard used by the district court because a government contractor could never be held liable under the FCA if the governmental entity decides that it should continue to fund the contract, notwithstanding the fact that it knew

[6] Because we have already determined that the Government adequately pled a false statement, we turn only to the question of whether the false scorecards themselves were "material" to the false statement.

the contractor had made a false statement in connection with a claim. *Harrison II*, 352 F.3d at 916-17. Along the same lines, a contractor should not receive a windfall and escape FCA liability if — as the district court suggested here — a Government employee fails to catch an otherwise material false statement. That approach would be doubly deficient: it would inappropriately require actual reliance on the false record and import a presentment requirement from § 3729(a)(1)(A) that is not present in § 3729(a)(1)(B). *See United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 308 (4th Cir. 2009). In addition, that approach "does not accomplish one of the primary purposes of the FCA—policing the integrity of the government's dealings with those to whom it pays money." *Harrison II*, 352 F.3d at 917. The FCA is meant to cover "all fraudulent attempts to cause the Government to pay out sums of money." *Neifert-White*, 390 U.S. at 233. The district court thus erred in focusing on the actual effect of the false statement rather than its potential effect. A false record may, in the appropriate circumstances, have the potential to influence the Government's payment decision even if the Government ultimately does not review the record.

B.

Applying the proper standard, we find that the Government has properly pled materiality in Count II. The false records in this case — the falsified scorecards — are material to the false statement (the invoices) because they complete the fraud. The false scorecards make the invoices appear legitimate because, in the event the COR reviewed the guards' personnel files, the COR would conclude that Triple Canopy had complied with the marksmanship requirement. TO-11's provisions likewise anticipated that the COR would indeed review the scorecards, as they offered the most direct evidence that Triple

Canopy's guards satisfied the marksmanship requirement. The false scorecards were thus integral to the false statement and satisfy the materiality standard. We therefore reverse the district court's dismissal of Count II of the Government's complaint.[7]

V.

Finally, we address the dismissal of Counts II-V in Badr's complaint. Badr alleged in those counts that Triple Canopy submitted false claims by invoicing the Government for guard services under four additional contracts: Cobra, Kalsue, Basra, and Delta. The sum of Badr's allegations on these counts is as follows: that the Ugandan guards were "demobilized . . . and transferred" to the four contracts while still not "qualified to provide" security services, and that Triple Canopy was "paid by the U.S. Government under terms similar to those under the Al Asad Contract." (J.A. 15). By comparison, in support of his claim regarding the Al Asad airbase, Badr listed dates, specified the actions taken on those dates, and identified the Triple Canopy personnel involved. *See, e.g.* J.A. at 14 ("Site Manager D.B. instructed [Badr] to falsely indicate that the men had obtained scores in the 30-31 range . . . A new Site Manager, D.B.2., then signed the sheets, falsely postdating them to indicate that the Ugandans had qualified in the following month of June").

The district court correctly dismissed Counts II-V for failing to comply with Rule 9(b). Rule 9(b) requires

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[7] Triple Canopy argues in the alternative that the Government has failed to allege causation. Causation is likely not required under § 3729(a)(1)(B). *See Ahumada*, 756 F.3d at 280 n.8. In any event, causation in this situation is no different than materiality: if the false record had a natural tendency or was capable of influencing agency action, then the record caused the false claim.

"at a minimum" that Badr "describe the time, place, and contents of the false representations," *United States ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc.*, 707 F.3d 451, 455-56 (4th Cir. 2013) (internal quotation marks omitted). We agree with the district court that Badr cannot state a claim by doing "nothing more than simply presum[ing]" that *Triple Canopy* submitted false claims under those contracts. Triple Canopy, 950 F.Supp.2d at 900. Badr contends that discovery may reveal the contents of the contracts and invoices, but fraud actions that "rest primarily on facts learned through the costly process of discovery" are "precisely what Rule 9(b) seeks to prevent." *Wilson*, 525 F.3d at 380. *See also Harrison I*, 176 F.3d at 789 ("The clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed.") (internal quotation marks omitted).

VI.

The FCA is "strong medicine in situations where strong remedies are needed." *Owens*, 612 F.3d at 726. That strong remedy is needed when, as here, a contractor allegedly engages in a year-long fraudulent scheme that includes falsifying records in personnel files for guards serving as a primary security force on a United States airbase in Iraq. Accordingly, for the foregoing reasons, we reverse the district court's dismissal of Counts I and II of the Government's complaint, we affirm the dismissal of Counts II-V of Badr's complaint, and we remand for proceedings consistent with our opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Filed: 06/19/13

Case No. 1:11-cv-288 (GBL/JFA)

UNITED STATES OF AMERICA ex rel., OMAR BADR

Plaintiff–Relator,

v.

TRIPLE CANOPY, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Triple Canopy Inc.'s ("TCI") Motion to Dismiss Relator Omar Badr's Complaint and Intervenor United States of America's Complaint for failure to state a claim. (Docs. 29, 31.) This case concerns allegations against a government contractor for fraudulent billing arising from the contractor's duty to provide security at United States military installations in Iraq. The instant motions present five issues before the Court.

The first issue is whether submission of an invoice listing the title of an employee whose services were billed, without reference to whether the employee met contractual conditions, constitutes a false claim under the False Claims Act ("FCA"), 31 U.S.C. § 3729(a), if submitted knowing that the employee failed to meet a

certain contractual requirement. The Court holds that the Government fails to state a claim because it failed to sufficiently plead that Defendant submitted a demand for payment containing an objectively false statement. The Government's Complaint does not sufficiently allege that the types of services provided or the amount for which it was billed were false statements. Mere failure to comply with all contractual conditions does not necessarily render the billing for those services so deficient or inadequate that the invoice constitutes a false claim under the FCA. Nor does it constitute an incorrect description of services provided to constitute a false statement sufficient to impose FCA liability.

The second issue is whether Relator sufficiently states an FCA claim where he alleges that (1) certain personnel were deficient in weapons training and therefore did not meet contractual requirements, (2) these personnel were transferred to other military installments, (3) the Government paid Defendant for work performed at those other installments, and (4) work at the other installments was governed by contracts "similar" to the contract governing the installment where Relator worked. The Court holds that Relator fails to state a claim because Relator does not sufficiently allege with particularity the existence of any false claims or the submission of a false claim by Defendant. Furthermore, Relator lacks personal knowledge as to the particular relevant provisions of the contracts governing other military bases or the events that transpired at those bases. Accordingly, the Court grants Defendant's Motion to Dismiss Relator's Complaint.

The third issue is whether the Government sufficiently alleges a false records claim under the FCA on the basis of allegedly fabricated weapons qualification scorecards, the placement of those qualifications in personnel files, and the Government's payments to Defendant, without an allegation that the Government reviewed the weapons scorecards for the purposes of issuing payment. The Court holds that the Government fails to sufficiently allege the existence of a false claim or the Government's reliance upon the allegedly falsified records. A false records claim still requires the existence of a false claim, which the Government fails to sufficiently allege here. Furthermore, the Government's allegations fail to demonstrate its reliance upon the allegedly falsified records. The Government's broad and conclusory allegations fail to satisfy Rule 9(b)'s requirement regarding fraudulent behavior. Thus, Count II of the Government's Complaint fails.

