NO. 16-1262

United States Court of Appeals

for the

Fourth Circuit

UNITED STATES EX REL. BENJAMIN CARTER,

Plaintiff-Appellant,

– v. –

HALLIBURTON CO.; KELLOGG BROWN & ROOT SERVICES, INC.; SERVICE EMPLOYEES INTERNATIONAL INC.; KBR, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA IN CASE NO. 1:11-CV-00602
THE HONORABLE JAMES C. CACHERIS, SENIOR U.S. DISTRICT COURT JUDGE

JOINT APPENDIX
VOLUME I OF II (Pages JA1-JA229)

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U.S. District Court
Eastern District of Virginia - (Alexandria)
CIVIL DOCKET FOR CASE #: 1:11-cv-00602-JCC-JFA

Carter v. Halliburton Co. et al
Assigned to: District Judge James C. Cacheris
Referred to: Magistrate Judge John F. Anderson
Case in other court: 4th Circuit, 12-01011
4th Circuit, 16-01262
Cause: 31:3729 False Claims Act

Date Filed: 06/02/2011
Date Terminated: 11/12/2015
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

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Defendant

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Defendant

Service Employees International, Inc.	represented by	**John Martin Faust** (See above for address) *ATTORNEY TO BE NOTICED* **Kathryn Bridget Codd** (See above for address) *ATTORNEY TO BE NOTICED* **Tirzah Sungyeh Lollar** (See above for address) *ATTORNEY TO BE NOTICED*

Defendant

KBR, Inc.	represented by	**John Martin Faust** (See above for address) *ATTORNEY TO BE NOTICED* **Kathryn Bridget Codd** (See above for address) *ATTORNEY TO BE NOTICED* **Tirzah Sungyeh Lollar** (See above for address) *ATTORNEY TO BE NOTICED*

Interested Party

United States of America	represented by	**Richard W. Sponseller** United States Attorney's Office 2100 Jamieson Ave Alexandria, VA 22314 (703)299-3700 Email: Richard.Sponseller@usdoj.gov *ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
06/02/2011	1	COMPLAINT against Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (Filing fee $ 350.00 receipt number 14683021954), filed by Benjamin Carter.(stas) (Additional attachment(s) added on 8/26/2011: # 1 Civil Cover Sheet, # 2 Receipt) (nhall,). Text Modified on 4/11/2012 To Remove UNDER SEAL verbiage (nhall). (Entered: 06/02/2011)
08/23/2011	3	The United States' Notice Of Election To Decline Intervention by United

		States of America. (Attachments: # 1 Proposed Order)(nhall) Docket Entry Modified on 4/11/2012 Per Order Of 8/24/11(nhall). (Entered: 08/24/2011)
08/24/2011	4	ORDER. IT IS ORDERED that, 1. the complaint be unsealed and served upon the defendant by the relator; 2. all other contents of the Court's file in this action remain under seal and not be made public or served upon the defendant, except for this Order and The United States' Notice of Election to Decline Intervention, which the relator will serve up the defendant only after service of the complaint; 3. the seal be lifted as to all other matters occurring in this action after the date of this Order. (See Order For Details). Signed by District Judge James C. Cacheris on 8/24/11. (nhall) Docket Entry Modified on 4/11/2012 Per Order Of 8/24/11(nhall). (Entered: 08/24/2011)
09/26/2011	5	MOTION Joint Motion Concerning Service and Deadline for Defendants Response to Relators Complaint by Benjamin Carter. (Attachments: # 1 Proposed Order)(Holmes, William) (Entered: 09/26/2011)
09/29/2011	6	ORDER, hereby ORDERED that Defendants shall file a response to Relator's Complaint on or before October 21, 2011. Signed by District Judge James C. Cacheris on 9/29/11. (nhall) (Entered: 09/29/2011)
10/04/2011	7	NOTICE of Appearance by John Martin Faust on behalf of Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (Faust, John) (Entered: 10/04/2011)
10/04/2011	8	NOTICE of Appearance by Tirzah Sungyeh Lollar on behalf of Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (Lollar, Tirzah) (Entered: 10/04/2011)
10/04/2011	9	NOTICE of Appearance by Kathryn Bridget Codd on behalf of Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (Codd, Kathryn) (Entered: 10/04/2011)
10/11/2011	10	ORDER granting appearance Pro hac vice of Craig David Margolis Filing fee $ 50, receipt number 14683024678. Signed by District Judge James C. Cacheris on 10/11/11. (Attachments: # 1 Letter, # 2 Receipt)(nhall) (Entered: 10/12/2011)
10/21/2011	11	MOTION to Dismiss *Relator's Complaint* by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Faust, John) (Entered: 10/21/2011)
10/21/2011	12	Notice of Hearing Date set for 11/18/11 re 11 MOTION to Dismiss *Relator's Complaint* (Faust, John) (Entered: 10/21/2011)
10/21/2011	13	MOTION to Seal *Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint* by Halliburton Co., KBR, Inc., Kellogg

		Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Faust, John) (Entered: 10/21/2011)
10/21/2011	14	Notice of Hearing Date set for 11/18/11 re 13 MOTION to Seal *Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint* (Faust, John) (Entered: 10/21/2011)
10/21/2011	15	Consent MOTION To Set Briefing Schedule re 11 MOTION to Dismiss *Relator's Complaint* by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Faust, John) (Entered: 10/21/2011)
10/21/2011	16	Sealed Document-Memorandum In Support Of Defendants' Motion To Dismiss Relator's Complaint re 11 MOTION to Dismiss Relator's Complaint. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8)(nhall) (Entered: 10/27/2011)
10/24/2011		Set Deadlines as to 13 MOTION to Seal *Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint*, 11 MOTION to Dismiss *Relator's Complaint*. Motion Hearing set for 11/18/2011 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 10/24/2011)
10/27/2011	17	ORDER, IT IS HEREBY ORDERED that Relator shall file his opposition brief to Defendants' motion to dismiss Relator's complaint by 5 pm on November 3, 2011, and Defendants shall file their reply brief in support of their motion to dismiss on November 8, 2011. (See Order For Details). Signed by District Judge James C. Cacheris on 10/27/11. (nhall) (Entered: 10/27/2011)
11/03/2011	18	MOTION to Seal *Memorandum in Opposition to Defendants' Motion to Dismiss Relator's Complaint* by Benjamin Carter. (Holmes, William) (Entered: 11/03/2011)
11/03/2011	19	Notice of Hearing Date re 18 MOTION to Seal *Memorandum in Opposition to Defendants' Motion to Dismiss Relator's Complaint* (Holmes, William) (Entered: 11/03/2011)
11/03/2011	20	Opposition to 13 MOTION to Seal *Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint* filed by Benjamin Carter. (Holmes, William) (Entered: 11/03/2011)
11/03/2011	21	UNDER SEAL Opposition to 11 MOTION to Dismiss *Relator's Complaint*filed by Benjamin Carter [Document is Spiral Bound and has been placed in the Civil Vault]. (stas) (Entered: 11/03/2011)
11/04/2011		Set Deadlines as to 18 MOTION to Seal *Memorandum in Opposition to Defendants' Motion to Dismiss Relator's Complaint*. Motion Hearing set

		for 11/18/2011 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 11/04/2011)
11/07/2011	22	Motion to appear Pro Hac Vice by David Stone and Certification of Local Counsel W. Clifton Holmes Filing fee $ 75, receipt number 0422-2768407. by Benjamin Carter. (Holmes, William) (Entered: 11/07/2011)
11/07/2011	23	ORDER granting 22 Motion for Pro hac vice. Signed by District Judge James C. Cacheris on 11/7/11. (nhall) (Entered: 11/07/2011)
11/07/2011	24	ORDER granting 13 Motion to Seal. (See Order For Details). Signed by District Judge James C. Cacheris on 11/7/11. (nhall) (Entered: 11/07/2011)
11/08/2011	25	MOTION to Seal *Reply Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint* by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Faust, John) (Entered: 11/08/2011)
11/08/2011	26	Notice of Hearing Date set for 11/18/11 re 25 MOTION to Seal *Reply Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint* (Faust, John) (Entered: 11/08/2011)
11/08/2011	27	Sealed Document-Reply Memorandum In Support Of Defendants' Motion To Dismiss Relator's Complaint re 11 MOTION to Dismiss Relator's Complaint. (Attachments: # 1 Exhibit 9, # 2 Exhibit 10)(nhall) (Entered: 11/09/2011)
11/09/2011		Set Deadlines as to 25 MOTION to Seal *Reply Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint*. Motion Hearing set for 11/18/2011 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 11/09/2011)
11/11/2011	28	MOTION to Seal *Relator's Motion for Leave to File Sur-Reply* by Benjamin Carter. (Attachments: # 1 Proposed Order)(Holmes, William) (Entered: 11/11/2011)
11/11/2011	29	MOTION for Leave to File *Sur-Reply* by Benjamin Carter. (Holmes, William) (Entered: 11/11/2011)
11/11/2011	30	Notice of Hearing Date re 29 MOTION for Leave to File *Sur-Reply* (Holmes, William) (Entered: 11/11/2011)
11/11/2011	31	RESPONSE to Motion re 18 MOTION to Seal *Memorandum in Opposition to Defendants' Motion to Dismiss Relator's Complaint* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Faust, John) (Entered: 11/11/2011)
11/14/2011	32	Sealed MOTION-Relator's Motion For Leave To File Sur-Reply by Benjamin Carter, re: 28 MOTION to Seal Relator's Motion for Leave to File Sur-Reply by Benjamin Carter. (Attachments: # 1 Exhibit 1, # 2

		Exhibit A)(nhall) (Entered: 11/14/2011)
11/14/2011		Set Deadlines as to 32 Sealed MOTION, 28 MOTION to Seal *Relator's Motion for Leave to File Sur-Reply*. Motion Hearing set for 11/18/2011 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 11/14/2011)
11/15/2011		Reset Deadlines as to 25 MOTION to Seal *Reply Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint*, 11 MOTION to Dismiss *Relator's Complaint*, 28 MOTION to Seal *Relator's Motion for Leave to File Sur-Reply*, 18 MOTION to Seal *Memorandum in Opposition to Defendants' Motion to Dismiss Relator's Complaint*. Motion Hearing set for 11/18/2011 at 09:30 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 11/15/2011)
11/16/2011	33	MOTION to Seal *Defendants' Response to Relator's Motion for Leave to File Sur-Reply* by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Faust, John) (Entered: 11/16/2011)
11/16/2011	34	Notice of Hearing Date set for 11/18/11 re 33 MOTION to Seal *Defendants' Response to Relator's Motion for Leave to File Sur-Reply* (Faust, John) (Entered: 11/16/2011)
11/16/2011	35	Sealed Document Defendants' Response To Relator's 29 MOTION for Leave to File Sur-Reply. (Attachments: # 1 Exhibit 11)(nhall) (Entered: 11/17/2011)
11/17/2011		Set Deadlines as to 33 MOTION to Seal *Defendants' Response to Relator's Motion for Leave to File Sur-Reply*. Motion Hearing set for 11/18/2011 at 09:30 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 11/17/2011)
11/18/2011	36	MOTION to Seal *REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SUR-REPLY* by Benjamin Carter. (Attachments: # 1 Proposed Order)(Holmes, William) (Entered: 11/18/2011)
11/18/2011	37	Notice of Hearing Date re 36 MOTION to Seal *REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SUR-REPLY* (Holmes, William) (Entered: 11/18/2011)
11/18/2011	38	Sealed Document-Relator's Reply In Support Of His 29 MOTION for Leave to File Sur-Reply.(nhall) (Entered: 11/18/2011)
11/18/2011	39	Minute Entry for proceedings held before District Judge James C. Cacheris: Sealed Minutes held on 11/18/2011. (Court Reporter J. Goodwin.) (jall) (Entered: 11/21/2011)

11/29/2011	40	UNDER SEAL MEMORANDUM OPINION. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
11/29/2011	41	SEALED DOCUMENT: Under Seal Memorandum Opinion. (jall) (Entered: 11/29/2011)
11/29/2011	42	UNDER SEAL ORDER. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
11/29/2011	43	MEMORANDUM OPINION. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
11/29/2011	44	AMENDED ORDER. This Order amends the Courts Order of November 7, 2011, 24 to read as follows: For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that: (1) Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.s (collectively, Defendants) Motion to Seal Memorandum in Support of Defendants Motion to Dismiss 13 is GRANTED only as to Exhibit 3 and the portions of Defendants memorandum and exhibits that reference the Under Seal Action (as defined in the accompanying Memorandum Opinion) and is DENIED as to all other exhibits and materials. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
11/29/2011	45	ORDER: For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that: (1) Relator Benjamin Carters (Relator) Motion to Seal Portions of the Opposition to Defendants Motion to Dismiss 18 is GRANTED only as to the portions of Relators opposition and exhibits that reference the Under Seal Action (as defined in the accompanying Memorandum Opinion) and DENIED as to all other exhibits and materials; (2) Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.s (collectively, Defendants) Motion to Seal Reply Memorandum in Support of Defendants Motion to Dismiss 25 is GRANTED only as to Exhibit 9 and the portions of Defendants reply memorandum and exhibits that reference the Under Seal Action and is DENIED as to all other exhibits and materials; (3) Relators Motion to Seal his Motion for Leave to File Sur-reply 28 is DENIED; (4) Defendants Motion to Seal Defendants Response to Relators Motion

		for Leave to File Sur-reply 33 is DENIED; (5) Relators Motion to Seal his Reply Memorandum in Support of his Motion for Leave to File Surreply 36 is DENIED. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
12/07/2011	46	NOTICE by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. re 45 Order,,,, 44 Order,, *Praecipe* (Faust, John) (Entered: 12/07/2011)
12/07/2011	47	Memorandum in Support re 11 MOTION to Dismiss *Relator's Complaint [see Praecipe #46]* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 4, # 4 Exhibit 5, # 5 Exhibit 6, # 6 Exhibit 7, # 7 Exhibit 8)(Faust, John) (Entered: 12/07/2011)
12/07/2011	48	Reply to Motion re 11 MOTION to Dismiss *Relator's Complaint - Reply Memorandum in Support of Defendants' Motion to Dismiss Relator's Complaint [see Praecipe #46]* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 10)(Faust, John) (Entered: 12/07/2011)
12/07/2011	49	RESPONSE to Motion re 29 MOTION for Leave to File *Sur-Reply - Defendants' Response to Relator's Motion for Leave to File Sur-Reply [see Praecipe #46]* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 11)(Faust, John) (Entered: 12/07/2011)
12/08/2011	50	Consent MOTION to Unseal Document 42 Sealed Order, 40 Memorandum Opinion by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit)(Faust, John) (Entered: 12/08/2011)
12/08/2011	51	Sealed Document-Exhibit Under Seal re 50 Consent MOTION to Unseal Document 42 Sealed Order, 40 Memorandum Opinion. (nhall) (Entered: 12/08/2011)
12/08/2011	52	NOTICE by Benjamin Carter *NOTICE OF FILING OF UNREDACTED COPIES OF RECENT BRIEFS* (Holmes, William) (Entered: 12/08/2011)
12/08/2011	53	Opposition to 47 Memorandum in Support, filed by Benjamin Carter. (Holmes, William) (Entered: 12/08/2011)
12/08/2011	54	MOTION for Leave to File *Sur-Reply (Unredacted Copy)* by Benjamin Carter. (Attachments: # 1 Proposed Order Proposed Order)(Holmes, William) (Entered: 12/08/2011)
12/08/2011	55	REPLY to Response to Motion re 54 MOTION for Leave to File *Sur-Reply (Unredacted Copy)* filed by Benjamin Carter. (Holmes, William)

		(Entered: 12/08/2011)
12/12/2011	56	ORDER granting 50 Motion to Unseal Document. (See Order For Details). Signed by District Judge James C. Cacheris on 12/12/11. (nhall) (Main Document 56 replaced on 12/12/2011) (nhall,). (Entered: 12/12/2011)
12/12/2011	57	MEMORANDUM OPINION re: 11 MOTION to Dismiss Relator's Complaint by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc., 29 MOTION for Leave to File Sur-Reply by Benjamin Carter. (See Memorandum Opinion For Details). Signed by District Judge James C. Cacheris on 12/12/11. (nhall) (Entered: 12/12/2011)
12/12/2011	58	ORDER for the reasons stated in the accompanying Memorandum Opinion granting, 29 MOTION for Leave to File *Sur-Reply* filed by Benjamin Carter, denying, 11 MOTION to Dismiss *Relator's Complaint* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (See Order For Details). Signed by District Judge James C. Cacheris on 12/12/11. (nhall) (Entered: 12/12/2011)
12/28/2011	59	NOTICE OF APPEAL as to 42 Sealed Order by Benjamin Carter. Filing fee $ 455, receipt number 0422-2843401. (Holmes, William) (Entered: 12/28/2011)
12/29/2011	60	Transmission of Notice of Appeal to US Court of Appeals re 59 Notice of Appeal (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (nhall) (Entered: 12/29/2011)
01/04/2012	61	USCA Case Number 12-1011 4th Circuit, Case Manager M. Radday for 59 Notice of Appeal filed by Benjamin Carter. (rban,) (Entered: 01/04/2012)
01/25/2012	62	TRANSCRIPT REQUEST before Judge James C. Cacheris, (rban,) (Entered: 01/25/2012)
01/25/2012	63	Letter to the court, please transmit a partial record. (rban,) (Entered: 01/25/2012)
01/25/2012		Assembled PARTIAL Electronic Record Transmitted to 4CCA pleadings 41, 42, and 43 transmitted. (rban,) (Entered: 01/25/2012)
02/24/2012	64	UNDER SEAL Transcript of Proceedings on 11/18/2011. (rban,) (Entered: 02/24/2012)
03/18/2013	65	PUBLISHED Opinion of USCA re 59 Notice of Appeal--Reversed and remanded. (gwal,) (Entered: 03/18/2013)
03/18/2013	66	USCA JUDGMENT as to 59 Notice of Appeal filed by Benjamin Carter.

		In accordance with the decision of this court, the judgment of the district court is reversed. This case is remanded to the district court for further proceedings consistent with the court's decision. This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41. (gwal,) (Entered: 03/18/2013)
04/01/2013	67	Stay Of Mandate Under FRAP 41(d)(1) from USCA re 59 Notice of Appeal. (nhall) (Entered: 04/02/2013)
04/23/2013	68	ORDER of USCA as to 59 Notice of Appeal filed by Benjamin Carter. The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. Ap. P. 35. The court denies the petition for rehearing en banc. (nhall) (Entered: 04/25/2013)
05/01/2013	69	USCA Mandate re 59 Notice of Appeal. The judgment of this court, entered 03/18/2013, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. (nhall) (Entered: 05/01/2013)
05/01/2013	70	USCA Mandate re 59 Notice of Appeal. The judgment of this court, entered 3/18/2013, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of FRAP. (rban,) (Entered: 05/02/2013)
05/16/2013	71	ORDER that the parties appear on Friday, May 24, 2013, at 10:00 a.m. for a Status Conference. Set Hearings: Status Conference set for 5/24/2013 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. Signed by District Judge James C. Cacheris on 5/16/13. (nhall) (Entered: 05/16/2013)
05/20/2013		ReSet Deadlines/Hearings Status Conference set for 5/24/2013 at 09:30 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (Per JCC chambers) (clar,) (Entered: 05/20/2013)
05/21/2013	72	NOTICE of Appearance by David Ludwig on behalf of Benjamin Carter (Ludwig, David) (Entered: 05/21/2013)
05/21/2013	73	NOTICE by Benjamin Carter *of Withdrawal* (Holmes, William) (Entered: 05/21/2013)
05/24/2013	74	Motion to appear Pro Hac Vice by Robert A. Magnanini and Certification of Local Counsel David Ludwig Filing fee $ 75, receipt number 0422-3530758. by Benjamin Carter. (Ludwig, David) (Entered: 05/24/2013)
05/28/2013	75	Minute Entry for proceedings held before District Judge James C. Cacheris: Status Conference held on 5/28/2013. Appearance of Counsel for Pltf. and Deft. Pltf. requests that the deft. and Govt. notify the Court and pltf. if they

		know of any other cases that have been filed or any other cases they are going to maintain. Pltf. ordered to submit an order. 30 days to file brief; 20 days to respond; and 10 days to reply w/**MOTION HEARING** set for 9/06/2013 at 10:00 a.m. in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (Court Reporter J. Egal.) (jall) (Entered: 05/28/2013)
05/29/2013	76	ORDER granting 74 Motion for Pro hac vice. Signed by District Judge James C. Cacheris on 5/29/13. (nhall) (Entered: 05/30/2013)
05/30/2013	77	Letter *and Proposed Order re Doc. No. 75*. (Ludwig, David) (Entered: 05/30/2013)
05/31/2013	78	Letter *re Relator's proposed order*. (Faust, John) (Entered: 05/31/2013)
06/03/2013		Notice of Correction re 77 Letter. The signature block on the document does not match the user's login. The filing user has been notified and has been asked to either refile the document or to have the attorney whose signature block appears on the document refile the docment. (nhall) (Entered: 06/03/2013)
06/03/2013	79	Letter *and Proposed Order re Doc. No. 75 (corrected version of Doc. No. 77))*. (Ludwig, David) (Entered: 06/03/2013)
06/04/2013	80	ORDER: This matter having come on for a status conference before this Court, and the Court having considered the oral presentations of counsel and for other good cause shown, it is hereby ORDERED that: (1) Defendants application for a stay pending their submission of a Petition for Certiorari to the United States Supreme Court is DENIED; (2) The parties shall submit supplemental briefs sufficient to update their arguments before the Court. These supplemental briefs should focus in particular on the public disclosure and original source issues, including, but not limited to, cases and other relevant authority issued since the Courts previous hearing held on November 18, 2011; (3) Accordingly, the Court sets the following schedule: (a) Defendants supplemental briefing shall be due on June 24, 2013; (b) Relators supplemental briefing shall be due on July 15, 2013; (c) Defendants reply, if any, shall be due on July 25, 2013; (d) The Court shall hear oral argument on the supplemental briefing on September 6, 2013 at 10:00 a.m.; (4) The Court directs Defendants to promptly notify Relators counsel and this Court of any pending cases that they maintain may jurisdictionally preclude the re-filing litigation and/or trial of the above-referenced matter. This shall be a continuing obligation which shall apply until this matter either is dismissed with prejudice by this Court and/or is re-filed by the

		Relator in theevent of a dismissal without prejudice (5) Recognizing the Governments concerns and its position that (1) qui tam filings filed under 31 U.S.C. § 3730 are filed under seal (§ 3730(b)(2)) and, therefore, bar disclosure unless permission is granted by the court where the qui tam is filed, (2) that first-to-file jurisdictional limitations involve questions of fact and law under §3730(e) that can be determined only after adequate review of the filing and information that may be obtained outside of the qui tam complaint, and (3) that jurisdictional issues are never waived, the Court directs the knowledgeable officers of the United States Departmentof Justice to provide timely notice to this Court of other actions that have been filed or may be filed under 31 U.S.C. § 3730(b) which could nullify the jurisdiction of this Court over the instant action. Signed by District Judge James C. Cacheris on 6/04/2013. (jall) (Entered: 06/12/2013)
06/24/2013	81	Memorandum in Support re 11 MOTION to Dismiss *Relator's Complaint SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER THE PUBLIC DISCLOSURE BAR* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 12, # 2 Exhibit 13)(Faust, John) (Entered: 06/24/2013)
06/25/2013		Notice of Correction re 81 Memorandum in Support. The signature block on the certificate of service does not match the filing users login. The filing user has been notified and has been asked to refile the document. (nhall) (Entered: 06/25/2013)
06/25/2013	82	Memorandum in Support re 11 MOTION to Dismiss *Relator's Complaint SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER THE PUBLIC DISCLOSURE BAR* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 12, # 2 Exhibit 13)(Faust, John) (Entered: 06/25/2013)
07/15/2013	83	Memorandum in Opposition re 11 MOTION to Dismiss *Relator's Complaint SUPPLEMENTAL BRIEF IN SUPPORT OF RELATOR'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER THE PUBLIC DISCLOSURE BAR* filed by Benjamin Carter. (Ludwig, David) (Entered: 07/15/2013)
07/25/2013	84	REPLY to Response to Motion re 11 MOTION to Dismiss *Relator's Complaint SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER THE PUBLIC DISCLOSURE BAR* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Faust, John) (Entered: 07/25/2013)
09/05/2013	85	NOTICE of Appearance by Christina Maria Heischmidt on behalf of

		Benjamin Carter (Heischmidt, Christina) (Entered: 09/05/2013)
09/06/2013	86	Minute Entry for proceedings held before District Judge James C. Cacheris: Motion Hearing held on 9/6/2013 re 11 MOTION to Dismiss *Relator's Complaint* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. Appearances of Counsel for Pltf. and Deft. Matter argued and TAKEN UNDER ADVISEMENT. Order to follow. (Court Reporter J. Egal.) (jall) (Entered: 09/10/2013)
09/19/2013	87	MEMORANDUM OPINION re: 11 MOTION to Dismiss Relator's Complaint by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (See Memorandum Opinion For Details). Signed by District Judge James C. Cacheris on 9/19/13. (nhall) (Entered: 09/20/2013)
09/19/2013	88	ORDER. For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that: (1) Defendant Halliburton Co.'s ("Defendant") Motion to Dismiss [Dkt. 11] is DENIED; (2) in accordance with the Court's affirmed dismissal on the grounds of the FCA's first-to-file bar [Dkts. 65-66], Relator's Complaint [Dkt. 1] is DISMISSED WITHOUT PREJUDICE. (See Order For Details). Signed by District Judge James C. Cacheris on 9/19/13. (nhall) (Entered: 09/20/2013)
07/01/2014	89	Letter re: leave to file a brief as amicus curiae is granted as to 59 Notice of Appeal filed by Benjamin Carter. (nhall) (Entered: 07/03/2014)
07/14/2015	90	ORDER of USCA as to 59 Notice of Appeal filed by Benjamin Carter. The court grants appellee-defendants' motion for summary affirmance and affirms the district court's judgment. (rban,) (Entered: 07/14/2015)
07/14/2015	91	USCA JUDGMENT as to 59 Notice of Appeal filed by Benjamin Carter. In accordance with the decision of this court, the judgment of the district court is affirmed. This judgment shall take effect upon issuance of this court's mandate in accordance with FRAP 41. (rban,) (Entered: 07/14/2015)
08/07/2015	92	UNPUBLISHED ORDER of USCA as to 59 Notice of Appeal filed by Benjamin Carter - AFFIRMED IN PART, REVERSED AND REMANDED IN PART (gwalk,) (Entered: 08/07/2015)
08/07/2015	93	USCA JUDGMENT as to 59 Notice of Appeal filed by Benjamin Carter (gwalk,) (Entered: 08/07/2015)
08/07/2015	94	USCA Mandate re 59 Notice of Appeal (gwalk,) (Entered: 08/07/2015)

