APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. Billy Joe Hunt, *Plaintiff-Appellant*, versus COCHISE CONSULTANCY, INC., doing business as Cochise Security, THE PARSONS CORPORATION, doing business as Parsons Infrastructure & Technology, *Defendants-Appellees*.	No. 16-12836 D.C. Docket No. 5:13-cv-02168-RDP

Appeal from the United States District Court for the Northern District of Alabama

(April 11, 2018)

Before WILSON and JILL PRYOR, Circuit Judges, and BARTLE,[*] District Judge.

JILL PRYOR, Circuit Judge:

Relator Billy Joe Hunt filed a *qui tam* action alleging that his employer The Parsons Corporation and another entity, Cochise Consultancy, Inc., violated the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, by

[*] Honorable Harvey Bartle III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

submitting to the United States false or fraudulent claims for payment. Hunt filed his action more than six years after the alleged fraud occurred but within three years of when he disclosed the fraud to the government. In this appeal, we are called upon to decide whether Hunt's FCA claim is time barred. To answer this question, we must construe the FCA's statutory provision that requires a civil action alleging an FCA violation to be brought within the later of:

- "6 years after the date on which the violation . . . is committed," 31 U.S.C. § 3731(b)(1), or
- "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," *id.* § 3731(b)(2).

The question we answer today, which is one of first impression, is whether § 3731(b)(2)'s three year limitations period applies to a relator's FCA claim when the United States declines to intervene in the *qui tam* action.

The district court concluded that the limitations period in § 3731(b)(2) is inapplicable in such cases and thus Hunt's claim is time barred. After careful consideration of the statutory scheme, we hold that § 3731(b)(2)'s three year limitations period applies to an FCA claim brought by a relator even when the United States declines to intervene. Further, because the FCA provides that this period begins to run when the relevant federal government official learns of the facts giving rise to the claim, when the relator learned of the fraud is immaterial for statute of limitations

purposes. Here, it is not apparent from the face of Hunt's complaint that his claim is untimely because his allegations show that he filed suit within three years of the date when he disclosed facts material to the right of action to United States officials and within ten years of when the fraud occurred. The district court therefore erred in dismissing his complaint. We reverse and remand to the district court for further proceedings.

I. FACTUAL BACKGROUND

A. The Fraudulent Scheme

Hunt alleges that Parsons and Cochise (the "contractors") defrauded the United States Department of Defense for work they performed as defense contractors in Iraq.[1] The Department of Defense awarded Parsons a $60 million contract to clean up excess munitions in Iraq left behind by retreating or defeated enemy forces. Hunt worked for Parsons in Iraq on the munitions clearing contract, managing the project's day-to-day operations. One facet of the contract required Parsons to provide adequate security to its employees, its subcontractors, and others who were working on the munitions clearing project. Parsons relied on a subcontractor to provide the security services.

After seeking bids for the security subcontract, a Parsons committee awarded it to ArmorGroup. But an Army Corps of Engineers contracting officer in Iraq

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[1] In deciding whether the district court erroneously dismissed the complaint as untimely, we accept as true the well-pleaded allegations in the complaint. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)*; La Grasta v. First Union Sec., Inc.,* 358 F.3d 840, 845 (11th Cir. 2004). We thus recite the facts as Hunt has alleged them.

whom Cochise had bribed with trips and gifts, Wayne Shaw, was determined to override this decision and have the subcontract awarded to Cochise. Shaw directed Hunt to have Hoyt Runnels, another Parsons employee who served on the committee that selected ArmorGroup, issue a directive awarding Cochise the subcontract. When Hunt did so, Runnels refused to issue the directive, explaining that such a directive had to come from the Corps.

Shaw then created a forged directive rescinding the award to ArmorGroup and awarding the subcontract to Cochise. The directive had to be signed by Steven Hamilton, another Corps contracting officer. Hamilton, who was legally blind, relied on Shaw to describe the document he was signing. Shaw did not disclose that the directive rescinded the award to ArmorGroup so that the subcontract could be awarded to Cochise.

After Hamilton signed the directive, Shaw directed Runnels to execute it. Runnels again refused because he believed the award to Cochise had been made in violation of government regulations. Shaw threated to have Runnels fired. Two days later, Hamilton learned that the directive Shaw had him sign rescinded the award to ArmorGroup and awarded Cochise the subcontract. Hamilton immediately rescinded his directive awarding the subcontract to Cochise.

After Runnels refused to follow Shaw's directive to award the subcontract to Cochise, another Parsons employee, Dwight Hill, replaced Runnels and was given responsibility for awarding the security subcontract. Rather than give the subcontract to ArmorGroup, Hill awarded it to Cochise through a no-bid

process. Hill justified using a no-bid process by claiming there was an urgent and immediate need for convoy services and then defended the choice of Cochise to fill this immediate need by asserting that Cochise had experience that other security providers lacked. But Hunt alleges that Hill selected Cochise because he was its partner in the fraudulent scheme.

From February through September 2006, Cochise provided security services under the subcontract. Each month the United States government paid Cochise at least $1 million more than it would have paid ArmorGroup had ArmorGroup been awarded the subcontract. The government incurred other additional expenses as well. For example, armored vehicles were needed to provide the security services, and because Cochise had no such vehicles, the government paid more than $2.9 million to secure the vehicles. In contrast, ArmorGroup would have supplied its own armored vehicles, saving the government millions of dollars. In September 2006, when Shaw rotated out of Iraq, Parsons immediately reopened the subcontract for bidding and awarded it to ArmorGroup.

Several years later, Hunt reported the fraud to the United States government. On November 30, 2010, FBI agents interviewed Hunt about his role in a separate kickback scheme. During the interview, Hunt told the agents about the contractors' fraudulent scheme involving the subcontract for security services. For his role in the separate kickback scheme, Hunt was charged with federal crimes, pled guilty, and served ten months in federal prison.

B. Procedural History

After his release from prison, on November 27, 2013, Hunt filed under seal in federal district court an

FCA complaint against the contractors. Hunt set forth two theories why the claims the contractors submitted for payment qualified as false claims under the FCA. First, he alleged that Cochise fraudulently induced the government to enter into the subcontract to purchase Cochise's services by providing illegal gifts to Shaw and his team. He alleged that Parsons, through Hill, conspired with Cochise and Shaw to rig the bidding process for the subcontract. Second, Hunt alleged that the contractors had a legal obligation to disclose credible evidence of improper conflicts of interest and payment of illegal gratuities to the United States but failed to do so.