The fourth issue is whether the Government sufficiently alleges actual fraud and constructive fraud based upon the alleged scheme of falsifying weapons qualification scorecards where the Complaint lacks any specific allegations that a government official actually reviewed the records and relied upon them in authorizing payment to TCI. The Court holds that the Government fails to state a claim because it does not plead reliance upon such submissions. Both actual fraud and constructive fraud require reliance upon a misrepresentation. Counts IV and V fail because the Government fails to allege with specificity that a government official actually reviewed and relied upon the allegedly false records in certifying an invoice and authorizing payment.

The fifth issue is whether the Government may maintain an unjust enrichment claim based upon its payment of funds to TCI where TCI allegedly falsified records that would not have been paid had the Government known of the alleged falsifications. The Court holds that the unjust enrichment claim cannot stand where an express contract controls the dispute. Thus, this claim cannot stand where the Government's Complaint insufficiently challenges the validity of an existing contract.

I. BACKGROUND and PROCEDURAL HISTORY

The United States of America, as Intervenor, brings this action against Defendant TCI for damages and civil penalties under the False Claims Act, 31 U.S.C. § 3729 ("FCA"), as well as under common law theories of breach of contract, fraud, constructive fraud, payment by mistake, and unjust enrichment. (Intervenor's Compl. ¶ 1, Doc. 21.) The Government alleges that TCI's fraudulent conduct related to TCI's performance of a firm fixed-price government contract W91GDW-07-D-4022 ("Task Order (TO) 11") in Al Asad, Iraq. (*Id.* ¶ 3.)

As discussed more fully below, Relator, Mr. Omar Badr, a former TCI employee, filed this action under the FCA's "whistleblower" *qui tam* provisions. (*Id.* ¶¶ 2, 8.) Badr is Georgia resident who was employed as a TCI medic from February 2008 to June 2010. (Relator's Compl. ¶ 4, Doc. 1.) TCI is an Illinois corporation with a corporate office located in Reston, Virginia. (Intervenor's Compl. ¶ 9.) TCI is in the business of providing "mission support, security, and training services" to the United States government and private corporations. (Def.'s Mem. Supp. Mot. to Dismiss Intervenor's Compl. at 1, Doc. 32.)

In support of the Department of Defense ("DoD"), TCI was awarded government contracts to provide security services to various military installations overseas, including military bases located in Iraq. (*Id.*) Relevant to the present litigation, TCI bid on and was awarded TO 11 to provide supplies and security services at Forward Operating Base Al Asad, Iraq and the Al Asad Airbase located in Iraq. (Intervenor's Compl. ¶¶ 11-13.) In part, TO 11 provided that TCI was "to provide all labor, weapons, equipment and other essential requirements to supplement and augment security operations at Al Asad Airbase, Iraq." (*Id.* ¶ 14.) Under its terms, TO 11 specified twenty responsibilities, three of which concerned security personnel whom TCI was to employ as security guards. (*Id.* ¶ 14.)

Given the nature of the assignment to protect the military base, TCI was required to ensure compliance with TO 11's weapons qualification requirements. TO 11 was initiated to acquire perimeter defense and entry control point operation at the Al Asad installation. (*Id.* ¶ 21.) Thus, TO 11 required that TCI personnel maintain U.S. Army standard weapons qualifications. Specifically, TO 11 required TCI to "ensure that all employees have received initial training on the weapons they carry, that they have qualified on a U.S. Army qualification course, and that they have received, at a minimum, annual training/requalification on an annual basis, and that the employee's target is kept on file for a minimum of 1 yr." (*Id.* ¶¶ 14-15.)

Under the terms of the contract, oversight of TCI's performance was to be conducted by an appointed Contracting Officer's Representative ("COR"), and TCI's training records were to be made available for inspection by the COR at any time. (*Id.* ¶¶ 22, 28, 42, 47, 49.) The COR bore responsibility for ensuring that

the goods and services provided by TCI conformed to the terms and conditions of TO 11. (*Id.* ¶ 22.) The form by which the COR documented his acceptance was the Material Inspection and Receiving Report, also known as a "DD-250." (*Id.* ¶ 62.) The form required that the COR sign and select a box for "ACCEPTANCE" of the services once they "conform to contract, except as noted herein or on supporting documents." (*Id.* ¶ 64.) Part 22 of the DD-250 further required the COR to sign the form if the services provided "were received in apparent good condition except as noted." (*Id.* ¶ 65.) All of the relevant DD-250s in this case were appropriately signed and checked by the Government's COR. (*See generally* Def.'s Mem. Supp. Mot. to Dismiss Intervenor's Compl. Ex. A, Doc. 32-1.) The DD-250s did not contain any certifications by Triple Canopy and were not endorsed by any Triple Canopy employee. (*See id.*)

The Government alleges that TCI failed to comply with the terms and conditions of TO 11 from the outset. Specifically, the Government alleges that on June 21, 2009, 332 Ugandan TCI guards arrived for duty at Al Asad. (Intervenor's Compl. ¶ 30.) Shortly after arriving, all the Ugandan guards allegedly failed to zero their rifles—a basic skill required before even attempting to qualify on a qualification course. (*Id.* ¶ 31.) Jesse Chavez, a TCI Site Manager, allegedly reported this to TCI Deputy Country Manager Mark Alexander and TCI Project Manager Terry Lowe. (*Id.* ¶ 34.) As a result, the Government alleges that, as early as its first claim for payment, TCI knew the guards provided had a demonstrated inability to qualify on a U.S. Army qualification course and thus did not conform to the terms of TO 11. (*Id.* ¶¶ 32-35.) On August 10, 2009, TCI presented its first claim for payment to the Government for its performance of TO 11. (*Id.* ¶ 35.) The claim billed for the services of 303

guards during the period between July 27, 2009 and August 26, 2009, including the period during which the Ugandan guards were allegedly not weapons qualified. (*Id.*)

The Government alleges that TCI's noncompliance and fraudulent billing continued throughout its performance of TO 11. After failed attempts to qualify the Ugandan guards, TCI allegedly began to falsify scorecards that were then place in the guards' personnel files in the event of an inspection and to mislead the CORs when the CORs certified TCI's compliance. (*Id.* ¶ 42.) The Government alleges that accurate personnel files were material considerations to the Government for payment and that TCI continued to bill the Government for the guards' services despite the guards' noncompliance with TO 11's weapons qualification requirements. (*Id.* ¶¶ 43-44.)

