United States of America ex rel.
Katherine Knapp

v.

Calibre Systems, Inc. and Does
1 Through 10, Inclusive

Case No. CV 10-4466 ODW (JCGx)
United States District Court,
Central District of California

Report of Ronald H. Clark, Ph.D., J.D.
12/26/12

SIGNATURE:_____

I. Introduction

I have been retained on behalf of defendant Calibre Systems, Inc. ("Calibre") by the law firm of Jackson Lewis LLP to offer an expert opinion relating to the case of *United States ex rel. Knapp v. Calibre Systems, Inc. and Does 1 Through 10 Inclusive,* Case No. CV 10-4466 ODW (JCGx) (C.D. Cal.). Specifically, I was requested to offer an expert opinion regarding the appropriate method(s) for determinating damages should Calibre be found liable under the False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA").

The *qui tam* complaint alleges that Calibre violated the Act in connection with securing and performing contracts with the United States in regards to the Ft. Irwin National Training Center in California. The complaint was filed on or about June 17, 2010. (Dkt. No. 1.) The United States filed its notice of election to decline intervention on January 25th, 2011. (Dkt. No. 2.) The operative complaint is the Third Amended Complaint, filed on May 9, 2012. (Dkt. No. 49.)

After addressing the background of the present litigation and my own experience with the FCA, my report discusses the appropriate measures of damages under the FCA that I believe plaintiff could recover in this action if her allegations were sustained at trial.

II. The Complaint's Allegations

The third amended complaint (TAC) alleges that Calibre entered into contracts

in connection with environmental impact issues at Ft. Irwin, California.[1/] According to the complaint, Calibre was required to follow Sections 106 and 110 of the National Historic Preservation Act of 1996 ("NHPA"), as well as Section 106 of the Archeology Guidance ("Guidance") and 36 C.F.R. 800 *et seq.* (TAC ¶ 11) in the performance of its contractual obligations. As well, the TAC alleges that Calibre "was required to comply with all Federal, State and local laws, executive orders, and regulations that were applicable to Calibre's performance under the contract." (TAC ¶ 13). Monthly invoices (TAC ¶ 14) and monthly reports (TAC ¶ 15) were to be submitted detailing performance under the contract.

The TAC further alleges that Calibre "fraudulently induced" the government to enter into the contracts "by knowingly presenting false or fraudulent proposals, plans of action, and other false representations and promises, which caused the United States government to enter into the contracts" and make payments. (TAC ¶ 16). The complaint also alleges various ways in which Calibre allegedly deviated from these regulatory requirements. (TAC ¶¶ 18-23). These allegations underlie the First Cause of Action for violations of the FCA.

There is, however, a Second Cause of Action, predicated upon the whistleblower protection provision of the FCA, 31 U.S.C. § 3730(h). There the relator alleges that she was "terminated from her employment in retaliation for her lawful acts done in furtherance of this action." Paragraphs 24 through 33, and 35-40, of the TAC relate

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[1/]There was in addition to the original contract a follow-up bridge contract as well. *See* TAC, ¶ 34.

to this allegation.

The remaining Causes of Action pertain to state law causes of action which are outside my assignment and I offer to opinions regarding them.

III. Background and Pertinent Experience

In December, 2008, I retired from my partnership in the health, government contracts and litigation groups at Arent Fox LLP in Washington, D.C. I joined Arent Fox in 1995 after 15 years in the United States Department of Justice, including two years as an Assistant United States Attorney ("AUSA") in the District of New Jersey (1982-84), and 11 years (1984-1995) as Trial Attorney and later Senior Trial Counsel in the Civil Fraud Section, Commercial Litigation Branch, Civil Division, at Main Justice in Washington. I first began working with the FCA while an AUSA. When I shifted to Washington, I worked almost exclusively on FCA cases relating to all manner of governmental programs. Principally I was involved in defense procurement fraud cases and Medicare cases, although I also handled FCA cases relating to the Departments of Education, Agriculture, Veterans Affairs and other agencies, including the SBA. In 1986, I participated in the amendment of the FCA, including helping to redraft one section.

