No. 17-__

IN THE

Supreme Court of the United States

TRIPLE CANOPY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, AND
UNITED STATES EX REL. OMAR BADR,

Respondents.

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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August 14, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In *Universal Health Services, Inc. v. United States ex rel. Escobar*, this Court held that "the implied false certification theory can be a basis for liability" under the False Claims Act "when the defendant submits a claim for payment" that contains "specific representations" that are "misleading." 136 S. Ct. 1989, 1995 (2016). This Court expressly reserved the question whether "all claims for payment," even those that do not contain specific misleading representations, "implicitly" certify compliance with all statutory, regulatory, and contractual requirements. *Id.* at 2000. This case poses the question that was left undecided in *Escobar* and that has split lower courts: does a government contractor's mere request for payment constitute an implied certification of compliance with all contractual provisions sufficient to satisfy the False Claims Act's "falsity" requirement?

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 ten percent of its stock. The parent corporation and sole stockholder of Triple Canopy, Inc., is Constellis Holdings, LLC, a Delaware limited liability company, which is ultimately owned by Eagle LM5 Holdings, Inc. Eagle LM5 Holdings, Inc., is managed by Apollo Global Management, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Triple Canopy, Inc. ("Triple Canopy") 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 857 F.3d 174, Petitioner's Appendix ("Pet. App.") 1a–11a. That opinion was issued following a June 27, 2016, grant, vacate, and remand order of this Court, *see* Pet. App. 12a. The Court of Appeals' vacated opinion is reported at 775 F.3d 628, Pet. App. 13a–33a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 950 F. Supp. 2d 888, Pet. App. 34a–65a.

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 May 16, 2017. 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:

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.

STATEMENT OF THE CASE

A. The False Claims Act

The False Claims Act imposes 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 False Claims Act 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 Act's punitive regime, defendants are subject to treble damages and civil penalties. 31 U.S.C. § 3729.

Although the False Claims Act 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 has strict limits. This Court has warned against attempts to "expand the FCA well beyond its intended role

of combating 'fraud against the Government'" or to render the reach of the Act as "almost boundless." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 669 (2008). This Court has accordingly held that "[t]he False Claims Act is not an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) (internal citations omitted).

B. Triple Canopy Performs Al Asad Contract

Triple Canopy 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 and dangerous environments. In 2009, the Department of Defense chose Triple Canopy as one of several awardees of the Theatre-Wide Internal Security Services contract ("TWISS I"). From June 2009 to June 2010, Triple Canopy performed TWISS I Task Order 11 ("TO-11"), under which it provided security services at Al Asad Airbase in western Iraq.

TO-11 identified twenty itemized responsibilities that Triple Canopy had with regard to supplementing Al Asad's security operations. These tasks included "repel[ing] and control[ling] any unlawful or destructive activity directed towards 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 69a–71a. The last of these twenty responsibilities was to "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." *Id.* at 72a. 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.* Notably, TO-11 did not expressly condition payment on compliance with any of these obligations.

During TO-11's period of performance, Triple Canopy 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 Triple Canopy certify compliance in the invoices with any of TO-11's terms.

C. District Court Proceedings

On March 21, 2011, relator Omar Badr filed his Complaint, alleging that Triple Canopy violated the False Claims Act 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 Triple Canopy's Al Asad guard force was not properly weapons qualified as required by one of TO-11's contractual terms. The Government also alleged that, on two occasions, Triple Canopy employees at Al Asad falsified guards' scorecards to indicate that the guards had passed a weapons qualification course when they had not.

Notably, neither the Government nor Mr. Badr alleged that (1) Triple Canopy violated any provisions of TO-11 other than the weapons qualification requirement; (2) any of Triple Canopy'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 Triple Canopy's compliance with any of the contract terms pertaining to guards; (4) Triple Canopy 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 Triple Canopy's TO-11 invoices.