On May 12, 2010, Mr. Badr, reported this allegedly fraudulent conduct to TCI's Human Resources Director, Vice President, and General Counsel. (*Id.* ¶ 51.) After returning to Al Asad about six days later, Badr was instructed by a TCI site manager to produce firing qualification scorecards reflecting passing scores for all TCI guards. (*Id.* ¶ 52.) At the time, TCI's contract year for TO 11 was coming to an end, and the Complaint alleges that TCI sought to continue the contract for another year. (*Id.*) Badr did as instructed and altered TCI's scorecards to reflect passing scores. (*Id.*) For the next two months, TCI continued billing the Government for the guards' services. (*Id.*)

For reasons not presented to the Court, TCI was not awarded the TO 11 contract renewal. (Relator Comp11 20.) However, TCI continued to perform other government contracts in Iraq. (*Id.*) The Ugandan unqualified guards stationed at Al Asad were allegedly transferred

to other installations in Iraq to perform similar services under similar government contracts. (*Id.* ¶ 21.) Approximately thirty TCI guards were sent to perform a contract known as "Cobra," approximately twenty-five were transferred to a project known as "Kalsue," an unspecified number were sent to perform the "Delta Contract," and the remainder were sent Basra, Iraq to perform the "Basra Contract." (*Id.*) Relator alleges that TCI continued to employ and bill the Government for these guards knowing that guards were not qualified under the terms of these various contracts, which Mr. Badr claims were similar to those of the TO 11 contract governing TCI's work at Al Asad. (*Id.*)

Relator Omar Badr filed this action pursuant to the *qui tam* provisions of the FCA on March 21, 2011. (*See* Doc. 1.) Relator's Complaint alleges five violations of 31 U.S.C. § 3729(a), seeking relief for false claims submitted in connection with Defendant's activities at five military installations pursuant to five separate contracts: Government Contract W91GDW-07-D-4022, otherwise referred to as TO 11, which governed activities at Al Asad (Count I); the "Cobra Contract" (Count II); the "Kalsue Contract" (Count III); the "Basra Contract" (Count IV); and the "Delta Contract" (Count V). (Relator's Compl. ¶¶ 23, 30, 37, 44, 51.)

On June 25, 2012, the United States elected to intervene as to Count I of Relator's Complaint. (*See* Doc. 18.) The Government filed its Complaint in Intervention on October 25, 2012. (Doc. 21.) The Government's Complaint in Intervention presents seven causes of action: false claims in violation of 31 U.S.C. § 3729(a)(1)(A) (Count I); false statements in violation of § 3729(a)(1)(B) (Count II); breach of contract (Count III); actual fraud (Count IV); constructive

fraud (Count V); payment by mistake (Count VI); and unjust enrichment (Count VII).

TCI filed its Motions to Dismiss on December 24, 2012, arguing that (1) Relator failed to state a claim on all five of his counts, and (2) the Government failed to state a claim on Counts I, II, IV, V, and VII. (Does. 29, 31.) The Court heard oral argument on the matter on January 11, 2013. The Motions are now ripe for disposition.

II. STANDARD OF REVIEW

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) should be granted unless the complaint "states a plausible claim for relief' under Rule 8(a). *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *LeSueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 264 (4th Cir. 2012) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). The Court attaches no such assumption to those "naked assertions" and "unadorned conclusory allegations" devoid of "factual enhancement." *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013) (citations omitted). Thus, the Court's review involves the separation of factual allegations from legal conclusions. *Burnette v. Fahey*, 698 F.3d 171, 180 (4th Cir. 2012).

The complaint must contain sufficient factual allegations, taken as true, "to raise a right to relief above the speculative level" and "nudge [the] claims across the line from conceivable to plausible." *Vitol*, 708 F.3d at 543 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.

544, 555, 570 (2007)). The facial plausibility standard requires pleading of "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 554 (4th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). The complaint must present "'enough fact to raise a reasonable expectation that discovery will reveal evidence' of the alleged activity." *US Airline Pilots Ass 'n v. Awappa, LLC*, 615 F.3d 312, 317 (4th Cir. 2010) (quoting *Twombly*, 550 U.S. at 556). Thus, in order to survive a Rule 12(b)(6) motion to dismiss, the complaint must present sufficient non-conclusory factual allegations to support reasonable inferences of the plaintiffs entitlement to relief and the defendant's liability for the unlawful act or omission alleged. *See Francis v. Giacomelli*, 588 F.3d 186, 196-97 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678-79 and *Gooden v. Howard Cnty., Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc)).

In cases involving fraud, plaintiffs "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). With respect to False Claims Act cases, this requires pleading "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (citing *Harrison v. Westinghouse Savannah R. Co.*, 176 F.3d 776, 784 (4th Cir. 1999) ["*Harrison I*"] (internal quotations omitted). This typically entails "the 'who, what, when, where, and how' of the alleged fraud." *Id.* (quoting *U.S. ex rel. Willard v. Humana Health Plan of Tx. Inc.*, 336 F.3d 375, 384 (5th Cir. 2003)). Failure to comply with Rule 9(b) is treated as a failure to state a claim under Rule 12(b)(6). *U.S. ex rel. Jones v. Collegiate*

Funding Servs., Inc., 469 F. App'x 244, 257 (4th Cir. 2012) (citing *Harrison I*, 176 F.3d at 783 n.5).

III. DISCUSSION

The Court grants TCI's Motions to Dismiss for failure to state a claim. The Court holds that the false claims violations, alleged in Count I of the Government's Complaint and all five counts of Relator's Complaint, fail to state a claim because they do not sufficiently allege the presentment of a false statement or certification in support of a demand for payment or claim by Defendant.[1] The Court holds that the false records claim, Count II of the Government's Complaint, must be dismissed for failure to plead presentment of and reliance on a false claim. The Court holds that the Government's fraud claims, Counts IV and V, must be dismissed for failure to plead reliance upon any false statements. The Court holds that the Government's unjust enrichment claim, Count VII, must be dismissed

[1] Count I of Relator's Complaint is superseded by the Government's Complaint and therefore dismissed for lack of standing. While an individual suing on behalf of the Government is the assignee of an FCA action, intervention by the Government on a claim that is identical to the individual's claim precludes the individual from maintaining the same. As the FCA indicates, such intervention means that the "action shall be conducted by the Government." 31 U.S.C. § 3730(b)(4). Because Relator's Count 1 is virtually indistinguishable from the Government's Count I, the Court finds that Relator is superseded on that claim. *See U.S. ex ref. Feldman v. City of New York*, 808 F. Supp. 2d 641, 648-49 (S.D.N.Y. 2011) (finding the relator's complaint "superseded in its entirety by the Government's Amended Complaint" and thus dismissed where the relator's complaint was "predicated on nearly identical factual allegations of wrongdoing" as the government's complaint and the relator "completely fail[ed] to specify any material difference between his Amended Complaint and that of the Government's").

because quasi-contractual remedies are not available where an express contract controls a dispute. The Court discusses each of these rulings in turn.

a. False Claims in Violation of 31 U.S.C. § 3729(a)(1)(A)

The Court holds that both the Government's and the Relator's claims alleging a violation of § 3729(a)(1)(A) fail because the respective complaints do not allege Defendant's presentment of a false claim to the Government for payment.

i. The Government's § 3729(a)(1)(A) Claim Fails

The False Claims Act ("FCA") imposes liability on "any person who knowingly presents, or causes to be presented, a false or fraudulent *claim* for payment or approval. . . ." 31 U.S.C. § 3729(a)(1)(A) (emphasis added). The FCA defines "claim" broadly to include "any request or demand, whether under a contract or otherwise, for money or property . . . that is presented to an officer, employee, or agent of the United States. . . ." 31 U.S.C § 3729(c). "[T]o trigger liability under the Act, a claim actually must have been submitted to the federal government for reimbursement, resulting in 'a call upon the government fisc.'" *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 454 (4th Cir. 2013) (quoting *Harrison I*, 176 F.3d at 785). Accordingly, the presentment of a false claim is "the central question" in creating FCA liability. *Harrison I*, 176 F.3d at 785; *cf. U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("The submission of a claim is not . . . a 'ministerial act,' but the *sine qua non* of a False Claims Act violation."). The Fourth Circuit has emphasized the importance of Rule 9(b)'s particularity requirement in FCA claims. *See, e.g., Wilson*, 525 F.3d at 376. Accordingly, an indication of the "the 'who, what,

when, where, and how' of the alleged fraud" is critical to the Court's finding. *Id.* (quoting *Willard*, 336 F.3d at 384).