Beginning on or about 1988, after I was promoted to Senior Trial Counsel, I undertook initial supervision of all health care fraud cases in the Civil Fraud Section, including cases initiated by the Department as well as an increasing number of *qui tam* cases. As part of my responsibilities as Senior Trial Counsel, I supervised cases handled by the various U.S. Attorneys' offices across the nation,

trained Assistant U.S. Attorneys in a number of offices, and helped write the internal Civil Division FCA manual that is used by United States Attorneys' offices and Main Justice.

An important dimension of my responsibilities as Senior Trial Counsel involved the evaluation of new FCA cases, whether originated by the Department or filed by *qui tam* relators. That process involved assessing the alleged violation of government rules and regulations, the damages accruing to the government as a result, and the applicability of the FCA's treble damages and penalty provisions. Based upon this analysis, I formulated recommendations to my superiors and to the appropriate agency Inspector General ("OIG").

As soon as a *qui tam* complaint arrived alleging fraud, it was assigned for evaluation to one of the fraud section's Trial Attorneys I supervised. Almost immediately, copies of the pertinent materials were dispatched to the appropriate OIG, because it was that agency that usually conducted the investigation leading to a recommendation regarding whether the United States should intervene in the action. On occasion, investigative resources from other agencies were utilized, including the FBI, Defense Criminal Investigative Service, and the Office of Management and Budget. During my tenure as Senior Trial Counsel, I coordinated well over 100 cases with OIGs.

Following the investigation stage, the OIG would make a recommendation as to whether the United States should intervene in the case. OIG also, as the client agency, would submit recommendations about proposed settlements or complaints.

During my tenure, I received four Health and Human Services OIG Integrity Awards based on my work with that office in prosecuting healthcare fraud cases. I also received commendation letters from several other agencies as well.

If a case were being negotiated with the actual or potential defendant(s), I would often participate with the Trial Attorneys and Assistant U.S. Attorneys assigned to the matter. I would oversee the drafting of the "suit authorization" memorandum when litigation was contemplated. If a proposed settlement were reached, I oversaw all memos that would go forward seeking settlement approval. I handled my own cases as well, which required me to analyze the potential damages to the government, evaluate acceptable settlement options, and devise appropriate litigation strategy.

One of my primary responsibilities as Senior Trial Counsel was to train Civil Fraud Section Trial Attorneys and AUSA's in how to evaluate FCA fraud cases, assess government losses, and develop negotiating positions. In order to effectively negotiate a settlement, or secure authorization to litigate a case, it was essential that DOJ personnel accurately analyze a potential case, both as to legal theories as well as to what would be necessary to make the government whole.

In April 1995, I joined Arent Fox LLP, first as Counsel and beginning in 1997 as an equity partner. My practice was almost exclusively related to defensive FCA and *qui tam* matters. Most of my FCA cases involved healthcare and government contracting issues. Once again, my primary responsibilities in representing defendants included assessing potential damages the government might seek to

recover, resolving regulatory issues pertaining to pertinent statutes and policies, and developing litigation strategies. Since many of my cases involved negotiations with the Department of Justice, I maintained contact with current DOJ thinking regarding theories of liability, methods for computing FCA damages and penalties, and new variations of FCA legal and negotiation strategies.

Since 2011, I have participated as an expert on the FCA in a major experts' network, involving over 60 telephone consultations with various clients regarding all manner of FCA issues, including computing potential damages.

As a result of both my extensive service in the Department of Justice, my tenure in private practice between1995 and 2008, as well as my consulting practice since 2008, I am abundantly qualified to address the issues raised in the present litigation. I have a thorough and well-grounded background in the FCA and DOJ procedures, techniques, and strategies. I have worked with the FCA since 1982, have written extensively on it, and have personally been involved in the entire range of government fraud matters. Most importantly, for my entire period working with the FCA I have been required to evaluate the financial dimensions to FCA cases–including theories of recovery, losses to the government, and the appropriate role of multiple damages and penalties. And I previously have testified as an expert on FCA damages issues.

Attached to my report, as **Exhibit A**, is my current webpage resume, including FCA web articles, reported FCA-related federal decisions, and my general background. Also included is a listing of my published articles, book chapters and

book, including those relating to the FCA.[2/] I have attached as **Exhibit B** a listing of the materials I consulted in formulating my opinions.