After the United States declined to intervene, Hunt's complaint was unsealed. The contractors moved to dismiss, arguing that the claim was time barred under the six year limitations period in 31 U.S.C. § 3731(b)(1), and Hunt had waited more than seven years after the fraud occurred to file suit. Hunt responded that his claim was timely under the limitations period in § 3731(b)(2) because he had filed suit within three years of when the government learned of the fraud at his FBI interview and ten years of when the fraud occurred. The district court disagreed, concluding that § 3731(b)(2)'s limitations period was either (1) unavailable to Hunt because the United States had declined to intervene or (2) expired because it began to run when Hunt learned of the fraud. The district court then granted the motions to dismiss, finding Hunt's claim untimely under § 3731(b)(1)'s limitation period because it was apparent from the face of Hunt's complaint that he failed to file suit within six years of when the fraud occurred. This is Hunt's appeal.

II. STANDARD OF REVIEW

We review *de novo* a district court's dismissal of a complaint for failure to state a claim upon which relief can be granted. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). A dismissal for failure to state a claim on statute of limitations grounds is appropriate "only if it is apparent from the face of the complaint that the claim is time-barred." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal quotation marks omitted). "We review the district court's interpretation and application of statutes of limitations *de novo*." *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006).

III. BACKGROUND ON THE FCA

Before addressing whether Hunt's claim is timely, we pause to provide some necessary background information about the roles of the government and the private plaintiff in a *qui tam* suit and to discuss the relevant FCA provisions. The FCA was enacted in 1863 to "stop[] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1996 (2016) (internal quotation marks omitted). These contractors billed the United States "for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *Id.* (internal quotation marks omitted). In response, Congress passed the original FCA, which imposed civil and criminal liability for fraud on the government, subjecting violators to double damages, forfeiture, and imprisonment. *Id.*

Since 1863, Congress repeatedly has amended the FCA. Today, the FCA continues to prohibit making

false claims for payment to the United States. *See* 31 U.S.C. § 3729(a). But unlike the original FCA that provided for both civil and criminal liability, violators today face only civil liability, which subjects them to treble damages and civil penalties.[2] *Id.*

Section 3730 of the FCA sets forth three different enforcement mechanisms for a violation of the Act. Section 3730(a) provides that the Attorney General may sue a violator in a civil lawsuit. Section 3730(b) allows a private plaintiff, known as a relator, to bring a *qui tam* action in the name of the United States against a violator. Section 3730(h) creates a private right of action for an individual whose employer retaliated against him for assisting an FCA investigation or proceeding.

This appeal concerns the second mechanism, a *qui tam* action brought by a relator under § 3730(b). In a *qui tam* action, the relator "pursues the government's claim against the defendant, and asserts the injury in fact suffered by the government." *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1233 (11th Cir. 2008).[3] In bringing a *qui tam* action, the relator "in effect, su[es] as a partial assignee of the United States." *Vt. Agency of Nat. Res.*

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[2] The FCA imposes a civil penalty of up to $11,000 for each violation occurring on or before November 2, 2015 and up to $21,563 for each violation occurring after that date. *See* 31 U.S.C. § 3729(a); 28 C.F.R. §§ 85.3(a)(9), 85.5.

[3] The FCA is one of only a handful of federal laws still in effect that may be enforced through a *qui tam* action. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000) (identifying four federal statutes that authorize *qui tam* actions).

v. United States ex rel. Stevens, 529 U.S. 765, 773 n.4 (2000) (emphasis omitted).

Special procedures apply when a relator brings an FCA action; these procedures afford the government the opportunity to intervene and assume primary control over the litigation. A relator who initiates an FCA action must file her complaint under seal and serve it only on the United States. 31 U.S.C. § 3730(b)(2). While the lawsuit remains under seal, the United States has the opportunity to investigate and decide whether to intervene as a party.[4] *Id.* During this period, the United States may serve a civil investigative demand upon any person believed to be in possession of documents or information relevant to an investigation of false claims, requiring that person to produce documents, answer interrogatories, or give oral testimony. *Id.* § 3733(a)(1). In addition, the United States may meet with the relator and her attorney, giving the government an opportunity to ask questions to assess the strengths and weaknesses of the case and the relator a chance to assist the government's investigation.[5]

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[4] The United States intervenes in approximately 25 percent of FCA *qui tam* actions. David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1719 (2013).

[5] Relators often provide such assistance while the government is deciding whether to intervene. *See, e.g.*, *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 86-87 (D.D.C. 2012) (explaining that the relator worked closely with the government while the case was under seal by identifying potential witnesses, proposing categories of documents to be subpoenaed, and making presentations about the merits of the case);

If the United States decides to intervene, the government acquires "primary responsibility for prosecuting the action," although the relator remains a party. *Id.* § 3730(c)(1). In contrast, if the United States declines to intervene, the relator may proceed with the action alone on behalf of the government, but the United States is not a party to the action. *Id.* § 3730(c)(3).

Although the United States is not a party to a non-intervened case, it nevertheless retains a significant role in the litigation. The government may request to be served with copies of all pleadings and deposition transcripts, seek to stay discovery if it "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," and veto a relator's decision to voluntarily dismiss the action. *Id.* § 3730(b)(1), (c)(3), (c)(4). Additionally, the court may permit the government to intervene later "upon a showing of good cause." *Id.* § 3730(c)(3).

United States ex rel. Rille v. Hewlett-Packard Co., 784 F. Supp. 2d 1097, 1099 (E.D. Ark. 2011) (discussing actions taken by the relator while the case was under seal including meeting with government lawyers, reviewing documents for the government, and maintaining a database of subpoenaed documents); *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1326 (M.D. Fla. 2001) (explaining that while the complaint was under seal the relator was interviewed by the government multiple times, identified categories of documents for the government to subpoena, and reviewed subpoenaed documents for the government); *see also* Robert Fabrikant & Nkechinyem Nwabuzor, *In the Shadow of the False Claims Act: "Outsourcing" the Investigation by Government Counsel to Relator Counsel During the Seal Period*, 83 N.D. L. Rev. 837, 843 (2007) (summarizing the types of support a relator's counsel may give to the government while a complaint is under seal).