As a threshold matter, the Court holds that, on their face, the TCI invoices did not contain factually false statements. The False Claim Act "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'" *Harrison I*, 176 F.3d at 785 (internal quotation marks omitted). A claim for payment is false when it "involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *United States v. Sci. Applications Intl Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (quoting *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001)). The claim for payment must represent an objective falsehood to be actionable. *Wilson*, 525 F.3d at 376-77. TO 11 was a firm fixed price government contract. (Intervenor's Compl. ¶ 59.) The supplies and services for which TCI billed were identified in each invoice by contract line item numbers. (*Id.*) The invoices identified the quantity of guards provided, the unit price for each guard, the period of service that each guard performed, and the amount for the guards' services. (*Id.*) Notably, the Government does not allege that TCI billed for anything other than what TCI delivered. That is, the Government does not contend that TCI invoiced a fraudulent number of guards or billed for a fraudulent sum of money. *cf. U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 730 (4th Cir. 2010) (holding that an invoice was not a false where the defendant billed for goods and the invoice matched the quantity of goods supplied, despite the questionable quality of those goods). Thus, TCI's invoices do not contain objectively false statements sufficient to render them false claims for purposes of FCA liability.

The Court finds that the submission of the DD-250 forms in this case does not constitute submission of false claims by TCI. The Government argues that the "claims" in this case are not only the twelve TCI invoices but also the DD-250s submitted along with TCI's invoices. (Mot. to Dismiss Hr'g. Tr. 20:11-13, Jan. 18, 2013, Doc. 46.) Under the FCA, the term "claim" means "any request or demand, whether under contract or otherwise, for money or property . . . (i) that is presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A). In its Complaint, the Government alleges that the DD-250s for all of TCI's invoices were presented for payment along with the invoices themselves. (Intervenor's Compl. ¶ 66.) However, a DD-250 form has been recognized as a claim for FCA purposes only where it is submitted as the invoice itself. *U.S. ex rel. Butler v. Hughes Helicopters, Inc.*, 91 F.3d 321, 331 (9th Cir. 1995). Otherwise, a DD-250 form in and of itself cannot be the basis of a false claim. *See U.S. ex rel. Stebner v. Stewart & Stephenson Servs., Inc.*, 144 F. App'x 389, 394 (5th Cir. 2005) (citation omitted) (holding that FCA liability could not attach by way of a DD-250 form because the form did not "expressly certify[y] compliance with every provision of the overall contract" and the Fifth Circuit does not recognize the implied theory of certification); *U.S. ex rel. Carter v. Halliburton Co.*, No. 1:08-CV-1162, 2009 WL 2240331, at *13 (E.D. Va. July 23, 2009) (explaining that a DD-250 could not serve as the basis of a false claim act violation because (1) the contractor was under no "legal obligation [] to disclose unperformed tests" on the form and (2) the contractual obligation to submit the form does not equal an obligation to make such a disclosure). Thus, reliance on the form is unlikely to provide a sufficient basis for meeting the requirement that TCI submitted

a false claim. Even assuming, *arguendo*, that the DD-250 forms here could constitute false claims under the FCA, the forms did not contain factually false statements made by TCI. The DD-250s were completed by CORs who, by completing the form, certified that they had inspected for TCI's compliance and indicated that TCI's performance conformed to TO 11's terms. Thus, any statement contained in the DD-250s, whether true or false, was not made by TCI. *See Butler*, 91 F.3d at 331 (holding that a DD-250 form did not constitute a claim by the defendant, as defined by the FCA, "because the government, not [defendant], certified on the form that the goods confirmed to contract"). Therefore, the DD-250 cannot in and of itself rescue the false claim allegation.

The Government additionally argues that it has sufficiently alleged a false or fraudulent claim because the TO 11 invoices submitted by TCI billed for "guard" services, an act of implicitly billing for guards that were qualified pursuant to the terms of the contract. Because the terms of the contract required the guards to attain a certain weapons qualification, the Government argues, the contract defined the term "guard," such that TCI's failure to verify that the guards actually met the contractual requirements constitutes an "incorrect description of services provided," and was therefore a fraudulent claim submitted for payment. Essentially, the Government seeks to read into the TO 11 invoices contractual terms related to the guards' weapon qualification requirements.

The Government's argument fails, however, for four reasons. First, the terms of the contract do not reference, let alone define, the term "guard." TO 11 generally states that all employees are required to receive weapons training and qualify on a United States Army

qualification course. It follows that the Government's interpretation of "guards" to be employees who possess a certain weapons qualification is an attenuated construction of the contractual terms. This extenuates the Government's argument that TCI's billing of "guards" in its submission of the TO 11 invoices is objectively false because the terms of the contract do not define, nor reference, the term "guard." In other words, the Government cannot assert that TCI falsely claimed services for "guards," as that term is defined by contract, when the contract does not expressly define that term. *Cf. United States v. Fadul*, No. 11-0385, 2013 WL 781614, at *7 (D. Md. Feb. 28, 2013) (citing *Wilson*, 525 F.3d at 377) (observing that "imprecise statements or differences in interpretation growing out of a disputed legal question are . . . not false under the [False Claims Act]").

Second, it cannot be said, based on these allegations, that because the guards were not qualified under the terms of the contract, their services were "incorrectly described" in a manner that rendered a request for payment for their services factually or objectively false. The Government analogizes their factual falsity argument with cases involving defective products in the FCA context. Specifically, the Government cites *United States v. Bornstein*, 423 U.S. 303 (1976), and *U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002), for its position that, because the guards were not properly weapons qualified, charging for their services equates to charging the Government for products held to be defective because the products were incorrectly described. However, *Bornstein* involved falsely marked tubes used in radio kits, and Roby involved defective transmission parts provided to the Army. *See Bornstein*, 423 U.S. at 307-08; Roby, 302 F.3d at 639-40. The defective *goods* in these cases are materially different than a claim for

defective *services* as alleged in this case. There may be some inherent value retained in a service that is provided by an unqualified employee compared to a complete inability to use a product that is rendered defective. *Cf. U.S. ex rel. Sanchez-Smith v. AHS Tulsa Reg. Med. Ctr., LLC*, 754 F. Supp. 2d 1270, 1287 (N.D. Okla. 2010) (rejecting a worthless services theory based upon substandard medical care because some care was provided, even if ultimately below expectations). Thus, the Court declines to adopt this factual falsity argument.