IV. FCA Damages are Limited to the Government's Actual Damages

The plain language of the FCA limits recovery to actual damages. The Act provides that if a person commits one of seven statutorily enumerated types of fraud, that person is "liable to the United States Government for a civil penalty [3/] plus 3 times the amount of *damages which the Government sustains because of the act of that person.*" 31 U.S.C. § 3729(a) (emphasis added).[4/] Therefore, the government's recovery under the False Claims Act is simply limited to actual damages. *See, e.g., United States ex rel. Taylor v. Gabelli,* 2005 WL 2978921 (S.D.N.Y.).

Case law as well demonstrates that courts have limited the government's measure of damages to actual damages and have refused to award plaintiffs any windfall. The Supreme Court in *United States v. Bornstein*, 423 U.S. 303, 326, n. 13 (1976), definitively articulated the standard rule regarding FCA damages: "the Government's actual damages" is measured as "equal to the difference between the market value of the [product or service] it received and retained and the market

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[2/] My fees for this assignment are $535 per hour.

[3/] In addition to providing treble damages, the FCA authorizes civil penalties of between $5,500 to $11,000 per claim for violations committee on or after September 29, 1999. *See* Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47,099, 47,103-47,104 (1999).

[4/] The effective date of the Fraud Enforcement and Recovery Act of 2009 ("FERA"). amendments to the FCA is May 20, 2009, so I did not employ the amended statute in my analysis.

value of that the [product or service] it would have had if [it] had been of the specified quality." Courts, including the Ninth Circuit, have followed that rule in computing FCA damages. *See United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966) (ruling no damages when the government received the full value of what it bargained to receive). *See also, Gabelli, supra.*

Courts have generally ruled that when the government receives a product or service that has *some* value, the measure of damages is the difference between the value of what the government received and the value of what it would have received had the claim not been false. *See, e.g., Faulk v. United States,* 198 F.2d 169, 172 (5th Cir. 1952). Moreover, if the value of the product or service received is equal to the amount the government paid, there are no FCA damages. *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 433-34 (Fed. Cl. 1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995). Also, courts have refused to accept the government's argument that damages in the full amount of the payment were justified because had the government known of the alleged fraud it, would not have paid any amount. *See, e.g., Harrison v. Westinghouse Savannah River Co.,* 352 F.3d 908, 922-23 (4th Cir. 2003); and *Woodbury*, 359 F.2d at 379.

V. The TAC's Theories of False Claims Act Liability

It must be determined as a preliminary matter exactly what theories of FCA liability the relator is asserting. The situation is somewhat challenging since the TAC lumps all these theories together in ¶42, some with little explanation. I found

it helpful to review relator's opposition to Calibre's motion to dismiss, filed on 09/02/11. (Dkt. No. 24.) There, in II. (at pp. 1-2), relator asserts that she alleged "three separate and distinct ways" in which Calibre violated the FCA. Those theories are:

1. "...defendant provided *express false certifications* to the United States Government that it was in compliance with regulations set forth by sections 106 and 110 of the National Historic Preservation Act of 1996." (Emphasis supplied.) Relator points to Calibre's "invoices for payment" as carrying the false certifications. *Id.*, at 1.

2. "...defendant provided *implied false certification* to the United States Government that it was in compliance with federal regulations by accepting federal monies for work it did not perform." (Emphasis supplied.) That is, by presenting monthly reports in connection with requests for payment, Calibre was falsely certifying to the government that it was entitled to be paid for work under the contractual terms. *Id.* 1-2; TAC ¶ 15.

3. "...defendant violated the Act by providing *worthless services* to the federal government by submitting and causing to be submitted false certifications to the government in return for payment." (Emphasis supplied.) *Id.* at 2.

However, one additional theory is apparently asserted in ¶42, TAC: *"fraudulently inducing* the government to enter into the contracts with CALIBRE and to pay CALIBRE, presenting to the United States government a false or fraudulent bid

price for the contracts...". (Emphasis added.) I have concluded that this language is a reference to ¶¶ 16 & 34, TAC, and discuss this allegation in that context.

I address each of these theories in turn. Thereafter, I review of the whistleblower protection claim articulated in the Second Cause of Action, ¶¶ 44-46 TAC.