08/07/2015	95	MOTION TO SET BRIEFING SCHEDULE AND ORAL ARGUMENT by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Lollar, Tirzah) (Entered: 08/07/2015)
08/11/2015	96	Letter *re Proposed Briefing Schedule for Motion to Dismiss with Prejudice*. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Ludwig, David) (Entered: 08/11/2015)
08/12/2015	97	REPLY to Response to Motion re 95 MOTION TO SET BRIEFING SCHEDULE AND ORAL ARGUMENT filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Lollar, Tirzah) (Entered: 08/12/2015)
08/12/2015	98	ORDER. Accordingly, it is HEREBY ORDERED that: (1) The Clerk of Court shall set this matter on the civil motions docket of the undersigned for a status conference hearing on Thursday September 17, 2015 at 10:00 a.m. (See Order For Details). Signed by District Judge James C. Cacheris on 8/12/15. (nhall) (Entered: 08/13/2015)
08/17/2015	99	MOTION to Dismiss *RELATOR'S COMPLAINT WITH PREJUDICE* by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Lollar, Tirzah) (Entered: 08/17/2015)
08/17/2015	100	Memorandum in Support re 99 MOTION to Dismiss *RELATOR'S COMPLAINT WITH PREJUDICE* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Lollar, Tirzah) (Entered: 08/17/2015)
08/17/2015	101	Notice of Hearing Date set for September 17, 2015 re 100 Memorandum in Support, 99 MOTION to Dismiss *RELATOR'S COMPLAINT WITH PREJUDICE* (Lollar, Tirzah) (Entered: 08/17/2015)
08/18/2015		Set Deadlines as to 99 MOTION to Dismiss *RELATOR'S COMPLAINT WITH PREJUDICE*. Motion Hearing set for 9/17/2015 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 08/18/2015)
08/24/2015	102	Consent MOTION re 101 Notice of Hearing Date *to Set Briefing Schedule and Reset Hearing Date* by Benjamin Carter. (Attachments: # 1 Proposed Order)(Ludwig, David) (Entered: 08/24/2015)
08/25/2015	103	ORDERED that Relator shall file his opposition brief to Defendants' motion to dismiss Relator's complaint with prejudice [Doc. Nos. 99, 101] and cross-motion for leave to amend the complaint by September 8, 2015; Defendants' reply brief in support of their motion to dismiss and opposition brief to Relator's cross-motion shall be filed by September 24, 2015; and Relator's reply brief in support of his cross-motion shall be filed

		by October 1, 2015. IT IS FURTHER HEREBY ORDERED that the hearing on the motion to dismiss and on the cross-motion to amend the complaint is scheduled for October 15, 2015 at 10:00 am. Signed by District Judge James C. Cacheris on 08/25/2015. (jlan,) (Entered: 08/25/2015)
08/25/2015		Reset Deadline as to 99 MOTION to Dismiss RELATOR'S COMPLAINT WITH PREJUDICE. Motion Hearing set for 10/15/2015 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (jlan) (Entered: 08/25/2015)
09/08/2015	104	Memorandum in Opposition re 99 MOTION to Dismiss *RELATOR'S COMPLAINT WITH PREJUDICE* filed by Benjamin Carter. (Ludwig, David) (Entered: 09/08/2015)
09/08/2015	105	MOTION to Amend/Correct 1 Complaint, by Benjamin Carter. (Attachments: # 1 Proposed Order)(Ludwig, David) (Entered: 09/08/2015)
09/08/2015	106	Notice of Hearing Date *Thursday, October 15, 2015 at 10:00 am* re 105 MOTION to Amend/Correct 1 Complaint, (Ludwig, David) (Entered: 09/08/2015)
09/08/2015	107	MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend* by Benjamin Carter. (Attachments: # 1 Proposed Order)(Ludwig, David) (Entered: 09/08/2015)
09/08/2015	108	Memorandum in Support re 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend* filed by Benjamin Carter. (Ludwig, David) (Entered: 09/08/2015)
09/08/2015	109	Notice of Hearing Date set for Thursday, October 15, 2015 at 10:00 am re 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend* (Ludwig, David) (Entered: 09/08/2015)
09/08/2015	110	Sealed Document re 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend*. (Attachments: # 1 Letter)(gwalk,) (Entered: 09/09/2015)
09/08/2015	111	Sealed Document re 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend*. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C part 1, # 4 Exhibit C part 2, # 5 Exhibit D)(gwalk,) (Entered: 09/09/2015)
09/14/2015	112	TRANSCRIPT of proceedings held on September 6, 2013, before Judge James C. Cacheris, Court Reporter/Transcriber Julie Goodwin, Telephone number 571-970-3191. **NOTICE RE REDACTION OF TRANSCRIPTS:The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely**

		electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the court reporter/transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 10/14/2015. Redacted Transcript Deadline set for 11/16/2015. Release of Transcript Restriction set for 12/14/2015.(egal, julie) (Entered: 09/14/2015)
09/22/2015	113	RESPONSE to Motion re 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Lollar, Tirzah) (Entered: 09/22/2015)
09/23/2015		Notice of Correction re 106 Notice of Hearing Date, 109 The filing user has been notified to file an Amended Notice of Hearing Date for Friday Docket.(klau,) Modified text on 9/23/2015 (klau,). (Entered: 09/23/2015)
09/23/2015		Set Deadlines as to 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend*, 105 MOTION to Amend/Correct 1 Complaint, . Motion Hearing set for 10/15/2015 at 10:00 AM in Alexandria Courtroom 501 before Magistrate Judge John F. Anderson. (Attorney was notified to file an amended notice of hearing for an appropriate Friday Docket - **Deadlines Terminated** (klau,) (Entered: 09/23/2015)
09/23/2015		MOTIONS REFERRED to Magistrate Judge: Anderson. 105 MOTION to Amend/Correct 1 Complaint, , 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend* (klau,) (Entered: 09/23/2015)
09/24/2015	114	Consent MOTION for Leave to File Combined Reply in Support of Defendants' Motion to Dismiss With Prejudice and Opposition to Plaintiff's Motion for Leave to Amend by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Lollar, Tirzah) (Entered: 09/24/2015)
09/24/2015	115	Notice of Hearing Date *of October 15, 2015 at 10:00 a.m.* re 114 Consent MOTION for Leave to File Combined Reply in Support of Defendants' Motion to Dismiss With Prejudice and Opposition to Plaintiff's Motion for Leave to Amend (Lollar, Tirzah) (Entered: 09/24/2015)
09/24/2015	116	Reply to 100 Memorandum in Support *of Defendants' Motion to Dismiss With Prejudice* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Lollar, Tirzah) (Entered: 09/24/2015)

09/24/2015	117	Opposition to 105 MOTION to Amend/Correct 1 Complaint, *Defendants' Opposition to Plaintiff's Motion for Leave to Amend* filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Lollar, Tirzah) (Entered: 09/24/2015)
09/25/2015		Set Deadlines as to 114 Consent MOTION for Leave to File Combined Reply in Support of Defendants' Motion to Dismiss With Prejudice and Opposition to Plaintiff's Motion for Leave to Amend . Motion Hearing set for 10/15/2015 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 09/25/2015)
09/25/2015		Reset Deadlines as to 105 MOTION to Amend/Correct 1 Complaint, . Motion Hearing set for 10/15/2015 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (Per JCC chambers) (clar,) (Entered: 09/25/2015)
10/01/2015	118	REPLY to Response to Motion re 105 MOTION to Amend/Correct 1 Complaint, filed by Benjamin Carter. (Ludwig, David) (Entered: 10/01/2015)
10/05/2015	119	Withdrawal of Motion by Benjamin Carter re 107 MOTION to Seal *Amended Complaint and Memorandum in Support of Motion to Amend* (Ludwig, David) (Entered: 10/05/2015)
10/07/2015	120	NOTICE by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. re 105 MOTION to Amend/Correct 1 Complaint, , 99 MOTION to Dismiss *RELATOR'S COMPLAINT WITH PREJUDICE (Notice of Supplemental Authority)* (Attachments: # 1 Exhibit A - Shea Opinion)(Lollar, Tirzah) (Entered: 10/07/2015)
10/13/2015	121	Response to 120 NOTICE, *(of Supplemental Authority)* filed by Benjamin Carter. (Ludwig, David) (Entered: 10/13/2015)
10/15/2015	122	Minute Entry for proceedings held before District Judge James C. Cacheris: Motion Hearing held on 10/15/2015. Appearance of counsel. Defendants' 99 Motion to Dismiss and Plaintiff-Relator's 105 Motion for Leave toFile an Amended Complaint - Argued and taken under advisement. (Court Reporter: J. Egal)(tarm) (Entered: 10/15/2015)
10/15/2015	123	ORDER granting 114 Motion for Leave to File Combined Rely. Signed by District Judge James C. Cacheris on 10/15/15. (gwalk,) (Entered: 10/15/2015)
11/12/2015	124	MEMORANDUM OPINION. Signed by District Judge James C. Cacheris on 11/12/2015. (dvanm,) (Entered: 11/12/2015)
11/12/2015	125	ORDER granting 99 Motion to Dismiss; denying 105 Motion to Amend/Correct. Signed by District Judge James C. Cacheris on

		11/12/2015. (dvanm,) (Entered: 11/12/2015)
11/16/2015	126	TRANSCRIPT of Motions Hearing held on October 15, 2015, before Judge James C. Cacheris, Court Reporter/Transcriber Julie Goodwin, Telephone number 571-970-3191. **NOTICE RE REDACTION OF TRANSCRIPTS:The parties have thirty(30) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vaed.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the court reporter/transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 12/16/2015. Redacted Transcript Deadline set for 1/19/2016. Release of Transcript Restriction set for 2/16/2016.(egal, julie) (Entered: 11/16/2015)**
11/23/2015	127	BILL OF COSTS by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 1 - Decl. of Tirzah S. Lollar, # 2 Exhibit A - Fees of the Clerk, # 3 Exhibit B - Fees of the Marshal, # 4 Exhibit C - Deposition Transcripts, # 5 Exhibit D - Hearing Transcripts, # 6 Exhibit E - Internal Copying, # 7 Exhibit F - External Copying)(Lollar, Tirzah) (Entered: 11/23/2015)
11/24/2015		Notice of Correction re 127 Bill of Costs. The filing user has been notified that document 127 is an incorrectly saved PDF fillable form and has been removed. The filing user was directed to refile the document. (kgra,) (Entered: 11/24/2015)
11/24/2015	128	BILL OF COSTS -- *CORRECTION TO DKT. 127* -- by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 1 - Decl. of Tirzah S. Lollar, # 2 Exhibit A - Fees of the Clerk, # 3 Exhibit B - Fees of the Marshal, # 4 Exhibit C - Deposition Transcripts, # 5 Exhibit D - Hearing Transcripts, # 6 Exhibit E - Internal Copying, # 7 Exhibit F - External Copying)(Lollar, Tirzah) (Entered: 11/24/2015)
12/10/2015	129	MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion by Benjamin Carter. (Heischmidt, Christina) (Entered: 12/10/2015)
12/10/2015	130	NOTICE by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. re 129 MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion -- *Notice of KBR Defendants' Intention to Respond to Plaintiff-Relator's Motion for Reconsideration of Court's Nov. 12, 2015 Memorandum Opinion and Order* (Lollar, Tirzah) (Entered: 12/10/2015)

12/11/2015		Notice of Correction re 129 MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion The filing user has been notified to file a Notice of Hearing Date or a Notice of Waiver of Oral Argument. (kgra,) (Entered: 12/11/2015)
12/16/2015	131	NOTICE by Benjamin Carter re 129 MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion *(of Supplemental Authority)* (Attachments: # 1 Exhibit A)(Ludwig, David) (Entered: 12/16/2015)
12/18/2015	132	Request for Hearing by Benjamin Carter re 131 NOTICE, 129 MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion (Heischmidt, Christina) (Entered: 12/18/2015)
12/18/2015	133	Waiver of re 131 NOTICE, 132 Request for Hearing, 130 NOTICE, *Waiver of Oral Argument* by Benjamin Carter (Heischmidt, Christina) (Entered: 12/18/2015)
12/21/2015		Set Deadlines as to 129 MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion . Motion Hearing set for 1/7/2016 at 10:00 AM in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (clar,) (Entered: 12/21/2015)
12/21/2015		Per JCC chambers motions set for 1/7/16 have been waived please see document #133 - Deadlines terminated (clar,) (Entered: 12/21/2015)
12/23/2015	134	RESPONSE to Motion re 129 MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Lollar, Tirzah) (Entered: 12/23/2015)
12/29/2015	135	Reply to Motion re 129 MOTION for Reconsideration re 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 124 Memorandum Opinion filed by Benjamin Carter. (Heischmidt, Christina) (Entered: 12/29/2015)
02/17/2016	136	MEMORANDUM OPINION. Signed by District Judge James C. Cacheris on 02/17/16. (kgra,) (Entered: 02/17/2016)
02/17/2016	137	ORDER- it is hereby ORDERED that: (1) Relators Motion for Reconsideration 129 is DENIED; (2) The Courts November 12, 2015 Memorandum Opinion is modified in accordance with the Memorandum Opinion accompanying this Order;. Signed by District Judge James C. Cacheris on 02/17/16.(kgra,) (Entered: 02/17/2016)

03/11/2016	138	NOTICE OF APPEAL as to 125 Order on Motion to Dismiss, Order on Motion to Amend/Correct, 137 Order on Motion for Reconsideration, by Benjamin Carter. Filing fee $ 505, receipt number 0422-4896169. (Ludwig, David) (Entered: 03/11/2016)
03/11/2016	139	Transmission of Notice of Appeal to US Court of Appeals re 138 Notice of Appeal (All case opening forms, plus the transcript guidelines, may be obtained from the Fourth Circuit's website at www.ca4.uscourts.gov) (kgra,) (Entered: 03/11/2016)
03/14/2016	140	USCA Case Number 16-1262 4th Circuit, Case Manager C. Bennett for 138 Notice of Appeal filed by Benjamin Carter. (dest,) (Entered: 03/14/2016)
05/03/2016	141	MOTION to Supplement the Record, Memorandum in Support, and Certification of David Ludwig re 111 Sealed Document by Benjamin Carter. (Attachments: # 1 Proposed Order)(Ludwig, David) (Entered: 05/03/2016)
05/04/2016		Notice of Correction re 141 MOTION to Supplement the Record, Memorandum in Support, and Certification of David Ludwig re 111 Sealed Document The filing user has been notified to file a Notice of Hearing Date or a Notice of Waiver of Oral Argument. (kgra,) (Entered: 05/04/2016)
05/10/2016	142	Waiver of re 141 MOTION to Supplement the Record, Memorandum in Support, and Certification of David Ludwig re 111 Sealed Document *Waiver of Oral Argument* by Benjamin Carter (Ludwig, David) (Entered: 05/10/2016)
05/17/2016	143	RESPONSE in Opposition re 141 MOTION to Supplement the Record, Memorandum in Support, and Certification of David Ludwig re 111 Sealed Document filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Lollar, Tirzah) (Entered: 05/17/2016)
05/25/2016	144	MEMORANDUM OPINION. Signed by District Judge James C. Cacheris on 05/25/16. (kgra,) (Entered: 05/25/2016)
05/25/2016	145	ORDER- it is hereby ORDERED that: Relator Benjamin Carters Motion to Supplement the Record 141 is DENIED. Signed by District Judge James C. Cacheris on 05/25/16. (kgra,) (Entered: 05/25/2016)

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PACER Login:	cp0140:2528446:4016252	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	1:11-cv-00602-JCC-JFA
Billable Pages:	16	**Cost:**	1.60

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

UNITED STATES ex rel.
BENJAMIN CARTER,

Plaintiffs,

v.

HALLIBURTON CO.,

KELLOGG BROWN & ROOT SERVICES, INC.,

SERVICE EMPLOYEES INTERNATIONAL, INC.,

KBR, INC.,

Defendants.

Filed under seal pursuant to 31 U.S.C. § 3729, et seq.

Civil Action No. 1:11cv602
JCC/JFA

COMPLAINT

1. This action stems from Defendants' fraudulent receipt of payments from the United States Government under the LOGCAP III Contract ("LOGCAP" or "the Contract") for phantom labor and services which were never provided or performed.

2. The Defendants collected LOGCAP payments for the salaries of employees tasked to test and purify water distributed for use by U.S. troops at war in Iraq. Defendants' employees did not perform such services, which Defendants were required to supply under LOGCAP. Although the employees did not perform the services, and Defendants were aware that the employees were not performing such services, the Defendants falsely billed the Government for the cost of such employees' salaries and the performance of such services.

PARTIES

3. Relator Benjamin was employed by Defendants[1] in Iraq as a Reverse Osmosis Water Purification Unit (ROWPU) Operator. Prior to his employment by Defendants, Mr. Carter had twenty years of experience as a water purification specialist. For five of these years, Mr. Carter owned and operated his own water treatment company in Gunnison, Colorado. Mr. Carter brings this action on behalf of himself and on behalf of the United States.

4. Carter was hired in January 2005 as a Reverse Osmosis Water Purification Unit (ROWPU) Operator to work in Iraq on behalf of the Defendants. He was assigned to work in Iraq, in support of LOGCAP III, on January 13, 2005, and was assigned to Camp Ar Ramadi.

5. Defendant Halliburton Company ("Halliburton") is a publicly-traded company incorporated in Delaware. During much of the time at issue in this Second Amended Complaint, Defendant KBR, Inc. was a wholly-owned subsidiary of Halliburton. Halliburton's CEO has publicized Halliburton's work on LOGCAP in conference calls with investment analysts, referencing LOGCAP III as "our LOGCAP contract" and citing "our [Halliburton's] work" on the contract. Halliburton has extensively publicized its responsibility for services rendered under LOGCAP. According to a transcript of a November 29, 2005 investment analyst call, Halliburton's COO referred to the United States as "our customer" on LOGCAP III. Likewise, on a subsequent January 27, 2006 conference call with analysts, Halliburton's CEO termed the United States the purchasing "customer" of "our work" on LOGCAP III. During times pertinent to this Second Amended Complaint, Halliburton has assisted KBR, Inc. in performing various

[1] Mr. Carter's nominal employer was Service Employees International, Inc.; Mr. Carter obtained his employment by responding to a job offer posted on the "KBRJOBS.com" website. Mr. Carter was trained by Halliburton personnel in Houston, Texas prior to departing for Iraq, as described in this Amended Complaint. Additionally, as also described in this Amended Complaint, "Halliburton/KBR" personnel treated Mr. Carter as an employee, and at other times pertinent to this Amended Complaint, as a former employee.

corporate functions, including, without limitation: information technology and communications; human resource services such as payroll and benefit plan administration; legal; tax; accounting; office space and office support; risk management; treasury and corporate finance; and investor services, investor relations and corporate communications. Halliburton has a principal place of business at 5 Houston Center, 1401 McKinney, Houston, TX 77010. Halliburton submitted or caused the submission of the false claims and false statements at issue and otherwise is liable for the claims asserted.

6. Defendant KBR, Inc. is a Delaware corporation registered to do business in the State of Texas. KBR, Inc.: indirectly owns KBRSI and SEII; performs services for them (such as finance and human relations services) that are directly relevant to the misconduct alleged; submitted or caused the submission of the false claims and false statements at issue; and otherwise is liable for the claims asserted. KBR, Inc.'s principal office is located at 601 Jefferson Street, Houston, TX 77002.

7. Defendant[2] Kellogg Brown and Root Services, Inc. ("KBRSI") is a Delaware corporation. Defendant KBR, Inc. is an indirect parent of KBRSI. KBRSI does business at 4100 Clinton Drive, Houston, Texas 77020, and at other locations within this judicial district. It is the awardee of the government contract at issue, the LOGCAP III Contract.[3] KBRSI is a party to the Task Orders 59 and 89 of LOGCAP III at issue in this case. KBRSI submitted or caused the

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[2] *See* Relator's Notice of Filing of Second Amended Complaint (Jan. 28, 2009) (addressing the naming of KBRSI as Defendant).

[3] Specifically, it is not the original awardee, but rather a successor. The legal entity that was the original awardee, and its affiliates, have experienced a variety of corporate reorganizations and transformations since the time of award, including an asbestos-related bankruptcy petition, and a well-publicized divestiture by corporate parent Halliburton, Inc. These contortions notwithstanding, the conduct described in this Complaint is fairly attributed to each Defendant, or each Defendant is otherwise liable for it, as specifically alleged.

submission of the false claims and false statements at issue, and is otherwise liable for the claims asserted.

8. Defendant[4] Service Employees International, Inc. ("SEII") is a Cayman Islands corporation. Defendant KBR, Inc. is an indirect parent of SEII. The former parent company of KBR, Inc., i.e., Halliburton, Inc., has identified SEII as a subsidiary in filings with the U.S. Securities and Exchange Commission. On information and belief, SEII does business at 4100 Clinton Drive, Houston, Texas 77020. When Halliburton, KBR, Inc. and KBRSI have hired contract employees for work overseas, they frequently have diverted those employees to employment by SEII. Halliburton and KBR, Inc. treat SEII labor as "subcontract labor" for tax purposes, as reflected in their written statements to federal government auditors. On information and belief, Mr. Carter and many other employees described herein, whose work was billed to the U.S. Government, were SEII employees, at least nominally. SEII has been paid by KBRSI for services rendered by SEII's Reverse Osmosis Water Purification Unit ("ROWPU") employees described below in this Complaint. SEII submitted or caused the submission of the false claims and false statements at issue, and is otherwise liable for the claims asserted.

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction to entertain this action under 28 U.S.C. §§ 1331 and 1345. The Court may exercise personal jurisdiction over the defendants pursuant to 31 U.S.C. §§ 3732(a).

10. Venue is proper in the Eastern District of Virginia under 31 U.S.C. §§ 3732 and 28 U.S.C. §§ 1391(b) and (c) because the defendants reside and transact business in this District.

ALLEGATIONS

[4] *See* Relator's Notice of Filing of Second Amended Complaint (Jan. 28, 2009) (addressing the naming of SEII as Defendant).

THE LOGCAP CONTRACT

11. Since the early 1990s, the Department of Defense ("DoD") has used logistics support contracts to meet many of its logistical support needs during combat operations, peacekeeping missions, and humanitarian assistance missions. More recently, these contracts have supported contingency operations such as Operation Enduring Freedom (the War in Afghanistan) and Operation Iraqi Freedom. DoD relies on such contracts to provide supplies and services to the military.

12. In 1992, DoD created the Logistics Civil Augmentation Program (LOGCAP) contract as an umbrella support contract to provide all the support services necessary in a conflict. The Army awarded the first LOGCAP contract (LOGCAP I) in 1992 to Halliburton's Kellogg, Brown &Root subsidiary. Support services were provided under LOGCAP I to contingency operations in Haiti, Somalia and the Balkans. In 1997, LOGCAP (LOGCAP II) was awarded to DynCorp Services to continue services in the Balkans. In 2001, LOGCAP III, Contract No. DAAA09-02-D-0007, was awarded to KBRSI's predecessor, Brown& Root Services, Inc., and to non-party Kellogg, Brown &Root, Inc. LOGCAP III has supported contingency operations in Iraq, Kuwait, Afghanistan, Dijbouti, Republic of Georgia, and Uzbekistan.

13. The Defendants have experience staffing the ROWPU position in combat theaters other than Iraq. For example, on dates previous to the Defendants' hiring of Mr. Carter for work in Iraq, Defendants had hired ROWPU Operators to perform water purification services in Afghanistan. The staffing of individuals such as Relator into the position in Iraq, and billing the Government for ROWPU services, was not a new endeavor for Defendants at the time Relator was hired. The concerted, fraudulent methods employed by Defendants to bill the Government

for phantom ROWPU labor in Iraq, described below, were not the result of innocent mistakes made by a rookie contractor.

14. The LOGCAP III Contract is a cost-plus award fee contract. Under LOGCAP III, Task Orders are issued with specific Statements of Work for designated types of work and geographic areas of performance within Iraq.

15. For much of the relevant period, the largest LogCAP III task orders were Task Orders 59 and 89. Under these task orders and the statements of work issued thereunder, KBRSI provided a range of logistics support services. Relator was hired to provide water purification labor services in Iraq on behalf of Defendants, as a ROWPU Operator, pursuant to LogCAP Task Orders 59 and 89.

16. Under LOGCAP, the Government "can terminate, reduce the amount of work, or replace [the LOGCACP] contract with a new competitively bid contract at any time during the term of the contract." See Halliburton Co. 10-Q Securities and Exchange Commission Quarterly Report, Oct. 31, 2005, at 39 (available at http://www.sec.govA.

17. LOGCAP itself bears out this understanding on the part of Halliburton. The Contract incorporates by reference FAR 52.246-5. That FAR provision provides that "[i]f any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee.. .If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, the Government may—...Terminate the contract for default." Id(e)(2).

WATER PURIFICATION AND TESTING DUTIES

18. KBRSI was obligated under LOGCAP III, LOGCAP III Task Orders 59 and 89,

and Statements of Work issued thereunder, to:

a. Treat (i.e., purify) water distributed for use by U.S. troops at base camps throughout Iraq, including at Ar Ramadi, where Relator was sited for much of his time in Iraq.

b. Test such water for purity.

c. Adhere to prescribed environmental standards, including those set forth in Department of Army Technical Bulletin MED 577 ("TB MED 577"), in treating and testing such water.

19. As reflected by a Statement of Work issued under LOGCAP Task Order 59 dated November 14, 2004, KBRSI's specific LOGCAP III contractual duties included, without limitation, "providing], installing], operating] and maintaining] potable and non-potable water systems, to include plumbing, sewage and gray/black water disposal, to facilitate the operation of facilities as directed by the A[dministrative] C[ontracting] 0[fficer] (I[n] Accordance] W[ith] applicable Army regulations) and provide on-site storage as needed." Also stipulated under the Statement of Work is KBRSI's duty to "provide, emplace in Life Support Areas and maintain ablution units equipped with environmental control units, showers, mirrors, and sinks (1 head x 20 males and 1head x 15 females) I[n] Accordance] W[ith] base camp populations and as directed by the A[dministrative] Contracting] 0[fficer]....[and to] provide, fill, re-fill and maintain non-potable water holding tanks sufficient to store a three-day supply to the ablution units."

20. KBRSI was required to operate and maintain such potable and non-potable water

systems and ablution units both at Ar Ramadi, Iraq, where Relator was sited for much of his time *in Iraq*, and at Al Asad, Iraq, where Relator separately observed Defendants' water purification activities, as further described below.[5]

21. As Mr. Carter was personally aware, an Army regulation denominated as TB MED 577 was an "applicable" regulation, per LOGCAP, to which KBRSI was subject in its discharge of its potable and non-potable water system operation and maintenance duties in Iraq.

22. TB MED 577 sets forth detailed water treatment and testing obligations incumbent upon KBRSI and the Defendants in their implementation of KBRSI's LOGCAP contractual duties. Among those duties were a requirement that water purification personnel, such as the personnel that Defendants hired and assigned to work in Iraq, including Mr. Carter, "[c]onduct tests of raw and product water for chemical agents and radioactivity as necessary."

23. TBMED 577 prescribed purification and testing duties specific to shower water, *i.e.*, water intended for use by troops in their showers. As to such water, "[w]ater storage tanks" were to be used "for treating and storing non-potable fresh water available on site." TB MED 577 further provided that although "water [intended for use by troops] for showers need not meet all of the drinking water standards, [such water] should not impair the health of personnel." Thus, per TBMED 577, KBRSI was required to ensure that such water was "chlorinated to at least a 1 p[arts] p[er] million] chlorine residual" level.[6] KBRSI was obligated to ensure that its ROWPU personnel such as Mr. Carter and his colleagues at Ar Ramadi conducted routine tests

[5] Potable water is water that is safe for human drinking purposes. Non-potable water is water that is unsafe to drink in large quantities, but which may be used for purposes such as laundering clothes and showering.

[6] One part per million of "Free Chlorine residual" was thus the minimum allowable amount. There are two types of chlorine residual, free and total chlorine. Free Chlorine indicates an on going availability of chlorine to effect disinfection.

of the shower water: "[t]ests for chemical agents and radioactivity will be conducted weekly by *water purification* personnel." Further, KBRSI was required to "[r]ecord from where the water source was procured or supplied" and to "check [shower water]...every 8 hours...[for] chlorine residual [levels]."

24. Other obligations adhered to KBRSI pursuant to TBMED577. KBRSI was required to ensure that shower "wastewater and runoff will be discharged at least 25 yards downstream of the raw water intake."

25. TB MED 577 also required of KBRSI that "[o]pen top tank" water storage Containers "be covered" to prevent contamination.