Third, the Government's "worthless services" theory of FCA liability fails because the Government does not sufficiently allege that the TCI guards were entirely deficient so as to render their services worthless. "[I]in a worthless service claim, the performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all." *U.S. ex rel. Davis v. US. Training Ctr., Inc.*, 498 F. App'x 308, 315 n.11 (4th Cir. 2012) (citing *Straus*, 274 F.3d at 703). The Ugandan guards provided a service, although perhaps not to the satisfaction of the Government or in full compliance with terms of the contract. The Government fails to sufficiently allege that the guards' services were entirely devoid of value or that the noncompliance with the weapons qualification requirement caused any injury to the Government such that the guards effectively provided no service at all. *Cf. In re Genesis Health Care Ventures, Inc.*, 112 F. App'x 140, 143 (3d Cir. 2001) ("Case law in the area of 'worthless services' under the FCA addresses instances in which either services are literally not provided or the service is so substandard as to be tantamount to no service at all."). Nothing in the Complaint demonstrates that the services were known to lack any value or that no service was rendered. The Government admits that its Complaint does not allege that a guard

never showed up to work or failed to perform their duties in a manner that would equate to no performance at all. (*See* Hr'g Tr. 23:21-24:7.) Thus, the Government essentially argues that the falsity arises from a lack of qualifications while failing to indicate that the guards provided "utterly failed" to perform various services in their capacities as guards. *Cf. U.S. ex rel. Davis v. Prince*, No. 1:08-CV-1244, 2011 WL 2749188, at *7 (E.D. Va. July 13, 2011) (explaining that a worthless services theory under the FCA requires evidence of an "utter fail[ure] to perform . . . contractual duties"), *aff'd sub nom. U.S. ex rel. Davis v. US. Training Ctr. Inc.*, 498 F. App'x 308 (4th Cir. 2012). Such an argument remains unpersuasive without an indication of utter failure to perform.

The Government's reliance on *United Slates v. Southern Maryland Home Health Services*, 95 F. Supp. 2d 465 (D. Md. 2000), is similarly misplaced because that decision did not address whether the services were worthless in that case. The Government here recognizes as much insofar as it stated in its brief that "the case principally addressed the issue of vicariously liability." (Intervenor's Opp'n at 11, Doc. 36.) In that case, the theory pursued by the Government was a worthless service theory on grounds that the defendant employed an individual to perform physical therapy yet that individual was not licensed to do so, a requirement for Medicare reimbursement.[2] *Southern*

[2] To the extent that the Government argues that the allegedly unqualified guards required a license to perform their services in Iraq, nothing in the Complaint demonstrates that such licensure was a precondition to payment in the same way the District of Maryland explained that non-licensure could invoke FCA liability. Thus, notwithstanding the fact that its argument fails to demonstrate that TCI's employees were unlicensed, the Government's "clarification" of its statements during oral argument

Maryland, 95 F. Supp. 2d at 466-67. However, the issue before the court was whether the employer could be held vicariously liable for the employee's actions, a question that did not require an inquiry into whether a worthless services theory could be pursued. *Id.* Therefore, the Government's reliance on *Southern Maryland* in support of its worthless services argument is misplaced, as that case offered no analysis or insight as to whether services rendered by an unlicensed individual are worthless solely for the reason that the individual lacks a license, even where there is no indication of an utter failure to adequately and sufficiently perform the various duties required.

Moreover, the contract required that employees receive weapons training and qualify on a U.S. Army qualification course. The Complaint alleges that TCI did provide the weapons training required by contract. The weapons qualification requirement suggests that the employees were required to qualify after training, and the Government's Complaint is that the guards did not qualify on a U.S. Army qualification course, despite their weapons training, and TCI continued to employ the unqualified guards. Such a claim may support a breach of contract action. Here, the Government does not allege that the TCI ever presented the alleged false weapons qualifications targets in the individual guards' files to the contract representative or the Government in support of a demand for payment.

Fourth, the Court declines recognition of an implied certification theory of liability and, in any event, the Government fails to demonstrate that TCI's actions implied certification with a precondition for payment.

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cannot transform *Southern Maryland* into an analogous scenario. (*See* Doc. 53.)

False certification in the FCA context arises where (1) "a government contract or program required compliance with certain conditions as a prerequisite to a government benefit, payment, or program;" (2) "the defendant failed to comply with those conditions;" and (3) "the defendant falsely certified that it had complied with the conditions in order to induce the government benefit." *U.S. ex rel. Godfrey v. KBR, Inc.*, 360 F. App'x 407, 411-12 (4th Cir. 2010) (quoting *Harrison I*, 176 F.3d at 786). The Fourth Circuit explained in *Harrison I* that certification is implied, rather than express, where a plaintiff contends "that the submission of invoices and reimbursement forms constituted implied certifications of compliance with the terms of the particular government program." 176 F.3d at 786 n.8 (citations omitted). The court reasoned that, because "there can be no False Claims Act liability for an omission without an obligation to disclose," an implied certification claim is "questionable" in the Fourth Circuit. *Id.* No Fourth Circuit decision has adopted the viability of an implied certification theory, and district courts have followed *Harrison I*'s doubts by rejecting claims predicated on the implied certification theory. *See United States v. Jurik*, No. 5:12-CV-460, 2013 WL 1881318, at *6 (E.D.N.C. May 3, 2013) (dismissing FCA claims where the government "concedes no affirmative certification of compliance exists in this case" and it "fails to argue adequately that []an implied [certification] theory should be adopted in the Fourth Circuit"); *U.S. ex rel. Rostholder v. Omnicare, Inc.*, No. CCB-07-1283, 2012 WL 3399789, at *14 (D. Md. Aug. 14, 2012) (noting that the Fourth Circuit has not adopted implied certification liability); *Carter*, 2009 WL 2240331, at *13 (dismissing an FCA claim presented through an implied certification theory because "[n]othing in Relator's argument convinces

this Court that the Fourth Circuit would choose to recognize an implied false certification claim, in spite of its statement implying the contrary in *Harrison I*").

Even if courts in this circuit recognized implied certification, the viability of a claim premised on certification by silence requires a showing that "certification was a prerequisite to" payment. *U.S. ex rel. Herrera v. Danka Office Imaging Co.*, 91 F. App'x 862, 864 (4th Cir. 2004) (citations omitted). Thus, the absence of a precondition for payment connected to the weapons qualification certification forms undermines any implied certification liability here. *See id.* at 865 (explaining that implied certification liability would not apply where the controlling agreement "does not condition payment of [the defendant's] invoices on a certification" of compliance with certain provisions); *Harrison I*, 176 F.3d at 793 (citations omitted) ("To the extent that Harrison is asserting an implied certification by silence . . . Harrison's claim fails on the pleadings because he has never asserted that such implied certifications were in any way related to, let alone prerequisites for, receiving continued funding."); *cf. Prince*, 2011 WL 2749188, at *7 (finding the relators' false certification claim insufficient where they failed to allege that compliance with certain contractual provisions "was a prerequisite for payment"). Accordingly, the Court both declines to adopt the implied certification theory and finds that the Government's allegations would in any event be insufficient to invoke this theory of liability.