VI. False Express Certification Allegation

The TAC asserts FCA liability on behalf of Calibre based upon an **express** certification theory in ¶¶ 15 & 42. *See also* relator's opposition to Calibre's motion to dismiss (Dk. No. 24.) at 1:

> Defendant provided express false certification to the United States Government that it was in compliance with regulations set forth by sections 106 and 110 of the National Historic Preservation Act of 1966. Plaintiff is informed and believes that *defendant presented invoices for payment to the federal government falsely certifying that it had performed its contractual obligations to ensure compliance with the historical preservation regulations* knowing full well that it had provided no such service. Defendant's express false certification of compliance resulted in the wrongful payment of federal monies to defendant. (Emphasis added.)

As the Ninth Circuit has explained, "Express certification simply means that the entity seeking payment certifies compliance with a law, rule or regulation as part of the process through which the claim is submitted." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.), *cert. den.*,131 S.Ct. 801 (2010). However: "Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996), *cert. den.*, 519 U.S. 1115 (1997). *See also, United*

States ex rel. Main v. Oakland City University, 426 F.3d 914, 917 (7th Cir. 2005) ("failure to honor one's promise is (just) breach of contract")[5/]

The most basic and essential element of an express certification claim is that there must be a written explicit certification.[6/] The TAC identifies none of the alleged express certifications it is alleging. Relator's opposition to defendant's motion to dismiss, quoted above, identifies them as being in the "invoices for payment" presented by Calibre to the government. I have personally reviewed the 28 invoices presented by Calibre for payment under the original and bridge contacts. I find no express certifications contained in any of them, or anywhere else in the documents provided to me (including the monthly reports).

Without any demonstrated written express certifications being present, in my opinion relator can recover no damages under this theory. Moreover, since the invoices carry no false certifications, and have been attacked solely on that ground, I do not believe the court would impose any civil penalties whatsoever.

VII. False Implied Certifications

However, the TAC also asserts a second certification theory in ¶¶ 15 and 42. This is the so-called "**implied** certification" theory. Essentially, this theory maintains that if invoices for services are submitted by a contractor under a government contract, it is **impliedly** certifying it has performed in conformity with the

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[5/] Therefore, TAC ¶13's allegations alone do not state a violation of the FCA.

[6/] *See, e.g., United States ex rel. Connor v. Salina Regional Health Center, Inc.*, 543 F.3d 1211, 1218 (10th Cir. 2008). A typical **express** certification is reproduced *id.*, at 1219.

contractual terms. *See, e.g., Ebeid*, 616 F.3d at 996; *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001). The TAC is somewhat confusing since it argues in ¶15 that the monthly reports are implied certifications, even though courts generally have limited application of the doctrine to claims for payment. *See, e.g., Ab-Tech Construction v. United States*, 31 Fed. Cl. 429, 434 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995). ¶ 42 adds no clarification as to what exactly relator is asserting are the implied false certifications.[7/]

Moreover, the Ninth Circuit has indicated that an implied certification theory may not be applicable where "[t]here are administrative and other remedies for regulatory [or in this case, contractual] violation." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996). Each of the pertinent contracts in this case contains the following statement: "Any deviation from the mandatory assumptions may cause an adjustment to the price of this effort."[8/] Much as in *Hopper*, there was no requirement that Calibre certify its invoices.

In government contract cases there are frequently changes made by the contractor as performance continues. The quoted provision is designed to cover such situations, because it affords the government a device for making sure it does not receive less performance than it had bargained for. These provisions might argue against the **premature** application of an implied certification *qui tam* complaint

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[7/] However, in its motion to dismiss opposition (Dkt. No. 24.) at 1-2, to the extent that this is pertinent, relator does assert her allegation is predicated upon invoices.

[8/] *See, e.g.*, Calibre document production, pp. 00132, 00140, & 00092 (Exhibit C hereto).

that could foreclose the government's preferred method of protecting itself and resolving contractual disputes. *See, Connor,* 543 F.3d at 1221 (premature *qui tam* actions "could prevent the government from proceeding deliberately through the carefully crafted remedial process and could demand damages far in excess of the entire value of [ ] services performed" by the contractor). *See also, Hopper,* 91 F.3d at 1267.

Some Circuits have held that an implied certification is appropriately applied "only where the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." *Mikes,* 274 F.3d at 700. Neither of the statutes cited in TAC ¶ 15, nor the contracts at issue themselves, contains such a provision.[9/] As of now, the Ninth Circuit has taken no position on this issue. *See Ebeid,* 616 F.3d at 998 & note 3 (limited to Medicare context cases).