On June 19, 2013, the district court dismissed all False Claims Act and fraud claims against Triple Canopy. With respect to the False Claims Act 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 "did not contain factually false statements." Pet. App. at 46a. "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 [Triple Canopy] billed for anything other than what [Triple Canopy] delivered. That is, the Government does not contend that [Triple Canopy] invoiced a fraudulent number of guards or billed for a fraudulent sum of money." *Id.*

Second, the court rejected several of the Government's alternative theories of falsity, including that the term "guard" in the invoice is an implicit certifica-

tion of the contract's weapons qualifications requirements. *Id.* at 46a–53a. The district court explained that this theory did not pass muster because the term "guard" is not defined in the invoices or in TO-11 and certainly is not defined as referring to a person who has passed a particular marksmanship requirement. *Id.* at 48a–51a. The court added that, at the time, the Fourth Circuit had rejected the "implied certification" theory, and the plaintiffs had failed to allege that the contract made compliance with the weapons qualification requirement a prerequisite for payment. *Id.* at 53a–55a.

The district court also dismissed the plaintiffs' False Claims Act 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 60a–61a. The court further found that the false records claims failed as a matter of law under both the False Claims Act 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 61a–62a.

D. Appellate Proceedings

Both the Government and Mr. Badr 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, holding the theory of "implied certification" could support liability under the False Claims Act. Pet. App. at 14a–33a. While

acknowledging its previous warning "against turning what is essentially a breach of contract into an FCA violation," *id.* at 22a, the Court of Appeals adopted an implied-certification theory that did precisely that. Seizing on Triple Canopy's alleged failure to fully 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 25a (citations omitted). Under this version of the implied certification theory, the Court of Appeals held that the Government had sufficiently pleaded a claim under the False Claims Act because (1) the contract listed the weapons qualification requirement as a "responsibility" for Triple Canopy to fulfill; (2) the complaint alleged that Triple Canopy 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 26a–29a. Triple Canopy filed a Petition for Rehearing en Banc on February 23, 2015. On March 9, 2015, the Court of Appeals denied that petition without comment. *Id.* at 67a. Triple Canopy then filed a Petition for a Writ of Certiorari on June 5, 2015. On June 27, 2016, this Court granted the petition, vacated the judgment, and remanded the case to the Court of Appeals for consideration in light of this Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). Pet. App. at 12a.

Following the remand, on May 16, 2017, the Court of Appeals held that *Escobar* had not altered its earlier decision, which it reaffirmed, and it then remanded the case to district court. *Id.* at 6a–11a.

In reaching this decision, the Court of Appeals twisted the facts to support a narrative that Triple Canopy deliberately defrauded the Government. The Court of Appeals cited the fact that the Government did not award TO-11's renewal to Triple Canopy as "evidence that Triple Canopy's falsehood affected the Government's decision to pay." *Id.* at 10a. Not only is this claim not alleged in the Complaint, the facts are the exact opposite. *See* 4th Cir. Joint Appendix at 023–052. The next year's award of the Al Asad task order to SOC—another private security company with other TWISS I task orders—was unrelated to any purported contractual failings or Mr. Badr's later-contrived claims against Triple Canopy. The Government intervened in June 2012, almost two years after the award of TO-11 to SOC. *Compare* 4th Cir. Joint Appendix at 002 (June 25, 2012 Notice of Election to Intervene) *with* 4th Cir. Joint Appendix at 027 (noting that TO-11 "end[ed] June 26, 2010"). In fact, the Contracting Officer's Representative remarked in a letter of commendation that he was "extremely impressed at the professionalism, work ethic, and integrity of all Triple Canopy employees" at Al Asad Airbase. *See* District Court Dkt. No. 32 at 1. The Fourth Circuit's statement to the contrary was nothing more than an unsubstantiated interference. *See* Pet. App. at 10a.