Any recovery obtained from a defendant in an FCA *qui tam* action belongs to the United States, regardless of whether the government has intervened. The relator is entitled to a portion of the recovery, however. *Id.* § 3730(d). Because the relator receives a share of the government's proceeds, he "is essentially a self-appointed private attorney general, and his recovery is analogous to a lawyer's contingent fee." *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992); *see Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003) (explaining that a relator sues in the name of the government "with the hope of sharing in any recovery"). By allowing a relator to bring a *qui tam* action and share in the government's recovery, the FCA creates an economic incentive to encourage "citizens to come forward with knowledge of frauds against the government." *Milam*, 961 F.2d at 49.

The size of the relator's share depends upon whether the United States intervenes. In an intervened case, the relator usually is entitled to between 15 and 25 percent of the proceeds, as well as reasonable expenses, attorney's fees, and costs. 31 U.S.C. § 3730(d)(1). In a non-intervened case, the relator's share usually is greater: between 25 and 30 percent of the proceeds, as well as reasonable expenses, attorney's fees, and costs. *Id.* § 3730(d)(2).

Even though the relator receives a smaller share in an intervened case, relators generally try to persuade the United States to intervene because the government's intervention makes it far more likely that there will be a recovery. When the United States elects to intervene, about 90 percent of the time the case generates a recovery, either through settlement or a final judgment. But only about 10 percent of non-

intervened cases result in recovery.[6] *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U. L. Rev. 1689, 1720-21 (2013). Indeed, when the government declines to intervene, more than 50 percent of the time the relator decides not to proceed and voluntarily dismisses the action. *See id.* at 1717-18.

IV. ANALYSIS

With this general background in mind, we now turn to the issue in this case: whether it is apparent from the face of Hunt's complaint that his FCA claim is time barred. To answer this question, we must interpret the FCA's statute of limitations provision, which creates two limitations periods that potentially apply:

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[6] To be clear, we do not take the dramatically different success rates for intervened cases and non-intervened cases to mean that if the government declines to intervene, the case necessarily is meritless. The government may decline to intervene based on its evaluation of factors other than the merits of the claim, such as the likely size of the recovery, available agency resources, or whether the relator and his counsel have resources to prosecute the action on their own. *See* Engstrom, *supra*, at 1714. Conversely, the fact that most intervened cases generate a recovery does not necessarily mean that every intervened case has merit. The involvement of the Department of Justice in an intervened case may create a strong incentive for a defendant to settle an FCA claim regardless of its relative merit to avoid things like increased publicity of the fraud because the defendant cannot cast the litigation solely as the product of an overzealous relator; the disadvantages of litigating against the government with its considerable resources and ability to coordinate with officials at the affected agency; or the risk that the defendant may be barred from federal contracting, a sanction that is unavailable in non-intervened cases. *Id.* at 1713.

> (b) A civil action under section 3730 may not be brought—
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> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
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> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
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> whichever occurs last.

31 U.S.C. § 3731(b). Because it *is* apparent from the face of Hunt's complaint that he failed to file his action within the six year limitations period of § 3731(b)(1), this case turns on whether Hunt can avail himself of § 3731(b)(2). To determine whether § 3731(b)(2) applies, we must address whether its limitations period is available when the United States declines to intervene and, if so, whether the limitations period is triggered when the relator knew or should have known facts material to his claim.

A. Section 3731(b)(2) Applies When the United States Declines to Intervene.

The primary question before us is whether Congress intended to allow relators in non-intervened cases to rely on § 3731(b)(2)'s limitations period. We must begin "where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc). In considering the text, we bear in mind that "[a] provision that may

seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted). We look to "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). As part of this inquiry, we also consider the canons of statutory construction. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001). Legislative history may prove helpful when the statutory language remains ambiguous after considering "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

We conclude that the phrase "civil action under section 3730" in § 3731(b) refers to civil actions brought under § 3730 that have as an element a violation of § 3729, which includes § 3730(b) *qui tam* actions when the government declines to intervene. Section § 3731(b) begins by providing that its limitations periods apply to "[a] civil action under section 3730." 31 U.S.C. § 3731(b). A non-intervened cases is a type of civil action under § 3730. *See id.* § 3730(b)(1) (permitting any person to bring a civil action alleging a violation of § 3729); *id.* § 3730(c)(3) (allowing a relator to continue to conduct a *qui tam* action after the United States declines to intervene). And nothing in § 3731(b)(2) says that its limitations period is unavailable to relators when the government declines to intervene. In the absence of such language, we conclude that the text supports allowing relators in non-intervened cases to rely on § 3731(b)(2)'s limitations period.

To ascertain its meaning, we must, of course, view § 3731(b)(2) in the broader statutory context. Looking to the statutory context, the Supreme Court has recognized that the phrase "[a] civil action under section 3730" did not refer to *all* types of § 3730 civil actions because it excluded retaliation actions brought under § 3730(h). *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005).[7] In *Graham County*, the Supreme Court considered whether § 3731(b)(1)'s six year limitations period—which begins to run when the defendant submits a false claim—applied to an employee's § 3730(h) retaliation claim alleging that her employer forced her to resign after she assisted federal officials investigating her employer for submitting false claims to the United States. *Id.* at 413-14. On its face, § 3731(b) appeared to apply to § 3730(h) retaliation actions, which were a type of civil action under § 3730. *Id.* at 415. Relying on statutory context, the Court nonetheless concluded that § 3731(b)'s literal text was ambiguous as to whether the phrase "[a] civil action under section 3730" included § 3730(h) retaliation actions. *Id.* at

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[7] Section 3730(h) creates a cause of action for an employee, contractor, or agent who "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and condition of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h)(1). Although the FCA now expressly provides a three year statute of limitations for retaliation claims, *id.* § 3730(h)(3), this provision was added after the Supreme Court decided *Graham County*. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A(c), 124 Stat. 1376, 2079 (2010).