Setting these difficulties aside, the applicable measure of damages is the standard one identified above as articulated in *Bornstein*: "the Government's actual damages" is measured as "equal to the difference between the market value of the [product or service] it received and retained and the market value of the [product or

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[9/] I respectfully disagree with the Court in its order granting in part and denying in part Calibre's motion to dismiss. (Dkt. No. 27.). I do not believe that a contractual provision requiring compliance with several statutes satisfies the implied certification requirement mandating compliance as a prerequisite to obtaining a government benefit. Such prerequisites are usually specified in the underlying statute or regulation and are quite explicit. *See, e.g., Connor,* 543 F.3d at 1218. Nor is there even such an express requirement in the contracts themselves that in order to be paid, the contractor must comply with the contracts.

service] it would have had if [it] had been of the specified quality." 423 U.S. at 326, n. 13.

VIII. Worthless Services

This theory of FCA liability is quite straightforward: if the government pays for material or services which are in fact worthless and not what it contracted and paid for, then the *total* amount paid to the contractor should serve as the basis for determining single damages. In my experience, which is extensively involved with issues of healthcare fraud, I usually only found this theory of damages applied to contractor services asserted in cases relating to government healthcare programs such as Medicare and Medicaid. Indeed, the Ninth Circuit case recognizing this theory deals with healthcare fraud. *U.S. ex rel. Lee v. Smithkline Beecham Clinical Laboratories*, 245 F.3d 1048, 1053 (9th Cir. 2001).[10/] In this context, the argument is that healthcare services are either 100% satisfactory, or they are worthless to the government: *e.g.*, the government cannot pay for ½ of a heart transplant operation. So, in this context, the theory has become familiar.

The other application of the theory I have encountered is where the government contracts for a piece of equipment, and when delivered it is **totally** useless. For example, I once had a case while at the Department of Justice involving steering arm assemblies for Bradley troop carriers. The contractor had not followed the

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[10/] Noted the 9th Circuit, "In an appropriate case, knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729, regardless of any false certification conduct." *Id.* at 1053.

contractual specifications for materials, instead employing cheaper metal alloys, with the result that when the assemblies were used, they shriveled up and the driver would lose control. In that case, we utilized successfully the full contract price as the basis for single damages. Once again, it was easy to determine what if any use the government got out of the assemblies: zero.

In my opinion, utilization of a worthless services theory in this case presents some substantial difficulties. Here we are talking about potentially dozens of different kinds of environmental (including archaeological) and management services specified under the contracts. Calibre's monthly reports evidence simultaneous activity on a number of different fronts, so we are not dealing with a single or a few services such as is the pattern in worthless service cases. In fact, the TAC alleges multiple failures to perform in ¶¶ 18, and 20-23. However, this listing does not include most of the obligations under the contracts, which the relator apparently is not alleging were unsatisfactorily performed. *See, e.g.*, contract pages CALIBRE 00096-00099 (Exhibit D hereto), and particularly the extensive Monthly Status Reports listing a wide range of activities.

Moreover, the government apparently found Calibre's performance acceptable on at least some if not all of its contractual responsibilities, by executing DD-250 forms,[11/] and later entering into the bridge contract for similar Calibre services. So

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[11/] This is the "Material Inspection and Receiving Report" form utilized by the Department of Defense in most of its contracts for supplies and services. When executed by the appropriate government official (in box 21), it documents the inspection and acceptance by the government of the contracted-for service or manufactured item as being in conformity with the governing

as far as I can tell from the documents provided to me, Calibre's performance on at least some or even most of its various contractual obligations has not been challenged by the Government or in the TAC.

Given the complexities of the situation, I believe the best way to determine FCA damages, if any, in this particular situation was discussed in *United States v. SAIC*, 626 F.3d 1257, 1278-79 (D.C. Cir. 2010). "Where a contractor's fraud consists of knowingly submitting nonconforming goods with ascertainable market value, the Supreme Court has instructed that '[t]he government's actual damages are equal to the difference between the market value of the [product] it received and retained and the market value that the [product] would have had if [it] had been of the specified quality,' " *citing to United States v. Bornstein*, 423 U.S. at 326 n. 13. However, "if the value that conforming goods or services would have had is impossible to determine, then the fact-finder bases damages on the amount the government actually paid minus the value of the goods or services the government received and used." [12/]

Further noted the court, the government would only be entitled to recover the full

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[footnote continued] contract.