26. TBMED 577 was updated by the Army in November 2005 and December 2005. The quoted provisions above are from the March 1986 version of the regulation, which immediately preceded the November 2005 version and remained in effect through November 2005. Provisions substantially identical to those cited above are reflected at pages 44, 46, 48, and 49 of the December 2005 version of TB MED 577.

27. In order to perform the water purification and testing services described under LOGCAP III, Task Orders 59 and 89, and the Statements of Work issued thereunder, KBRSI hired water quality specialists such as Mr. Carter to perform the subject duties.

RELATOR'S HIRING AND TRAINING BY THE DEFENDANTS

28. Mr. Carter initially applied for his position in late November 2004/early December 2004 with the Defendants through the "KBRJOBS.com" website.

29. The ROWPU Operator position was described on that website as one in which Relator would be involved in purifying water distributed for use to U.S. troops. Relator had the

option to specify a preference for work in Afghanistan or Iraq. Relator expressed a first preference for ROWPU work in Afghanistan.

30. Relator filled out employment application paperwork which bore the lettering "Halliburton KBR" in the header.

31. At Defendants' request, Relator signed an "Applicant Personal Information Supplement" bearing the designation "Halliburton Companies" in the header. The opening paragraph of this supplement stated, "In connection with my application for employment with Halliburton Inc. and/or associated companies, I understand that..."

32. Relator received employment application materials via email from a Beth Laxton, "KBR Government Operations." Ms. Laxton's email address bore the suffix '@halliburton.com.'

33. Relator received a call from a Defendant recruiter in early December 2004 offering him a position in Iraq.

34. Prior to embarking for Iraq, Relator received roughly 10days of training at Defendant facilities in Houston, Texas, along with roughly 700 other new employee-trainees. During this training, Defendants' employee-trainers emphasized to Mr. Carter and to the other trainees that their salaries for service in Iraq were paid for by the U.S. Government.

35. Prior to his arrival in Houston, Relator had received a document from the Defendants entitled, "ITINERARY/INFO PACKET CANDIDATE PROCESSING FOR LOGCAP III." This document contained the designation "KBR" in the header.

36. Once at Houston, Mr. Carter and the other trainees received training modules on several subjects, such as "Harassment Briefing," and "Medical Follow-up." Among the training modules was a session lasting one and a half hours entitled "LOGCAP III Project Briefing."

37. Relator and the other trainees received extensive framing from Defendants' personnel in the filling out of timecards to record their labor-hours worked once in Iraq. Defendants' personnel emphasized the following concerning the timecard process to Mr. Carter and the other trainees:

a. That each Defendant employee needed to retain his or her weekly timecard on his other person at all times once in Iraq, since Department of Defense auditing personnel could appear on site at any moment and ask to see and inspect a given Defendant employee's timecard;

b. That the employees' timecards were to be submitted to the Government to secure payment for each Defendant employee's salary while in Iraq; and

c. That it was important that the timecards accurately reflect the employee's hours worked for each day while in Iraq, since any misrepresentation on a timecard could be construed by the United States Government as fraud.

38. At the Houston training, Mr. Carter, along with the other trainees, received a large binder/manual with the title "LOGCAP III Orientation." The material in this binder emphasized in exceptional detail that Halliburton/KBR Inc/KBRSI would receive reimbursement from the Government for the labor services that the trainees were about to provide in Iraq under the LOGCAP III Contract.

39. In Houston, Mr. Carter received a military identification card that he would carry with him at all times while in Iraq.

RELATOR'S ROWPU POSTING IN IRAQ

40. Once in Iraq at Ar Ramadi, Mr. Carter discovered that the Defendants' personnel required employees such as Mr. Carter to submit fraudulent timecards, on penalty of termination from employment.

Al Asad

41. Prior to arrival in Ar Ramadi, Mr. Carter was stationed in Al Asad, Iraq for three days, in mid-January 2005.

42. While in Al Asad, Mr. Carter was given a tour of Defendants' Al Asad ROWPU operations.

43. Comparatively speaking, the scale of Defendants' water processing operations at Al Asad was larger than at Ar Ramadi. At least 10 Defendant employees were nominally staffed as ROWPU employees assigned to the Al Asad site, including an individual named Dale Lehew.

44. Mr. Carter discovered during his tour of the Defendants' Al Asad ROWPU operations that the Defendants' water purification efforts there were a fiction.

45. Mr. Carter personally observed Defendant personnel using rejected drainage water that had cycled through the ROWPU process (i.e., per se highly contaminated water) and re-using such water as a raw input for the production of potable and non-potable water to be distributed for use by U.S. troops at Al Asad.

46. These activities resulted in purported water purification "services" that had no value whatsoever. The TBMED577regulations clearly required "wastewater and runoff...be discharged at least 25 yards downstream of the raw water intake." The Al Asad Defendant employees, including managerial employees, engaged in this activity were aware that their labor "services" had no value whatsoever. Indeed, the "services" had negative value, in that they posed a prima facie and known—or readily knowable—risk ofharm to those exposed to the purportedly "purified" water generated at Al Asad by the Defendants.

47. Defendants' ROWPU manager at Al Asad did not even know how to start the Reverse Osmosis Water Purification Unit at Al Asad, and a third country national (i.e., non-U.S. laborer) on site had to demonstrate to him how to start the unit.

48. Dale Lehew, who hailed originally from Oklahoma and whose position at Al Asad at the time of Mr. Carter's visit there was ROWPU Operator, had no background in water purification or testing whatsoever. His annualized salary was $84,000.

49. Mr. Carter had witnessed a cavalcade of pretend water purification specialists at "work."

Ar Ramadi

50. Per Defendant instruction, Mr. Carter traveled from Al Asad to the Junction City camp at Ar Ramadi and commenced work there in mid-January 2005.

51. Upon his arrival, Mr. Carter was told by the Defendant Ar Ramadi ROWPU foreman (Walter Meyers) that both non-potable and potable water at the Ar Ramadi site was being chlorinated and was safe.

52. Mr. Carter was stunned to find that he had no actual water purification or testing duties to perform between mid-January 2005 and early March 2005. He repeatedly requested such work from Meyers, but told that there was no work that needed to be performed.

53. Between January 19, 2005 and late February, 2005, Mr. Carter retained his timecards on his person during the day, as per Defendants' Houston training instructions, until the end of the week.

54. During this time, and over his objections, he was required to fill in timecards stating that he worked 12 hour a day, each day, with uniformity, on ROWPU functions, per instruction of Walter Meyers and per instruction of Defendant Ar Ramadi Chief of Services Warren (Tom) Smith.

55. On these dates, he had actually worked 0 hours per day on ROWPU functions.

56. Meyers and Smith were aware that Mr. Carter had actually worked zero hours per day on these dates.

57. Mr. Carter was apprised by Smith that Mr. Carter's timecards were being submitted by Defendants' managerial personnel to the Government.

58. Mr. Carter was threatened with termination by Smith if Carter did not submit the timecards with the requested 12 hour time allocations. Specifically, Smith told Carter that "There are plenty of people back in Houston willing to take your job," if Carter did not go along with the timesheet scheme.

59. There were a total of 3 Defendant ROWPU personnel assigned to Ar Ramadi: foreman Walter Meyers, who had been there since on or about September 1, 2004 in that capacity, Mr. Carter, and, after mid-February 2005, Dale Lehew, who was transferred to Ar Ramadi from Defendants' Al Asad ROWPU operation.

60. The ROWPU personnel were part of a larger group of Defendant employee personnel at Ar Ramadi classified as "Trade" or "Operations and Maintenance" personnel. Other laborers in this category included carpenters and electricians. The total number of employees in this group was 30-40 employees.

61. If any Trade employee's as-submitted time card did not total exactly 12 hours per day and 84hours per week, he or she would be called in to the Operations manager's building over site radio frequency at the end of the work day to change the time card to align with the required 12hr. day/84 hr. week total. This happened to Mr. Carter on several occasions; managerial personnel—principally, Don Mandy and Walter Meyers— would call Mr. Carter's code name over the radio intercom ("Water One") and request that Mr. Carter come to the managerial facility to change his time card.

62. The timesheets were printed on 8" x 11"paper, with the paper quality that of standard paper used for computer printouts. The timesheets contained a straightforward grid depicting the days of the week.

63. Meyers repeatedly bragged to Mr. Carter that he (Meyers) was earning a salary of $160,000 per year for his ROWPU foreman "duties."

64. Mr. Carter's annual salary rate was $84,000.

65. Mr. Carter's understanding was that Meyers, as per the routine practice of all other Trade personnel, was also submitting 12 hr. day/84 hr. week timesheets to be submitted to the Government.

66. In late February, the timesheet submission process changed.

67. Mr. Carter was gathered into a room with other Trade personnel and apprised that a government auditor would soon be arriving at the Camp Junction site. Defendant camp management, including Meyers and Smith, did not want to continue submitting both original and amended timesheets to the Government (as had been the case when employees of their own volition initially submitted timesheets that added to something other than 84 hours per week). Per instruction by Meyers and Smith, new timecard submission methods would be employed. Now, each employee would be required to leave his or her timesheets with camp management (as opposed to carrying them around on his or her person). Further, each evening at 7 PM, each employee, including Mr. Carter, would sign a daily timesheet entry in Smith and Meyers' presence.

68. Additionally, Meyers and Smith began requiring all employees, including Mr. Carter, to input their labor-hours worked figures for each Sunday on the Saturday evening before each

Sunday. That way, according to Smith, "You'll get paid on time." Meyers and others would then play Softball on Sunday and bill the 12-hour labor day for Sunday to the Government.

69. This new fraudulent timesheet submission continued in effect from late February 2005 through April 2005, and, upon information and belief, continued during LogCAP performance after Mr. Carter left Iraq (April 2005).

70. The government auditor noted in paragraph 67 did ultimately arrive on site between late February and April 1st. When the auditor did arrive, Defendant Ar Ramadi site management instructed Trade personnel including Mr. Carter to "look busy" and drive around the Ar Ramadi site to create a false appearance of actual work being done.

71. In mid-February 2005, Dale Lehew commenced service as an Ar Ramadi ROWPU Operator, upon transfer from Al Asad.

72. As noted, Mr. Lehew's annualized salary was $84,000.

73. Mr. Carter was instructed by Meyers to personally review Lehew's timesheets to ensure that they were consistent with those of Carter and Meyers (i.e., that Lehew's timesheets also included Active hour tallies).

74. It was not until early March 2005 that Mr. Carter was allowed to inspect the Ar Ramadi Camp Junction base water delivery systems.

75. Mr. Carter was promoted to acting ROWPU foreman when Meyers left the base for the United States on a two-week vacation leave.

76. To that point, no Defendant managerial staff member had provided Mr. Carter with any Iraq Theatre-wide or Ar Ramadi site-specific set of instructions, policies or procedures, or any other information regarding the operation of the ROWPU or maintaining water quality standards for military and civilian personnel on the base.

77. To that point, Mr. Carter was not aware of the existence of any records reflecting that the Defendants had conducted tests of any kind on non-potable or potable water at Ar Ramadi.

78. None of the equipment that would have been necessary to conduct weekly tests for chemical agents and radioactivity on water to be distributed for use to U.S. troops for showering was on hand or available for Mr. Carter's use.

79. At the threat of being fired, Mr. Carter was required to continue to bill his time to the Government notwithstanding the factual impossibility of his having performed water purification or testing activities.

80. On March 23, 2005, with Meyers on leave and Mr. Carter serving as acting ROWPU foreman, a Defendant Labor Foreman stationed in Ar Ramadi reported to management that he had discovered an organism in the toilet of his living quarters (i.e., vestibule). On inspection, Carter confirmed that a larvae was swimming in the Labor Foreman's toilet bowl.

81. Carter took the initiative to test the running lavoratory water in the employee's bathroom for chlorination. The test results indicated no presence of chlorine.

82. In conducting such tests, Mr. Carter relied on recently acquired spectrophotometers (testing tools).

83. Testing kits that included spectrophotometers for accurately measuring chlorine had never been present at Camp Ramadi until late March 2005. Such tools only arrived at that juncture because Mr. Carter advised Defendant Ar Ramadi Site Manager, Suzanne Raku Williams, that spectrophotometers were an absolutely mandatory tool in order for Defendants to carry out their LOGCAP III/TB MED 577 testing obligations.

84. During his entire time at Ar Ramadi, Relator never observed the presence of tools that would have allowed Defendants to test for chemical agents and/or radioactivity levels in water.

85. As a result of Mr. Carter's preliminary tests at the Labor Foreman's vestibule, Mr. Carter determined that the vestibule's lavatory water, including the water from that lavatory's sink and shower, was not fit for human use.

86. Concerned that the entire water system of the base was compromised, Carter suggested to Defendant site managers that the military be notified that their water needed immediate super-chlorinization. He was told by site manager Suzanne Raku-Williams that the military was, quote, "none of" Carter's concern.

87. Among the maladies that untreated water can cause exposed humans are salmonellois, shigellosis, cholera, amebias, giardiasis, and diarrheal disorders.

88. On March 24, 2005, Mr. Carter, at the suggestion of Mo Orr, a Defendant Health, Safety, and Environmental employee, committed his findings to writing in an email directed to Defendant managerial personnel. Mr. Carter sent a three paragraph, 587 word email to Suzanne Raku-Williams (Defendant Ar Ramadi Site Manager), Warren Smith (Chief of Services), Lisa Waterman (Administrative Specialist, O&M Service), and Walter Meyers (ROWPU Foreman, Acting O&M Manager), describing his finding of the toilet larvae and discussing the implications thereof. In his email, Mr. Carter stated, in part, that upon finding the larvae cited in paragraph 80 above, "I then immediately tested the cold water from the.. .sink in [Ross' vestibule] for free chlorine. There was none detected. It had been my understanding that this water was non-potable but was chlorinated."

89. Mr. Carter then tested other locations at which non-potable water was distributed and stored by Defendants at the Ar Ramadi base. These other locations included the Ar Ramadi communications room and the site's main non-potable water storage tanks. His tests at these other locations confirmed that non-potable water at such other locations was also not being

purified. Further, the non-potable water storage tanks, which had an open top structure, were uncovered.

90. Based on the full sum of these test results and the lack of any base testing records of any kind, Mr. Carter concluded that, during Walter Meyers' time as ROWPU foreman from September 1, 2004 through mid-March 2005, Meyers had not been performing any water tests of any kind. Meyers' work was fictive.

91. Mr. Carter then apprised Captain Matthew Hing of his findings. Hing was not aware that the Defendants had been failing to purify or test the non-potable water at Ar Ramadi. Hing had overall responsibilities for medical safety of personnel at the Ar Ramadi base.

92. Based on his conversation with Hing, Mr. Carter concluded that the Defendants had failed to apprise the Government of the ongoing failure to test or treat non-potable water.

93. Within a few days, in late March 2005, a Terrence Copling from Halliburton/KBR[7] Employee/Labor Relations arrived at Camp Junction, apparently assigned to investigate the recent events at Ar Ramadi unrelated to Mr. Carter's water findings.

94. Contemporaneous with the Copling visit, on March 25, 2005, Mo Orr, the Defendant Health, Safety, and Environmental employee noted at paragraph 88 above, resigned in disgust. He stated in his resignation statement that he would no longer work "in an environment where deception and fraud are commonplace." Orr sent this resignation email to David Halliday, Damon Scarborough, Darwin Mixon, Danny Gregory, Jason Walsh, Don Mandy, Jurgen Stringer, Kenneth May, Walter Duvall, and Harry Grocholski (all of whom, upon information and belief, were Defendant employees), and Mr. Carter.

CARTER'S INVESTIGATORY EFFORTS

[7] *See* Footnote 9, *infra.*

95. While Copling was on site, Mr. Carter related his recent water testing and purification and testing findings to Copling.

96. Copling assured Mr. Carter that managerial personnel involved in the Ar Ramadi fraud identified by Mr. Carter would be terminated.

97. Mr. Copling remained on site at Ar Ramadi for approximately 3 days, leaving on or about March 27, 2005.

98. After Mr. Copling left the Ar Ramadi site, Mr. Carter emailed him frequently.

99. Mr. Copling did not return those emails.

100. In April 2005, a Defendant employee named Phillip Daigle, whose title, upon information and belief, was Medic, gave a speech to all Defendant employees at the Ar Ramadi site. Mr. Carter attended this meeting, but was not offered the opportunity to speak at it. The meeting was an all-hands-on-deck safety meeting (one was held every Sunday, on various topics). The subject of this meeting was to address the potential risks associated with the nonpotable water supply at Ar Ramadi. Phillip Daigle purported to offer Defendants' managerial perspective on recent water-related issues at Ar Ramadi. Defendant Ar Ramadi Chief of Services Manager Smith introduced Daigle by stating, "Ben [Carter's] doing a great job with the water situation here and he's got the situation under control." During the speech, Daigle stated that the "only risk" potentially associated with the assembled audience's exposure to non potable water over the months immediately preceding the speech was the risk of exposure to hepatitis.

101. Mr. Carter, out of disgust at the rampant and wanton fraud to which he bore witness, resigned from service to the Defendants, leaving their service in April 2005.

102. During the entire period of Mr. Carter's employment by Defendants, Mr. Carter observed no documentation purporting to reflect that Defendants had actually performed any tests required under the LOGCAP Contract.

103. Relator continued his investigation of Defendants' fraud after leaving Defendants' employ.

104. Mr. Carter contacted Halliburton employee relations representative Janet Little on July 13, 2005 concerning the water testing, purification, and billing issues described in this Amended Complaint.

105. Mr. Carter received an email message from Wil Granger, Defendants' Theater Water Quality Manager for Iraq and Kuwait, on July 21, 2005.

106. Mr. Granger apprised Mr. Carter that Mr. Carter's original whistle-blowing email of March 24, 2005, and his other whistle-blowing activities during that week, did in fact ultimately prompt Defendants to dispatch Granger to evaluate the on-the-ground water testing and treatment conditions at Ar Ramadi. In that July 21, 2005 email, Mr. Granger related that he completed his investigation on May 13, 2005. Mr. Granger further related that he had investigated the extent of documentation at other sites in Iraq that would support the conclusion that Defendants had conducted the water testing required under LOGCAP.

107. As detailed to Mr. Carter by Mr. Granger in that July 21, 2005 email (forwarding earlier emails authored by Granger dated July 15, 2005 and directed to Defendant managerial personnel), Mr. Granger's investigation corroborated Mr. Carter's initial findings.

108. Specifically, Granger found that:

> a. The Defendants had exposed the base camp population at Ar Ramadi to a water source that had not been treated, i.e., purified. The level of water at Ar Ramadi was roughly 2 times the normal contamination level of untreated water from the Euphrates River. Granger's findings concluded that the Ar Ramadi

base camp population would have been better off receiving raw water from the Euphrates River as its non-potable water source than the water it had been receiving through May 2005.

b. Granger confirmed in his email that the contamination was believed to have been ongoing through the entire life of the camp, from September 1, 2004 through late May 2005 -a nine month period.

c. Granger further stated that he had yet to find a Defendant-operated installation in Iraq where documentation existed to support the conclusion that the Defendants had performed any of the non-potable shower water testing required under LOGCAP III.

d. Granger additionally stated that he knew of no effort to inform the exposed population at Ar Ramadi of the water problems Granger had identified.

109. Mr. Granger related to Mr. Carter in the July 21, 2005 email that Mr. Granger had sent the results of the above-noted investigation on May 13, 2005 to six members of KBR/Halliburton's senior management team, including KBR/Halliburton's Vice President with overall responsibilities for the LOGCAP III Contract.

110. Janet Little of Halliburton, noted above, referred Mr. Carter to Faith Sproul, Workers' Compensation Manager for Halliburton Company.

111. On July 22, 2005, Mr. Carter sent a 43-word email to Faith Sproul. He asked Sproul "who [he] should contact" regarding the problem presented by contaminated water at Ar Ramadi and at other sites in Iraq. Mr. Carter asked Ms. Sproul if she had "seen the results of William Granger's report about the level of contamination and duration [of contamination] at Ramadi and other sites in Iraq?"

112. Sproul responded via email on that same date and stated that an individual named Chuck Murtoff was the appropriate point of contact, and that Murtoff's position was "Senior Manager for Employee Relations for our Government Operations."

113. On the afternoon of August 3, 2005, Mr. Carter was contacted by telephone by Murtoff. During the telephone call, Murtoff stated that Halliburton/KBR had formed a "special investigation team "to look into Mr. Carter's allegations.

114. Upon information and belief, Defendants' formation of this "special investigation team" was prompted by Mr. Carter's July 22, 2005 email to Faith Sproul.

115. The members of the "special investigation team" included the aforementioned Terrence Copling and Defendants' employees Donnie Askew, Jerry Allen, and Vic DeLeque.

116. On August 26, 2005, Mr. Murtoff emailed Mr. Carter to state that "our investigator would like to speak to you regarding your knowledge of the contaminated water incident at B4."[8]

117. According to that August 26, 2005 email, Murtoff's title was Senior Manager, Employee/Labor Relations for"Halliburton/KBR."[9]

118. On August 28, 2005, Donnie Askew, special investigator for Halliburton spoke with Mr. Carter by telephone from Baghdad. Mr. Carter provided answers to all of Askew's questions concerning his knowledge of the water systems operations at Ar Ramadi.

119. On August 29, 2005, Mr. Murtoff emailed Mr. Carter again. He stated that "the company has reached conclusion on the review of the contaminated water issue brought to our attention by yourself..." Mr. Murtoff did not state any specific findings from the review in his email. The email did not note any intention by "Halliburton/KBR" to take any further action in

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[8] Ar Ramadi is conventionally known by the Government and by Defendants and Defendants' personnel as site"B4."

[9] Mr. Murtoff's employer was reflected as "Halliburton/KBR" (Mr. Murtoff's own words) in email correspondences to Mr. Carter. Such emails contained a signature line authored by Mr. Murtoff stating, verbatim, "Chuck Murtofff,] Halliburton/KBR[,] Sr. Manager Employee/Labor Relations."

connection with the review, either with regard to the subject health risks or the billing of the Government.

120. Based on these email exchanges, including the empty statements by Mr. Murtoff concerning Defendants' "investigation," Mr. Carter concluded that the Defendants had continued to fail to apprise the Government that the Defendants had not been performing the testing and water purification duties noted in this Amended Complaint, *i.e.*, those that they were obligated to perform under LOGCAP; or that Defendants had taken corrective action with regard to the associated false billing.

121. On January 23, 2006, Mr. Carter testified before the Senate Democratic Policy Committee concerning his observations of Defendants' activities in Iraq.

PHANTOM ROWPU LABOR AT AR RAMADI

122. At varying points in time from September 1, 2004 through May 1, 2005, one (first, solely Meyers),two (Meyers and Carter), and then three (Meyers, Carter, and Lehew) men were nominally staffed by Defendants to water testing and purification duties at Ar Ramadi, Iraq.

123. Meyers repeatedly bragged to Mr. Carter about the level ($160,000 per annum) of his salary as ROWPU Foreman. Meyers came to Ar Ramadi on or about September 1, 2005.

124. Mr. Carter and his ROWPU colleagues at Ar Ramadi received salary payments every two weeks during the subject period.

125. Mr. Carter and his ROWPU colleagues received these salary payments at a Defendant Ar Ramadi Operations office from an employee named Don Mandy. The format of the payment receipts was in an envelope bearing each employee's name. The envelope typically contained a pay stub and cash.

126. Mr. Carter and his colleagues received a portion of their bi-weekly pay from

Defendants in cash, with the remainder of the pay being sent by Defendants via direct deposit to the employee's banking institution of choice in the UnitedStates.

127. Mr. Carter was personally aware that Dale Lehew and Walter Meyers received their salary payments in this fashion.

128. As alleged both *supra* and *infra*, all of the above salaries were billed to and ultimately paid by the Government pursuant to LOGCAPIII.

PHANTOM ROWPU LABOR AT AL ASAD

129. At least 10 Defendant employees were nominally staffed as ROWPU employees assigned to the Al Asad site.

130. Pursuant to the salary disbursement procedures with which Relator first became personally familiar at his Houston training sessions conducted by the Defendants - including, among other sources, the LOGCAP III Orientation binder distributed during those sessions - upon information and belief, the noted 10+ Al Asad ROWPU employees' time were billed under LOGCAP III, and those employees collected bi-weekly paychecks in a fashion identical to, or substantially identical to, that detailed at paragraphs 124 to 126, above.

131. As alleged, the Al Asad Defendant ROWPU employees were not engaged in any actual water purification duties on discrete dates in January 2005. Upon information and belief, for all dates preceding January 2005 during which such employees were sited at Al Asad, these same ROWPU employees were similarly tasked by the Defendants to labor duties that did not involve water purification or testing. Further, upon information and belief, such diversion of ROWPU labor to tasks that did not support Defendant ROWPU contracting duties continued during LogCAP performance after Mr. Carter left Al Asad.

PHANTOM ROWPU LABOR AT OTHER SITES IN IRAQ

132. As noted, the Defendants were required by the Government to supply ROWPU services under LOGCAP III at dozens of sites in addition to Ar Ramadi and Al Asad.

133. Byway of example, one other such site was the campsite in Ar Ramadi adjacent to the Camp Junction camp, known as Blue Diamond.

134. Atone point, Mr. Carter asked of Meyers that he be permitted to travel to the Blue Diamond campsite to observe Defendants' ROWPU operations at that site.

135. Meyers denied Mr. Carter the permission to make this visit. Meyers' permission was required in order for Mr. Carter to travel to Blue Diamond, since Mr. Carter would have needed to receive a military pass to make the trip (pursuant to U.S. travel strictures in place in Iraq), even though a short one.

136. The Defendants were obligated under LOGCAP III to supply water purification and testing services for the military at sites throughout Iraq other than Ar Ramadi/Camp Junction and Al Asad.

137. As noted, Defendants' Theater Water Quality Manager for Iraq and Kuwait stated to Carter in July 2005 that he (Granger) had yet to find a Defendant-operated installation in Iraq where documentation existed to support the conclusion that the Defendants had performed any of the non-potable shower water testing required under LOGCAP III.

138. Upon information and belief, the Defendants billed the Government for the labor costs of ROWPU employees staffed at such other sites, notwithstanding that Defendants were aware at the time that they billed the Government for such labor costs that the ROWPU laborers in question had not performed any of the non-potable water testing duties mandated under LOGCAP and described in this Complaint.

THE LOGCAP CONTRACT: ADDITIONAL BILLING FACTS

139. KBRSI submitted LOGCAP bills, including those at issue in this Second Amended Complaint, to officers and employees of the United States Government for payment or approval. KBRSI received payments from the Government for these bills.

140. LogCAP is a cost-reimbursable (specifically, CPAF) contract. LOGCAP contains both a 1% base fee provision, set forth at Section H36 of the contract (a fixed profit percentage applied to actual costs to complete the work), and an award fee provision(a variable profit percentage applied to "definitized" costs, which is subject to the U.S. Government's discretion and tied to the specific performance measures defined in the contract), also set forth at Section H36 of the contract. Base fee revenue is recorded at the time services are performed, based upon actual project costs incurred (including labor), and includes reimbursement for general, administrative, and overhead costs. Per Section H36 of the LOGCAP contract, an award fee is granted periodically by the U.S. Government based on an evaluation of Defendants' performance under the LOGCAP contract as evaluated by a LOGCAP Award Fee Evaluation Board (AFEB).

141. More specifically, the Federal Acquisition Regulation ("FAR"), Title 48 of the Code of Federal Regulations, identifies a cost reimbursement contract as one providing "for payment of allowable incurred costs, to the extent prescribed in the contract." FAR 16.301-1.

142. A CPAF contract pays the contractor not only allowable incurred costs permitted by the contract (as any cost reimbursement contract does), but also "a fee consisting of (a) a base amount . . . , and (b) an award amount, based on a judgmental evaluation by the Government." FAR 16.305; see also FAR 16.405-2.