Regardless of its reliance on these unalleged facts, the Court of Appeals opinion rests on a legal premise which *Escobar* left open: whether submission of an invoice alone, a mere request for payment that does not contain specific misleading representations, can give rise to an implied certification theory of liability under the False Claims Act. The Court of Appeals said yes, but other federal courts have disagreed since *Escobar*.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S OPINION RAISES THE QUESTION LEFT OPEN BY THIS COURT IN *ESCOBAR*

This Court has repeatedly recognized that "[t]he False Claims Act is not an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Universal Health Servs., Inc. v. United States ex. rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) (citing *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008) (formatting omitted). In *Escobar*, this Court first addressed the "implied certification theory" of False Claims Act liability. The Court held that while "the implied certification theory can be a basis for liability," it was subject to strict conditions: "first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." *Escobar*, 136 S. Ct. at 2001.

The facts in *Escobar* are crucial to understanding this holding. Yarushka Rivera, a teenager who received Medicaid benefits, died after an adverse reaction to medication prescribed by a purported doctor at Arbour Counseling Services, a mental health facility. *Id.* at 1997. As a Medicaid provider, Arbour submitted claims for reimbursement to the Government. Arbour's claims were chock-full of specific representations, including both "payment codes corresponding to different services that its staff provided to Yarushka, such as 'Individual Therapy' and 'family therapy,'" and also "National Provider Identification numbers," which "correspond to specific job titles." *Id.* These payment

codes and Identification numbers were misleading. "For instance, one Arbour staff member who treated Yarushka registered for a number associated with 'Social Worker, Clinical,' despite lacking the credentials and licensing required for social workers engaged in mental health counseling." *Id.* "Likewise, the practitioner who prescribed medicine to Yarushka, and who was held out as a psychiatrist, was in fact a nurse who lacked authority to prescribe medications absent supervision." *Id.* Arbour's use of payment codes and identification numbers in its Medicaid reimbursement claims were thus "clearly misleading in context," as they specifically represented to the Government that staff members with specific job titles had provided specific medical services when, in fact, they lacked the requisite licenses to hold those job titles or perform those services. *Id.* at 2000.

This case thus differs dramatically *Escobar*. There, the contractor billed for services performed by staff with specific job titles that required specific licenses; the staff lacked the requisite licenses, so the reimbursement claims were misleading on their face. *Id.* at 1997. Here, Triple Canopy's invoices contained no specific representations—no payment codes, identification numbers, or their equivalent—that were misleading or otherwise fraudulent.

Because the representations in the claim for payment in *Escobar* did "more than merely demand payment," the Court declined to "resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment." *Id.* at 2000.

That unresolved question is the lynchpin on which the Fourth Circuit's opinion rests. In its original (vacated) opinion below, the Fourth Circuit held that the Government's False Claims Act allegations should

survive a motion to dismiss "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." Pet. App. 4a (quoting 775 F.3d at 636). On remand, the Fourth Circuit reaffirmed that holding. *Id.* at 9a. It explained that to the extent *Escobar* "left open the question of whether 'all claims for payment implicitly represent that the billing party is legally entitled to payment,' 136 S. Ct. at 2000, we already answered that question" in the affirmative. *Id.* at n. 3.

Pursuant to its determination that implied-certification claims remain valid based on the submission of any claim for payment, even ones that do not contain specific misleading representations, the Fourth Circuit remanded the instant case back to the district court. Pet. App. at 11a.

II. POST-*ESCOBAR*, FEDERAL COURTS DISAGREE ON WHETHER INVOICES ALONE CAN PRESENT IMPLIED CERTIFICATION CLAIMS

Shortly before the Fourth Circuit's opinion issued, the Southern District of New York endorsed a similar analysis. In *United States ex rel. Wood v. Allergan, Inc.*, the court concluded that *Escobar* "addressed only one type" of implied certification claims, namely those premised on "specific representations" that involved "fraudulent half-truths." No. 10-CV-5645, 2017 WL 1233991, at *24 (S.D.N.Y. Mar. 31, 2017), *appeal pending,* No. 17-2191 (2d Cir.). Accordingly, the Southern District of New York ruled that *Mikes v. Straus,* 274 F.3d 687, 700 (2d Cir. 2001) "remains good law" insofar as "it held that falsity may arise from the defendant's submission of a claim for payment that does not

include a specific representation about the goods or services provided, coupled with noncompliance with a material payment requirement." 2017 WL 1233991, at *24.