[12/] The *SAIC* court also suggested: "In a case where the defendant agreed to provide goods or services to the government, the proper measure of damages is the difference between the value of the goods or services actually provided by the contractor and the value the goods or services would have had to the government had they been delivered as promised." *Id.* at 1279. So if the value of the alleged worthless services here could be itemized separately, that amount would serve as the single damages figure.

value of payments made to the contractor where it "proves that it received no value from the product delivered" (*citing to Harrison*, 352 F.3d at 923 & n. 17).[13] Relator bears that evidentiary burden in the present action. And, of course, the contractor can submit its evidence to the contrary.

Irrespective of proving damages, the government would be entitled to a civil penalty of between $5,500 and $11,000 for each invoice resulting from the contract it proved to be fraudulent. However, here that determination is extremely difficult, in my opinion, given that the invoices do not identify any specific services because the contracts are "fixed price" and not "cost plus" contracts.

IX. Fraudulent Inducement and Inflated Bid

I have chosen to treat the fraudulent inducement and inflated bid allegations separately to enhance clarity. My conclusion relative to both related theories is the same as to the measure of damages.

(a) Fraudulent Inducement

The Ninth Circuit has applied a fraudulent inducement theory in FCA cases. In *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006), *cert. den.*, 550 U.S. 903 (2007), the court explained this theory (which it also designated as "promissory fraud") holds that liability will attach to each claim

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[13] "Taken literally, the SAIC court seems to be shifting the focus of the False Claims Act damages inquiry away from remedying the contractors' unjust enrichment and, instead, towards remedying the possible financial injury suffered by the government." Robert Vogel, *The SAIC Case: A New Approach to False Claims Act Damages*, Vogel, Slade, & Goldstein LLP internet bulletin (accessed in 2012).

submitted to the government under a contract when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." I take it this is the theory relator is asserting in the ¶ 42 of the TAC. The government too has relied upon this theory on occasion. *See, e.g., United States ex rel. Main v. Oakland City University*, 426 F.3d at 916-17.[14/]

The interesting issue is how to measure damages in such a situation. As I understand it, the government has argued in some cases that no matter what benefit it received under a fraudulently-induced contract, the FCA mandates that the *total* contract price serve as the single damages figure. *See, e.g., United States ex rel. Longhi v. Lithium Power Technologies*, 575 F.3d 458 (5th Cir. 2009); *U.S. ex rel. Magee v. Knesel, et al.*, 2010 WL 972214, No. 1:09cv324 (S.D. Miss. March 12, 2010). In short, the government maintained that if it would not have entered into the contract but for the fraudulent inducement, then no matter what benefits it received the entire contract amount would serve as single damages and be trebled under the FCA.

In my opinion, this theory of damages is inapplicable in the present case. I believe that the *SAIC* case discussed above demonstrates that the traditional measure of FCA damages (amount paid minus value of what the government actually received) controls here. Had the government received no benefit from

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[14/] The *Oakland City University* court did, however, note: "But fraud requires more than breach of promise: fraud entails making a false representation, such as a statement that the speaker will do something it plans not to do. Tripping up on a regulatory complexity does not entail a knowingly false representation." *Id.* at 917.

Calibre, then the *Longhi* approach might be applicable. But here the numerous monthly reports indicate that the government did receive substantial benefit under the contracts. Therefore, the value of these services should be subtracted from the total contract payments to determine the single damages figure.[15/]

(b) The Bridge Contract Issue

TAC ¶ 34 alleges that, in connection with securing the bridge contract, Calibre "inflated the price of the bridge contract by bidding a price for four (4) months of work for the three-month (3) bridge contract." Moreover, it alleges the government accepted this proposal and made an unspecified number of payments under the bridge contract.