143. A CPAF contract, unlike a cost-plus-incentive-fee ("CPIF") contract, generally calculates the fee in relation to total allowable costs actually incurred under the contract, not target costs. Thus in a CPAF contract like LogCAP, there is no direct penalty for cost overruns

(although the Government may consider cost-effectiveness when determining the award amount).

144. The payment of an award fee, consisting of a base amount plus an award amount, is reflected in the LogCAP Contract, for instance at Contract Line Item Number ("CLIN") 0009, on Page 7 of the LogCAP Contract.

145. Pursuant to LOGCAP contract clause FAR 52.216-7, incorporated into the contract at page 36, KBRSI submits LOGCAP claims for payment "as work progresses." Also per FAR 52.216-7, KBRSI's payment claims include claims for its incurred labor costs, such as the cost of the labor of employees tasked to work on water purification.

146. Section H.36 of the LogCAP Contract provides for a maximum award fee of 3%. The LogCAP base fee is 1% of allowable cost. The "earned" award fee is up to 2%of cost, based on KBR's award fee score, as determined by AFEB. The AFEB evaluates Defendants' performance under LOGCAP as "Excellent," "Very Good," "Good," or "Average," in deciding on an award fee to be tendered to Defendants, pursuant to procedures set forth at Pages 11-17 of Attachment 002 of the contract. As set forth at pages 11 and 12, under LOGCAP, the contractor's receipt of an award fee is contingent on the contractor's receipt of a performance rating of "Good," "Very Good," or "Excellent."

147. As described at page 11 of attachment 2 to the contract, in order to receive its award fee, the LOGCAP contractor must submit to the Government a "written assessment describing its performance" under the contract.

148. In 2006 alone, the Defendants received $120 million in LogCAP award fees.

149. The U.S. Army has awarded the Defendants most, although not all, of LogCAP's 2% "earned" award fee. Both the base fee and the "earned" award fee are calculated on the basis of Defendants' incurred costs.

150. The only constraint on this phenomenon - that Defendants profit from LogCAP waste, fraud and abuse - is when the Defendants gets caught. Getting caught can lead to: the disallowance of costs submitted as allowable costs in LogCAP claims; a reduction in the percentage of the "earned" award fee; a reduction in the fixed base fee; a reduction in the costs found to be allowable under the contract; and the treble damages and penalties recoverable in this action, *inter alia*. These remedial actions can occur, however, only when the Defendants get caught.

151. Since DoD pays Defendants for its LOGCAP work for all costs that the Defendants claim as allowable under the terms of the LOGCAP contract, Defendants have no incentive to minimize its costs of performing its LOGCAP contracting duties.

152. Since the task orders are awarded without competition, the normal constraint that competition imposes on waste, fraud and abuse has been eliminated.

153. The Defendants submit "cost or pricing data" with its task order proposals, to help DoD judge cost realism and reasonableness in the pricing of these task orders.

154. As a result, the Defendants do not even try to economize on LogCAP expenditures. Onthe contrary, as outlined above, the Defendants consciously endeavor to waste money because higher costs result directly in higher base and award fees.

155. Page 36 of the LogCAP Contract incorporates by reference Federal Acquisition Regulation ("FAR") 52.216-7 ("Allowable Cost and Payment"). Paragraph (a)(1) of FAR 52.216-7 mandates that the contractor

"submit to an authorized representative of the Contracting Officer... an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract."

FAR52.216-7(a)(l).

156. "Allowable costs" are defined under FAR 52.216-7 as follows:

For the purpose of reimbursing allowable costs (except as provided in paragraph (b)(2) of this clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only—

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made—

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

(B) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;
(C) Direct labor;
(D) Direct travel;
(E) Other direct in-house costs; and
(F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(iii) The amount of financing payments that have been paid by cash, check, or other forms of payment to subcontractors.

FAR 52.216-7(b).

157. KBRSI was required under LOGCAP, at page 32, to submit an invoice form known as "DD Form 250," or its electronic equivalent, to obtain payments from the government.

158. The Government, pursuant to published guidance issued by the Defense Contract Management Agency, requires that contractors report "known deficiencies," including any "unperformed tests" on the Form250 in order to obtain LOGCAP payments from the Government.

159. As enumerated above at, without limitation, paragraphs, 5, 6, and 8, SEII, Halliburton, and KBR, Inc. caused KBRSI to submit payment claims to the Government for the labor of ROWPU employees.

160. Page 1 of the LOGCAP contract provides that payments under the contract will be made by the Defense Finance& Accounting Service ("DFAS"), Rock Island Operating Location, Building 68, Rock Island, Illinois 61299. KBRSI —and any other Defendant with knowledge of this information, are thereby aware that KBRSI's LogCAP claims will be presented to DFAS — at that location. On information and belief, Halliburton, SEII, and KBR, Inc. were aware of this information. Upon information and belief, during the pertinent time period, DFAS further processed KBRSI's LogCAP claims in: Indianapolis, Indiana; Kansas City, Missouri; Cleveland or Columbus, Ohio; and/or Denver, Colorado, *inter alia*.

First Claim - SCHEME TO SUBMIT FRAUDULENT CLAIMS (FCA § 3729(a)(1))

155. All of the preceding allegations are incorporated herein.

156. KBRSI has submitted LogCAP claims for payment to a variety of U.S. Government offices, as alleged in detail above. Each of these offices is staffed by officers or employees of the United States Government or members of the Armed Forces of the United States. Such KBRSI LogCAP claims have been received by such officers, employees and members.

157. KBSRSI knowingly presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

158. Halliburton, KBR, Inc., and SEII knowingly caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

159. As alleged above, during the period between the beginning of the applicable limitations period and the time that this lawsuit is resolved, the Defendants have performed under LogCAP.

160. The Defendants engaged in a scheme to defraud the United States Government into approving or paying false LOGCAP claims.

161. Beginning in or around September 1, 2004, and continuing through April 2005, Defendants knowingly and intentionally presented claims for payment to the United States for the salaries of employees staffed as Ar Ramadi ROWPU personnel, with knowledge that:

a) Employee Walter Meyers was not engaged in any water testing or purification duties in support of the LOGCAP Contract; and, further, that

b) Employee Benjamin Carter was prevented from engaging in meaningful water testing or purification duties in support of the LOGCAP Contract; and, further, that

c) Employee Dale Lehew was not engaged in any water testing or purification duties in support of the LOGCAP Contract;

d) That Defendants were billing the Government for work that was not actually performed;

e) The Defendants thus tried to get paid for work that they had not actually done.

162. Upon information and belief, these fraudulent submissions continued during LogCAP performance after Mr. Carter left Iraq; and, absent action by the Court, will continue during the pendency of this action.

163. Defendants knowingly and intentionally presented claims for payment to the United States for the salaries of employees staffed as Al Asad ROWPU personnel, for the period of service of such personnel during January 2005, with knowledge that:

a) Employee Dale Lehew was not engaged in any water purification duties in support of the LOGCAP Contract;

b) That all other 9+ Defendant ROWPU employees were not engaged in any water purification duties in support of the LOGCAP Contract; and

c) That Defendants were billing the Government for work that was not actually performed;

The Defendants thus endeavored to get paid by the Government for work that they had not actually done.

164. On information and belief, such false and fraudulent conduct preceded the period of Mr. Carter's observations of Defendants' Al Asad ROWPU activities; it has continued during LogCAP performance after Mr. Carter left Al Asad; and, absent action by the Court, it will continue during the pendency of this action.

165. Upon information and belief, Defendants were also aware that the aforementioned Al Asad ROWPU employees were not engaging in any water testing duties in support of the LOGCAP Contract, yet knowingly and intentionally presented claims for payment to the United States for the salaries of such employees.

166. Commencing after April 1, 2003, and continuing during LogCAP performance after Mr. Carter left Iraq, Defendants knowingly and intentionally presented claims for payment to the

United States for the salaries of employees staffed as ROWPU personnel at sites other than the Camp Junction Ar Ramadi site and the Al Asad site in Iraq, with knowledge that:

a) Such personnel were not engaged in any water testing or purification duties in support of the LOGCAP Contract; and

b) That Defendants were billing the Government for work that was not actually performed;

The Defendants thus endeavored to get paid by the Government for work that they had not actually done.

167. All such fraudulent claims resulted in:

a) excessive direct costs (excessive direct labor);

b) resultant excessive indirect cost charges (applied to the excessive or inflated direct costs);

c) resultant inflated indirect cost rates; and

d) enhanced "base fee" payments premised upon the unnecessary labor components;

e) an enhanced award fee under the contract; and

f) a purposeful avoidance of the LOGCAP Contract penalty provisions, including contract termination, as set forth at FAR 52.246-5(e)(2).

167. On information and belief, KBRSI billed the Government under LogCAP for reimbursement of the labor costs of ROWPU employees during the subject time period at least once each month, and as often as every two weeks. Each LogCAP invoice submitted from the beginning of the applicable limitations period in support of this fraudulent scheme and continuing through the resolution of this lawsuit, was, is and will be a false or fraudulent claim, for all the reasons alleged above.

Second Claim - FALSE CLAIMS, OMISSION OF REQUIRED INFORMATION (FCA § 3729(a)(1))

168. All of the preceding allegations are incorporated herein.

169. The Government requires that contractors such as Defendants to report "known deficiencies," including any "unperformed tests" on Form 250s or their equivalent in order to obtain LOGCAP payments from the Government.

170. Pursuant to Defense Contract Management Agency guidance, KBRSI was under an obligation to disclose to the Government that it had not performed required non-potable water purification tests at Ar Ramadi, Al Asad, and other sites throughout Iraq, in its DD250 or form equivalent claim submissions to the Government.

171. KBRSI intentionally and willfully omitted this required information in its DD 250 or equivalent form claim submissions to the Government requesting payments from the Government for the salaries of the employees noted in this Complaint, during the time periods noted in this Complaint.

172. Upon information and belief, Halliburton, KBR, Inc., and SEII took affirmative steps to prevent KBRSI from disclosing the required information to the Government in the DD250 or equivalent form claim submissions cited above.

173. In the alternative, Halliburton, KBR, Inc., and SEII willfully and knowingly withheld the required information from KBRSI.

174. The omissions thereby allowed the Defendants to fraudulently collect payments for the ROWPU labor services noted above in this Amended Complaint.

175. The omissions further allowed the Defendants to purposely avoid the LOGCAP contract penalty provisions, including contract termination, specified at FAR52.246-5(e)(2).

176. The omissions thus allowed Defendants to fraudulently collect payments for all other services rendered under LOGCAP separate and apart from ROWPU labor service payments.

177. The omissions further allowed the Defendants to collect a contract award fee larger than that to which they were contractually entitled.

Third Claim - SUBMISSION OF CLAIMS CONTAINING FALSE EXPRESS OR IMPLIED CERTIFICATIONS (FCA § 3729(a)(1))

178. All of the preceding allegations are incorporated herein.

179. The DD Form 250 contains an express certification that the contractor's performance conforms to the contract.

180. In many cases, especially in recent years, the submission of DD Form 250s has been superseded by the electronic submission of equivalent claims for payment.

181. On information and belief, such electronic substitutes also expressly certify that the contractor's performance conforms to the contract.

182. On information and belief, KBRSI's LogCAP claims for payment contain such certifications.

183. KBRSI billed the Government under LogCAP for reimbursement of the labor costs of ROWPU employees during the subject time period. On information and belief, KBRSI submitted these bills at least once each month, and as often as every two weeks.

184. Each invoice submitted by KBRSI for payment of salary costs of ROWPU employees stationed at Ar Ramadi for periods of labor including, but not limited to, August 2004-April 2005, were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP and were, and are and will be, false or fraudulent claims for their false express certification of compliance with the LOGCAP contract.

KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

185. Each invoice submitted by KBRSI for payment of salary costs of ROWPU employees stationed at Al Asad for the periods of labor encompassed by Defendants' fraud, were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP and were, and are and will be, false or fraudulent claims for their false express certification of compliance with the LOGCAP contract. KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

186. Each invoice submitted by KBRSI for payment of salary costs of ROWPU employees stationed at camps other than the Ar Ramadi Cam Junction camp and the Al Asad camp for the periods of labor encompassed by Defendants' fraud, were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP. These invoices were, and are and will be, false or fraudulent claims for their false express certification of compliance with the LOGCAP contract. KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

187. Regardless of whether the contractor's claim expressly certifies that the contractor's performance conforms to the contract, the submission of the claim constitutes an implied certification that the contractor's performance conforms to the contract.

188. When the contractor's performance does not conform to the contract, this certification is false or fraudulent.

189. Each invoice submitted by KBRSI for payment of salary costs of employees described supra at paragraphs 184 through 186 were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP. These invoices were, and are and will be, false or fraudulent claims for their false implied certification of compliance with the LOGCAP contract. KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

Fourth Claim - FALSE STATEMENTS (FCA § 3729(a)(2))

190. All of the preceding allegations are incorporated herein.

191. Every timesheet submitted by Defendants to the Government in support of the purported cost of labor of ROWPU employees stationed at Ar Ramadi, Iraq for anyone-week time period from September 1, 2004-April 2005 comprised false records or statements and false statements of costs claimed to be allowable under FAR 52.216-7. All such false records or statements were made to the Government to get false or fraudulent claims paid or approved by the Government.

192. Defendants knowingly presented false statements and records to the Government in an effort to get false or fraudulent claims paid or approved by the Government, including, *inter alia*:

a) Each statement submitted in support of claims for payment of salary costs of ROWPU Foreman Meyers for the period of labor spanning September 1, 2004 through September 5, 2004;

b) Each statement submitted in support of claims for payment of salary costs of ROWPU Foreman Meyers for the period of labor spanning September 6, 2004 through September 12, 2004;

c) Each statement submitted in support of claims for payment of salary costs of ROWPU Foreman Meyers for each weekly period of labor dating from September 13, 2004, through May 27, 2005, inclusive;

d) Each statement submitted in support of claims for payment of salary costs of Relator for the period of labor spanning January 19, 2005 through January 23, 2005;

e) Each statement submitted in support of claims for payment of salary costs of Relator for the period of labor spanning January 24, 2005 through January 30, 2005;

f) Each statement submitted in support of claims for payment of salary costs of Relator for each weekly period of labor dating from January 31, 2005, through April 17, 2005, inclusive;

g) Each statement submitted in support of claims for payment of salary costs of ROWPU Operator Lehew for the period of labor spanning February 14, 2005 through February 20, 2005;

h) Each statement submitted in support of claims for payment of salary costs of ROWPU Operator Lehew for the period of labor spanning February 21, 2005 through February 27, 2005;

i) Each statement submitted in support of claims for payment of salary costs of ROWPU Operator Lehew for each weekly period of labor dating from February 28, 2005, through May 27, 2005, inclusive;

j) Each statement submitted in support of claims for payment of salary costs of every Defendant ROWPU Operator, ROWPU Foreman, and other ROWPU personnel in Iraq other than those employees enumerated at sub-paragraphs a) through i) above, whom Defendants knew were factually precluded from performing required LOGCAP testing duties during the period between the beginning of the applicable limitations period and the time that this lawsuit is resolved, for reasons including, but not limited to, Defendants' failure to procure and make available to such personnel water testing equipment necessary for Defendant KBRSI's fulfillment of its duties under the LOGCAP Contract.

193. The Defendants thus knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the Government.

PRAYER FOR RELIEF

WHEREFORE, for each of these claims, the Qui Tam Plaintiff requests the following relief from each of the Defendants, jointly and severally:

A. Three times the amount of damages that the Government sustains because of the acts of the Defendant;

B. A civil penalty of $11,000 for each violation;

C. An award to the Qui Tam Plaintiff for collecting the civil penalties and damages;

D. Award of an amount for reasonable expenses necessarily incurred;

E. Award of the Qui Tam Plaintiffs reasonable attorneys' fees and costs;

F. Interest; and

G. Such further relief as the Court deems just.

JURY DEMAND

Relator hereby demands trial by jury.

Respectfully submitted,

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Dated: June 2, 2011

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

Alexandria Division

REDACTED

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	UNDER SEAL
v.	)	1:11cv602 (JCC/JFA)
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

M E M O R A N D U M O P I N I O N

This matter is before the Court on Defendants Halliburton Company, KBR, Inc. ("KBR"), Kellogg Brown & Root Services, Inc. ("KBRSI"), and Service Employees International, Inc.'s ("SEII") (collectively, "Defendants"), Motion to Dismiss [Dkt. 11] and Relator Benjamin Carter's ("Relator" or "Carter") Motion for Leave to File a Sur-reply [Dkt. 29]. For the following reasons, the Court will grant Defendants' Motion to Dismiss and deny Relator's Motion for Leave to File a Sur-reply.

I. Background

A. Carter Action

The subject matter underlying this case is before the court for a third time and involves the Defendants' alleged fraudulent billing of the United States. As set forth below, this case is identical to two earlier cases dismissed by this

Court and related to an earlier case filed in district court in California.

1. Carter's Allegations

In his Complaint, Carter brings a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 through 3733 (the "FCA"), alleging that Defendants falsely billed the Government for services provided to United States military forces serving in Iraq.

Specifically, Carter alleges that Defendants "knowingly presented [or caused to be presented] to an officer or employee of the United States Government . . . false or fraudulent claims for payment or approval" in violation of 31 U.S.C. § 3729(a)(1). (Complaint [Dkt. 1] ("Compl.") ¶¶ 157-58.) Carter also alleges that "Defendants knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the Government" in violation of 31 U.S.C. § 3729(a)(2).[1] (Compl. ¶¶ 192-93.)

These allegations stem from Carter's work as a Reverse Osmosis Water Purification Unit ("ROWPU") Operator in Iraq from mid-January 2005 until April 2005. (Compl. ¶¶ 3, 41, 69.) During that period, Carter worked at two camps, Al Asad and Ar Ramadi. (Compl. ¶¶ 41-42.)

[1] Section 3729(a)(1) has been re-codified at 31 U.S.C. § 3729(a)(1)(A) and section 3729(a)(2) has been re-codified at 31 U.S.C. § 3729(a)(1)(B).

Carter alleges that "the Al Asad Defendant ROWPU employees were not engaged in any actual water purification duties on discrete dates in January 2005," but nevertheless, the "Al Asad ROWPU employees' time [was] billed under LOGCAP[2] III" as if they had been purifying water. (Compl. ¶¶ 130-31.) Similarly, while working at Ar Ramadi, Carter was allegedly "required to fill in timecards stating that he worked 12 hour[s] a day, each day, with uniformity, on ROWPU functions," though during this time Carter "actually worked 0 hours per day on ROWPU functions." (Compl. ¶¶ 54-55.) Carter also alleges that all "trade employees" such as he were required to submit time cards totaling "exactly 12 hours per day and 84 hours per week" and that it was their "routine practice" to do so. (Compl. ¶¶ 60-61, 65, 67-68.)

In essence, Carter contends that Defendants had knowledge that at the Ar Ramadi and Al Asad camps in Iraq, ROWPU "personnel were not engaged in any water testing or purification duties in support of the LOGCAP Contract," and "Defendants were billing the Government for work that was not actually performed." (Compl. ¶¶ 163, 166.)

[2] As noted in this Court's May 10, 2010 Memorandum Opinion in 1:08cv1162, LOGCAP III was the Logistics Civil Augmentation Program ("LOGCAP") contract put out by the Department of Defense for civil logistical support for military operations in Iraq, Afghanistan, and other countries.

2. Procedural History

a. 2008 Carter

Carter filed an earlier case in this Court against Defendants, Civil Action No. 08cv1162 (JCC/JFA) ("2008 Carter"). In May 2010, this Court dismissed 2008 Carter without prejudice for lack of jurisdiction. (1:08cv1162 [Dkt. 307].) The Court held that 2008 Carter was barred by § 3730(b)(5) of the FCA, which bars a relator from "bring[ing] a related action based on the facts underlying [a] pending action," known colloquially as the FCA's "first-to-file bar." 31 U.S.C. § 3730(b)(5).

Relator filed 2008 Carter on February 1, 2006, in the United States District Court for the Central District of California, with a first amended complaint filed on February 10, 2006. (1:08cv1162 [Dkt. 5].) Carter 2008 was transferred to this Court on November 3, 2008. (1:08cv1162 [Dkt. 73].) This Court dismissed Carter's first amended complaint in Carter 2008 on January 13, 2009, granting leave to amend. (1:08cv1162 [Dkt. 90].) Carter filed a second amended complaint in Carter 2008 on January 28, 2009. (1:08cv1162 [Dkt. 92].)

Also of significance here is this Court's July 23, 2009 Order in Carter 2008 dismissing Counts 2 and 3 of Relator's second amended complaint in their entirety, dismissing Count 1, alleging that Defendants knowingly submitted false claims to the United States, except as it related to September 1, 2004 through

April 2005 for Ar Ramadi, and during January 2005 for Al Asad, (*See* Memorandum Opinion ("Mem. Op.") at 19, 22, 1:08cv1162 [Dkt. 121] (July 23, 2009)), and dismissing Count 4, alleging that Defendants knowingly made or used false records or statements material to a false claim, except as it related to the time cards of the Ar Ramadi ROWPU employees from September 1, 2004 to April 2005, (*id.* at 34).

b. California Action

The first-filed "pending action" barring Carter 2008 was *United States ex rel. Thorpe v. Halliburton Co.*, No. 05cv08924 (C.D. Cal.), filed on December 23, 2005 (the "California Action"). (Mem. Op. at 2, 15-19, 1:08cv1162 [Dkt. 306] (May 10, 2010).)

On March 23, 2010, in the week before Carter 2008 was set for trial, the Department of Justice ("DOJ") disclosed to the parties the existence of the California Action. Defendants moved to dismiss Carter 2008 under § 3730(b)(5)'s first-to-file bar, and this Court dismissed Carter 2008 without prejudice on May 10, 2010. (1:08cv1162 [Dkt. 307].)

After this Court dismissed Carter 2008, the California Action was dismissed on July 30, 2010. (Memorandum in Support [Dkt. 16] ("Mem.") at 4)

c. 2008 Carter Appeal

Relator filed a notice of appeal to the Fourth Circuit on July 13, 2010. (1:08cv1162 [Dkt. 325].) Carter moved to dismiss the appeal on December 14, 2010. (Mem. at 4.) The Fourth Circuit dismissed the Carter 2008 appeal on February 14, 2011. (1:08cv1162 [Dkt. 331, 332].)

d. 2010 Carter

Carter filed a second case in this Court on August 4, 2010, Civil Action No. 10cv864 (JCC/TCB) ("2010 Carter"). The Court dismissed 2010 Carter in May 2011, again holding that the case was barred by the FCA's first-to-file bar. (Mem. Op. at 10-11, 1:10cv864 [Dkt. 46] (May 24, 2011).) Specifically, the Court noted that 2010 Carter was filed while the appeal in Carter 2008 -- and, thus, Carter 2008 itself -- was still pending. (*Id.* at 10.) Because the two cases were indisputably related, the Court dismissed 2010 Carter without prejudice. (*Id.* at 10-11, 13.)

e. The Instant Action

Carter filed this case on June 2, 2011. [Dkt. 1.] The United States declined to intervene on August 23, 2011. [Dkt. 3.] This Court unsealed the Complaint on August 24, 2011. [Dkt. 4.] Carter's complaint in this case is identical to the complaint filed in 2010 Carter and the second amended complaint

filed in 2008 Carter, except for its title, case number, and signature block.

On October 21, 2011, Defendants filed a Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [Dkt. 11.] In their Motion, Defendants argue, among other things, that this case not only remains barred by the California Action, but is also barred by [redacted] *United States ex rel. Duprey v. Halliburton, Inc., et al.*, No. 8:07cv1487 (D. Md.) (the "Maryland Action"). [redacted] Carter filed an opposition to the Motion to Dismiss on November 3, 2011. [Dkt. 21.] Defendants filed their reply in support on November 8, 2011. [Dkt. 25.] Carter filed a Motion for Leave to File a Sur-reply [Dkt. 29] on November 11, 2011, which Defendants opposed [Dkt. 35] on November 16, 2011. Carter filed a reply in support of his Motion for Leave to File a Sur-reply on November 18, 2011. [Dkt. 38.] Defendants' Motion to Dismiss and Carter's Motion for Leave to File a Sur-reply are before the Court.

B. Maryland Action

The Maryland Action alleges that Defendants "knowingly presented, or caused to be presented, to an officer or employee of the United States government, false or fraudulent claims for payment or approval, in violation of 31 U.S.C. § 3729(a)(1)." (Maryland Compl. (Mem. Ex. 4) ¶ 168.) The Maryland Relators further allege that Defendants "knowingly made, used, or caused to be made or used, a false record or statement to get false or fraudulent claims paid by the Government in violation of 31 U.S.C. § 3729(a)(2)." (Maryland Compl. ¶ 171.)

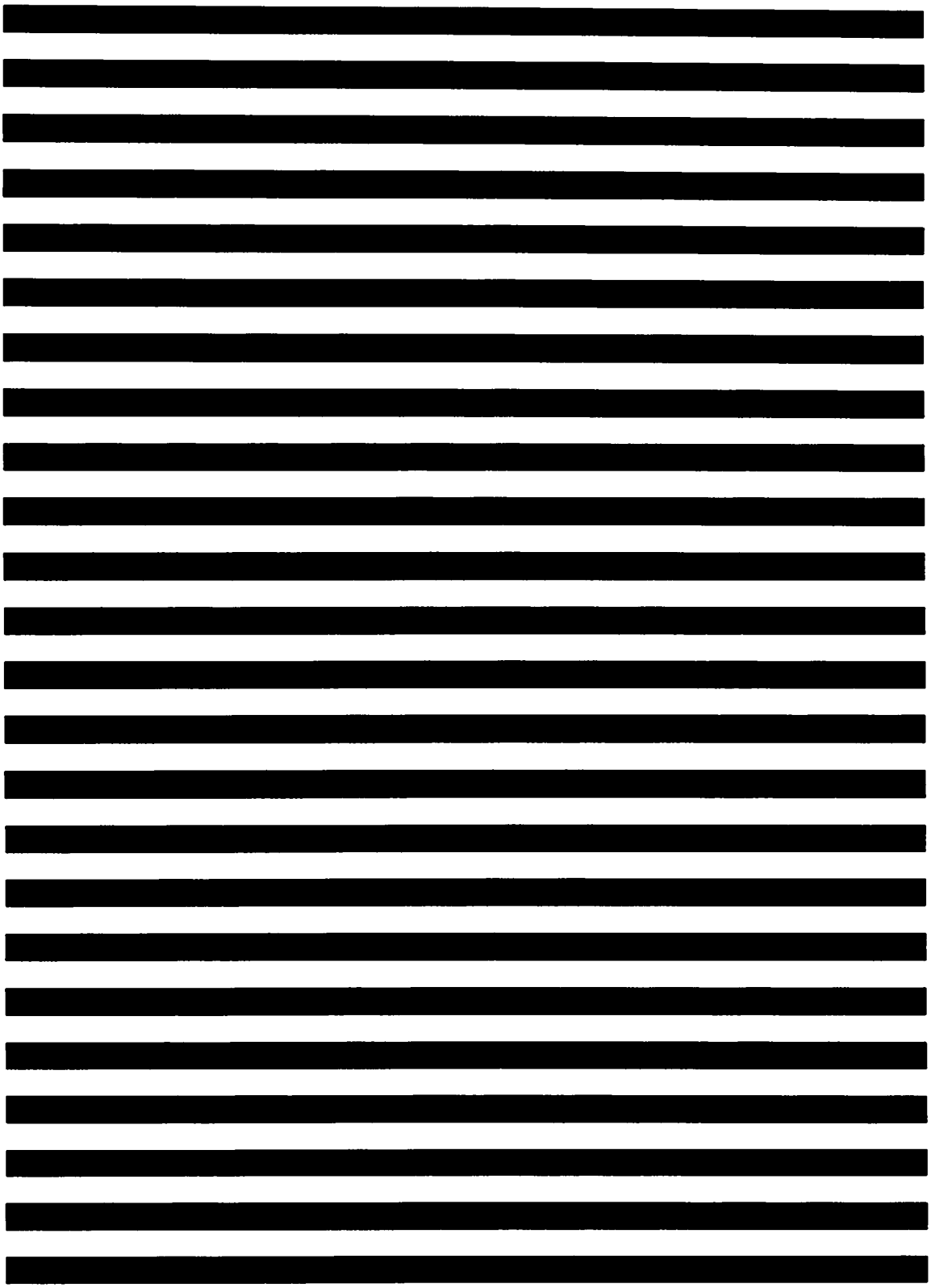
Since at least March 2003, Defendant KBR provided shipping and transportation support for the United States military in Iraq by operating a division known as the Theater Transportation Mission ("TTM") pursuant to LOGCAP III. (Maryland Compl. ¶¶ 6-7, 19-20.) The Maryland Relator was employed by Defendant KBR as a truck driver in the TTM division and worked in Iraq from March 27, 2005 to January 15, 2006. (Maryland Compl. ¶¶ 1, 22.) The Maryland Relator alleges that his section, as well as other sections in the TTM division, inflated the hours on their time cards pursuant to an "unwritten corporate policy" requiring all TTM drivers to enter "no fewer than twelve hours of work per shift" and "to bill a minimum of eighty-four (84) hours per week, notwithstanding the number of hours actually worked." (Maryland Compl. ¶¶ 23-26.)