The Fourth Circuit's and Southern District of New York's holdings that all claims for payment on government contracts implicitly represent an entitlement to payment is at odds with other post-*Escobar* opinions. Notably, the Ninth Circuit recently rejected a False Claims Act allegation premised on a contractor's failure to comply with contractually mandatory accounting procedures. *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 332–33 (9th Cir. 2017). Reiterating that "an actual false claim is the *sine qua non* of an FCA violation," the Ninth Circuit explained that the defendant's submitted invoices did not contain "any specific representations about Serco's performance" other than "a single express certification that the services listed in them were performed during the time periods stated." *Id.* at 332. The submitted invoices listed detailed line-item costs of labor and materials for cell tower upgrades. *Id.* That work had been completed—"There is no evidence that these employees failed to do the work for which [the Government] had contracted"—the contractor just had not used the mandatory accounting submission format. *Id.* at 333.

The Central District of California has since confirmed that "the most reasonable reading of *Kelly* is that an FCA claim under an implied false certification theory cannot survive if the relator does not identify any specific representations in the claims for payment." *United States ex rel. Mateski v. Raytheon Co.*, No. 06-CV-03614, 2017 WL 3326452, at *4 (C.D. Cal. Aug. 3, 2017). The district court there dismissed the claim, with prejudice, on the basis that plaintiff could

not "identify an overtly false representation in the claim for payment." *Id.* at *5.

The Ninth Circuit does not stand alone. The Third Circuit has also recited *Escobar's* holding requiring "specific representations about the goods or services provided" en route to dismissing fraud claims against a school district. *United States v. Eastwick Coll.*, 657 F. App'x 89, 94 (3d Cir. 2016). A district court within the Third Circuit has since applied *Eastwick* to dismiss a case where "Plaintiffs do not allege that Defendants made specific representations about the products for which they sought Government reimbursement." *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.*, No. 11-CV-4607, 2017 WL 1133956, at *5 (E.D. Pa. Mar. 27, 2017). The court in *Schimelpfenig* ruled that "specific representations" that are implicitly false are the *only* way to establish "FCA liability for legally false claims under the implied certification theory," and that there is not a separate "avenue" left whereby "all claims for reimbursement are implicit representations of legal entitlement to Government payment." *Id.* at *5–6.

Under the Third and Ninth Circuit's standard, the Government's allegations here would not survive dismissal. Triple Canopy submitted standard line-item invoices detailing work actually performed pursuant to its contract at Al Asad Airbase, without specific representations on the invoice that were either expressly or implicitly false. *See* Pet. App. at 46a.

These emerging divisions within the lower courts warrant certiorari review. Under the Fourth Circuit's and Southern District of New York's endorsed rule, the distinction between breach-of-contract and False Claims Act claims evaporates. This theory means that every invoice incorporates by reference every contract

term, every regulatory requirement, and every statutory obligation, even in the absence of any specific representations related to compliance. The punitive scope of endorsing such a legal theory is astounding, as treble damages and attorney fees can now be sought in even "mine-run" contract cases. *Contra Escobar,* 136 S. Ct. at 2003. It is not sufficient to leave the materiality prong of the False Claims Act analysis to address this thread; the "falsity" prong should carry independent weight. As recognized by the Ninth and Third Circuits, falsity should not be satisfied by coupling simple breach of contract allegations with mere requests for payment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 14, 2017

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: 05/16/2017]

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No. 13-2190

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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.

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No. 13-2191

———

UNITED STATES ex rel. OMAR BADR,

Plaintiff-Appellant,

v.