417. The Court observed that § 3731(b)(1)'s limitations period was triggered by the defendant's submission of a false claim. *Id.* at 415. But a plaintiff bringing a retaliation claim under § 3730(h) did not need to allege or prove that the defendant actually submitted a false claim because an employer can be liable for retaliating against an employee who assists with an investigation or civil action even if the employer is innocent. *Id.* at 416. This tension in applying § 3731(b)(1)'s limitation period to retaliation actions led the Court to find the statute ambiguous as to whether "action under section 3730" referred to "all actions under § 3730, or only §§ 3730(a) and (b) actions." *Id.*

The Supreme Court resolved this ambiguity by concluding that § 3731(b)(1)'s limitations period did not apply to retaliation claims under § 3730(h). The Court recognized that Congress generally drafted statutes of limitations to begin to run when a cause of action accrues. *Id.* at 418. Applying § 3731(b)(1)'s limitations period to an FCA retaliation action would violate this general rule because the limitations period would begin to run when the employer committed the actual or suspected FCA violation, not when it retaliated against the employee. This interpretation could lead to the odd result that a plaintiff's retaliation claim was time barred before the employer took any retaliatory action. *Id.* at 420-21. To "avoid[] these counterintuitive results," the Court construed "civil action under section 3730" to "mean[] only those civil actions under § 3730 that have as an element a violation of section 3729, that is, §§3730(a) and (b) actions."

Id. at 421-22 (internal quotation marks omitted).[8] *Graham County* thus made clear that to determine whether § 3731(b)(2) includes *qui tam* actions where the United States declines to intervene, we must consider the text of § 3731(b)(2) in the relevant statutory context. But nothing in *Graham County* directly addressed whether the statutory context shows that § 3731(b)(2)'s limitations period is available only when the government is a party.

Here, the contractors raise several arguments contending that the statutory context and the canons of statutory construction show that Congress intended for § 3731(b)(2) to be unavailable to relators in non-intervened cases. They claim that allowing a relator

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[8] The Court also considered that Congress used the phrase "action under section 3730" imprecisely throughout § 3731 "to refer only to a subset of § 3730 actions." *Graham Cty.*, 545 U.S. at 417-18. In § 3731(d), Congress used similar language to provide that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." 31 U.S.C. § 3731(d). Despite the broad reference to civil actions under § 3730, the Court explained that Congress intended for this provision to apply only to § 3730(a) actions brought by the United States or § 3730(b) actions when the United States intervened because Congress could not have intended for the United States to bear the burden of proof when it was not participating in the action. *Graham Cty.*, 545 U.S. at 417-18.

Acknowledging that imprecision permeates § 3731, the Court in *Graham County* accepted that the similar language in § 3731(b) and § 3731(d) referred to different categories of § 3730 actions. That is, the phrase "[a] civil action under section 3730" as used in § 3731(b) referred to any civil action that has an element a violation of § 3729, including non-intervened actions brought under § 3730(b), while the phrase "action brought under section 3730" as used in § 3731(d) referred only to those civil actions where the United States was a party. *Id.* at 421-22.

in a non-intervened action to rely on a limitations period that is triggered by a government official's knowledge would lead to absurd results and render a portion of § 3731(b) superfluous. We reject each of these arguments. The text of § 3731(b)(2), when viewed in context, shows that § 3731(b)(2) is available to relators when the government declines to intervene. But even if we were to conclude that § 3731(b)(2) is ambiguous making it appropriate to consider legislative history, as the contractors urge us to do, we still would conclude that § 3731(b)(2) is available to relators when the government declines to intervene.

1. We Reject that Allowing a Relator in a Non-Intervened Case to Rely on § 3731(b)(2)'s Limitations Period Is Absurd.

The contractors' primary argument is that the statutory context shows that § 3731(b)(2) is available only when the United States is a party to the case because the limitations period is triggered by a federal official's knowledge. They argue that Congress must have intended such a limitations period to be available only when the government is a party to the case because to apply a limitations period triggered by a federal official's knowledge when the United States is not a party would create a "bizarre scenario." Parsons' Br. at 12 (quoting *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008)). Put differently, they argue that reading § 3731(b)(2) to apply to non-intervened actions would lead to an absurd result. Of course, we should refrain from interpreting a statute in a way that "produces a result that is not just unwise but is clearly absurd." *CBS*, 245 F.3d at 1228 (internal quotation marks

omitted). But we have cautioned that the absurdity doctrine is "rarely applied" to avoid having "clearly expressed legislative decisions . . . be subject to the policy predilections of judges." *Id.* (internal quotation marks omitted).

This case presents no such rare instance when the absurdity doctrine applies. Certainly, it is generally the case that a discovery-based limitations period begins to run when a *party*—the plaintiff—knew or should have known about the fraud or claim. *See, e.g., Merck & Co. v. Reynolds*, 559 U.S. 633, 637 (2010) (recognizing that a securities fraud claim accrued when the plaintiff knew or should have known the facts constituting the violation); *see also* Restatement (Second) of Torts § 899(e) (statute of limitations begins to run when "the injured person has knowledge or reason to know of the facts"). We cannot say that in the unique context of an FCA *qui tam* action,[9] however, it would be absurd to peg a limitations period to a federal official's knowledge unless the United States brings the action or chooses to intervene. We reject the contractors' absurdity argument because even though the United States is not a party to a non-intervened *qui tam* action, the United States remains the real party in interest and retains significant control over the case.

Even in a non-intervened case, the relator brings the suit as the partial assignee of the United States and asserts a claim based on injury suffered by the United States as the victim of the fraud. *United States ex rel. Eisenstein v. City of New York*, 556 U.S.

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[9] *See Stevens*, 529 U.S. at 768 n.1 (explaining that the FCA is one of only four statutes authorizing *qui tam* action that remain in effect).

928, 934-35 (2009). Importantly, as the victim of the fraud, the United States—not the relator—is entitled to the bulk of the recovery. *See* 31 U.S.C. § 3730(d)(2). Given the government's primary interest in a non-intervened *qui tam* action, Congress carved out for it a formal role, allowing it to intervene at any time upon a showing of good cause, request service of pleadings and deposition transcripts, seek to stay discovery if it "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," and veto a relator's decision to voluntarily dismiss the action. *Id.* § 3730(b)(1), (c)(3), (c)(4). Given this unique role, we cannot say that it would be absurd for Congress to peg the start of the limitations period to the knowledge of a government official even when the United States declines to intervene.

The contractors argue that allowing a relator in a non-intervened case to rely on § 3731(b)(2)'s limitations period conflicts with the Supreme Court's decision in *Eisenstein*. In *Eisenstein*, the relators in a non-intervened case filed a notice of appeal 54 days after the district court entered a final judgment dismissing their claims. 556 U.S. at 930. Although parties normally have 30 days to file a notice of appeal, the relators argued that they could avail themselves of the 60 day deadline that applies when the United States is a party to the action. *Id.* at 930-31. The Supreme Court rejected this argument and affirmed the dismissal of the appeal, holding that the United States is not a party to a *qui tam* action when it declines to intervene. *Id.* at 937. But our decision today in no way relies on the United States being a party to the non-intervened case, and nothing in *Eisenstein* addressed whether the

United States' non-party status means that the limitations period in § 3731(b)(2) is unavailable to relators in non-intervened cases.