The Ninth Circuit recently held that fraudulent estimates can constitute potential violations of the FCA. *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012). In the past, some courts had reasoned that estimates being predictions, they could not constitute false statements. I am setting aside any certification issue because the TAC does not allege that Calibre certified the accuracy of its cost and pricing information when submitting its bid.[16/]

[15/] *See, e.g.*, Julie M. Carpenter, *Going From $0 to $232 Million With No Evidence of Harm: DOJ's New Damages Theory in FCA Fraudulent Inducement Cases, And How to Fight Back*, Jenner & Block "Government Contracts Practice Advisory" (May 17, 2012), available on internet (accessed in 2012); Victor Walton and Joseph Harper, *Measuring Damages in FCA Fraudulent Inducement Cases*, Vorys, Sater on-line advisory (August 23, 2012), available on internet (accessed in 2012).

[16/] An inflated bid theory is being relied upon by the government in its recent FCA action against the Gallup organization. *See, U.S. ex rel. Lindley v. The Gallup Organization*, 09-cv-01985 (D.D.C.).

Assuming that the jury were to find liability on the part of Calibre, the district court would apply, in my opinion, the following standard: what would the government have paid had it been aware of the false bid estimate? In other words, had Calibre submitted accurate cost and pricing information, what would the government have paid under the contract? Given the data submitted to secure the analogous first contract, where no allegations have been made of falsity, it would seem a very straightforward matter to submit that issue to the jury, supported by testimony from a government contracting representative. I do not believe the court would simply take the full amount paid under the contract and use that figure to determine single damages.

Next, in my opinion, the district court would then subtract from the total contract payments the amount an informed government agency would have actually paid if it had been furnished with accurate cost and pricing data in the contract proposal to determine single damages. It would then treble that figure. There also would be a determination by the jury of the number of false invoices, if any, submitted for payment under the contract. The court would then determine what the penalty amount would be for each such false invoice, assessing a penalty of between $5,500 and $11,000 for each such invoice.

This is the approach applied by the court in *Miller v. Holzmann*, 563 F. Supp. 2d 54 (D.D.C. 2008).[17] This interesting case involved an alleged bid rigging scheme

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[17] *Affirmed in part, vacated in part, remanded*, 608 F.3d 871 (D.C. Cir. 2010), *on remand*, 786 F.Supp 110 (D.D.C. 2011), *cert. den.*, 131 S. Ct. 2443 (May 16, 2011). At no point during the

related to an Egyptian dam built in part with U.S. government funds. Since a FCA violator is only liable for the amount of loss the government sustains as a result of his fraudulent actions, the district court held that "the proper measure of damages in this FCA action was 'the difference between what the United States paid and what it would have paid had there been no bid-rigging agreement.' " The district court placed reliance upon *Harrison*, 352 F.3d at 922-23 ("the amount of money the government paid by reason of the false statements over and above what it would have paid absent the false statement").

The district court also placed reliance upon 9th Circuit authority, *United States v. Mackby*, 339 F.3d 1013, 1019 (9th Cir. 2003), *cert. denied*, 541 U.S. 936 (2004): " 'Ordinarily the measure of the government's damages under the FCA would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful," *quoting Woodbury*, 359 F.2d at 379.[18] Particularly given that the complaint here contains no allegations that the government did not receive the services promised in the bridge contract, this would seem to be the most appropriate method of computing damages in this situation.

X. The 31 U.S.C. §3730(h) Whistleblower Retaliation Claim

The Second Cause of Action (TAC ¶¶ 18-40; 44-46) contains an allegation under

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[footnote continued] subsequent litigation was the district court's damages theory contested.

[18] *Holzman*, 563 F. Supp.2d at 108.

the Anti-Retaliation provisions of the FCA, 31 U.S.C. § 3730(h).[19/] This section is designed to protect potential relators from suffering any discrimination at the hands of their employers while engaged "in furtherance of an action under" the *qui tam* provisions of the FCA. Paragraph 45 alleges that the relator "faced retaliation and eventual termination" due to her activities regarding Calibre's performance of the pertinent contracts at Ft. Irwin.

In its motion to dismiss (Dkt. No. 22.), Calibre asserted that the relator had failed properly to allege a viable claim under § 3730(h). The district court agreed in its opinion (Dkt. No. 27.), finding that the relator had not alleged she had informed Calibre directly of her "protected conduct" as required under the statute. *Id.* at 7. Therefore, the district court dismissed the retaliation claim, but granted relator leave to amend. *Id.* at 9. The present second cause of action constitutes the revised retaliation claim.