TRIPLE CANOPY, INC.,

———

On Remand from the Supreme Court of the United States. (S. Ct. No. 14-1440)

Argued: January 26, 2017
Decided: May 16, 2017

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, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Washington, D.C., for Appellee. ON BRIEF: Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Joyce R. Branda, Acting Assistant Attorney General, Stuart F. Delery, Assistant Attorney General, Michael S. Raab, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Dana J. Boente, United States Attorney, Richard W. Sponseller, Peter S. Hyun, Gerard Mene, Christine Roushdy, Assistant United States Attorneys, 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.; Jonathan G. Cooper, QUINN EMANUEL URQUHART & SULLIVAN, LLP, Washington, D.C., for Appellee.

SHEDD, Circuit Judge:

On remand from the United States Supreme Court, we are asked to consider whether the Government stated a claim under the False Claims Act (FCA), 31 U.S.C. § 3729(a) against Triple Canopy, Inc. Applying *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016), we conclude that the Government properly alleged an FCA claim.

I.

The facts and procedural history are recounted in detail in our earlier opinion. See *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 632-33 (4th Cir. 2015). In brief, the Government awarded Triple Canopy a one-year contract to provide security services at Al Asad Airbase in Iraq. As part of that contract, Triple Canopy was required to meet certain "responsibilities," including "ensur[ing] that all employees have . . . qualified on a U.S. Army qualification course." (J.A. 99). According to the relator, Omar Badr, Triple Canopy brought in guards from Uganda who were unable to meet this marksmanship requirement. Rather than inform the Government of this deficiency, Triple Canopy falsified the scorecards on several occasions throughout the year. Triple Canopy submitted invoices for its guards on a monthly basis but was not required to certify that its guard services complied with the contract's responsibilities.

Badr brought an action against Triple Canopy under 31 U.S.C. §§ 3729 & 3730. The Government intervened and filed a two-count complaint, alleging, *inter alia*, that Triple Canopy knowingly presented false claims, in violation of 31 U.S.C. § 3729(a)(1)(A) because it "billed the Government for the full price for each and every one of its unqualified security guards." (J.A. 24).

The district court granted Triple Canopy's motion to dismiss. *United States ex rel. Badr v. Triple Canopy, Inc.*, 950 F.Supp.2d 888 (E.D. Va. 2013). In doing so, the court "decline[d] recognition of an implied certification theory of liability."[1] *Id.* at 899.

We reversed in relevant part, concluding that the implied certification theory was valid in certain circumstances: "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." 775 F.3d at 636 (internal quotation marks omitted). To guard against the potential for abuse, we required "strict enforcement of the Act's materiality and scienter requirements." *Id.* at 637 (internal quotation marks omitted).

Applying this standard, we found that the Government successfully stated a claim because it alleged that Triple Canopy made a material falsehood. On falsity, we explained that the marksmanship requirement was a contractual responsibility that Triple Canopy failed to satisfy, instead undertaking "a fraudulent scheme . . . to obscure its failure." *Id.* We also rejected Triple Canopy's argument that implied representations could only give rise to liability if

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[1] As the Court defined the theory in *Universal Health:*

> [W]hen a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim "false or fraudulent."

Universal Health, 136 S.Ct. at 1995 (quoting U.S.C. § 3729(a)(1)(A)).

payment was conditioned on compliance with the requirement because "nothing in the statute's language specifically requires such a rule." *Id.* at 637 n. 5 (internal quotation marks omitted). We also found that the Government properly pled materiality:

> [C]ommon 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.

Id. at 637-38. We noted that Triple Canopy's own elaborate cover-up suggested that the contractor realized the materiality of the marksmanship requirement.