We recognize that our decision to reject the absurdity doctrine is at odds with the published decisions of two other circuits. *See Sanders*, 546 F.3d at 293 ("Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action."); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006) ("Surely, Congress could not have intended to base a statute of limitations on the knowledge of a non-party.").

These cases do not persuade us. They reflexively applied the general rule that a limitations period is triggered by the knowledge of a party. They failed to consider the unique role that the United States plays even in a non-intervened *qui tam* case. In light of this role, we cannot say that it would be absurd or "bizarre" to peg the limitations period to the knowledge of a government official when the government declines to intervene. We disagree that Congress, by specifying that § 3731(b)(2)'s limitations period is triggered by the knowledge of a United States official, necessarily intended that this limitations period be available only in § 3730 civil actions where the United States is a party and not in non-intervened *qui tam*

actions.[10] We thus cannot say that the statutory context shows that § 3731(b)(2)'s limitations period is unavailable to relators in non-intervened *qui tam* actions.

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[10] In *Sanders*, the Fourth Circuit also asserted that allowing a relator in a non-intervened case to rely on the limitations period in § 3731(b)(2) would place an inappropriate burden on the defendant and government by expanding the litigation into the issue of government knowledge. 546 F.3d at 295. The Fourth Circuit was concerned about allowing discovery into government knowledge when the United States declined to intervene as a party. *Id.* We agree that allowing a relator to rely on § 3731(b)(2)'s limitations period means that the parties may engage in discovery about government knowledge, but we think the Fourth Circuit's concerns about the burden associated with this discovery were overstated because the court ignored that government knowledge may be relevant to the merits of the relator's FCA claim even in a non-intervened *qui tam* action.

To prevail on the merits of her FCA claim, the relator must show, among other things, that the defendant made a misstatement that was material and that the defendant "knowingly" submitted a false claim. *See* 31 U.S.C. § 3729(a)(1); *Universal Health*, 136 S. Ct. at 2003. A defendant may rely on evidence of government knowledge to negate both of these elements. Government knowledge may disprove materiality because "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Universal Health*, 136 S. Ct. at 2003. Evidence that the government knew the relevant facts at the time that the defendant submitted its claim may also show that the defendant understood its conduct to be lawful. *See Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1051 (9th Cir. 2012) ("[T]he extent and the nature of government knowledge may show that the defendant did not 'knowingly' submit a false claim and so did not have the intent required by the . . . FCA." (internal quotation marks omitted)); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305

2. Our Interpretation Does Not Render a Portion of § 3731(b) Superfluous.

The contractors, relying on a canon of construction, next argue that to give meaning to the entirety of § 3731(b), we must construe § 3731(b)(2) to exclude non-intervened cases. Certainly, "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). But this canon does not apply when a statutory provision would remain operative under the interpretation in question in at least some situations. *See Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1304 (11th Cir. 2013).

The contractors assert that if relators have three years from the date when the government learned of the fraud to file suit under § 3731(b)(2), relators will always delay telling the government about the fraud to increase the damages in the case. Therefore, they say, the limitations period in § 3731(b)(1), which expires six years after the date when the violation occurred, will never apply, rendering the provision meaningless. We disagree. The contractors overlook that other provisions of the FCA create strong incentives to ensure that relators promptly report fraud.

A relator who waits to report a fraud risks recovering nothing or having his relator's share decreased. The relator's claim may be barred if another relator beats him to the courthouse with an FCA claim based

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F.3d 284, 289 (4th Cir. 2002) ("[T]he government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation.").

on the same facts, 31 U.S.C. § 3730(b)(5), or if the allegations or transactions are publicly disclosed either in a federal hearing where the government was a party or in a news report, unless the relator was the original source of the information, *id.* § 3730(e)(4). And because § 3731(b)(2)'s limitations period begins to run when the relevant government officials learns about the fraud from any source, a relator who delays reporting the fraud to the government also runs the risk that the government will learn about the fraud from another source and thus that § 3731(b)(2)'s three year period will expire before the relator files suit. But even if there were no risk that the government could learn of the fraud from another source, a relator still would have an incentive to report fraud promptly because the court in setting the relator's share may consider whether he "substantially delayed in reporting the fraud or filing the complaint." *United States ex rel. Shea v. Verizon Commc'ns, Inc.*, 844 F. Supp. 2d 78, 89 (D.D.C. 2012).

Looking at the FCA as a whole, we conclude that relators who can rely on the limitations period in § 3731(b)(2) will still have sufficient incentive to report fraud promptly. Because relators will continue to report fraud promptly and under § 3731(b)(2) suit must be filed within three years of the fraud being reported, there will be cases in which § 3731(b)(1)'s six year limitations period will expire later. We thus reject the contractors' argument that our reading of the FCA would render superfluous one of its provisions.

3. To the Extent that Legislative History is Relevant, It Bolsters Our Conclusion.

The contractors argue that the legislative history shows that § 3731(b)(2)'s limitations period is unavailable to a relator when the United States declines to

intervene. Assuming that the statutory language, after viewing it in light of the statutory context and the canons of construction, remains ambiguous such that a resort to legislative history is appropriate, *see United States v. Alabama*, 778 F.3d 926, 939 (11th Cir. 2015), we cannot agree that the relevant Congressional records undermine our interpretation of § 3731(b)(2).

Congress added the limitations period in § 3731(b)(2) to the FCA in 1986. False Claims Amendments Act of 1986 ("1986 FCA Amendments"), Pub. L. No. 99-562, 100 Stat. 3153 (1986). The legislative history reveals that one of the broad purposes of the 1986 FCA Amendments was to "encourage more private enforcement suits." S. Rep. No. 99-345 at 23-24 (1986). This purpose is consistent with Congress's historical use of *qui tam* rights of action to create incentives for private individuals to help root out fraud against the government. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991). Allowing relators to continue to pursue FCA claims even after the government declines to intervene is consistent with the broad underlying purpose of the FCA because it creates the potential for "more fraud [to] be discovered, more litigation [to] be maintained, and more funds [to] flow back into the Treasury." *Milam*, 961 F.2d at 49.