In support of these allegations, the Maryland Relator specifically claims that, while "[d]ayshift missions typically ended at 1700 hours, rather than the scheduled 1930 hours. . . . it was the regular practice of drivers, convoy commanders, and foremen to include the un-worked balance of the full shift time, up to 1930 hours, on their timesheets, even when completing the shift early." (Maryland Compl. ¶ 44.) Moreover, "most dayshifts included a two (2) hour lunch break which was not deducted from the time sheet," and "drivers would frequently take a two (2) hour breakfast upon arrival at the duty location while 'on-the-clock.'" (Maryland Compl. ¶ 46.) Convoy commanders also allegedly "add[ed] unnecessary hours to the time their crew beg[an] preparations for the mission." (Maryland Compl. ¶ 48.) Similar time card fraud allegedly occurred during night shifts. (Maryland Compl. ¶¶ 71–83). The complaint cites specific examples of truck drivers inflating the hours reported on their time sheets and describes the methods they used to do so. (Maryland Compl. ¶¶ 84-94, 96-101, 102-04, 110, 118-19, 121-30.)

The Maryland Relator alleges "systematic timesheet fraud . . . occurring on a daily basis" throughout the duration of his time in Iraq. (Maryland Compl. ¶ 52.) The Maryland Relator also alleges, based upon information and belief, that "fraudulent timekeeping and billing practices continue to occur

to this day." (Maryland Compl. ¶ 60.) Moreover, "because it is KBR's practice to occasionally transfer truck driving staff between Iraq, Kuwait, and Afghanistan, it is the good faith belief of [the Maryland Relator] that these particular fraudulent timekeeping and billing practices are commonplace throughout KBR's operations in Iraq, Kuwait, and Afghanistan." (Maryland Compl. ¶ 61.)

[redacted]



II. Standard of Review

A. Subject Matter Jurisdiction

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Defendants may attack subject matter jurisdiction in one of two ways. First, defendants may contend that the complaint fails to allege facts upon which subject matter jurisdiction may be based. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *King v. Riverside Reg'l Med. Ctr.*, 211 F. Supp. 2d 779, 780 (E.D. Va. 2002). In such instances, all facts alleged in the complaint are presumed to be true. *Adams*, 697 F.2d at 1219; *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995).

Alternatively, defendants may argue that the jurisdictional facts alleged in the complaint are untrue. *Adams*, 697 F.2d at 1219; *King*, 211 F. Supp. 2d at 780. In that situation, "the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Virginia v. United States*, 926 F. Supp. at 540 (quoting *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993)); *see also Velasco v. Gov't of Indonesia*, 370 F.3d 393, 398 (4th Cir. 2004) (holding that "the district court may regard the pleadings as mere evidence on the issue and

may consider evidence outside the pleadings without converting the proceeding to one for summary judgment") (citations omitted).

In either circumstance, the burden of proving subject matter jurisdiction falls on the plaintiff. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams*, 697 F.2d at 1219; *Johnson v. Portfolio Recovery Assocs.*, 682 F. Supp. 2d 560, 566 (E.D. Va. 2009) (holding that "having filed this suit and thereby seeking to invoke the jurisdiction of the Court, Plaintiff bears the burden of proving that this Court has subject matter jurisdiction").

B. Failure to State a Claim

Rule 12(b)(6) allows a court to dismiss those allegations which fail "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A court may dismiss claims based upon dispositive issues of law. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The alleged facts are presumed true, and the complaint should be dismissed only when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.*

In deciding a 12(b)(6) motion, a court must first be mindful of the liberal pleading standards under Rule 8, which require only "a short and plain statement of the claim showing

that the pleader is entitled to relief." Fed. R. Civ. P. 8. While Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions" because "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (citation omitted).

To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to meet this standard, *id.*, and a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555. Moreover, a court "is not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 129 S.Ct. at 1949-50.

III. Analysis

Defendants argue that this Court should dismiss Carter's Complaint because the Court lacks jurisdiction under

two provisions of the FCA: the FCA's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), (Mem. at 5-13), and the FCA's public disclosure bar,[3] 31 U.S.C. § 3730(e)(4)(A), (Mem. at 16-22). Second, Defendants argue that even if neither jurisdictional bar applies, virtually the entire case must be dismissed due to the FCA's six-year statute of limitations. (Mem. at 13-16.)

A. The First-to-File Bar

Defendants first argue that this case remains barred by the California Action, even though the California Action was dismissed prior to the filing of the instant complaint.[4] Next, Defendants argue that aside from the California Action, this case is barred under the first-to-file rule [redacted] filed in Maryland [redacted]

Section 3730(b)(5) of the FCA is "known colloquially as the Act's first-to-file bar." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004); *Erickson ex rel. United States v. Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 918 (E.D. Va. 1989) (explaining that "this provision establishes a first in time rule"). The text of the first-to-file bar provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending

[3] The Court does not address Defendants' public disclosure bar argument because the Court need not reach that issue to dispose of Defendants' Motion to Dismiss.

[4] The Court need not resolve this issue, as it concludes that Carter's action is barred by the Maryland Action discussed herein.

action." 31 U.S.C. § 3730(b)(5). Section 3730(b)(5) is jurisdictional in nature, and if an action based on the facts underlying a pending case comes before the court, a court must dismiss the later-filed case for lack of jurisdiction. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186-87 (9th Cir. 2001).

1. Related Action

The Court is mindful that "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Ramey v. Dir., Office of Workers' Comp. Program*, 326 F.3d 474, 476 (4th Cir. 2003) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others," and must presume that when Congress writes a statute, it "says . . . what it means and means . . . what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive Relators from bringing related actions based on the same underlying facts. *See Lujan*, 243 F.3d at 1187. Importantly, Congress

drafted the statute to bar all "related actions" not all "identical actions," and thus a subsequent action may differ from a first-to-file action, yet nevertheless be jurisdictionally barred so long as it is considered a "related" action. *See Grynberg*, 390 F.3d at 1279 (holding that "an identical facts test would be contrary to the plain meaning of the statute, which speaks of 'related' *qui tam* actions, not identical ones.") Some courts have held that "if the later-filed complaint alleges the same type of wrongdoing as the first, and the first adequately alleges a broad scheme encompassing the time and location of the later filed, the fact that the later complaint describes a different time period or geographic location . . . does not save it from the absolute first-to-file bar of § 3730(b)(5)." *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 13 (D.D.C. 2003).

In determining if the actions are "related," courts have adopted slight variations of a common approach: § 3730(b)(5) is an "exception-free" provision that bars subsequently filed actions alleging the "same material elements described in an earlier suit, regardless of whether the allegations incorporate somewhat different details."[5] *Lujan*, 243 F.3d at 1189.

[5] Some Courts have required the same "type of fraud," *see Grynberg*, 390 F.3d at 1280); the same "essential facts," *see United States ex rel. LaCorte v.*

In accordance with this Court's May 10, 2010 Memorandum Opinion in Carter 2008, the Court will apply the test developed in *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989). That is, the Court will find that Carter's suit is barred unless: (1) it is based on facts different from those alleged in the prior suit; and, (2) gives rise to separate and distinct recovery by the government. *See Erickson*, 716 F. Supp. at 918. In determining whether the first-to-file bar applies, the Court looks "at the facts as they existed at the time that action was brought." *Grynberg*, 390 F.3d at 1279.

The Court first examines whether the claims are "based on facts different from those alleged in the prior suit." *Erickson*, 716 F. Supp. at 908. [redacted] While the Maryland Action focuses on activities at Camp Anaconda (*see* Maryland Compl. ¶¶ 65-70), the Maryland Relator also alleges that fraudulent timekeeping and billing practices are commonplace throughout KBR's operations in Iraq (*see* Maryland Compl. ¶ 61), thus encompassing

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SmithKline Beecham Clinical Labs, 149 F.3d 227, 232-33 (3rd Cir. 1998)); or the same "material elements of fraud," *see Lujan*, 243 F.3d at 1189).

[6] Carter's complaint also names two other entities defendants -- KBRSI and SEII -- both of which are indirect subsidiaries of KBR. (Compl. ¶¶ 7-8.) Complaints that allege the same material elements of fraud may be deemed related even if they are asserted against different entities within the same corporate structure. *See Grynberg*, 390 F.3d at 1280 n.4; *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003).

Al Asad and Ar Ramadi. The Maryland Action also alleges that time sheet fraud was an "institutionalized" practice known throughout KBR's corporate structure in Iraq and other countries. (Maryland Compl. ¶¶ 163, 165.) [redacted]

Following this Court's July 23, 2009 Memorandum Opinion in 2008 Carter, the scope of Carter's claims has been narrowed to the submission of fraudulent time sheets between September 1, 2004 and April 2005 at Ar Ramadi and during January 2005 at Al Asad. (Mem. Op. at 19, 22, 34, 1:08cv1162 [Dkt. 121] (July 23, 2009).) The Maryland Relator worked for KBR in Iraq from March 27, 2005 to January 15, 2006 (Maryland Compl. ¶ 1) [redacted] While most of the Maryland Relator's employment in Iraq was after the relevant time period in Carter's case, the Maryland Action also states that KBR provided support to the United States military in Iraq since at least March 2003. (*See* Maryland Compl. ¶ 19.) Additionally, the Maryland Action alleges that Defendants' time sheet fraud had been "institutionalized" and was rooted in an "unwritten

corporate policy." (*See* Maryland Compl. ¶¶ 24-26, 163, 165.) [redacted] *see United States ex rel. Chovanec*, 606 F.3d 361, 364-65 (7th Cir. 2010) (finding complaint alleging fraud in Illinois in 2002 related to complaints alleging fraud in California and Kansas in the 1990s). [redacted] "a relator cannot avoid § 3730(b)(5)'s first-to-file by simply adding factual details or geographic locations to the essential or material elements" of the first-filed claims. *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009). [redacted] These allegations certainly provide the Government with knowledge of "the essential facts of a fraudulent scheme" and

"enough information to discover related frauds." *See Branch*, 560 F.3d at 378 (quoting *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998)).

[redacted] This Court, however, previously rejected such a distinction, finding that 2008 Carter was related to the California Action, notwithstanding the fact that the California Relators were a carpenter and a plumber. (Mem. Op. at 4-5, 15-16, 1:08cv1162 [Dkt. 306] (May 10, 2010).)

[redacted] "This is the 'same type of wrongdoing,' as seen in Carter's case, albeit across a broader

[7] Indeed, as noted in the previous footnote, other courts have found complaints "related" even when they involve allegations against different affiliated *entities*. *See Grynberg*, 390 F.3d at 1280 n.4; *Hampton*, 318 F.3d at 218.

spectrum of LOGCAP III tasks." (*Id.* (quoting *Lujan*, 243 F.3d at 1188).)

Next the Court examines whether Carter's action "gives rise to separate and distinct recovery by the government." *Erickson*, 716 F. Supp. at 908. The Court notes that the first element of its inquiry, which has been answered affirmatively, is the crucial one. *See Ortega*, 240 F. Supp. 2d at 13. "[A]n examination of possible recovery merely aids in the determination of whether the later-filed complaint alleges a different type of wrongdoing on new and different material facts." *Id.* [redacted]

See United States v. Apollo Grp., Inc., No. 08 CV 1399, 2009 WL 3756623, at *3 (S.D. Cal. Nov. 6, 2009) (finding that the earlier-filed action and later-filed action were based on the same type of wrongdoing, and hence did not allege two different fraudulent schemes that would give rise to separate and distinct recovery).

[redacted] *See Ortega*, 240 F. Supp. 2d at 13 ("[T]he fact that the later complaint describes a

different time period or geographic location that could theoretically lead to a separate recovery does not save it from the absolute first-to-file bar of § 3730(b)(5).") "[S]uch duplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *Id.* (quoting *LaCorte*, 149 F.3d at 234). Both elements of the *Erickson* test are therefore satisfied. Accordingly, the Court deems Carter's action related to the Maryland [redacted] within the meaning of § 3730(b)(5).

2. Pending Action

Section 3730(b)(5)'s plain language establishes a first-to-file bar, preventing successive plaintiffs from bringing suit while a related action is "pending." The Maryland Action was filed on June 5, 2007 (Mem. at 11), almost four years before Carter filed the instant complaint on June 2, 2011. The Maryland Action was voluntarily dismissed without prejudice on October 31, 2011, after the Maryland Relator failed to serve his complaint on the defendants. (Opp. at 13 n.15; Reply at 8 n.8.) However, whether a *qui tam* action is barred by § 3730(b)(5) is determined by looking at the facts as they existed when the action was brought. *Grynberg*, 390 F.3d at 1279. It is undisputed that the Maryland Action was pending when Carter

filed the instant suit. Thus the Maryland Action is deemed pending for purposes of § 3730(b)(5), and Carter's action is barred.

[redacted] Having determined that Carter's suit is barred by the Maryland Action, the Court need not reach the issue.

B. Statute of Limitations

Defendants also argue that Carter's claims are barred by the statute of limitations.[8] (Mem. at 13.) Because Carter has elected to re-file new actions rather than amend his prior complaints, Defendants contend that his claims are not subject to tolling. (*Id.*) The FCA provides that a civil action under § 3730 may not be brought "more than 6 years after the date on which the violation of § 3729 is committed." 31 U.S.C. § 3731(b)(1).[9] Defendants argue that a violation is committed for

[8] The Court's conclusion that Carter's suit is precluded by the first-to-file bar is, of course, dispositive. The Court addresses Defendants' statute-of-limitations argument because, in addition to providing an independent basis for dismissal of Carter's claims, it bears on whether or not dismissal should be with prejudice.

[9] Section 3731(b)(2) provides for an alternative three-year limitations period "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." 31 U.S.C. §

purposes of § 3731 when the claim for payment is submitted to the Government.[10] (Mem. at 14.) Applying the six-year limitations period from the date the false claims were submitted, Defendants contend that Carter's claims are time-barred except as to $673.56 relevant to Count 4, which was included on a public voucher submitted to the Government on June 15, 2005. (Mem. at 15 & n.9.) Carter's sole argument[11] in response is that the statute of limitations on all of his claims is tolled by virtue of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287.[12] (Opp. at 19.)

3731(b)(2). The Fourth Circuit, however, has held that § 3731(b)(2) extends the statute of limitations beyond six years only in cases in which the United States is a party. *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). Since the United States has elected not to intervene in this case, Carter is bound by the six-year limitations period set forth in § 3731(b)(1).

[10] The Fourth Circuit has not clarified when a violation is deemed to have occurred under § 3731(b)(1). A majority of courts have concluded that the statute of limitations starts to run when a false claim is submitted to the Government. *See United States ex rel. Dugan v. ADT Sec. Servs., Inc.*, No. DKC 2003-3485, 2009 WL 3232080, at *4 n.2 (D. Md. Sept. 29, 2009) (citing cases). At least one district court in the Fourth Circuit has held that the statute of limitations is six years from the date of filing a false claim. *See United States v. Shelburne*, No. 09cv00072, 2010 WL 2542054, at *4 (W.D. Va. June 24, 2004).

[11] In a footnote of his proposed sur-reply, and at oral argument, Carter also argued that his claims should be equitably tolled. For the reasons in Section III.C, *infra*, Carter's Motion for Leave to File a Sur-reply is denied. In any event, the Court notes that equitable tolling is "reserved for those rare instances where -- due to circumstances external to the party's own conduct -- it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). Here, Carter timely filed an identical action -- Carter 2010 -- which was dismissed because he chose to proceed while Carter 2008 was still on appeal, thereby triggering the first-to-file bar. Thus, Carter cannot show that the instant suit is untimely due to circumstances external to his own conduct, and equitable tolling is inappropriate.

[12] WSLA was reenacted as the Wartime Enforcement of Fraud Act of 2008 ("WEFA"). *See* Wartime Enforcement of Fraud Act of 2008, S. Rep. No. 110-431 (2008). For ease of reference, the Court refers to the statute as the WSLA, as that is the name used in the parties' briefs and in the case law discussed herein.

1. Statutory Background

The WSLA was enacted in 1942, and extended the time prosecutors had to bring charges relating to criminal fraud offenses against the United States. Wartime Enforcement of Fraud Act of 2008, S. Rep. No. 110-431, at 2 (2008). Prior to October 14, 2008, the WSLA provided that:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

18 U.S.C. § 3287 (2008). On October 14, 2008, the Act was amended to expand its operation to times "[w]hen the United States is at war *or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b))*." 18 U.S.C. § 3287 (2011) (emphasis added). The amendment also extended the suspension period until "5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." *Id.*

Courts are in conflict as to whether the post-amendment WSLA should apply to offenses which occurred before

passage of the 2008 amendments.[13] Courts are also divided as to whether the pre-amendment WSLA requires a formal declaration of war or whether the authorized use of military force may also suffice.[14] Because the Court concludes that neither the pre-amendment nor the post-amendment version of the WSLA applies to Carter's action -- *i.e.*, a non-intervened civil FCA action -- the Court need not decide these issues.

2. Applicability of the WSLA to Non-Intervened Civil FCA Actions

The issue before the Court is a narrow one: whether the WSLA applies to civil FCA actions brought by a relator in which the Government has declined to intervene. Resolution of this issue requires the Court to interpret the WSLA -- specifically the meaning of the term "offense." In keeping with the principles of statutory construction discussed *supra*, the Court begins by looking at the plain language of the statute. At oral argument, Carter argued that the statutory language clearly applies to civil offenses against the United States,

[13] *Compare United States v. Anghaie*, No. 1:09-CR-37, 2011 WL 720044, at *2 (N.D. Fla. Feb. 21, 2011) (applying post-amendment WSLA to counts for which the limitations period would have expired after the amendment) *with United States v. W. Titanium, Inc.*, No. 08-CR-4229, 2010 WL 2650224, at *1, 3-4 (S.D. Cal. July 1, 2010) (applying pre-amendment WSLA to offenses that occurred prior to the amendment) *and United States v. Pearson*, No. 2:09cr43, 2010 WL 3120038, at *1 (S.D. Miss. Aug. 4, 2010) (same).

[14] *Compare Anghaie*, 2011 WL 720044, at *2 (pre-amendment WSLA requires congressional declaration of war), *Western Titanium*, 2010 WL 2650224, at *3-4 (same) *and United States v. Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993)(Persian Gulf conflict not a "war" within meaning of the WSLA) *with United States v. Prosperi*, 573 F. Supp. 2d 436, 455-56 (D. Mass. 2008) (concluding that the United States was "at war" for purposes of the pre-amendment WSLA during the Afghanistan and Iraq conflicts that began in 2001 and 2002) *and Pearson*, 2010 WL 3120038, at *1-2 (same).

whether the United States is or is not a party. The Court disagrees. The Court need only look at the definition of the word "offense" to see that Carter is mistaken. Black's Law Dictionary defines "offense" as "[a] violation of the law; a crime, often a minor one." Black's Law Dictionary 1110 (8th ed. 2004). The American Heritage Dictionary similarly defines "offense" as, among other things, "[a] transgression of law; a crime" and lists "crime" as a synonym. American Heritage Dictionary of the English Language 1255 (3d ed. 1992); *see also* Black's Law Dictionary 1110 ("The terms 'crime,' 'offense,' and 'criminal offense,' are all said to be synonymous, and ordinarily used interchangeably.") (citing 22 C.J.S. *Criminal Law* § 3, at 4 (1989)). Black's includes an entry for the term, "civil offense," but rather than provide a definition, it cross-references "public tort." *Id.* at 1111. Thus, it is by no means clear from the statutory language that the term "offense" as used in the WSLA necessarily includes civil offenses, let alone non-intervened civil FCA actions.

Defendants argue that the applicability of the WSLA to the FCA is doubtful, citing *Marzani v. United States*, 168 F.2d 133, 135 (D.C. Cir. 1948), *aff'd by an equally divided Court*, 335 U.S. 895 (1948). In *Marzani*, a criminal case involving the false statements clause from the criminal provisions of the

FCA,[15] the D.C. Circuit held that the WSLA "does not apply to offenses under the False Claims Act" -- a conclusion which it believed necessarily followed from Supreme Court precedent. *Marzani* first cited *United States v. Noveck*, 271 U.S. 201 (1926), a case in which the Supreme Court addressed whether the predecessor statute to the WSLA applied to the crime of perjury in an income tax return. The Supreme Court held that it did not, because defrauding the United States is not an element of the crime of perjury. *Noveck*, 271 U.S. at 203-04. Next, *Marzani* cited *United States v. Gilliland*, 312 U.S. 86 (1941), a criminal case which asked whether the FCA is restricted to matters in which the Government has some financial or proprietary interest. The Supreme Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of FCA offenses. *Gilliland*, 312 U.S. at 93. Based on this line of cases, the D.C. Circuit concluded that since pecuniary fraud is not "an essential ingredient" of offenses under the FCA, the WSLA does not apply. *Marzani*, 168 F.2d at 136. *See also Bridges v. United States*, 346 U.S. 209,

[15] The FCA was enacted in 1863 and provided both civil and criminal sanctions for "false, fictitious, or fraudulent" claims submitted to the United States. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. In 1874, the FCA's civil and criminal provisions were severed, the civil penalties being codified in one section of the United States Code and the criminal provisions in another. *See* U.S. Rev. Stat. tit. 36, § 3490 (1875) (civil); *id.* tit. 70, § 5438 (criminal). In 1982, Congress enacted legislation making the FCA's civil provisions freestanding, without a cross-reference to a criminal statute. *See* Pub. L. No. 97-258, § 3729, 96 Stat. 877, 978 (1982).

222 (1953) (applying similar reasoning to criminal charges involving false statements under oath).

However, in *United States v. Grainger*, 346 U.S. 235, 243 n.14 (1953), also a criminal case, the Supreme Court admonished that references made in cases arising under the false statements clause, such as *Marzani*, should be read as referring to that clause rather than to the false claims clause or the FCA as a whole. Unlike *Marzani*, *Grainger* dealt with the false claims clause, and involved offenses including the making of claims upon the Government for payments induced by knowingly false representations. *Id.* at 242. The Supreme Court noted that this offense included more than the mere making of a false statement, *id.*, and held that the WSLA therefore applied, *id.* at 243.

Here, Carter alleges both false claims (Count 1) and false statements (Count 4). The false statements at issue, however, arise in the civil context and are therefore distinguishable from those in *Marzani*.[16] Defendants' alleged fraud is decidedly pecuniary in nature -- the falsification of

[16] Indeed, the false statements clause from the criminal provisions of the FCA, considered in *Marzani*, read as follows: "whoever shall knowingly and willfully . . . make . . . any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." 168 F.2d at 135 (citing 18 U.S.C. § 80, now 18 U.S.C. § 1001). Conspicuously absent is a pecuniary element. The false statements clause from the civil provisions of the FCA, relevant here, applies to "any person who knowingly makes, uses, or causes to be made or used, a false record or statement *material to a false or fraudulent claim* [for payment.]" 31 U.S.C. § 3729(b) (emphasis added).

time cards for purposes of fraudulently billing the Government. *Marzani*, by contrast, involved allegations that the defendants had made false statements to government agencies in seeking federal employment and lacked a pecuniary element. For these reasons, *Marzani* does not compel the conclusion that the WSLA is inapplicable to Carter's false statement claim. *See United States v. Prosperi*, 573 F. Supp. 2d 436, 441 (D. Mass. 2008) (distinguishing *Marzani* and *Bridges* and holding that the WSLA applied to criminal charges that defendants created false reports in order to procure payment from the Government).

As Carter points out, a handful of out-of-circuit federal trial courts have concluded that the WSLA applies to civil actions brought under the FCA.[17] In all but one of these cases, however, the United States was the party -- not a relator. In the lone case brought by a relator and in which the United States declined to intervene, *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 550-51 (D.D.C. 1956), the court found that after the 1944 amendment to the WSLA, in which Congress removed the term "now indictable," the statute became applicable to civil actions, including those brought under the FCA. The court did not distinguish actions brought by relators from actions in which the United States is a party. As

[17] *See, e.g., United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 550-51 (D.D.C. 1956); *United States v. Temple*, 147 F. Supp. 118, 120-21 (N.D. Ill. 1956); *United States v. Salvatore*, 140 F. Supp. 470, 473 (E.D. Pa. 1956); *Dugan & McNamara, Inc. v. United States*, 127 F. Supp. 801, 803-04 (Ct. Cl. 1955); *United States v. Strange Bros. Hide Co.*, 123 F. Supp. 177, 184 (N.D. Iowa 1954).

it turns out, the court need not have decided the issue at all because the relator exceeded even the WSLA's extended limitations period. *Id.* at 551.

The Fourth Circuit, on the other hand, has distinguished FCA actions in the statute-of-limitations context based on whether or not the United States is a party to the action. *See United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). Indeed, it is the reasoning in *Sanders* that leads this Court to the conclusion that the WSLA does not apply to non-intervened civil FCA actions. *Sanders* held that 31 U.S.C. § 3731(b)(2) extends the FCA's statute of limitations only in cases in which the United States is a party. 546 F.3d at 293. First, *Sanders* stated that any other reading of the statute would be problematic given that Section 3731(b)(2) refers only to the United States -- and not to relators. *Id.* The WSLA likewise speaks in terms of the United States, and does not mention relators.[18] *See* 18 U.S.C. § 3287 (2011) (referring to offenses involving "fraud or attempted fraud against the *United States or any agency thereof*") (emphasis added).

Second, *Sanders* rejected the relator's argument that the phrase "[a] civil action under section 3730" in the preface to Section 3731(b) includes all civil actions under the FCA."

[18] The legislative history surrounding the 2008 amendment also omits reference to relators. *See* S. Rep. No. 110-431. Rather, the legislative history speaks of prosecutors, investigators, and auditors. *See id.* at 2.

546 F.3d at 294. The Fourth Circuit disagreed with the premise that "'a civil action' must be read indiscriminately to encompass all FCA claims in all contexts." *Id.* This Court similarly finds that while the term "offense" in the WSLA *may* include civil actions, it by no means must encompass *all* civil actions.

Third, many of the "practical difficulties" discussed in *Sanders* would arise were the WSLA deemed applicable to non-intervened civil FCA actions. The Fourth Circuit recognized that:

> [Relator's] reading of Section 3731(b)(2) . . . would allow relators to sit on their claims for up to ten years before filing an action and informing the government of the material facts. Indeed, relators would have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery.