Therefore, based on the allegations in the Government's Complaint, the Court holds that the TO 11 invoices submitted for payment were not false claims containing factually or objectively false statements. Accordingly, the Court dismisses Count I of the Government's Complaint.

ii. Relator's FCA Claims Fail

Counts II through IV of Relator's Complaint are dismissed because he fails to sufficiently allege presentment of a claim to the Government for payment. In *Takeda*, the Fourth Circuit held that failure to plead presentment of a specific claim submitted for payment is fatal to a relator's FCA action. 707 F.3d at 457-58. The court recognized that "liability under the [FCA] attaches only to a claim actually presented to the government for payment, not to the underlying fraudulent scheme. . . . Therefore, when a relator fails to plead plausible allegations of presentment, the relator has not alleged all the elements of a claim under the [FCA]." *Id.* at 456 (citing *Harrison I*, 176 F.3d at 785 and *Clausen*, 290 F.3d at 1313). Thus, Relator cannot use his allegations of a fraudulent scheme at one location involving one contract to create an inference that the scheme must have resulted in the submission of false claims at other locations governed by other contracts of which he lacked personal knowledge. *Id.* To assume the submission of a claim based on an individual's assumptions without any allegation of such submission would "strip[] all meaning from Rule 9(b)'s requirement of specificity." *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 869 F. Supp. 2d 1336, 1343-44 (M.D. Fla. 2012) (quoting Clausen, 290 F.3d at 1312 n.21); *U.S. ex rel. Conrad v. GRIFOLS Biologicals, Inc.*, No. 07-3176, 2010 WL 2733321, at *5 (D. Md. July 9, 2010) (quoting *U.S. ex rel. Atkins v. Mclnteer*, 470 F.3d 1350, 1357 (11th Cir. 2006)).

Here, Relator fails to allege with any degree of specificity those claims for payment allegedly submitted by TCI to the United States with respect to the "Cobra Contract," "Kalsue Contract," "Basra Contract," or "Delta Contract." While the Fourth Circuit has recognized that "[t]he fact that [a relator] never actually

saw the contracts is not dispositive," there must be at least some circumstantial evidence to "raise a distinct possibility of a viable FCA action even where an employee does not have access or has not actually viewed the contractual documents." *Glynn v. EDO Corp.*, 710 F.3d 209, 217 (4th Cir. 2013). In *Glynn*, the court found that the relator's "nineteen years of working for defense contractors and substantial time running his own business provided the context for his objectively reasonable belief that" false claims were submitted in violation of the contracts. *Id.* Conversely, Relator here lacks personal knowledge of the requirements of those contracts and thus did not plead any provisions of those contracts supporting a plausible inference that TCI failed to comply with those contracts. Relator also lacks the sort of circumstantial evidence, such as personal experience with defense contractor provisions as demonstrated in *Glynn*, to support his belief. The allegations in his Complaint demonstrate that Relator worked as a defense contractor for the two years TCI employed him and, prior to his work with TCI, he served in the United States Army. Neither this experience nor any other allegation in his Complaint raise sufficient circumstantial evidence to support his claims regarding non-Al Asad contracts and TCI's compliance or lack thereof. He does nothing more than simply presume, based upon what he was told after leaving Iraq, that TCI failed to perform its duties as required by those non-Al Asad contracts and billed for unperformed services.

Furthermore, nothing in Relator's Complaint establishes or creates a plausible inference that Relator was at the sites governed by these contracts and would thus have had personal knowledge of the alleged breaches at these sites. This Court previously addressed a similar situation involving claims by a government contractor

employee in Iraq alleging breaches at military camps aside from the one where the employee worked. *Carter*, 2009 WL 2240331, at *3-4. In *Carter*, the relator worked at a military installation in Iraq and brought allegations that the defendant contractor fraudulently billed for water purification services at various military installations. *Id.* at *14. In addition to allegations concerning the installation where the he was employed, the relator alleged that, subsequent to his departure from the company, the defendant failed to fulfill contractual requirements at other military installations and billed for those unperformed tasks. *Id.* at *4. This Court held that the allegations regarding those other sites were insufficient to fulfill Rule 9(b)'s requirements. *Id.* at *9. In much the same manner, "it is clear" that Relator's Counts II through V here, presenting allegations about installations aside from the Al Asad base where he worked, are nothing more than "mere[] extrapolati[on] from his personal knowledge about [one] specific site[] in Iraq to obtain discovery regarding all of Defendant's other sites in Iraq." *Id.* As noted, these assumptions, which would strip Rule 9(b) of its force, will not be permitted to permit "precisely the kind of fishing expedition that the Fourth Circuit sought to prevent in *Harrison I*." *Id.* Without any additional pre-discovery information to support his allegations regarding the non-Al Asad installations, Relator's claim fails. Therefore, Relator's Complaint is dismissed as to Counts II through IV for failure to plead presentment of a claim and failure to plead these causes of action with specificity.[3]

[3] By operation of intervention, as explained in note 1, this dismisses the entirety of Relator's Complaint.

b. False Records Claim Under § 3729(a)(1)(B)

The Court grants TCI's Motion to Dismiss Count II of the Government's Complaint for two reasons. First, as explained above, the Government fails to demonstrate the submission of an objectively false claim by Defendant. Second, the Government fails to allege with necessary specificity enough facts to demonstrate reliance on TCI's records such that causation is sufficiently alleged.

A "false records" claim under the FCA provides for liability where a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). An FCA claim, whether for false statements under § 3729(a)(1)(A) or false records under § 3729(a)(1)(B), requires "(1) that [defendant] made a false statement or engaged in a fraudulent course of conduct; (2) that such statement or conduct was made or carried out with the requisite scienter; (3) that the statement or conduct was material; and (4) that the statement or conduct caused the government to pay out money or to forfeit money due." *Owens*, 612 F.3d at 728-29 (citing *U.S. ex rel. Harrison v. Westinghouse Savannah R. Co.*, 352 F.3d 908, 913 (4th Cir. 2003) ["*Harrison II*"]).

i Effect of 2009 FCA Amendments

As an initial matter, the Court rejects the Government's argument that the 2009 FERA amendment renders the *Harrison* test obsolete as to false records claims. Congress amended the FCA in 2009, adjusting the language of the provisions defining a cause of action under the FCA. *See* Fraud Enforcement Recovery Act, Pub. L. No. 111-21 § 4(f), 123 Stat. 1617, 1625 (2009) ("FERA"). The Government infers that the FCA's current language controls false records claims, not the

pre-FERA test applied in the *Harrison* cases, and thus renders unnecessary an allegation that a false record caused payment.[4] (Intervenor's Opp'n at 18-19 & n.11.) However, the Fourth Circuit continues to apply the *Harrison* test to claims where the FERA language governs. Owens, 612 F.3d at 728-29 & n.* (applying the FERA amendments and requiring the relator to demonstrate the four elements defined in *Harrison II*; accord *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 & n.1 (5th Cir. 2010) (relying on the four pre-FERA elements—identical to those used in the Fourth Circuit—when assessing post-FERA claims). Accordingly, the Court finds no reason to either question the validity of the Harrison test or otherwise depart from post-FERA precedent reaffirming application of those elements set forth in *Harrison I* and *Harrison II*.