After issuing our decision, the Supreme Court granted certiorari in *Universal Health* to resolve a circuit split on whether and to what extent the implied certification theory is valid under the FCA. The Court first held that "at least in certain circumstances," the theory "can be a basis for liability." *Universal Health*, 136 S.Ct. at 1995. Thus, a contractor can be liable under the FCA "when [it] submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement." *Id*. In addition, the Court held that liability "does not turn upon whether those requirements were expressly designated as conditions of payment" because "[w]hat matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Id*. at 1996. Abuse of the theory, the Court cautioned, should be cabined by the "rigorous materiality requirement." *Id*.

The Court next fleshed out how to apply the "demanding" materiality standard. *Id.* at 2003. As the Court summarized:

> A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial.

Id.

In so ruling, the Court rejected the Government's more expansive argument that a misrepresentation was material so long as the contractor knew that the Government would be entitled to refuse payment. The Court referred to the Government's hypothetical wherein a contractor provides health services but violates a requirement that all contractors must use American-made staplers. "The False Claims Act," the Court emphasized, "does not adopt such an extraordinarily expansive view of liability." *Id.* at 2004. Instead, the Court suggested that proof of materiality could include "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on [similar] noncompliance." *Id.* at 2003.

After issuing its decision in Universal Health, the Court granted certiorari in our case, vacated our earlier opinion, and remanded the case for further consideration. *Triple Canopy, Inc. v. United States ex*

rel. Badr, 136 S.Ct. 2504 (2016). On remand, we ordered the parties to brief and argue the impact of *Universal Health* on our earlier panel decision.

II.

Our task is straightforward: we must determine whether *Universal Health* alters our earlier conclusion that the Government stated a claim under § 3729(a)(1)(A).[2] The fact that the Supreme Court vacated our earlier opinion does not impact our ultimate conclusion; that action is not a decision on the merits, and we remain free to "enter the same judgment." *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144, 148 (1st Cir. 2006). Applying *Universal Health*, we readily conclude that it does not alter our earlier panel decision and, accordingly, we again reverse the district court's dismissal of the Government's complaint and remand for further proceedings.

Universal Health made two rulings relevant here. First, the Court held (as we did in our earlier panel decision) that the implied certification theory of liability is valid in certain circumstances. Second, the Court counseled that concerns about abuse of the theory should be addressed by employing a rigorous materiality requirement. Triple Canopy argues that, under *Universal Health*, the Government's complaint falls short of alleging both falsity and materiality. We disagree.

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[2] Nothing in *Universal Health* affects our conclusion that the Government properly pled a false records claim under § 3729(a)(1)(B) or that Badr failed to state a claim regarding his allegations that Triple Canopy operated a similar scheme at several others bases in Iraq. Accordingly, we reinstate Parts IV and V of our earlier panel opinion.

Regarding falsity, Triple Canopy argues that *Universal Health* adopted a much narrower view of falsity than we did and that, applying the Court's test, the Government failed to state a claim. *Universal Health* requires the Government to show that a contractor "makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement." *Universal Health*, 136 S.Ct. at 1995. Triple Canopy contends that, in *Universal Health*, that standard was satisfied because when the contractor billed Medicare, it chose specific billing codes for services, thus making a "specific representation" about the services provided. Here, in contrast, Triple Canopy argues that it merely submitted invoices listing the number of guards and hours worked and these invoices contained no falsities on their face.

We conclude that the Government has sufficiently alleged falsity. Simply, the *Universal Health* rule is not as crabbed as Triple Canopy posits. In announcing the rule, the Court made clear that it was targeting omissions that "fall squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." *Id*. at 2000. That "half-truth" is exactly what we have here: although Triple Canopy knew its "guards" had failed to meet a responsibility in the contract, it nonetheless requested payment each month from the Government for those "guards." Just as in *Universal Health*, anyone reviewing Triple Canopy's invoices "would probably—but wrongly—conclude that [Triple

Canopy] had complied with core [contract] requirements." *Id*.[3]