Id. at 295. In comparison, application of either version of the WSLA to non-intervened civil FCA actions could allow relators to sit on their claims well in excess of ten years. For example, were this Court to take August 31, 2010[19] as the end of the war in Iraq, application of the pre-amendment WSLA to Carter's claims would extend the limitations period to August 31, 2019 -- almost fourteen years after the final fraudulent claims

[19] On August 31, 2010, President Obama declared "the end of our combat mission in Iraq" in a nationally televised presidential speech. *See* President Barack Obama, Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq.

Defendants allegedly submitted to the Government. The 2008 amendments to the WSLA, which extended the suspension period to five years, would of course only serve to exacerbate the problem.

As the Fourth Circuit admonished, "allowing relators to sit on their claims "would undermine the purpose of the *qui tam* provisions of the FCA: to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not -- 'to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *Id.* (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943)). Application of the WSLA as proposed by Carter would instead allow fraud to extend perhaps indefinitely.[20] Moreover, "a relator's failure to notify the government promptly of FCA violations might also cause the government to lose out on its ability to bring a criminal fraud prosecution, which must be filed within five years of the violation." *Id.* (citing 18 U.S.C. §§ 287, 3282). For these reasons, the Court concludes that the WSLA does not apply to the instant suit -- that is, a civil FCA action brought by a relator, in which the United States has opted not to intervene.

[20] Indeed, in his proposed sur-reply and during oral argument, Carter asserted that "war" has yet to conclude within the meaning of the WSLA. Thus, according to Carter, the statute of limitations on his claims still hangs in a state of suspension.

For the foregoing reasons, the Court concludes that Carter's claims are time-barred except for the public voucher for $673.56 relevant to Count 4. Of course, this claim and Carter's complaint as a whole are independently barred by operation of the first-to-file bar. Because the aforementioned public voucher was submitted to the Government on June 2, 2005, it too would be untimely were Carter to again file a new action. And amendment of the complaint would provide no cure to the Court's lack of jurisdiction by virtue of the first-to-file bar. *See United States ex rel. Branch Consultants LLC v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 267-68 (E.D. La. 2011); *Ortega*, 240 F. Supp. 2d at 14. Accordingly, dismissal is with prejudice.

C. Motion for Leave to File Sur-reply

Carter moves to file a sur-reply to respond to "five new arguments" raised in Defendants' reply brief. (Mot. for Leave to File Sur-reply [Dkt. 32] at 1.) These arguments respond to Carter's contention, raised in his opposition brief, that his claims are not barred by the statute of limitations because the limitations period has been suspended by operation of the WSLA.

A court has the discretion to allow a sur-reply where a party brings forth new material or deploys new arguments in a reply brief. *See, e.g., Lewis v. Rumsfeld*, 154 F. Supp. 2d 56,

61 (D.D.C. 2001). Where a party "seeks merely to re-open briefing on the issues raised in [a] motion to dismiss and challenge [the movant's] explanations of cited case law," a sur-reply should not be allowed. *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 467 (D. Md. 2008).

Carter, then, may not submit a sur-reply simply because Defendants used their reply brief to further support an argument made in their opening brief or to respond to new arguments in Carter's opposition. And that is precisely what happened here. Defendants raised the statute of limitations as an issue in their opening brief. Carter then argued, in one brief paragraph, that his claims were not time-barred because of the WSLA. And Defendants responded to that argument in their reply brief. Hence, none of the "new arguments" cited by Carter are truly new. That Carter chose to devote little time to his discussion of the WSLA in his opposition brief does not entitle him to file a sur-reply. Accordingly, the Court will deny Carter's motion.

IV. Conclusion

For these reasons, the Court will grant Defendants' Motion to Dismiss and deny Relator's Motion to File a Sur-reply. This action is dismissed with prejudice.

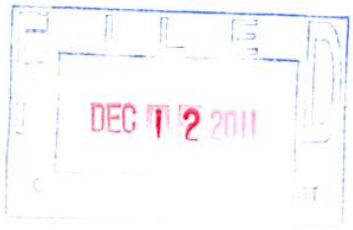
An appropriate Order will issue.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

November 29, 2011
Alexandria, Virginia

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

Alexandria Division



UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
	)	UNDER SEAL
v.	)	
	)	1:11cv602 (JCC/JFA)
HALLIBURTON COMPANY, *et al.*,	)	
Defendants.	)	

O R D E R

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.'s Motion to Dismiss [11] is GRANTED;

(2) Relator Benjamin Carter's ("Relator") Complaint [1] is DISMISSED WITH PREJUDICE pursuant to 31 U.S.C. § 3730(b)(5) and Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6);

(3) Relator's Motion for Leave to File Sur-reply [29] is DENIED; and

(4) the Clerk of the Court shall forward copies

of this Order and accompanying Memorandum Opinion to all counsel of record.

THIS ORDER IS FINAL.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

November 29, 2011
Alexandria, Virginia

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

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
	)	1:11cv602 (JCC/JFA)
v.	)	
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

M E M O R A N D U M O P I N I O N

This matter is before the Court on supplemental briefing for Defendants Halliburton Company ("Halliburton"), KBR, Inc. ("KBR"), Kellogg Brown & Root Services, Inc. ("KBRSI"), and Service Employees International, Inc.'s ("SEII") (collectively, "Defendants") Motion to Dismiss [Dkt. 11], following the Fourth Circuit's decision in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 174 (4th Cir. 2013) that reversed this Court's November 29, 2011 opinion and remanded the case for consideration of the public disclosure bar.[1] For the following reasons, the Court finds that the public disclosure bar does not prevent Relator Benjamin Carter ("Relator" or "Carter") from bringing this suit and accordingly,

[1] In analyzing the public disclosure bar, the Court considered the parties' arguments on this issue in both their original and supplemental briefing.

this Court will deny Defendants' Motion to Dismiss with regards to the public disclosure bar.

I. Background

A. Factual Background

The subject matter underlying this case has been before this Court multiple times previously and involves the Defendants' alleged fraudulent billing of the United States. As set forth below, this case is identical to two earlier cases dismissed by this Court and related to several other earlier cases filed in other district courts.

1. Carter's Allegations

In his Complaint, Carter brings a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 through 3733 (the "FCA"), alleging that Defendants falsely billed the Government for services provided to United States military forces serving in Iraq.

Specifically, Carter alleges that Defendants "knowingly presented [or caused to be presented] to an officer or employee of the United States Government . . . false or fraudulent claims for payment or approval" in violation of 31 U.S.C. § 3729(a)(1). (Compl. [Dkt. 1] ¶¶ 157-58.[2]) Carter also alleges that "Defendants knowingly made, used, or caused to be

[2] The Complaint has two sets of paragraphs 157 and 158. This citation refers to the second set, on page 32 of the Complaint.

made or used, false records or statements to get false or fraudulent claims paid or approved by the Government" in violation of 31 U.S.C. § 3729(a)(2).[3] (Compl. ¶¶ 192-93.)

These allegations stem from Carter's work as a Reverse Osmosis Water Purification Unit ("ROWPU") Operator in Iraq from mid-January 2005 until April 2005. (Compl. ¶¶ 3, 41, 69.) During that period, Carter worked at two camps, Al Asad and Ar Ramadi. (Compl. ¶¶ 41-42.)

Carter alleges that "the Al Asad Defendant ROWPU employees were not engaged in any actual water purification duties on discrete dates in January 2005," but nevertheless, the "Al Asad ROWPU employees' time [was] billed under LOGCAP[4] III" as if they had been purifying water. (Compl. ¶¶ 130-31.) Similarly, while working at Ar Ramadi, Carter was allegedly "required to fill in timecards stating that he worked 12 hour[s] a day, each day, with uniformity, on ROWPU functions," though during this time Carter "actually worked 0 hours per day on ROWPU functions." (Compl. ¶¶ 54-55.) Carter also alleges that all "trade employees" such as he were required to submit time cards totaling "exactly 12 hours per day and 84 hours per week"

[3] Section 3729(a)(1) has been re-codified at 31 U.S.C. § 3729(a)(1)(A) and section 3729(a)(2) has been re-codified at 31 U.S.C. § 3729(a)(1)(B).
[4] As noted in this Court's May 10, 2010 Memorandum Opinion in 1:08cv1162, LOGCAP III was the Logistics Civil Augmentation Program ("LOGCAP") contract put out by the Department of Defense for civil logistical support for military operations in Iraq, Afghanistan, and other countries.

and that it was their "routine practice" to do so. (Compl. ¶¶ 60-61, 65, 67-68.)

In essence, Carter contends that Defendants had knowledge that at the Ar Ramadi and Al Asad camps in Iraq, ROWPU "personnel were not engaged in any water testing or purification duties in support of the LOGCAP Contract," and that "Defendants were billing the Government for work that was not actually performed." (Compl. ¶¶ 163, 166.)

B. Procedural Background

1. 2008 Carter

Carter filed an earlier case in this Court against Defendants, Civil Action No. 08cv1162 (JCC/JFA) ("2008 Carter"). Relator originally filed 2008 Carter on February 1, 2006 in the United States District Court for the Central District of California, with a first amended complaint filed on February 10, 2006. (1:08cv1162 [Dkt. 5].) 2008 Carter was transferred to this Court on November 3, 2008. (1:08cv1162 [Dkt. 73].) This Court dismissed Carter's first amended complaint in 2008 Carter on January 13, 2009, granting leave to amend. (1:08cv1162 [Dkt. 90].) Carter filed a second amended complaint in 2008 Carter on January 28, 2009. (1:08cv1162 [Dkt. 92].)

In July 23, 2009, this Court dismissed Counts 2 and 3 of Relator's second amended complaint in 2008 Carter in their entirety; dismissed Count 1, alleging that Defendants knowingly

submitted false claims to the United States, except as it related to September 1, 2004 through April 2005 for Ar Ramadi, and during January 2005 for Al Asad, (*See* Memorandum Opinion ("Mem. Op.") at 19, 22, 1:08cv1162 [Dkt. 121] (July 23, 2009)); and dismissed Count 4, alleging that Defendants knowingly made or used false records or statements material to a false claim, except as it related to the time cards of the Ar Ramadi ROWPU employees from September 1, 2004 to April 2005 (*id.* at 34).

Later, in May 2010, this Court dismissed the remainder of 2008 Carter without prejudice for lack of jurisdiction. (1:08cv1162 [Dkt. 307].) The Court held that 2008 Carter was barred by § 3730(b)(5) of the FCA, which bars a relator from "bring[ing] a related action based on the facts underlying [a] pending action," known colloquially as the FCA's "first-to-file bar." 31 U.S.C. § 3730(b)(5).

2. California Action

The first-filed "pending action" barring 2008 Carter was *United States ex rel. Thorpe v. Halliburton Co.*, No. 05cv08924 (C.D. Cal.), filed on December 23, 2005 ("California Action"). (Mem. Op. at 2, 15-19, 1:08cv1162 [Dkt. 306] (May 10, 2010).)

On March 23, 2010, in the week before 2008 Carter was set for trial, the Department of Justice ("DOJ") disclosed to the parties the existence of the California Action. Defendants

moved to dismiss 2008 Carter under § 3730(b)(5)'s first-to-file bar, and this Court dismissed 2008 Carter without prejudice on May 10, 2010. (1:08cv1162 [Dkt. 307].)

After this Court dismissed 2008 Carter, the California Action was dismissed on July 30, 2010. (Mem.[Dkt. 16] at 4.)

3. 2008 Carter Appeal

Relator filed a notice of appeal to the Fourth Circuit on July 13, 2010. (1:08cv1162 [Dkt. 325].) Carter moved to dismiss the appeal on December 14, 2010. (Mem. at 4.) The Fourth Circuit dismissed the 2008 Carter appeal on February 14, 2011. (1:08cv1162 [Dkt. 331, 332].)

4. 2010 Carter

Carter filed a second case in this Court on August 4, 2010, Civil Action No. 10cv864 (JCC/TCB) ("2010 Carter"). The Court dismissed 2010 Carter in May 2011, again holding that the case was barred by the FCA's first-to-file bar. (Mem. Op. at 10-11, 1:10cv864 [Dkt. 46] (May 24, 2011).) Specifically, the Court noted that 2010 Carter was filed while the appeal in 2008 Carter –- and, thus, 2008 Carter itself –- was still pending. (*Id*. at 10.) Because the two cases were indisputably related, the Court dismissed 2010 Carter without prejudice. (*Id.* at 10-11, 13.)

5. The Instant Action

Carter filed this case on June 2, 2011. [Dkt. 1.] The United States declined to intervene on August 23, 2011. [Dkt. 3.] This Court unsealed the Complaint on August 24, 2011. [Dkt. 4.] Carter's complaint in this case is identical to the complaint filed in 2010 Carter and the second amended complaint filed in 2008 Carter, except for its title, case number, and signature block.

On October 21, 2011, Defendants filed a Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("Motion to Dismiss"). [Dkt. 11.] In that motion, Defendants argued that (1) the Court lacked jurisdiction under the FCA's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), (Mem. at 5-13), based on the California Action and two other related actions which at the time were pending (*United States ex rel. Purcella, et al. v. Halliburton, Inc., et al.*, No. 2:04cv205 (E.D. Tex.) (under seal) ("Texas Action") and *United States ex rel. Duprey v. Halliburton, Inc., et al.*, No. 8:07cv1487 (D. Md.) ("Maryland Action")); (2) the Court lacked jurisdiction under the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A); and (3) even if neither jurisdictional bar applied, virtually the entire case must be dismissed due to the FCA's six-year statute of limitations.

Following a hearing on November 18, 2011, this Court granted Defendants' Motion to Dismiss with prejudice on November 29, 2011, holding that the Court lacked jurisdiction under the "first-to-file" bar based on the Maryland Action and also that all of Relator's claims were time-barred except one minor claim under the FCA. [Dkts. 41-42.] In its opinion, the Court did not address the public disclosure bar argument because the Court concluded that it need not reach that issue to dispose of Defendants' Motion to Dismiss.

Relator filed a notice of appeal on December 28, 2011. [Dkt. 59.] On March 18, 2013, the Fourth Circuit reversed this Court's decision to dismiss Relator's complaint with prejudice. The Fourth Circuit found that Relator's claims were not time-barred under the FCA due to tolling under the Wartime Suspension of Limitations Act ("WLSA"). *Carter*, 710 F.3d at 174, 181. It also found that Relator's current complaint was barred under the first-to-file bar by the Maryland Action and Texas Action because those actions were pending at the time Relator filed his latest complaint. The Fourth Circuit concluded, however, that the first-to-file bar no longer precluded Relator from filing an action because both related actions currently were no longer pending. This Court, therefore, erred by dismissing the case with prejudice. As this Court had not addressed the parties' arguments regarding the FCA's public disclosure bar, the Fourth

Circuit remanded the case for further proceedings on that issue. The Fourth Circuit rejected Relator's petition for rehearing *en banc* on April 23, 2013.

Following a status hearing held before this Court on May 28, 2013, the Court ordered supplemental briefing on the parties' arguments, in particular the public disclosure bar. On June 24, 2013, Defendants filed their Supplemental Brief in Support of Defendants' Motion to Dismiss Under the Public Disclosure Bar. ("Supp. Mem" [Dkt. 81].) On July 15, 2013, Relator filed his Supplemental Brief in Support of Relator's Opposition to Defendants' Motion to Dismiss Under the Public Disclosure Bar. ("Supp. Opp." [Dkt. 83].) On July 25, 2013, Defendants filed their Supplemental Reply Brief in Support of Defendants' Motion to Dismiss Under the Public Disclosure Bar. ("Supp. Reply" [Dkt. 84].) The Court held a hearing on the supplemental briefing on September 6, 2013.

II. Standard of Review

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Defendants may attack subject matter jurisdiction in one of two ways. First, defendants may contend that the complaint fails to allege facts upon which subject matter jurisdiction may be based. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *King v. Riverside Reg'l Med. Ctr.*, 211 F.

Supp. 2d 779, 780 (E.D. Va. 2002). In such instances, all facts alleged in the complaint are presumed to be true. *Adams*, 697 F.2d at 1219; *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995).

Alternatively, defendants may argue that the jurisdictional facts alleged in the complaint are untrue. *Adams*, 697 F.2d at 1219; *King*, 211 F. Supp. 2d at 780. In that situation, "the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Virginia v. United States*, 926 F. Supp. at 540 (quoting *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993)); *see also Velasco v. Gov't of Indonesia*, 370 F.3d 393, 398 (4th Cir. 2004) (holding that "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment") (citations omitted).

In either circumstance, the burden of proving subject matter jurisdiction falls on the plaintiff. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams*, 697 F.2d at 1219; *Johnson v. Portfolio Recovery Assocs.*, 682 F. Supp. 2d 560, 566 (E.D. Va. 2009) (holding that "having filed this suit and thereby seeking to invoke the jurisdiction of the

Court, Plaintiff bears the burden of proving that this Court has subject matter jurisdiction").

III. Analysis

Defendants argue that Relator's claims are barred under the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), which jurisdictionally bars FCA claims that are based on matters that were publicly disclosed unless the relator was the "original source" of the allegations. (Mem. at 16.)

A. Retroactivity of the PPACA

Before reaching the merits of this argument, the Court must first determine the applicability of the Patient Protection and Affordable Care Act ("PPACA") amendments to the FCA, which were signed into law on March 23, 2010, before the filing of this action. *See* Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2011). Defendants argue that because the PPACA amendments are not expressly retroactive and they attach a new disability to past conduct, they "cannot be applied to the conduct alleged in this case, all of which occurred before PPACA was enacted." (Mem. [Dkt. 16] at 16 n.11; *see* Supp. Mem. [Dkt. 82] at 3.) Carter argues that the PPACA amendments should apply because the instant complaint was filed after the PPACA was passed and made effective and therefore he contends that no retroactivity is required for the PPACA to apply here. (Opp. [Dkt. 21] at 20; Supp. Opp. [Dkt. 83] at 15.)

The Court concludes that the pre-PPACA version of the FCA applies to this case. Certain provisions of the FCA, including the public disclosure bar, were amended by the PPACA in March 2010. The Supreme Court recently recognized that application of these amendments would have retroactive effect because they "eliminate[d] petitioners' claimed defense to a *qui tam* suit" and that the PPACA lacked the necessary clear congressional intent for retroactive application as it "makes no mention of retroactivity." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson ("Wilson")*, 559 U.S. 280, 283 n.1 (2010) (citing *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997)).

In *Hughes Aircraft*, the Supreme Court previously addressed the retroactive application of an FCA amendment to a disclosure jurisdictional bar. Prior to 1986, FCA *qui tam* suits were jurisdictionally barred if the information on which they were based was already in the Government's possession. *Hughes Aircraft*, 520 U.S. at 941. In *Hughes Aircraft*, the Court addressed whether the 1986 amendment to the FCA partially removing that bar applied retroactively to *qui tam* suits brought *after* the 1986 amendment but alleging false claims submitted *before* the enactment of the 1986 amendment. *Id*. at 941, 943. A unanimous Court held that the 1986 amendment did not apply retroactively to conduct occurring prior to the 1986 amendment's

effective date. *Id*. at 951. The Court reasoned that "the 1986 amendment eliminates a defense to a *qui tam* suit -- prior disclosure to the Government -- and therefore changes the substance of the existing cause of action for *qui tam* defendants by 'attach[ing] a new disability, in respect to transactions or considerations already past.'" *Id*. at 948 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994)). Accordingly, application of the amendment to conduct occurring prior to the amendment's effective date would result in a retroactive effect on such conduct. The Court distinguished the 1986 FCA amendment from "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action," which "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Id*. at 951 (emphasis in original); s*ee also Gordon v. Pete's Auto Service of Denbigh, Inc.*, 637 F.3d 454, 461 (4th Cir. 2011) (stating that "the [FCA,] at issue in *Hughes Aircraft* . . . had retroactive effect because it '[did] not merely allocate jurisdiction among forums' but instead 'create[d] jurisdiction where none previously existed"). The Court concluded that "[g]iven the absence of a clear statutory expression of congressional intent to apply the 1986 amendment to conduct completed before its enactment, we apply our presumption against retroactivity" and applied the pre-amendment

FCA in construing the government disclosure jurisdictional bar. *Hughes Aircraft*, 520 U.S. at 951.

The Supreme Court's reasoning in *Hughes Aircraft* controls the issue because here, like in that case, an FCA amendment modifies a prior jurisdictional bar based on disclosure of the facts underlying the suit and the amendment is silent as to its retroactivity. Similar to the facts in that case, Carter brought this suit after the enactment of the PPACA, alleging violations by Defendants committed in 2005 before the enactment of the PPACA. In addition, as recognized in *Graham*, the amendment creates jurisdiction where none previously existed, meaning application of the PPACA amendments would have retroactive effect. Finally, the presumption against retroactivity applies here because, as recognized in *Wilson* and *U.S. ex rel. Black v. Health & Hosp. Corp. of Marion Cnty.*, 494 F. App'x 285, 291 n.9 (4th Cir. 2012), the PPACA amendments lack the clear congressional intent necessary for retroactive application. Accordingly, the PPACA amendments to the public disclosure bar do not apply retroactively, and the Court will apply the public disclosure bar using the pre-PPACA statute.

Carter argues that because he brought this suit after the PPACA amended the FCA, the amended statute should apply. (Opp. at 20.) The Supreme Court addressed that argument in *Hughes Aircraft* and dismissed it. *See Hughes Aircraft*, 520 U.S.

at 946 ("Because the 1986 amendment became effective before this suit was commenced, respondent contends that it, rather than the 1982 *qui tam* provision, controls. We disagree.") Accordingly, the fact that the PPACA became effective before this suit was commenced will not alter this Court's application of the pre-PPACA FCA.

B. The Public Disclosure Bar

Section 3730(e)(4)[5], referred to as the "public disclosure bar," provides as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or 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 has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A), (B) (1986–2010). "The purpose of the public disclosure bar is 'to prevent 'parasitic' *qui tam* actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous

[5] Given the Court's holding that the pre-PPACA version of the FCA applies here, all references to the statute are to that version unless otherwise noted.

disclosures of government fraud.'" *United States ex rel. Davis v. Prince*, 753 F. Supp. 2d 569, 578 (E.D. Va. 2011) (citations omitted).

In order to determine whether the public disclosure bar eliminates federal court jurisdiction, a district court first must identify the claims in the relator's complaint. *Id*. Here, the relevant claims concern the submission by Defendants of fraudulent timesheets for ROWPU services from September 1, 2004 through April 2005 for Ar Ramadi and for January 2005 for Al Asad.

Second, a district court then must analyze each claim under the Fourth Circuit's standard for the public disclosure bar. *Id*. The Fourth Circuit follows a three-step approach. *See United States ex rel Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 299 (4th Cir. 2008), *overruled on other grounds by Wilson*, 559 U.S. at 301. As recently summarized by this Court:

> First, a district court must determine whether there is a "public disclosure" within the meaning of the FCA that covers the claim in question. If not, the claim is not subject to the public disclosure bar. If there is a public disclosure that covers the claim, the district court must then determine whether the relator's claim is "based upon" the public disclosure. If not, the claim is not barred. But if the claim is "based upon" the public disclosure, the district court must determine whether the relator is an "original source" of the information on which his claim is based. The relator has the burden of

> proving each jurisdictional fact by a preponderance of the evidence.

Prince, 753 F. Supp. 2d at 578 (internal quotations and citations omitted). "Unless 'the jurisdictional facts are intertwined with the facts central to the merits of the dispute,' the district court may then go beyond the allegations of the complaint and resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits." *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009).

1. Is There a Qualifying Public Disclosure?

"To determine whether there is a qualifying 'public disclosure' relating to a claim, a district court must address three issues." *Prince*, 753 F. Supp. 2d at 579. The first issue is whether the disclosure occurred in one of the sources enumerated in the statute. *Id*. Section 3730(e)(4)(A) enumerates "three sources: (1) in a 'criminal, civil, or administrative hearing'; (2) in a 'congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation'; or (3) in the 'news media.'" *Id*. (quoting 31 U.S.C. § 3730(e)(4)(A)).

The second issue is "whether the disclosure was made 'public' prior to the filing of the complaint." *Id*. at 580. "Although the Fourth Circuit has not construed the term 'public'

as used in § 3730(e)(4)(A), other circuits have done so, reaching essentially similar results" of "generally available to the public" or "in the public domain." *Id*.

The third issue is "whether the public disclosure reveals 'allegations or transactions,' and not merely information." *Id*. (citation omitted). "[T]o qualify as a 'public disclosure,' a disclosure must reveal an allegation of fraud, or a false and true state of facts from which fraud may be inferred."[6] *Id*.

Here, Defendants identify four disclosures that they argue bar the instant case: (1) Carter's colleague Kenneth May's January 23, 2006 testimony before the Senate Democratic Policy Committee,[7] (2) the complaints in 2008 Carter and 2010 Carter, (3) the complaint in the California Action,[8] the Maryland Action, and the Texas Action, and (4) this Court's May 10, 2010

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[6] In *Prince*, the Court noted that "[a]lthough the Fourth Circuit has not specifically construed the phrase 'allegations or transactions' within the meaning of § 3730(e)(4)(A), many circuit courts have done so, adopting the D.C. Circuit's interpretation of the phrase." 753 F. Supp. 2d at 580. This Court agrees with *Prince* and, thus, applies it here.

[7] *See An Oversight Hearing on Whether Halliburton Has Failed to Provide Clean Water to United States Troops in Iraq, Before the Senate Democratic Policy Comm.*, 109th Cong. 3 (Jan. 23, 2006) (statement of Ken May), *available at* http://dpc.senate.gov/dpchearing.cfm?h=hearing27. Carter offers this testimony as Exhibit 6 to his original Opposition.

[8] The complaint in the California Action was unsealed in April 2010. *See* ORDER Unsealing Complaint, *United States ex rel. Thorpe v. Halliburton Co.*, No. 05cv08924 (C.D. Cal.) [Dkt. 34] (filed Apr. 27, 2010, entered Apr. 29, 2010).

Memorandum Opinion in 2008 Carter.[9] (Mem. at 16-17 & n.12; Supp. Mem. at 4-5.)

First, all these disclosures are qualifying public disclosures except for the Texas Action, which was and remains sealed. The January 2006 Senate Hearing clearly qualifies under 31 U.S.C. § 3730(e)(4), *Prince*, 753 F. Supp. 2d at 579, and "civil complaints are regarded as 'public disclosures' in a 'civil hearing,'" *id.* at 596. Judicial opinions may be considered public disclosures as well. *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994) (noting that "any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes of section 3730(e)(4)(A)"); *see also McElmurray v. Consolidated Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1253 (11th Cir. 2007). Second, the hearing, the California Action, Maryland Action, and 2008 Carter and 2010 Carter were all "public," as they were in the public domain prior to the filing of the instant complaint. *Prince*, 753 F. Supp. 2d at 569. And third, each of these reveals "an allegation of fraud." *Id*. The California Action, Maryland Action, 2008 Carter, and 2010 Carter plainly allege fraud, and May's Senate Hearing

[9] Defendants do not discuss this last category of disclosures in their supplemental brief.

testimony does as well. (Opp. Ex. 6 (noting "time card fraud" and "fraudulent documentations and overbilling".) Moreover, "[t]o constitute a 'public disclosure' sufficient to negate FCA jurisdiction, a disclosure need not specifically show fraud, but must merely be sufficient to put the government on notice of the likelihood of related fraudulent activity." *Lopez v. Strayer Educ., Inc.*, 698 F. Supp. 2d 633, 641 (E.D. Va. 2010) (internal quotation marks and citations omitted). Thus, there were public disclosures of the fraud allegations alleged in the instant complaint before it was filed on June 2, 2011.