In my opinion, the present TAC second cause of action is equally defective as that dismissed by the district court. As the district court recognized, Ninth Circuit authority is clear: plaintiff must allege that the defendant knew she was engaging in conduct protected by the FCA. *See Hopper*, 91 F.3d at 1269. Usually this requires that the relator inform the employer explicitly that she is investigating potential fraud. *See, e.g., Tribble v. Raytheon Co.*, 2011 WL 490992 (9th Cir. Feb. 14, 2011), at

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[19/] The FCA was amended on May 20, 2009, via FERA (*see note 4, supra*). Given the chronology of the present case, I have chosen to use the language of the 1986 version of the section, though there is little if any variation, in substance, between it and the 2009 amendment.

*1: summary judgment on 3730(h) claim affirmed because the plaintiff "never indicated to anyone at (employer) that he was concerned about fraud or false claims against the U.S. government." *See also, United States ex rel. Lockyer v. Hawai'i Pacific Health Group Plan*, 2009 WL 2700321 (9th Cir. Feb. 13, 2009), at *1: summary judgment affirmed where plaintiff had not only never given an indication that he was investigating the employer for defrauding the federal government, but also had explained his conduct was related only to his compensation. Mere speculation that the employer was aware of the motivation behind the plaintiff's inquiries is not sufficient. *United States ex rel. Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1060-61 (9th Cir. 2011).

I can see no place in the TAC where such an allegation is made. That is, there is no allegation that the plaintiff informed Calibre that she had concerns about defrauding the government and that was why she was engaged in making inquiries.[20/] The most pertinent paragraphs in this regard are ¶¶28 - 31. But even there at no time does the TAC allege that plaintiff informed Calibre that she had concerns about defrauding the government or that she might file a whistleblower law suit.

Consequently I do not believe that the plaintiff can recover any damages under the second cause of action predicated upon section 3730(h). That is, she is not entitled to "reinstatement with the same seniority status such employee would have

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[20/] Nor have I found any such indication in Ms. Knapp's extensive deposition in this case, taken on October 26, 2012.

had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."

CONCLUSIONS

As a result of my analysis of the pertinent issues in the present litigation, I have reached the following conclusions:

(1) Plaintiff can recover no damages under the express certification theory.

(2) Plaintiff can recover no damages under the whistleblower protection provision of the FCA, 31 U.S.C. § 3730(h).

(3) Under none of the remaining theories, can plaintiff recover the entire contract amounts paid by the government as single damages, which would be trebled under the FCA, unless the government received no benefit from Calibre's performance of the contracts.

(4) The *Bornstein* formula, discussed above at pp. 8-9, governs the computation of damages under the viable Causes of Action asserted in the TAC.

EXHIBIT B

In connection with the preparation of my report, I have reviewed and relied upon the following:

-All the sources identified in my report

-The deposition of Katherine Anne Knapp, dated October 26, 2012

-The Third Amended Complaint in this Action

Books

-John T. Boese, *Civil False Claims and Qui Tam Actions* (3d. Ed.)
-Robert Salcido, *False Claims Act and the Healthcare Industry* (2d. Ed.)
-James Helmer, Jr., *False Claims Act: Whistleblower Litigation*

Articles

Barton, *Predicating False Claims Act Liability on False Cost Estimates May Impact Contractors' Willingness to Take On Projects Involving Next Generation Technologies*, SheppardMullin "Government Contracts & International Trade Blog," October 24, 2112, available on the internet (accessed in 2012).

Hurwitz, *Implied False Certification Theory Gains Support in Ninth Circuit,* **Government contracts, Investigations & International Trade Blog (Sheppard Mullin)**, September 13, 2010 (available on the internet (accessed in 2012).

Klass & Holt, *Implied Certification Under the False Claims Act*, Public Contract Law Journal, Vol. 41, No. 1, 2011, pp. 1-55.

Rhoad and Fornataro, *A Gathering Storm: The New False Claims Act Amendments and their Impact on Healthcare Fraud Enforcement,* **The Health Lawyer**, Vol. 21, No. 6, August, 2009.

Rushing, et al., *Federal Appeals Court says estimates in government bids can be actionable as false claims,* Morrison & Foerster LLP internet bulletin (accessed in 2012).

-Any and all other sources cited in my report.