ii. Lack of a False Claim, Materiality, and Causation

With the *Harrison* test still applicable to post-FERA claims, the Court finds that the Government's false records claim fails due to the lack of a false claim that would establish the causal element under *Harrison I*. The post-FERA version of the FCA still requires false records to be material to a false claim. The change in the statutory language removed the requirement that the claim actually be paid; this does not affect whether the false record is related to a false claim. *Cf. Hopper v. Solvay Pharm.*, 588 F.3d 1318, 1329 (11th Cir. 2009) (holding that pre-FERA false records claims require proof "that the government in fact paid a false claim"). Therefore, the Government here must demonstrate that the allegedly false weapons certifications were

[4] As explained below, the Government's argument regarding the causation of payment has no bearing on the Court's application of the Fourth Circuit's rubric for FCA claims.

connected to a false claim. *See U.S. ex rel. Dennis v. Health Mgmt. Assocs., Inc.*, No. 3:09-CV-484, 2013 WL 146048, at *17 (M.D. Tenn. Jan. 14, 2013) (dismissing relator's post-FERA false records claim where relator "fails to adequately identify any[] false or fraudulent claim," explaining that, "[o]n that basis alone, the relator's [3729(a)(1)(B) false records] claim for relief is subject to dismissal"). The Government acknowledges that its claim rests on the theory that the fabricated scorecards were false records material to a false claim. (Intervenor's Opp'n at 19.) However, the lack of a false claim directly undercuts their theory. This omission of the *sine qua non* of FCA liability is sufficient to defeat the Government's false records claim.

Furthermore, the Court finds lacking causation between the allegedly falsified marksman records and any claims for payment factors into the question of materiality. Materiality depends upon "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787, 799-800 (E.D. Va. 2007) (quoting *Harrison II*, 352 F.3d at 914 n.4). Both the third element in the *Harrison* cases and the post-FERA statutory language rely on whether a statement is material to a false claim. Here, the Court finds glaring the omission of any allegation that anyone in the Government actually viewed these false records, the date of any such viewing, and whether those who viewed the records actually relied on the records in submitting DD-250 forms. Such facts, pleaded with specificity as required by Rule 9(b), could demonstrate reliance upon the false statement and thus establish materiality and causation. The Government argues that government officials "routinely viewed" the weapons certification forms. (*See* Intervenor's Opp'n at 20, 22.) Despite its contentions, no specific allegations of such viewing appear in

the Complaint; the Government submits only general allegations that documents were reviewed. (*See* Hr'g Tr. 27:4-16.) At best, the Government's Complaint explains that the weapons certification forms were to be placed in personnel files and made available for review at any time. However, the Complaint remains devoid of any allegations that the weapons certification forms were actually reviewed prior to the submission of any claims for payment. As such, the weapons certification forms cannot be material if they in the absence of allegations that they were actually reviewed and relied upon in the Government's decisions to certify TCI's compliance with the TO 11 and pay funds to TCI.

Therefore, the Court grants Defendant's Motion as to Count II of the Government's Complaint seeking relief under a false records claim. The Government fails to plead with particularity the existence of a false claim and its reliance upon any false records in submission of a false claim.

c. Common Law Fraud

The Court grants Defendant's Motion to Dismiss Count IV, common law fraud, and Count V, Virginia constructive fraud, because the Government fails to demonstrate reliance upon any allegedly false statements.

The government may seek relief under common law actions as a supplement to statutory remedies, so long as the statutes do not expressly abrogate common law remedies. *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 667-68 (4th Cir. 1996). Accordingly, common law fraud remains available to the government because the FCA does not abrogate such a remedy. *United States v. Borin*, 209 F.2d 145, 148 (5th Cir. 1954).

Under federal common law, fraud requires four elements: "(1) misrepresentation of a material fact; (2) intent to deceive; (3) justifiable reliance on the misrepresentation by the deceived party; and (4) injury to the party deceived." *Veridyne Corp. v. United States*, 105 Fed. Cl. 769, 795 (Fed. Cl. 2012). Virginia law requires essentially the same elements, including reliance on the misrepresentation. *See Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.*, 507 S.E.2d 344, 346 (Va. 1998) (citations omitted) (defining the elements of actual fraud as "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled"). Virginia law also recognizes constructive fraud where clear and convincing evidence demonstrates "that a false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of . . . reliance upon the misrepresentation." *Id.* at 347. The operative element in each cause of action is the deceived party's reliance on the misrepresentation. Because this element is critical to both federal and Virginia common law fraud claims, the Court finds unnecessary a resolution of which version of actual common law fraud applies here.

The Court holds that Count IV, common law fraud, and Count V, constructive fraud, fail to demonstrate the Government's reliance upon the allegedly falsified weapons qualification scorecards. As explained above, the Complaint's allegations describe how the scorecards were required to be in personnel files and available for review. However, no allegations specifically allege with particularity who reviewed the files, when such files were reviewed, and how the review of files on a specific date influenced the submission of any particular claim.

Thus, the Complaint fails to demonstrate specific, actual reliance upon the allegedly fabricated documents.

d. Unjust Enrichment

The Court grants TCI's Motion to Dismiss Count VII, unjust enrichment, because an express contract controls the dispute.

"Where a contract governs the relationship of the parties, the equitable remedy of restitution grounded in quasi-contract or unjust enrichment does not lie." *WRH Mortg., Inc. v. S.A.S. Assocs.*, 214 F.3d 528, 534 (4th Cir. 2000). While the Government accurately states that a quasi-contract remedy may be pleaded in the alternative, despite the existence of a contract, a fundamental requirement is that the quasi-contractual remedy be pleaded sufficiently to withstand a motion to dismiss. *See U.S. ex rel. Frascella v. Oracle Corp.*, 751 F. Supp. 2d 842, 856 (E.D. Va. 2010) (denying a motion to dismiss fraud allegations, pleaded alongside breach of contract claims, because the complaint sufficiently "states a plausible claim to relief on . . . common law counts"). Accordingly, whether the unjust enrichment claims here may survive will depend on whether the quasi-contract claims are sufficiently pleaded.

Here, as noted above, the Government's fraud claims fail due to a lack of specific allegations as to any reliance upon the allegedly false submissions. Furthermore, the validity of the initial contract is not in dispute, and the Complaint fails to allege that the renewal could not have occurred had the Government known of the falsifications. Thus, the Complaint fails to provide a basis for finding that any of the parties' disputes are not governed by an express contract. As a result, the unjust enrichment claim fails. *See, e.g., Tabler v. Litton Loan Servicing, LP*, No. 3:09-CV-146, 2009 WL 2476532, at *4

(E.D. Va. Aug. 12, 2009) (citing *Acorn Structures, Inc. v. Sivantz*, 846 F.2d 923, 926 (4th Cir. 1988)) (dismissing an unjust enrichment claim because an express contract governed the dispute).