2. Are Carter's Instant Allegations "Based Upon" the Public Disclosures?

Having found qualifying public disclosures, the Court next turns to whether Carter's allegations are "based upon" any of these disclosures. "A public disclosure, by itself, does not trigger the public disclosure bar under the pre–2010 FCA; rather, the relator's allegations must also be 'based upon' the public disclosure." *Prince*, 753 F. Supp. 2d at 582 (citing 31 U.S.C. § 3730(e)(4)(A)). In the Fourth Circuit, "a *qui tam* action is barred only if the relator's allegations are actually derived from public disclosures:

> [A] relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based. Such an understanding of the term 'based upon,' apart from giving effect to the language

> chosen by Congress, is fully consistent with section 3730(e)(4)'s indisputed objective of preventing 'parasitic' actions, . . . for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

Id. (quoting *Siller*, 21 F.3d at 1348).[10] "Thus, a *qui tam* action will not be barred if the plaintiff's claims are similar or even identical to the publicly disclosed allegations, so long as the plaintiff had independent knowledge of the facts and did not derive his allegations from the public disclosure itself." *Id*. (internal quotation marks and citations omitted). Although a relator's claim must be "actually derived" from the publicly disclosed allegations, "it is important to note that § 3730(e)(4) bars jurisdiction over a relator's claim if the claim is even partly derived from a public disclosure." *Id*. "The relators have the burden of proving that their claim was not derived from the [public disclosure]." *Id*. at 589 (citing *Vuyyuru*, 555 F.3d at 348).

Carter's allegations are not "based upon" the qualifying public disclosures because the Court finds that

[10] The amended § 3730(e)(4)(A) no longer uses the phrase "based upon" and now bars claims "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (2010). In *Prince*, this Court noted that "*Siller's* interpretation of 'based upon' has been criticized by many circuits. . . . Notwithstanding this criticism, *Siller* remains the law in the Fourth Circuit for cases prior to the FCA's 2010 amendment." *Prince*, 753 F. Supp. 2d at 582-83.

Carter has shown that he had independent knowledge of the facts underlying his claim and that he derived his allegations from his own independent knowledge. *Id*. Defendants first argue that Carter actually derived his allegations from Kenneth May's Senate testimony. (Mem. at 19-21; Supp. Mem. at 8-9.) The entirety of May's testimony addressing time card fraud is: "The disregard for essential health, safety and security measures, *time card fraud, fraudulent documentations and overbilling* . . . made life at Ar Ramadi nearly unbearable." (Opp. Ex. 6 (emphasis added).) Defendants argue that Carter borrowed from May's allegations, especially the assertion that it was routine practice for KBR employees to record on their timecards hours they did not work. (Mem. at 20-21.) Defendants' evidence that Carter borrowed from May is November 2005 e-mails between the two. (*Id*. Ex. 8.) These e-mails, however, are not by themselves public disclosures.

The Court finds that the record establishes that it is more likely than not that Carter derived his allegations from his own personal knowledge and not from May's Senate testimony or, for that matter, from May's e-mails. *Prince*, 753 F. Supp. 2d at 589. Carter testified that he first was instructed to record 12 hours on his time card when he arrived at Al Asad, his first location in Iraq. (Carter Dep. Tr. 25:17-26:3 (Opp. Ex. 9).) According to Carter, he was told to go to the RWOPU

foreman at Al Asad and ask if there was work to be done while Carter was waiting, and the foreman would "sign off on [Carter's] 12 hours for the days that [Carter] was at Al Asad." (Carter Dep. Tr. 26:14-19.) Carter also testified that "the first day or the second day" he was in Ar Ramadi, Walter Meyers, who was the ROWPU foreman at Ar Ramadi, (Compl. ¶ 59), told Carter that even though there was no operating ROWPU with which to work, Carter could still report that he had worked 12 hours. (Carter Dep. Tr. 30:9-22.) Carter also testified that a representative of Defendants told him "on either the first Sunday or the second Sunday" that he was at Ar Ramadi that "on Sundays we would get our 12 hours but we were to either be playing softball or watching softball or washing our vehicles or cleaning our hooch." (Carter Dep. Tr. 29:1-8.) Carter essentially testified that his knowledge of time card fraud at Al Asad and Al Ramadi came from his own experiences there. Thus, "on this record, it seems more likely that [Carter] derived [his] allegations . . . from the facts learned by [Carter] during [his] employment" with Defendants "than from a single [statement]" in May's Senate testimony that "does not provide any details about fraudulent payments" by Defendants. *Prince*, 753 F. Supp. 2d at 590.

Defendants make much of the November 2005 e-mail exchanges between Carter and May. (Mem. at 23-25; Supp. Mem. at

8-9.) Defendants appear to try and bring May's statements in these e-mails into his Senate testimony. (Mem. at 19-20.) May, however, did not testify to any of the facts within the e-mails. Although they are not qualifying public disclosures, Defendants appear to use these e-mails to negate Carter's independent knowledge. Defendants argue that throughout the discussions embodied in these e-mails, Carter and May's correspondence makes it clear that May was the one with firsthand information underlying the timekeeping allegations. (*Id.*)

Carter and May's deposition testimony, however, undermine any contrary inferences raised by these email discussions. As set forth above, Carter testified that his first knowledge of billing for time not worked came when he first arrived at Al Asad and on his first or second day at Al Ramadi. May, in contrast, testified that he "can only speak for what [he] did on [his] time cards," that he never heard instructions from a supervisor to an employee to bill twelve hours per day, and that he only could infer that that direction was given based on the widespread practice of employees billing twelve hours per day ever day. (May Dep. Tr. 78:5-19 (Opp. Ex. 7).) Also as set forth above, Carter learned about the Sunday practices of billing for playing softball or doing nothing on his first or second Sunday at Al Ramadi.

Carter additionally testified to his own experience with the mechanics of submitting time cards and supervisors' participation in filling them out. Carter stated that the time card recording procedure changed "sometime in February" of 2005, when Walter Meyers and Tom Smith "required that we leave our time sheets in . . . Walter's office, and we would then fill them out at 7:00 p.m. in front of Walter and Warren Smith." (Carter Dep. Tr. 36:2-6.) Carter then testified that "Walter required [Carter to] be responsible for Dale Lehew, the ROWPU operator underneath [Carter at Ar Ramadi, (Compl. ¶ 59)], so [Lehew's] hours matched [Carter's] hours . . . [s]o Walter instructed [Carter] to take care of Dale Lehew's time sheet." (Carter Dep. Tr. 36:7-16.) In contrast, May's deposition testimony indicates that May lacked direct knowledge of many of these allegations. He testified that at a certain point in time, which he could not recall, that "all of a sudden the supervisors were bringing in all the time sheets that were already signed. And then I would assume that there were completed by the employee. But according to Ben [Carter], they were written down by the supervisors, the hours worked." (May Dep. Tr. 86:12-19.) May testified that "[he] can't say whether it happened or not because [he] didn't see it. So it makes sense what [Carter] says." (May Dep. Tr. 86:20-22.) This testimony, given its detail, establishes that it is more likely

than not that Carter had independent knowledge of the facts underlying his claim and that he derived his allegations from his own independent knowledge. *Prince*, 753 F. Supp. 2d at 589.

Next, Defendants argue that the California Action and Maryland Action are public disclosures barring jurisdiction in this case, but spend little to no time specifically arguing how Carter supposedly derived his allegations from these actions. (Mem. at 17 n.12; Supp. Mem. at 4-5, 7-9.) They point only to the fact that at the time of Carter's original complaint, his then-lawyer already had filed the California Action, raising the inference that Carter's claims were derived from that public disclosure. (Supp. Mem. at 9 n.10 (citing *Prince*, 753 F. Supp. 2d at 595 (noting that the inference that a relator's claims are derived, at least in part, from public disclosures is stronger where "relators' counsel has filed complaints with similar allegations in other suits").) Critically in *Prince*, however, the relators' counsel also had "admitted to deriving some of the information underlying the [relators' claim] from the public domain." 753 F. Supp. 2d at 595 & n. 52.

Despite the weak inference raised by the fact that Carter's then-lawyer also had filed the California Action, the Court finds that Carter has met his burden of proof that he did not base his allegations on the public disclosures of the California Action and Maryland Action and that he had knowledge

independent of those public disclosures. Although the Fourth Circuit affirmed that the general similarities between the allegations underlying the Carter litigation and those other cases are sufficient to make them "related actions" for purposes of the *first-to-file* bar, Carter has shown that he has knowledge independent of those public disclosures. Carter testified that he had independent knowledge of his allegations, as set forth above, with details regarding the time and place of where and when he gained his knowledge. Based on that record, the Court finds that he has proven by a preponderance of the evidence that he did not derive his claims from the public disclosures of the California Action and Maryland Action. In addition, the allegations in the California Action, as this Court noted in its May 10, 2010 Memorandum Opinion addressing the first-to-file bar in 2008 Carter, encompassed activity from December 2001 on, across all of the countries covered by the LOGCAP III contract, thus including, but not specifically naming, the Al Asad and Ar Ramadi bases. (Mem. Op. at 12, 1:08cv1162 [Dkt. 306] (May 10, 2010).) This Court found that at no time were the California relators stationed with Carter or at Al Asad and Al Ramadi. *Id.* at 12-13. The absence of these specific allegations in the California Action strengthens the inference that Carter learned the details of his allegations based on his own personal knowledge.

Finally, for similar reasons, the Court rejects Defendants' argument that Carter's Action is barred by 2008 Carter, 2010 Carter, and this Court's May 10, 2010 Memorandum Opinion. Defendants do not explain how Carter "derived" the instant complaint from any of these sources for purposes of the public disclosure bar. Their argument as to Carter's own prior complaints is particularly untenable. The public disclosure bar is designed to eliminate parasitic lawsuits. *See Graham Cnty.*, 559 U.S. at 294-95. In contending that the instant suit is barred by 2008 Carter and 2010 Carter, Defendants in essence argue that Carter should be treated as a parasite of himself. This is illogical.

Accordingly, as the Court concludes that it is more likely than not that Carter did not base the instant action on previous public disclosures but rather derived his allegations from his own independent knowledge, the public disclosure bar does not apply here.

3. Is Carter an "Original Source"?

Even assuming Carte's allegations were based upon public disclosures in part, the Court finds Carter has shown by a preponderance of the evidence that he was an original source. The pre-2010 "[s]ection 3730(e)(4)(B) defines 'original source' as an individual who has direct and independent knowledge of the information on which the allegations are based and has

voluntarily provided the information to the Government before filing an action.'" *Prince*, 753 F. Supp. 2d at 583 (quoting 31 U.S.C. § 3730(e)(4)(B)). A relator's knowledge "is 'direct' if he acquired it through his own efforts, without an intervening agency, and it is 'independent' if the knowledge is not dependent on public disclosure." *Id.* (internal quotations marks and citations omitted). "Further, while a relator does not need to have direct and independent knowledge of all the information on which a *qui tam* action is based, the relator must have direct and independent knowledge of the facts necessary to plead a plausible fraud claim." *Id.*

For the reasons set forth above, Carter has shown direct and independent knowledge of the facts necessary to plead a plausible fraud claim. *Id.* It is direct because Carter acquired it through his own efforts and without intervening agency, and it is independent because it is not dependent on public disclosure. *Id.* Moreover, the original source requirements are intended to "adequately identify legitimate *qui tam* actions and weed out parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research." *United States ex rel. Jones v. Collegiate Funding Servs., Inc.*, No. 3:07CV290, 2011 WL 129842, at *11 (E.D. Va. Jan. 12, 2011). Carter testified that he directly and independently learned of the time card fraud from his own

employment at Al Asad and Al Ramadi. Contrary to Defendants' assertions and the facts in *Black*, Carter did have access to the relevant "books and records of Defendants" and the "specific documents used to make the false or fraudulent claims": he personally witnessed and was made to participate in the falsification of timecards, the specific document upon which the false and fraudulent claims by Defendants to the government were based. 494 F. App'x at 296. For the reasons more thoroughly set forth above in the previous step of analysis, the Court finds that Carter has shown by a preponderance of the evidence that he is not a "plaintiff[] who offer[s] only secondhand information, speculation, background information or collateral research." *Collegiate Funding Servs.*, 2011 WL 129842, at *11. Thus, even assuming Carter's allegations partially were based on public disclosures, he has shown that it is more likely than not that he was the original source of his allegations.

IV. Conclusion

For the foregoing reasons, the Court will deny Defendants' Motion to Dismiss based on the FCA's public disclosure bar. In accordance with the affirmed dismissal on the grounds of the FCA's first-to-file bar, however, the Court will dismiss Relator's Complaint without prejudice.

An appropriate Order will issue.

/s/

September 19, 2013
Alexandria, Virginia

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

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

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
	)	1:11cv602 (JCC/JFA)
v.	)	
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

O R D E R

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendant Halliburton Co.'s ("Defendant") Motion to Dismiss [Dkt. 11] is DENIED;

(2) in accordance with the Court's affirmed dismissal on the grounds of the FCA's first-to-file bar [Dkts. 65-66], Relator's Complaint [Dkt. 1] is DISMISSED WITHOUT PREJUDICE;

(3) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

September 19, 2013
Alexandria, Virginia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES *EX REL.* BENJAMIN CARTER	)	
VS.	)	1:11-CV-602 JCC
	)	ALEXANDRIA, VIRGINIA
	)	SEPTEMBER 6, 2013
HALLIBURTON COMPANY., *ET AL.*	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES C. CACHERIS
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by Julie A. Goodwin.

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(SEPTEMBER 6, 2013, 10:15 A.M., OPEN COURT.)

THE COURT: Okay. I'll take *Carter v. Halliburton*.

Think we'll have to seal this. Is that correct?

MR. STONE: This is unsealed.

MR. FAUST: Yeah, I don't think we referred to any sealed material.

THE COURT: Very well. Okay.

Okay.

MR. FAUST: Your Honor, John Faust for KBR. We are here on our Motion To Dismiss For Lack Of Jurisdiction Under The Public Disclosure Bar.

Before I get started on that, just to give you a status update, following up on our last status conference, we did file a cert. Petition with the Supreme Court on the statute of limitations on the first-to-file issues. Mr. Carter got an extension on opposition, but that's now in. Our reply will go in I think next week, and we would anticipate some action from the Supreme Court in October.

THE COURT: Okay.

MR. FAUST: On public disclosure bar, Your Honor, we've been over this before, and we've had the supplemental briefing. So, you know, I don't want to cover everything; I think it's pretty well covered in the briefs.

Jumping to the heart of it, I think the question is the same one that Your Honor posed when we first raised this a

couple of years ago which is, who's the original source as between Mr. Carter and Mr. May. There are some other sources for public disclosure that come into play depending on what law you apply, but that is the essential question.

And what I want to underscore I think in the remarks I have today is that's a fact issue. It is one that Mr. Carter bears the burden on to prove by a preponderance. There aren't -- this is not summary judgment or a 12(b)(6). There aren't any presumptions here that apply. And the Court's findings on this fact issue are reviewable only for clear error.

I think when you look at it from that perspective of whether Mr. Carter has carried his burden on original source, the answer's got to be no, for a number of reasons.

First, and I think pretty importantly, he can't carry that burden in our view by pointing to details from his own personal experience working under the alleged time card fraud; that is, his own time card fraud or what was happening in particular in the water services department, sometimes called the ROWPU Department.

There's a couple reasons for that. One of them is law of the case for -- I think would be the term there. Your Honor has already held twice in the first-to-file context that Mr. Carter's personal ROWPU allegations are just evidence bearing on the fraud claim. They are not the fraud claim

itself, which is what you have to look at.

The underlying claim of fraud here that you have to look at is an alleged systematic recording of time on time cards that wasn't actually worked. Mr. Carter's characterized his claims that way. Your Honor has ruled twice that that is -- that's what his case is, and the Fourth Circuit has agreed with you in upholding your ruling on the first-to-file.

The question is -- is whether enough has already been said in prior public disclosures to put the Government on notice of a potential time card fraud. And our view is Mr. Carter is not -- Mr. Carter's details don't change any of that.

The other reason that we say this is -- and this, I think, comes out pretty clearly in the supplemental briefing. The law is clear both before and after the Affordable Care Act whether you look at Mr. Carter's cases or ours, including this *Leveski* case that they cite in the Seventh Circuit. You don't get to be an original source by just adding details from your own experience to a fraud scheme that somebody else already disclosed with enough -- well enough to put the Government on notice of the -- of the essence of the fraud. And, you know, our view is that Mr. May did that in 2006 when he testified before the Senate with Mr. Carter sitting at his side.

So the question is what has Carter given us to prove that he was the original source of that core allegation

of time card fraud. And his position on that is that maybe both he and Mr. May arrived at the same conclusions independently and that both of them can be an original source.

Our view on that is, that's not what the evidence suggests. What the evidence suggests is that Carter at the -- when this was all occurring didn't have any appreciation of time card issues on his own. Rather, years later after Your Honor dismissed the first version of his lawsuit, which had nothing to do with time card fraud, piggybacked on May's time card fraud allegations, which he had heard, to save the case, his case, and added some details of his own that don't materially add to what Mr. May already put before the United States Government.

And, you know, we've given you Carter -- or KBR has put forth a number of pieces of evidence to show you to sort of give rise to that very powerful inference. None of it's rebutted. Carter and May talking at length in 2005 about the case that they both at that time thought they were going to bring against KBR. May -- they had color-coded e-mails. May's portion of those e-mails related to time card fraud. Mr. Carter's related to water contamination.

Carter and May, as we've said, testified side by side at this Senate hearing back in 2006. Mr. May talked about time card fraud, among others things. Mr. Carter did not. He talked about water contamination.

We deposed Mr. Carter. We said, why was that? If you had time card allegations, why didn't you voice them?

Couldn't explain it. Didn't really have a reason. Didn't say that anybody had told him not to. He just didn't do it.

Later, Carter goes forward and sues KBR on his own. He drops Ken May, and he files two initial complaints which Your Honor will require -- will remember were first filed out there in California. Neither of the complaints --

THE COURT: Well, this case I think with two weeks prior to trial it became knowledgeable about the California case. We had to abort the trial in this case.

MR. FAUST: That's true, about a month before our scheduled trial. That's right.

Buy my point on that is the case that Mr. Carter first filed back in early 2006 doesn't say anything about time card fraud. That doesn't come into this case until 2009 after Your Honor first --

THE COURT: Let me ask you this question, Mr. Faust.

MR. FAUST: Sure.

THE COURT: If the Court finds that Mr. Carter is not precluded by public disclosure or Mr. Carter must refile his complaint given the Fourth Circuit's affirmative -- affirmance of our dismissal of the case of a first-to-file grounds.

MR. FAUST: He does have to refile.

THE COURT: Okay. All right.

I'm going to ask the same question to the plaintiff's lawyer.

All right. Go ahead.

MR. FAUST: Right. I think we covered that at our -- at least we agree on that at our last status conference.

THE COURT: Very well.

MR. FAUST: My point in bringing up all this evidence is there's a powerful inference here that Mr. May broke the story on time card fraud. Carter had nothing to add to that, as you can see from everything that happened at the time. Brings it back into the case; remembers what Mr. May said later when the Court decides that his water contamination case cannot go forward.

Now, I said at the outset, this is Mr. Carter's burden, so the question we have asked with all this evidence is why, if Mr. Carter was an original source of the time card allegations like he says, why did he pass up all the opportunities at the relevant time to make those allegations when he had every incentive to make his case as thoroughly and comprehensively as he could against KBR, why did he leave it out? And Carter has just chosen not to answer those questions.

If you look at the public disclosure of our cases, you'll see that typically when the challenge like this is raised, the relator will point to their disclosure statement to

the United States Government, or they will file an affidavit trying to explain why it is they think they're an original source and why the defendants are wrong about what happened.

That hasn't happened here. So we have, I think, an unrebutted inference from our -- from our evidence that Mr. May is the one who disclosed these allegations. Mr. Carter has come along later and echoed those and just added some --

THE COURT: Very well.

MR. FAUST: -- consequential additional details.

THE COURT: Okay.

MR. FAUST: Thank you, Judge.

MR. STONE: Good morning, Judge.

THE COURT: Identify yourself for the record, please. I know who you are.

MR. STONE: This is David Stone from Stone & Magnanini.

THE COURT: Okay. You agree that your client, if we find he's not barred by public disclosure, he'd have to refile his complaint?

MR. STONE: Yes, Your Honor. And we would request if possible that Your Honor, if that is going to be the ruling, give us notice so that we can just immediately refile the complaint so we don't have a situation where there's a timeline.

THE COURT: I'll rule on this. I'm going to take it

under advisement, but I'll rule on it after I review your arguments and the pleadings and what have you.

Go ahead.

MR. STONE: Certainly.

Your Honor, Mr. Faust is living in a dream world, and I need to explain why.

First of all, this case, which is a massive allegation of fraud at two military bases in a war zone --

THE COURT: I know -- I know what it's about. I mean, he claims they billed for 12 hours when they didn't do it. That they played games on Sunday and still billed, and whatever.

Go ahead.

MR. STONE: Right. But the reason I want to mention this is because I want to explain why, in fact, Mr. Carter is an original source of these allegations, which has been challenged. Unless Your Honor is going to find that he's an original source, then I won't bother. But other than, you know, I guess I need to make that argument for the record.

Mr. Carter was trained, as testified -- just by looking at Mr. Carter's depositions and Mr. May's depositions, both of which are in the record, it is clear that Mr. Carter is an original source of every allegation in his complaint.

He was trained to bill 12 hours a day. He was personally at these two bases. He personally did bill 12 hours

a day. He personally testified that he was personally told by supervisors he must bill 12 hours a day. He testified that he personally observed other employees being told that they must bill 12 hours a day.

He personally testified that he personally observed other employees being threatened, that they would be fired if they did not bill 12 hours a day. He testified that he was told by a supervisor to change one of his employee's time sheets to make it 12 hours a day.

He also testified that he was the one who was sent to these two bases to ensure that water purification for the troops occurred. In fact, at one of the bases no water purification was taking place even though there was purification equipment. At the other base there was no water purification equipment. He testified to that, which he personally observed. Your Honor actually restricted the case to what he personally observed, as we noted in our -- in our complaint.

So the idea that somehow Mr. May -- whether or not Mr. May also personally observed some of this information is somehow an original source and Mr. Carter is not is just wrong. On the facts we have conclusively demonstrated that.

I would point out that the statute does not -- anticipates that there may be more than one original source. And in fact, the first-to-file provision assumes that there may

be more than one original source, and that's why we have a first-to-file provision in part. So the idea that there can't be more than one original source of something is just not true.

We've given you chapter and verse in the brief, and I would be happy to go through it with you now.

THE COURT: It's not necessary. I've read it.

MR. STONE: Okay. Is there any other questions Your Honor has?

THE COURT: Okay. I understand your argument.

Mr. Faust, rebuttal.

MR. FAUST: Your Honor, I'll be brief.

I mean, the question still stands. If those are all the observations, if he is an original source of the time card allegations, why nothing until 2009? We don't have any explanation of that.

Mr. May was in the administrative office of -- of this camp that's at issue, handling all the time cards, handling them for payroll purposes - seeing all the, what he says were 12 hours recorded. He's the one who broke that allegation. Mr. Carter never in all the publicity he did, all the lawsuits, all the testimony never made that allegation until this Court dismissed his case, and all of a sudden he's an original source on time card fraud.

THE COURT: All right. I'll take it under advisement and let you-all know in about two weeks.

Thank you very much.

MR. FAUST: Thank you, Your Honor.

MR. STONE: Thank you, Judge.

(PROCEEDINGS CONCLUDED AT 10:28 A.M.)

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UNITED STATES DISTRICT COURT)
EASTERN DISTRICT OF VIRGINIA)

I, JULIE A. GOODWIN, Official Court Reporter for the United States District Court, Eastern District of Virginia, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above matter, to the best of my ability.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Certified to by me this 14TH day of SEPTEMBER, 2015.

/s/
JULIE A. GOODWIN, RPR
CSR #5221
Official U.S. Court Reporter
401 Courthouse Square
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Alexandria, Virginia 22314

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES *EX REL.* BENJAMIN CARTER	
VS.	1:11-CV-602 JCC
HALLIBURTON COMPANY., *ET AL.*	ALEXANDRIA, VIRGINIA OCTOBER 15, 2015

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JAMES C. CACHERIS
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by Julie A. Goodwin.

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(OCTOBER 15, 2015, 11:06 A.M., OPEN COURT.)

THE COURT: Good morning.

VOICES: Good morning, Your Honor.

THE COURT: Case of *Carter versus Halliburton, et al.*

Okay. Counsel want to identify themselves for the record, please.

MR. STONE: Yes, Your Honor. David Stone from Stone & Magnanini for the plaintiff. And I have with me Christina Heischmidt from the firm Dunlap, Bennett & Ludwig, our local counsel.

THE COURT: Okay.

MR. MARGOLIS: Good morning, Your Honor. Craig Margolis and Tirzah Lollar from Vinson & Elkins for KBR.

THE COURT: Good morning.

MS. LOLLAR: Good morning.

THE COURT: Okay. Comes on your client's motion to dismiss.

Go ahead.

MR. MARGOLIS: It does, Your Honor. Thank you.

So, we are obviously here in this long sort of running case on --

THE COURT: Yeah, I think I'll be at my tombstone --

MR. MARGOLIS: It's -- it is -- there's a lot of analogies we could use, Judge.

THE COURT: Yeah.

MR. MARGOLIS: But this case is -- we're now here on remand from the Fourth Circuit following remand from the Supreme Court. And, you know, certainly from KBR's perspective the question is -- is a fairly simple one in the sense that should the Court dismiss this matter now with prejudice or without prejudice. It's not whether or not to permit an amendment.

And in fact, Your Honor, I think it was Mr. Stone on Mr. Carter's behalf who put this perhaps best. He filed a brief. It's docket number 28 in this case, Your Honor, in April of 2014, when he was -- at the time when he was arguing that the Supreme Court pending cert. petition by KBR was not a bar, he argued, quote, Even if the Court granted KBR's petition and issued an opinion on the merits in favor of KBR, Carter 2011 complaint would remain dismissed because the issues presented to the Supreme Court could not result in an opinion that would revive that complaint as neither issue challenges this Court's dismissal of the Carter 2011 complaint.

Again, Your Honor, Mr. Stone said it best. The -- the first-to-file bar is binary. It's essentially, was there another related claim pending at the time that Carter 2011 was filed or was there not. No subsequent amended complaint can change --

THE COURT: Came within a week of trying this case.

MR. MARGOLIS: We did, Judge.

THE COURT: Yeah.

MR. MARGOLIS: We did.

THE COURT: All right. Go ahead.

MR. MARGOLIS: And we did, and the Government told us belatedly I think from everyone's perspective that there was at that time the *Thorpe* prior case.

So that is correct, Your Honor, and frankly should never have gotten that far, given the fact that *Thorpe* was pending when Carter first filed the -- what was the 2006 case.

But the fact of the matter is is that there was -- there was and this fact can never be changed that there was a related case pending, *Duprey*, at the time that Carter 2011 was filed. No amendment can change that fact. The first-to-file bar compels dismissal. So the only question is now whether it should be a dismissal with prejudice or without prejudice.

Obviously at an earlier time KBR argued to the Supreme Court and lost on the question as to whether or not once a prior -- previously filed case is no longer pending should the first-to-file bar remain in place. And we did lose on that question. The Supreme Court said, No. Once a previously pending case is no longer pending, the first-to-file bar does not require dismissal with prejudice.

THE COURT: Mr. Margolis, can you cite any pre-*Kellogg* case that found the dismissal of an earlier-filed suit to automatically cure a case from being barred by the

first-to-file bar?

MR. MARGOLIS: So a pre-KBR case that would say that a dismissal was a cure, Your Honor?

THE COURT: Yeah.

MR. MARGOLIS: I don't -- I don't believe we can.