The contractors argue that we should not infer Congressional intent to extend the limitations period for non-intervened cases because in the legislative history for the 1986 FCA Amendments Congress indicated that *qui tam* actions must be brought shortly after the fraud occurred. To support their position, the contractors point to the following portion of the Senate

Committee Report, which quotes from the reasoning in a Supreme Court decision:

> [The FCA] is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

S. Rep. No. 99-345, at 11 (quoting *Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943)).

The contractors argue this language shows that Congress allowed relators to bring *qui tam* actions under the FCA because relators are able to expose fraud more rapidly than the United States can discover it, from which they infer that Congress intended for a shorter limitations period to apply when the United States was not a party to the case. But nothing in this statement addresses the length of time that a relator should have to bring a *qui tam* action or whether the limitations period should depend on the government's decision to intervene. And so we fail to see how this legislative history supports the contractors' position that a shorter limitations period should apply when the government declines to intervene.

All told, there is little legislative history for § 3731(b)(2). And the few references there are do not

directly address the question before us. The contractors point to a floor statement from Senator Charles Grassley and testimony from Assistant Attorney General Richard K. Willard before a House subcommittee. But neither piece of legislative history is particularly helpful.

Senator Grassley said in a floor statement that Congress borrowed the language in § 3731(b)(2) from 28 U.S.C. § 2416, which sets forth the limitations period that generally applies to other actions brought by the United States. *See* 132 Cong. Rec. 20,536 (1986) (statement of Sen. Grassley). Senator Grassley's statement reflects that Congress borrowed the language "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act" from 28 U.S.C. § 2416. *See* 28 U.S.C. § 2416(c); 31 U.S.C. § 3731(b)(2). But we disagree with the inference the contractors draw from this fact: that Congress intended to make the statute of limitations in § 3731(b) available only when the United States was a party.

To understand 28 U.S.C. § 2416, we must also look to § 2415. Section 2415 establishes various limitations periods for certain categories of claims "brought by the United States or an officer or agency thereof," such as contract or tort claims. 28 U.S.C. § 2415(a), (b). Section 2416 tolls the limitations period for the United States to bring such claims when "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." *Id.* § 2416(c). The duplicate language in § 2416 is not what specifies that a limitations period in § 2415 applies only when the United States is a

party. Instead, § 2415 itself dictates that the United States must be a party for its limitations period to apply. *See id.* § 2415(a), (b) (stating limitations period applies only to claims "brought by the United States or an officer or agency thereof"). There is no similar language in any FCA provision expressly restricting § 3731(b)(2)'s limitations period to actions where the United States is a party. So we cannot say that by borrowing the description of the trigger for the limitations period from § 2416 Congress evinced an intent that the United States must be a party for the limitations period in § 3731(b)(2) to apply.

Turning to the committee testimony from Assistant Attorney General Willard, he explained that the purpose of § 3731(b)(2)'s limitations period was to give "us a little more flexibility in bringing some cases that otherwise would be barred."[11] The contractors construe Willard's testimony to mean that § 3731(b)(2) was intended to give the government—but not relators—more flexibility to bring FCA claims. Certainly, Willard testified that § 3731(b)(2) would extend the time period for the Attorney General to sue under the FCA. But Willard offered nothing about the intended effect of § 3731(b)(2) on *qui tam* actions or, more specifically, whether § 3731(b)(2) was intended to apply to *qui tam* actions when the government declined to intervene. Willard's testimony does not advance the ball for the contractors. *See also Regan v. Wald*, 468 U.S. 222, 237 (1984) (discussing limited usefulness of testimony of witnesses to ascertain meaning of statu-

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[11] *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary H.R.*, 99th Cong. 159 (1986) (statement of Richard K. Willard, Assistant Att'y Gen.).

tory language given the risk that relying on such colloquies "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President"). Because the legislative history does not squarely address whether Congress intended to make § 3731(b)(2)'s limitations period available to relators in non-intervened cases, we cannot agree with the contractors that the legislative history undermines our interpretation.

To wrap up, we conclude that Congress intended for § 3731(b)(2)'s limitations period to be available to relators even when the United States declines to intervene. The statutory text reflects that this limitations period applies to "[a] civil action under section 3730," and nothing in § 3731(b)(2) makes the limitations period unavailable in *qui tam* actions under § 3730 simply because the United States decides not to intervene. The contractors argue that because § 3731(b)(2)'s limitations period is triggered by government knowledge, Congress must have intended for it to apply only when the United States is a party to avoid absurd results. But in the unique context of a non-intervened *qui tam* action, we cannot say that it is absurd to apply a limitations period triggered by government knowledge. And even if the contractors are correct that we may consider legislative history, the legislative history provides no convincing support for their position.

B. The Statute of Limitations in § 3731(b)(2) Depends on the Government's Knowledge, Not the Relator's Knowledge.

Having concluded that the statute of limitations in § 3731(b)(2) is available to a relator in a non-inter-

vened case, we must now address whether that limitations period is triggered by the knowledge of a government official or of the relator. We hold that it is the knowledge of a government official, not the relator, that triggers the limitations period.

Section 3731(b)(2) is clear that the time period begins to run when "the official of the United States charged with responsibility to act in the circumstances" knew or reasonably should have known the material facts about the fraud. 31 U.S.C. § 3731(b)(2). Nothing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge. Given that the language is plain, we cannot rewrite the statute to say that the limitations period is triggered when the *relator* knew or should have known about the facts material to the fraud.

The Ninth Circuit nonetheless adopted such an approach, concluding that the statute of limitations is triggered by the relator's knowledge. *See United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996). The Ninth Circuit created a new legal fiction that because the relator "sue[d] on behalf of the government," the relator became a government agent and the government official charged with responsibility to act. *Id.* at 1217 n.8. Again, we find nothing in the text of § 3731(b)(2) or the statutory context to support this legal fiction. Because the text unambiguously identifies a particular official of the United States as the relevant person whose knowledge causes the limitations period to begin to run, we must reject the Ninth Circuit's interpretation as inconsistent with that text.

Applying our conclusions that § 3731(b)(2) applies in non-intervened cases and is triggered by the

knowledge of a government official, not of the relator, we hold that it is not apparent from the face of Hunt's complaint that his FCA claim is untimely. Hunt alleged that the relevant government official learned the material facts on November 30, 2010 when he disclosed the fraudulent scheme to FBI agents, and he filed suit within three years of this disclosure.[12] The district court therefore erred in dismissing his complaint on statute of limitations grounds.