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendant's Motions to Dismiss. Relator's Complaint fails to sufficiently allege presentment of a false claim or present allegations of false or fraudulent conduct based on personal knowledge regarding Counts II through V. The Government's false claims allegations, Counts I and II, fail to sufficiently allege with specificity the presentment of a false claim or that any false records were material to claims for payment. The Government's fraud claims, Counts IV and V, fail to allege reliance necessary to demonstrate common law fraud. The Government's unjust enrichment claim, Count VII, fails because an express contract controls the dispute. Therefore,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Relator's Complaint (Doc. 29) is GRANTED. Relator's Complaint is DISMISSED without prejudice;

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Counts I, II, IV, and V of Intervenor's Complaint (Doc. 31) is GRANTED. Counts I, II, IV, V, and VII of Intervenor's Complaint are DISMISSED without prejudice.

IT IS SO ORDERED.

ENTERED this 19th of June, 2013.

Alexandria, Virginia
6/19/2013

/s/
Gerald Bruce Lee
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: March 9, 2015

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No. 13-2190 (L)
(1:11-cv-00288-GBL-JFA)

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UNITED STATES OF AMERICA

Intervenor/Plaintiff–Appellant,

and

UNITED STATES ex rel. OMAR BADR

Plaintiff,

v.

TRIPLE CANOPY, INC.

Defendant–Appellee.

———

INTERNATIONAL STABILITY OPERATIONS ASSOCIATION;
NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

Potential Amicus Curiae

———

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: March 9, 2015

No. 13-2191
(1:11-cv-00288-GBL-JFA)

UNITED STATES ex rel. OMAR BADR

Plaintiff–Appellant,

v.

TRIPLE CANOPY, INC.

Defendant–Appellee.

INTERNATIONAL STABILITY OPERATIONS ASSOCIATION;
NATIONAL DEFENSE INDUSTRIAL ASSOCIATION

Potential Amici Curiae

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc and the motion for leave to file amicus curiae brief.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

EXCERPTS OF THEATRE-WIDE INTERNAL SECURITY SERVICES (TWISS) CONTRACT, TASK ORDER 11

Section I – Contrast Clauses

CLAUSES INCORPORATED BY FULL TEXT

* * *

952.225-0010 CONTRACTOR EMPLOYEE LEGAL REQUIREMENTS (MAR 2009)

(a) The contractor shall not employ, nor allow a subcontractor to employ, any person that has ever been convicted, in any U.S. court, including a court-martial, of any crime against an Iraqi and/or an Afghan national, regardless of the place at which the crime occurred.

(b) For the purpose of this clause, "crime" is defined as: "a violation of a law in which there is injury to the public or a member of the public and a term in jail or prison, and/or a fine as possible penalties." Further, the crime must be an offense that could be classified as a Class B misdemeanor, or any higher class up to a Class A felony, as referenced at 18 USC §3559.

(c) Contractors shall exercise effective screening processes to ensure that individuals not conforming to this standard are identified and prohibited from, or removed from if already employed) working under this contract.

(d) Contractor employees discovered to have one of more prior convictions as described above shall be removed from the contract at the contractor's expense.

(e) Failure to adhere to the requirements of this clause could result in a termination for cause or termination for default in accordance with the terms and conditions of this contract.

* * *

STATEMENT OF WORK

Statement of Work (SOW)
Internal Security Services for Al Asad Airbase
11 JUN 2009

* * *

5. SPECIFIC TASK DESCRIPTION:

5.1 The contractor's responsibilities shall include the following:

- The contractor shall provide management/ administrative oversight of designated (in this SOW) security functions and personnel;
- The contractor shall repel and control any unlawful or destructive activity directed towards the FOB/LSA;
- The contractor shall contact BDOC to request Coalition Forces support for any threats to FOB/LSA facilities and personnel;
- The contractor shall provide a security management team to coordinate command and control with Coalition Forces while communicating Coalition Force directives to contractor personnel;
- The contractor shall provide security advisors and planners within the security management team to facilitate and coordinate with the BDOC for implementation of security requirements and contingency plans to protect personnel, equipment, fixtures and real property on the FOB/LSA;

- The contractor shall ensure that all members of the security management team, to include the Program Manager (aka "Commanding Officer"), the Asst Program Manager (aka "XO"), the Logistics/Ops Manager, BDOC Liaisons, and the Medic, possess current SECRET clearances upon arrival aboard Al Mad Air Base;
- Provide security personnel within the BDOC to act as security liaisons to the BDOC and the security management team as required, but not limited to, security threats identified by internal and perimeter posts and Serious Incident Reports.
- Provide Third Country National (TCN) and Local National (LN) escorts as required between, but not limited to, the ECP, flight line, Camp Nejid and on-base work sites;
- The contractor shall develop arid train on emergency systems to handle security situations that could occur while protecting FOB/LSA;
- The contractor shall provide Third Country National (TCN) and Local National (LN) escorts as required between, but not limited to, the ECP and on-base work sites;
- The contactor shall conduct ECP operations to include (location dependent): searching vehicles and personnel entering and leaving FOB/LSA to ensure only authorized peened gain access (coalition forces will provide front-line security for perimeter ECPs and backscatter IMVACIS and military dogs), to deny the introduction of contraband, and to prevent theft;

- The contractor shall develop and refine Tactics, Techniques and Procedures (TTPs) for contractor security operations in accordance with existing FOB/LSA defense standard operating procedures (TTPs must be submitted to the FOB/LSA BDOC for approval prior to implementation);
- The contractor shall provide a list of all weapons to be utilized by contractor personnel in performance of this contract;
- The contractor shall provide an ammunition list of all contractor ordinance, its location, and method of security;
- The contractor shall provide Weapon, Rides of Engagement, Rules for Use of Force and Escalation of Force sustainment training IAW Multi-National Force-West Commander's guidance and policy;
- The contractor shall accelerate enrollment of all personnel into an automated web-based system called SPOT (https://SPOT.Altess.army.mil). The contractor shall input all employees under this contract into SPOT immediately. The contractor shall work closely with the Contracting Officer to obtain LOA's using the SPOT website. Within five (5) days after award, the contractor shall designate a person to be their SPOT point of contact. This person shall have a registered account in SPOT within five (5) days after the awarding of the contract;
- The contractor shall ensure that all Third Country Nationals have cleared an INTERPOL, FBI, County of Origin, or CIA background cheek, and have not been barred from any base by any commander within Iraq;

- The contactor shall ensure that all employees are eligible for, and receive upon arrival at Al Asad Air Base, a BISA badge or DOD CAC ID as appropriate;
- The contractor shall provide its own armory for storage of weapons and ammunition. The contractor must provide their own weapons and ammunition under this contract;
- The contractor shall ensure that all employees have received initial training on the weapon that they carry, that they have qualified on a US Army qualification course, and that they have received, at a minimum, annual training/requalification on an annual basis, and that the employee's target is kept on file for a minimum of 1 yr;

* * *

5.3. Language: All contractor personnel must be fluent in English so that timely and detailed situation reports can be provided to US personnel. Contractor personnel must also be familiar with the local geographical area and local customs.

* * *