We also conclude that nothing in *Universal Health* undermines our earlier conclusion that Triple Canopy's falsity was material. In fact, far from undermining our conclusion, *Universal Health* compels it.[4] In analyzing materiality, we noted that a material falsehood was one that was capable of influencing the Government's decision to pay. We explained that the standard was a high one intended to keep FCA liability from attaching to "noncompliance with any of potentially hundreds of legal requirements" in a contract. *Triple Canopy*, 775 F.3d at 637 (internal quotation marks omitted). Applying the standard, we found Triple Canopy's omissions material for two reasons: common sense and Triple Canopy's own actions in covering up the noncompliance. That conclusion perfectly aligns with

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[3] Moreover, to the extent *Universal Health* left open the question of whether "all claims for payment implicitly represent that the billing party is legally entitled to payment," 136 S.Ct. at 2000, we already answered that question in our earlier decision, holding that the Government pleads a false claim when it alleges a "request for payment under a contract" where the contractor "withheld information about its noncompliance with material contractual requirements." *Triple Canopy*, 775 F.3d at 636 (internal quotation marks omitted).

[4] If anything, we took a narrower view of materiality than the Court. In a footnote, we stated that, although a contract provision need not expressly be identified as a condition of payment to be material, as a practical matter it would be difficult for the Government to prove materiality absent a showing that the provision was a precondition for payment. *See Triple Canopy*, 775 F.3d at 637 n5. However, in *Universal Health*, the Court held that "the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive." *Universal Health*, 136 S.Ct. at 2003.

Universal Health. Most persuasively, in discussing scienter, the Court offered the following hypothetical:

> A defendant can have "actual knowledge" that a condition is material without the Government expressly calling it a condition of payment. If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has "actual knowledge." Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information" even if the Government did not spell this out.

Universal Health, 136 S.Ct. at 2001-02. Guns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight.

In addition, in discussing the types of evidence the Government could introduce to show materiality, the Court referenced whether the Government typically paid claims that violated the particular requirement. Here, the Government did not renew its contract for base security with Triple Canopy and immediately intervened in the litigation. Both of these actions are evidence that Triple Canopy's falsehood affected the Government's decision to pay. As we explained, 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." *Triple Canopy*, 775 F.3d at 638.

In sum, nothing contradicts our conclusion that the Government properly alleged that Triple Canopy violated the FCA.

III.

Having reconsidered our earlier panel decision in light of *Universal Health*, we conclude that the Government has stated a claim under § 3729(a)(1)(A) of the FCA. We also reinstate those portions of our opinion that were not impacted by *Universal Health*: Part III.C, which reversed the district court's dismissal of Badr from the implied certification claim; Part IV, which concluded that the Government stated a false records claims under 31 U.S.C. § 3729(a)(1)(B); and Part V, which concluded that Badr failed to state a claim with regard to Triple Canopy's actions at other bases in Iraq. We remand the case to the district court for further proceedings consistent with our opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

APPENDIX B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 27, 2016

Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street Room 501
Richmond, VA 23219

Re: Triple Canopy, Inc.
v. United States, ex rel. Omar Badr, et al.
No. 14-1440
(Your No. 13-2190, 13-2191)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of Universal Health Services, Inc. v. United States ex rel. Escobar, 579 U. S. ___ (2016).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: 01/08/2015]

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No. 13-2190

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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.

———

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

[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).

[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 "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.

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

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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 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.

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*).

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]

"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

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[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, 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.

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 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, 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

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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 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 false-hood—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

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 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

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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").

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*

[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.

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 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

[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.

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 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 D

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

[Filed: 06/19/2013]

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 Comp1120.) 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

[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").

plead reliance upon any false statements. The Court holds that the Government's unjust enrichment claim, Count VII, must be dismissed 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 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 con-tract, 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 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

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

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.

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 defend-ant'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]

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*

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

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*.

[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.

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 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 /s/
Gerald Bruce Lee
United States District Judge

6/19/2013

APPENDIX E

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

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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 Amicus 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 F

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.

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STATEMENT OF WORK

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

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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 personnel 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;

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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.

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