V. CONCLUSION

For the reasons set forth above, we reverse the district court's order dismissing Hunt's FCA claim as time barred and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[12] To be clear, if facts developed in discovery show that the relevant government official knew or should have known the material facts about the fraud at an earlier date, Hunt's claims could still be barred by the statute of limitations. We hold only that at the motion to dismiss stage it was error to dismiss the complaint on statute of limitations grounds.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

UNITED STATES OF AMERICA, ex *rel*. BILLY JOE HUNT, Plaintiffs, v. COCHISE CONSULTANCY, INC., d/b/a COCHISE SECURITY, Defendants.	)	Case No.: 5:13-cv-02168-RDP

MEMORANDUM OPINION

This matter is before the court on (1) Defendant Cochise Consultancy, Inc.'s Motion to Dismiss (Doc. # 35), and (2) Defendant The Parsons Corporation's Motion to Dismiss (Doc. # 50). In their Motions, Defendants have moved to dismiss Billy Joe Hunt's ("Relator Hunt") Complaint under the statute of limitations applicable to the federal False Claims Act found at 31

U.S.C. § 3731(b).[1] The Motions have been fully briefed. (Docs. # 48, 49, 51, 59 and 60).[2]

I. Background

Relator Hunt's Complaint alleges that Parsons and Cochise fraudulently agreed for a government subcontract to be awarded to Cochise on February 21, 2006. The Complaint alleges that, as a result of that fraudulent scheme, Parsons and Cochise caused the United States Government to pay false claims between February 2006 and September 2006. The Complaint further alleges that Parsons and Cochise continued the same fraudulent conduct to continue receiving subcontracts until early 2007. (Doc. # 1).

II. The Applicable Statute of Limitations

The FCA provides that:

> (b) A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more

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[1] Defendants also move to dismiss on the basis that, they argue, Relator Hunt has failed to allege his claims with sufficient particularity. Relator Hunt is correct that dismissal on this basis would be inappropriate without allowing him an opportunity to replead. (Doc. # 59 at 2).

[2] On January 29, 2015, the United States notified the court of its election to decline intervention. (Doc. # 9).

> than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

Relator Hunt's Complaint was filed on November 27, 2013, over six years after the occurrence of the conduct that Relator Hunt claims is fraudulent. (Doc. # 1). Defendants have moved to dismiss Relator Hunt's Complaint as barred by the applicable statute of limitations found at 31 U.S.C. § 3731(b). Relator Hunt concedes that his Complaint is barred under the six-year statute of limitations found in § 3731(b)(1),[3] but argues that the Complaint should still be deemed viable under the alternative three-year statute of limitations provided for in section 3731(b)(2). (Docs. # 48 and 59).

Relator Hunt's Response to Cochise's Motion makes clear that he first notified officials of the United States of the fraud allegations discussed in his Complaint on November 30, 2010. (Doc. # 48 at 3). However, his Response to both Motions avoids discussing in any detail the undisputed allegation that he was at least aware of, if not involved in, the fraudulent scheme as it was occurring in 2006. (Doc. # 48-1 at 25). Indeed, he reported as much to the Federal Bureau of Investigations on or about November 30, 2010. ("On February 14, 2006, Hunt was called into Army Corps of Engineers Program Manager Wayne

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[3] He further concedes that Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, does not operate to toll statutes for civil actions such as those under the FCA. *Kellog Brown & Root Servs., Inc. v. Carter*, 135 S. Ct. 1970, 1975-78 (2015).

Shaw's (Shaw) office. Shaw told Hunt to make sure the security contract was awarded to Cochise or Hunt could get out of Kuwait.")[4] (Doc. # 48-1 at 25).

Defendants' statute of limitations arguments require this court to interpret the relevant limitations provisions of the FCA. Federal courts have three differing interpretations of the FCA's statute of limitations. The first interpretation holds that section 3731(b)(2) simply does not apply to relators. *See, e.g., U.S. ex rel. Griffith v. Conn*, 117 F. Supp. 3d 961, 985 (E.D. Ky. 2015); *U.S. ex rel. Bauchwitz v. Holloman*, 671 F.Supp. 2d 674, 693-94 (E.D. Pa. 2009). The second provides that section 3731(b)(2) applies to qui tam relators/plaintiffs, but the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action. *See, e.g., U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996). And, under the third interpretation, relators are entitled to the ten-year outer limit of section 3731(b)(2), and the tolling clock does not begin to run until the government knew or should know about the right of action. *See, e.g., U.S. ex rel. Ven-A-Care v. Actavis Mid Atl. LLC*, 659 F. Supp. 2d 262, 274 (D. Mass. 2009).

The Eleventh Circuit has not weighed in on whether a Relator is entitled to take advantage of the

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[4] In another matter around this same time, Hunt reported to the FBI that he "received approximately $300,000 in kickbacks" from another contractor. (Doc. # 48-1 at 15). On or about May 8, 2012, Relator Hunt pleaded guilty to one violation of 18 U.S.C. § 371 (Conspiracy to Commit Wire Fraud, Mail Fraud and to Engage in Unlawful Kickbacks) and one violation of 26 U.S.C. § 7206(1) (Filing a False Tax Return). (Case No. 5:11-cr-00382-AKK-TMP, Docs. # 13, 21).

FCA's three-year statutory tolling provision in a published decision.[5] But other Circuits have addressed the issue. In a case involving the FCA's statute of limitations, the Third Circuit in *U.S. ex rel. Malloy v. Telephonics Corp.*, stated (in dicta) that the point in time when the relator became aware of the defendant's alleged fraud "is important, because it determines whether we apply the six year statute of limitations in § 3731(b)(1), or the three year limitation in § 3731(b)(2)." 68 Fed.App'x. 270, 273 (3d Cir. 2003). After *Malloy*, the Supreme Court considered an issue in the FCA context involving different appellate filing deadlines when the government is a "party" versus when the government is not involved. U.*S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009). The Court found that the United States is not a party to a privately initiated FCA suit when it declines to intervene, and that private relators are therefore not entitled to a longer appellate filing deadline. *Eisenstein*, 556 U.S. at 937. District courts in the Third Circuit have applied *Eisenstein's* reasoning to the FCA's statute of limitations provision and found that section 3731(b)(2) does not apply when the United States has declined to intervene. *See, e.g., U.S. ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674, 693-94 (E.D. Pa. 2009) (analyzing *Malloy* and *Eisenstein* to conclude that a private relator cannot "take advantage of a tolling provision applicable only to the government").

There is a split among the Circuit courts which have decided that particular issue. *Compare U.S. ex rel. Sanders v. N. Am. Bus Indus., Inc*., 546 F.3d 288,

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[5] *But see Foster v. Savannah Commc'n*, 140 Fed.App'x. 905, 907 (11th Cir. 2005) (applying only the six-year statute of limitations to the relator's claim without discussing § 3731(b)(2)).

293 (4th Cir. 2008) (holding that the statute of limitations in section 3731(b)(2) only applies in cases where the United States is a party); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) (same); *U.S. ex rel Erskine v. Baker*, 213 F.3d 638 (5th Cir. 2000) (unpublished table opinion) (same) *with U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996) ("[W]e conclude that Congress did not intend to restrict the tolling provisions of the Act to apply to suits brought by the Attorney General alone, but intended the tolling provision to apply to qui tam plaintiffs as well.").

For obvious reasons, Relator Hunt argues, as he must, that the third interpretation should prevail here. Under the first interpretation, Relator Hunt is right out. And if this court adopted the second interpretation -- that relators are entitled to take advantage of the longer limitations period provided under section 3731(b)(2), but that the limitations period runs from the date the relator/plaintiff knew or reasonably should have known of the facts material to the right of action -- his claim would be time-barred. According to his own Complaint, Relator Hunt had knowledge of the alleged fraudulent scheme more than six years before his Complaint was filed.

In hanging his hat on the third interpretation of section 3731(b)(2), Relator Hunt argues that the three-year statute of limitations begins to run when the requisite government official knew (or should have known) of the FCA violation. He contends this analysis should apply regardless of (1) when the violation occurred and (2) his (*i.e.*, the relator's) knowledge, so long as the complaint is ultimately filed within ten years of the violation. Notably, however, no Circuit has accepted this tortured interpretation of

section 3731(b)(2). After all, it would extend the limitations period in qui tam actions regardless of how long the relator has known of the material facts. To be sure, at least one court has held that such a rule is indefensible:

> A statute of limitations that allows the allegedly bound party to extend that period at its whim creates another bizarre result. In every case in which the government's knowledge comes from the relator, the relator would have an extra three years, up to ten years after the violation, to file suit. Thus, the relator could always wait until year seven to alert the government (assuming the government's knowledge comes only from the relator) and then file suit in year ten. As the Fourth Circuit explained, such a resolution would render the six-year limitations period "superfluous in nearly all FCA cases"—violating the "duty to give effect, if possible, to every clause and word of a statute." [*United States ex rel. Sanders v. N. Am. Bus Indus., Inc*., 546 F.3d 288, 295 (4th Cir. 2008)] (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L.Ed.2d 251 (2001)).

Griffith, 117 F. Supp. 3d at 986; *see also Hyatt*, 91 F.3d at 1218 ("Hyatt cannot have it both ways. If he accepts the benefits of the tolling statute, he must be subject to its restrictions. His duty to act must be triggered by his own knowledge, not the knowledge of others. This interpretation comports with the legislative scheme of the Act, the purposes of statutes of limitations and the FCA tolling provisions.").

This court finds this reasoning persuasive and for similar reasons rejects Relator Hunt's proposal that

this court adopt the third interpretation of section 3731(b). The court need not decide which of the other two interpretations applies[6] here because Relator Hunt's claim is barred under either interpretation.

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[6] The court also finds the reasoning of those courts which have held that the plain text of the FCA supports limiting section 3731(b)(2) to cases in which the government has intervened to be well-founded. *See United States v. Cephalon, Inc.,* 2016 WL 398014, at *6 (E.D. Pa. Feb. 2, 2016); *United States ex rel. Shemesh v. CA, Inc*., 89 F. Supp. 3d 36, 53 (D. D.C. 2015) ("the Court will follow the majority view that the tolling provision of 31 U.S.C. § 3731(b)(2) does not apply to qui tam relators."); *United States ex rel. Silver v. Omnicare*, 2014 WL 4827410, at *8 (D. N.J. Sept. 29, 2014) ("A plain reading of the statute compels the conclusion that a FCA claim must be filed within six years, or if the U.S. government intervenes, the limitations period is extended for three years"); *United States ex rel. Simpson v. Bayer Corp.,* 2014 WL 1418293, at *12 (D. N.J. April 11, 2014) (applying only the six year limitation period to qui tam action); *United States ex rel. Bauchwitz v. Holloman*, 671 F.Supp.2d 674, 694–95 (E.D. Pa. 2009) ("we conclude that the three-year tolling period in § 3731(b)(2) does not apply in cases where the government does not intervene."). These cases have followed the logic of the Supreme Court in *Eisenstein*, which held that, for the purposes of Federal Rule of Appellate Procedure 4, the United States is not a party to a qui tam FCA action unless it chooses to intervene. *Eisenstein*, 556 U.S. at 937.

III. Conclusion

For the foregoing reasons, the court holds that Relator Hunt's claims are barred by the FCA's statute of limitations. 31 U.S.C. § 3731(b).

A separate order will be entered.

DONE and **ORDERED** this April 28, 2016.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX C

False Claims Act

31 U.S.C. § 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

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

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

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

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

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

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

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

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

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person

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

did not have actual knowledge of the existence of an investigation into such violation,

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

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

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

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

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

(i) has actual knowledge of the information;

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

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

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

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

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

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to

be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

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

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

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

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

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

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

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

31 U.S.C. § 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the

complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the 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. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court

determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied

with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclu-

sion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government[1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus

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[1] So in original. Probably should be "General".

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Govern-

ment, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have 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. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. § 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[1] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or

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[1] So in original. Probably should be preceded by "section".

attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

31 U.S.C. § 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy

was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act[1] investigation.

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

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[1] So in original. Probably should be "law".

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such stand-

ards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial juris-diction of any court of the United States.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person

that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by

registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material

available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States

within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) CONDUCT OF ORAL TESTIMONY.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may

be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any

false claims law investigator, or other officer or employee of the Department of Justice. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for ex-amination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

> (i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that

person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such mate-

rial, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such

product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by

the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

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

(1) the term "false claims law" means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1);

(7) the term "product of discovery" includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or

admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A); and

(8) the term "official use" means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.