THE COURT: Okay.

MR. MARGOLIS: We're actually confident that the Court -- the cases are virtually uniformly in KBR's favor. And we understand about the *Palmieri* case and we can discuss that some.

THE COURT: Okay.

MR. MARGOLIS: But, look, even following the Supreme Court's remand where -- excuse me -- the Supreme Court's decision on first to file with a remand that's virtually identical to the remand that this Court got from the Fourth Circuit, the D.C. Circuit in *Shea* --

THE COURT: I know that's --

MR. MARGOLIS: Yes, sent the case back, and there the district court just across the river found - and there's no statute of limitations issue even in that case - found there had to be a dismissal.

THE COURT: Well, let me ask you this. Is your motion to dismiss based on the Court's lack of jurisdiction on a 12(b)(1) or based on Carter's failure to state a claim under 12(b)(6)?

MR. MARGOLIS: Well, Your Honor, essentially it can be -- it is both and it can be stated as both.

The Court of Appeals previously held that the first-to-file bar is jurisdictional. And because jurisdiction is measured at the time of filing, that there's no subject matter jurisdiction.

The D.C. Circuit has taken a different view in a case called *Heath* and has said that the first-to-file bar is non-jurisdictional. That doesn't change what the Fourth Circuit has currently said. But even there -- and that's the reason I bring it up, Your Honor, is that even there again in *Shea*, the district court across the river found regardless of whether it's jurisdictional there still has to be a dismissal.

THE COURT: All right.

MR. MARGOLIS: So we get to the -- we get to the same result whether it's 12(b)(6) or a 12(b)(1).

THE COURT: All right. If the Court finds the first-to-file bar does apply, why should the Court consider whether the statute of limitations would prevent refiling? What authority does the Court have to consider that issue?

MR. MARGOLIS: Well, Your Honor, I think the Court has -- I don't believe there's anything that the Fourth Circuit's remand said that precludes the Court's authority to consider that issue.

I mean candidly, Your Honor, we believe that the

Court's initial decision did find that it was not the first-to-file bar that required a dismissal with prejudice. It was the statute of limitations. But when somehow in the sort of mix in terms of the various courts of appeals, including the Supreme Court that has handled this case, when it comes back to Your Honor, it comes back - and I have a copy of it here, Your Honor - it comes back to Your Honor with a remand that says that the district court judgment was not wholly free from error as, quote, dismissal with prejudice of respondent's one live claim, quote, was not called for under the first-to-file rule.

So, Your Honor, candidly, we did not read your initial decision as requiring dismissal with prejudice under the first-to-file rule. We believe it was compelled under the statute of limitations.

Be that as it may, regardless, the Fourth Circuit did what courts of appeals -- I don't have to tell Your Honor this; Your Honor obviously has a long judicial career -- commonly do on remand which is allowed the district court to have the first crack at clarifying the issues.

So it's not -- we're not -- let's be very clear. We're not asking for a dismissal with prejudice under the first-to-file bar. We are asking for a dismissal with prejudice because of the statute of limitations and now the statute of repose because refiling would be futile. And in fact, Mr. Stone's last -- excuse me -- Mr. Carter's last

pleading just made in this notice of supplemental authority on *Shea* says as much in a footnote.

There's a footnote there that says if you dismiss, Your Honor, with or without prejudice because of the statute of limitations, we're going to have a bar. So that's why they're telling the Court not to dismiss. We believe that it's very clear that the Court has no discretion to retain --

THE COURT: Very well. I understand your argument, Mr. Margolis.

MR. MARGOLIS: Thank you, Your Honor.

THE COURT: Mr. Stone.

MR. STONE: Good morning, Your Honor. And it's been a long, a long time in this case, so I hope you'll --

THE COURT: I agree with you.

MR. STONE: -- indulge me to make what I think are a few very important points here.

First of all, the law of this case is the law that was set down by the Supreme Court in this case, and the Supreme Court in this case rejected the arguments being made by the defendants, which by the way included a ten-year statute of repose argument and stated that there remained at least one claim that could go forward in this case and remanded for that purpose. That's at page 12 of the opinion.

What Mr. Margolis is saying is the Supreme Court didn't know what it was doing. Well, we presume that the

Supreme Court did know what it was doing.

Another thing that the Supreme Court did was to give guidance to Your Honor in -- in its interpretation of pending where they said, why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government. And that's precisely why they rejected the position taken by Halliburton in the case, because they understood that the policy here is to allow valid meritorious cases to go forward, not -- not to bar them under complex procedural technical rules, but to allow them to go forward so that the Congress can -- can achieve its policy which is a liberal interpretation of the False Claims Act.

So, the Court has told you, and here's another thing that the Court said which is very important. The Court said -- excuse me. They said that if the reference to a pending action in the FCA is interpreting in this way an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed.

Judge Alito specifically chose that language, ceases to bar that suit once it is dismissed. The clear meaning of that and the commonsense meaning of that is that once an earlier suit is dismissed, that rule no longer applies, and at that -- in the future a case to the extent it continues to be pending is no longer barred by an earlier suit.

The Court could have said, will no longer bar a suit that is then filed or is later filed. It didn't say that. And it -- and it had before it the facts of this case where this case was pending. So I think there's a fair interpretation of that decision that says that once the cases as they were in this case that this Court had found were related to this case were dismissed, which has been the case for more than two years, that this case is no longer barred by those cases.

THE COURT: All right. Let me ask you the question I asked Mr. Margolis.

MR. STONE: Yes.

THE COURT: Can you cite any pre-*Kellogg* case that found the dismissal of an earlier-filed suit to automatically cure a case from being barred by the first-to-file bar?

MR. STONE: No, Your Honor, but I can cite *Palmieri* and *Kurnik* which were decided before the Supreme Court case. And in both those cases applying the same policy they found that a motion to amend could cure a first-to-file issue and should cure a first-to-file issue for many of the reasons that I've stated here. And, in fact, in those cases there wasn't a statute of limitations issue which is even more prejudicial to Mr. Carter here.

Because as a matter of fact if this case is dismissed, now this is like a gotcha for Halliburton. They're

going to say, dismiss this case. And then when we come back they're going to say, ah, you know, statute of limitations. And then this Court has to deal with the equitable tolling issue.

But what I'm saying is that under the sister Court's decision of Judge Hollander and Judge Alexander, which appear to be in this circuit, the current view of the law at least in terms of an amendment --

THE COURT: What about --

MR. STONE: -- amendment to --

THE COURT: Okay. Now what --

MR. STONE: Now we've made a motion to amend, Your Honor. We believe we have a right to make a motion to amend. We both have it as a matter of right because we made it within 21 days of their motion to dismiss.

But we believe even if we didn't have a right, Your Honor should grant it. It's the first motion to amend in this case that we've ever sought as to this complaint that's in this case, this docket number, and we should be permitted to do it in the interest of justice.

THE COURT: Okay. What about the *Shea* case, the D.C. case?

MR. STONE: The *Shea* case -- first of all, Your Honor, the *Shea* case is not in this circuit. It's another district court. You're not bound by it.

Second of all, the original decision of the *Shea* District Court was that the earlier action permanently barred, which was the exact argument made by Shea to the Supreme Court which was rejected in our case.

THE COURT: You mean Halliburton made the --

MR. STONE: Yeah, made by Halliburton --

THE COURT: Yeah.

MR. STONE: -- and Shea because they filed the petition.

So -- so that Court was already starting from the wrong premise in the first place. Second of all, that Court didn't even consider *Palmieri* or *Kurnik*. Didn't mention them; didn't distinguish them. And based on what was in front of that Court, the cases that were in front of that Court in that Court's circuit, you know, those cases said that you look at the time of the filing.

So I understand why the Court would have held that way, but that doesn't necessarily require that this Court hold that way. And in fact, the sister courts in this circuit, which the Fourth Circuit has said, you know, district courts should at least look at and consider particularly where they're well-reasoned have held the opposite. They've held that the cases can continue if there's an amended complaint, as we're seeking to do here.

THE COURT: Okay. I understand.

MR. STONE: Can I explain a little bit about the motion to amend?

THE COURT: Yes, please do.

MR. STONE: Okay. So with respect to the motion to amend, it should be pointed out that the defendants have repeatedly in numerous cases that we filed asked us to revise the complaint because Your Honor had made certain rulings which we did not take out of the complaint for the exact reason that we didn't want to just generate more motion practice. But they've been asking us to amend the complaint, so now when we amend the complaint, now they're saying we can't amend the complaint. It's too late. That's number one.

Number two, we have had in the case and we do have in the case claims would fall within the statute of limitation.

So to the extent that Your Honor rules in our favor on first to file and I -- I concede that we would need that. Right? Because if Your Honor dismisses the case, then whether we amend the case or not may not matter.

I would argue that Your Honor should first consider the motion to amend because if Your Honor considers the motion to amend and grants it, then the arguments that are being made should be applied to that complaint and not to this one. And the arguments would be slightly different because under *Palmieri* and under *Kurnik* it's clear that if there is an amended complaint we would be entitled since there's no pending

complaint now to proceed. So it does matter the order in which Your Honor considers these motions. And I think the appropriate order is our motion to amend first, and then if you grant our motion to amend, then the arguments that have been made --

THE COURT: I understand.

MR. STONE: I don't know that we'd need to re-brief.

THE COURT: I understand.

MR. STONE: As to -- I just want to make a few points as to the amendment and why it's within the statute of limitations.

From the beginning of this case, we have alleged that between at least January of 2005 and March of 2005, Halliburton failed to purify Ar Ramadi and Al Asad bases, water that they were required to purify. Lied about it; billed for it; received money for it. And that --

THE COURT: Very serious allegations your clients made.

MR. STONE: Yes, very serious. And, by the way, the -- the theater quality manager of Halliburton confirmed those allegations in a report in May. His name was Will -- I forget his last name. It's in our -- it's in our papers, Your Honor.

But in a report in May that was given to high-ranking Halliburton -- KBR officials, he confirmed that

exactly what Carter said was going on was going on. That there was no testing of the water. That there had been, you know, a serious breach of the purification requirements.

THE COURT: This gets to the merits and --

MR. STONE: But the only -- the only reason I'm pointing this out, Your Honor, is that since the beginning of this case they had that -- the allegation was there that they had that report in at least May of 2005. And then in June and July of 2005, which is within the statute of limitations - this case was filed in June 2nd of 2011 - they made presentations, including written presentations, to the U.S. Army and received a $21 million award for their excellent job under Task Order 59 which in part required them to purify the water at Al Asad and Ar Ramadi air bases.

So that's been in the case, but what I wanted -- what I'm trying to do with the motion to amend is to clarify for the Court that that is within the statute of limitations. And we should be permitted to proceed on those claims, even if the Court does not apply equitable tolling as to the claims that occurred before June of 2005.

THE COURT: Very well, sir.

MR. STONE: One last point, Your Honor.

It is clear that if the Court does not permit us to proceed at this point and go to a jury trial and have this claim determined by a jury, it will never be determined by a

jury. It is a fallacy to say that if this Court dismisses this case without prejudice that it is likely -- regardless of the fact that we believe we have legal arguments that could be made, Your Honor. I'm just being practical here. We would be getting into the ten-year statute of repose which is an issue that's never been decided. We'll be back in the Supreme Court again. We're going to be getting into, you know, additional equitable tolling issues.

So, the fact of the matter is if the Court dismisses this case, whether it does it with prejudice or without prejudice at this point, Halliburton will never face a jury --

THE COURT: I understand.

MR. STONE: -- for this.

THE COURT: Okay.

Mr. Margolis, what prejudice, if any, as to your client if I'll allow the plaintiff's leave to amend?

MR. MARGOLIS: Well, Your Honor, here's the prejudice, and I think with -- I have great respect for Mr. Stone. The reason that the Court is trying to -- excuse me. The reason that Mr. Stone is trying to have the Court consider the amendment first is because to try to fit this case in *Palmieri.*

Now we think that *Palmieri* is with respect is wrongly decided and we can explain why. But that's the prejudice, Judge. The prejudice is is that right now Mr. Stone

believes that that amendment would have jurisdictional significance. So if he can get an amendment first before you address first to file, it tries to bring this case closer to the situation in *Palmieri*.

You know, factually, Your Honor, we're not going to engage because we think it's not appropriate at this time on the substance. The -- but these award fee presentations were made in 2005. They would be outside of the statute. We believe even outside the statute of repose if this court case were to be refiled.

If I can -- if I can rewind, Your Honor, because I think this is very important. There's a lot of characterization of what the Supreme Court said or didn't say in the first-to-file portion of its opinion, which was very brief. But as we've already briefed to the Court, when deciding what the Supreme -- even the Supreme Court itself determines its jurisdiction based on the questions that were presented to it.

That's why Mr. Stone himself said based on -- as I've quoted earlier, Your Honor, based on the questions that were presented to the Supreme Court, the Supreme Court's determination of those questions would not change the basic premise of that regardless of how the first-to-file bar was -- issue is determined, there's still going to be a dismissal. It's either with or without prejudice, but there's still a

dismissal.

And in fact, as Justice Alito at the very beginning of his opinion -- and I'm quoting here -- characterized the question presented on first-to-file bar, it was, quote, whether the False Claims Act first-to-file bar keeps new claims out of court only while related claims are still alive, or whether it may bar those claims in perpetuity, close quote.

There was no question present -- the word amendment doesn't appear in the Supreme Court decision. It doesn't appear in any prior briefing respectfully until now because this case has been litigated since 2008, at a minimum, predicated on the assumption that once there's been a dismissal because of a previously pending case that there has to be a refiling.

The only thing that's changed is that obviously KBR took the position that a -- once a previously pending case was no longer pending the bar should continue. The first-to-file bar should continue. And the Supreme Court disagreed with us.

THE COURT: Very well.

MR. MARGOLIS: And fair enough. But, the statue of limitations hold -- excuse me -- the statute of limitations is what causes the problem here now, not the first-to-file bar.

Judge, I mean, I think we've treated *Palmieri* fairly extensively in our papers. Unless the Court has questions about it, we do respectfully suggest it's incorrectly

decided. A key distinction though, there -- what I think speaks from the opinion is that the Court did not want to engage in sort of empty formalism in the sense that if I send -- if I dismiss this case they're just going to refile it anyway. So what's the big deal? Why are we going to need to do that?

But that's not our case here. Here it actually matters. Here there's a substantive result. So there is -- there's prejudice there as well.

I would note that *Palmieri* relied very strongly on *Rockwell* from the Supreme Court. We believe in a -- in a way that's not entirely correct. And I would just point, rather than spend time in oral argument, unless the Court wants to hear it, I would direct the Court to a very good treatment of *Rockwell* in the case called *Penrose* from the Southern District of Ohio, that was also decided in 2015, just before the *Carter* decision from the Supreme Court.

But *Penrose*, we believe, appropriately analyzes *Rockwell*, and the basic -- *Rockwell* was a public disclosure bar case. It wasn't a first-to-file bar case.

The key issue is there's no number of amendments that can ever cure the basic problem. The fundamental issue is there was and there will always have been a related case pending, *Thorpe*, when this case was filed.

THE COURT: Very well.

Okay. Take it under advisement and let you-all know.

Thank you.

MR. MARGOLIS: Thank you, Your Honor.

MR. STONE: Thank you, Judge.

MS. LOLLAR: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED AT 11:38 A.M.)

-oOo-

UNITED STATES DISTRICT COURT)
EASTERN DISTRICT OF VIRGINIA)

I, JULIE A. GOODWIN, Official Court Reporter for the United States District Court, Eastern District of Virginia, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above matter, to the best of my ability.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Certified to by me this 16TH day of NOVEMBER, 2015.

/s/
JULIE A. GOODWIN, RPR
CSR #5221
Official U.S. Court Reporter
401 Courthouse Square
Tenth Floor
Alexandria, Virginia 22314

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

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
v.	)	1:11cv602 (JCC/JFA)
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

M E M O R A N D U M O P I N I O N

For seven years, *qui tam* relator Benjamin Carter's allegations of defense contractors submitting false claims to the Government have been before this Court. The case has undergone "a remarkable sequence of dismissals and filings." *Kellogg Brown & Root Servs., Inc. v. United States* ex rel. *Carter*, 135 S. Ct. 1970, 1974 (2015). It is back now, on remand from the Fourth Circuit after the Supreme Court found that this Court erred by dismissing with prejudice under the False Claims Act's ("FCA"), 31 U.S.C. §§ 3729-3733, first-to-file bar. Consistent with the Supreme Court's opinion, this Court now dismisses Relator's case under the first-to-file bar, this time without prejudice.

This matter came before the Court on Defendants Halliburton Company; Kellogg Brown & Root Services, Inc.;

Service Employees International, Inc.; and KBR, Inc.'s (collectively "Defendants") motion to dismiss with prejudice. [Dkt. 99.] In response to that motion, Relator Benjamin Carter ("Relator" or "Carter") motioned to file an amended complaint. [Dkt. 105.] For the following reasons, the Court will deny Relator's motion to amend and will dismiss Relator's case without prejudice.

I. Background

The Court briefly discusses this case's "remarkable" history so as to frame the present motions.

For four months in 2005, Carter worked for Defendants in a water purification unit employed to provide clean water to U.S. troops at war in Iraq. (Compl. [Dkt. 1] ¶¶ 1-3.) Carter alleges that during his time in Iraq, he never performed "actual water purification or testing duties." (*Id.* ¶¶ 40, 43, 53.) Instead, Defendants' personnel allegedly required Carter and other employees to fill out timecards reporting twelve hours of water purification work a day when they actually performed zero. (*Id.* ¶¶ 53-55.) Carter also alleges that it was "routine practice" to require "trade employees," such as him, to submit timecards totaling eighty-four hours per week, regardless of the actual work performed. (*Id.* ¶¶ 60-61, 65-68.) Through these allegedly false reporting practices, Carter argues that false claims were submitted to the Government and paid to Defendants.

Carter filed his original complaint under the False Claims Act in February 2006 in the U.S. District Court for the Central District of California. *United States* ex rel. *Carter v. Halliburton Co.*, No. 06-cv-616 (C.D. Cal. filed Feb. 1, 2006). In November 2008, after two years of investigation, the case was transferred to this Court ("*Carter I*"). *United States* ex rel. *Carter v. Halliburton Co.*, No. 08-cv-1162 (E.D. Va. transfer Nov. 7, 2008). Shortly before *Carter I*'s trial date, the Government informed the parties of a pending case filed in 2005 with related allegations of false billing, *United States* ex rel. *Thorpe v. Halliburton Co.*, No. 05-cv-8924 (C.D. Cal. filed Dec. 23, 2005). In response to *Thorpe* and the FCA's first-to-file bar, this Court dismissed *Carter I* without prejudice and Carter appealed that dismissal.

During the pendency of *Carter I*'s appeal, *Thorpe* was dismissed for failure to prosecute. In response, Carter filed a new complaint ("*Carter II*"), but he failed to dismiss his prior appeal. *United States* ex rel. *Carter v. Halliburton Co.*, No. 10-cv-864 (E.D. Va. filed Aug. 4, 2010). Because *Carter I* and *Carter II* were substantively identical, this Court ruled that the still-pending appeal barred *Carter II*. Thus, this Court dismissed *Carter II* without prejudice. 2011 WL 2118227, at *6. In response, Carter voluntarily dismissed his appeal in *Carter I* and again filed his complaint ("*Carter III*"). *United States* ex

rel. *Carter v. Halliburton Co.*, No. 11-cv-602 (E.D. Va. filed June 2, 2011). *Carter III* is the case currently before this Court. But *Carter III* underwent its own lengthy procedural journey before arriving for these present motions.

At the time *Carter III* was filed in June 2011, two cases alleging similar false billing by KBR were already pending in other courts: *United States* ex rel. *Duprey*, No. 8:07-cv-1487 (D. Md. filed June 5, 2007) ("Maryland Action") and a sealed action filed in Texas in 2007 ("Texas Action"). Defendants motioned to dismiss *Carter III*, arguing again that the earlier-filed cases destroyed this Court's subject matter jurisdiction due to the first-to-file bar. This Court concluded that the Maryland Action was related to Carter's claims and was pending when Carter filed his suit. Thus, the Court dismissed *Carter III* for lack of jurisdiction under the first-to-file bar. Additionally, the Court found that most of *Carter III*'s allegations of false claims fell outside the FCA's six-year statute of limitations. In total, only $673.56 in allegedly false claims were issued within the six years prior to 2011. The Court, however, found that those claims would also be untimely if Carter tried to refile his case after dismissal. Therefore, the Court dismissed *Carter III* with prejudice. 2011 WL 6178878, at *12.

Carter noticed an appeal to the Fourth Circuit arguing, first, that the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, tolled the statute of limitations on his claims. *See United States* ex rel. *Carter v. Halliburton Co.*, 710 F.3d 171, 177 (4th Cir. 2013). The Fourth Circuit agreed and reversed this Court's statute of limitations conclusion by finding that the WSLA did toll the statute and thus Carter's claims were not time barred. *Id.* at 181.

The Fourth Circuit then considered the effect of the first-to-file bar. By the time of appeal, the Maryland and Texas Actions had been voluntarily dismissed. Thus, Carter argued that those earlier-filed cases were no longer "pending" in a way that would bar his suit. The Fourth Circuit rejected this argument, noting that the "plain language of the first-to-file bar" required the court to "look at the facts as they existed when the claim was brought to determine whether an action is barred." *Id.* at 183. Because the Maryland and Texas Actions were "pending" when *Carter III* was filed, the subsequent voluntary dismissal of those cases did not remove the first-to-file bar. Thus, the Fourth Circuit agreed with this Court that the first-to-file bar precluded *Carter III*. *Id.*

The Fourth Circuit then considered whether the earlier Actions would continue to bar related suits in perpetuity, even though those Actions were dismissed. The Fourth Circuit appears

to have reached this question due to its interpretation that this Court dismissed *Carter III* with prejudice under a perpetual-bar theory. The Fourth Circuit concluded that dismissal with prejudice on first-to-file grounds was error because "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." *Id.* Therefore, this Court should have dismissed without prejudice to permit Carter to refile. *Id.* The Fourth Circuit did not consider whether the statute of limitations would have barred refiling, likely because the court found the WSLA tolled the statute of limitations.

This substantial litigation inertia carried *Carter III* all the way to the Supreme Court. *Kellogg Brown & Root Servs., Inc. v. United States* ex rel. *Carter*, 135 S. Ct. 1970 (2015) [hereinafter *Kellogg*]. On the statute of limitations question, the Supreme Court agreed with this Court that "the WSLA does not suspend the applicable statute of limitations." *Id.* at 1978. This holding rendered all of Carter's claims time barred except for $673.56 of false billing. Thus, the Supreme Court proceeded to consider the application of the first-to-file bar on those remaining claims. Looking at whether dismissal with prejudice was required under the first-to-file bar, the Supreme Court asked "whether the False Claims Act's first-to-file bar keeps new claims out of court only while related claims are still

alive or whether it may bar those claims in perpetuity." *Id.* at 1973. On this question, the Supreme Court "agree[d] with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error" because a case is no longer "pending" once it has been dismissed. *Id.* at 1978-79. Thus, the Supreme Court reversed in part and affirmed in part and remanded the case. The Supreme Court never addressed the question of whether the statute of limitations or repose would preclude Carter from refiling after dismissal without prejudice.

On remand, the Fourth Circuit considered the "only issue left for resolution . . . whether Carter timely filed his complaint under the principle of equitable tolling." *United States* ex rel. *Carter v. Halliburton Co.*, 612 F. App'x 180, 180 (4th Cir. 2015). Finding that Carter did not properly appeal the issue of equitable tolling, the Fourth Circuit granted the "extraordinary" remedy of summarily affirming this Court's decision not to equitably toll the statute of limitations. *Id.* at 180; *see also* 4th Cir. R. 27(f) ("Motions for summary affirmance . . . are reserved for extraordinary cases only and should not be filed routinely."). The Fourth Circuit noted, however, that "the district court judgment was not wholly free from error, as 'dismissal with prejudice of respondent's one live claim' was 'not called for' under the first-to-file rule."

Id. at 181 (quoting *Kellogg*, 135 S. Ct. at 1978-79). Therefore, the Fourth Circuit remanded the case to this Court. *Id.*

After this labyrinthine course, Carter's case is before this Court again on Defendants' motion to dismiss with prejudice pursuant to the first-to-file bar and the statute of limitations and repose that Defendants argue would prevent Carter from refiling. In response, Carter argues the first-to-file bar no longer precludes his case and he seeks to revive his time-barred allegations through amendment, relation back, and equitable principles. For the following reasons, the Court will deny Carter's motion to amend and will dismiss this case without prejudice due to the first-to-file bar.

II. Legal Standard

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Defendants raising a 12(b)(1) challenge may contend that the complaint "fails to allege facts upon which subject matter jurisdiction may be based" or "that the jurisdictional allegations of the complaint were not true." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In either case, the "burden of proving subject matter jurisdiction on a motion to dismiss is on the plaintiff, the party asserting jurisdiction." *Id.*

Additionally, Rule 12(b)(6) allows a court to dismiss a suit which fails "to state a claim upon which relief can be

granted." Fed. R. Civ. P. 12(b)(6).[1] To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). When reviewing the complaint, the court "must accept as true all the factual allegations contained in the complaint" and "draw all reasonable inferences in favor of the plaintiff." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011).

III. Analysis

The FCA's *qui tam* provision incentivizes citizens to report and prosecute knowingly false claims being submitted to the Government. The FCA, however, places limitations on *qui tam* suits to "prevent parasitic lawsuits based on previously

[1] During the October 15, 2015 hearing before this Court, Defendants framed their motion to dismiss as simultaneously a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and a 12(b)(6) motion to dismiss for failure to state a claim. The Fourth Circuit considers the first-to-file bar to be jurisdictional. *See Carter*, 710 F.3d at 181 ("Section 3730(b)(5) is jurisdictional and if an action is later filed that is based on the facts underlying the pending case, the court must dismiss the later case for lack of jurisdiction."). Thus, this motion proceeds principally as a 12(b)(1) motion. Even if the first-to-file bar were to sound in nonjurisdictional terms, however, the result in this case would not change. *See United States* ex rel. *Heath v. AT&T*, 791 F.3d 112, 119 (D.C. Cir. 2015) ("Even if the district court wrongly characterized its dismissal as jurisdictional, we could sustain that judgment for failure to state a claim under Rule 12(b)(6)."). Thus, the Court presents both standards here.

disclosed fraud." *Carter*, 710 F.3d at 181 (citing *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3d Cir. 1998)). The first-to-file bar, 31 U.S.C. § 3730(b)(5), is one such limitation. Section 3730(b)(5) "precludes a *qui tam* suit 'based on facts underlying [a] pending action." *Kellogg*, 135 S. Ct. at 1974. Specifically, the statute states the following: "When a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." § 3730(b)(5).

In the present case, it is uncontested that the Maryland and Texas Actions were "pending" when Carter filed this suit in June 2011. Carter argues that those Actions no longer bar his suit because they were dismissed in October 2011 and March 2012, respectively, making them no longer "pending" under *Kellogg*'s recent definition of that term. Thus, in Carter's view, he may proceed to trial on his timely claims without dismissing his case or amending his complaint. As an alternative position, Carter argues that the now dismissed Actions would not bar his suit if he filed an amended complaint. The Court will consider these arguments in turn.

A. Automatic First-Filer Status

Carter's argument that he can proceed with his current complaint unimpeded by the dismissed Maryland and Texas Actions

relies on his interpretation of the *Kellogg* holding, which reads: "a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed." (Pl.'s Mem. in Opp'n at 4 (quoting *Kellogg*, 135 S. Ct. at 1979).) In Carter's view, this holding means that "once an earlier suit is dismissed it ceases to bar the later suit which then rises to the status of first-to-file." (Pl.'s Mem. in Opp'n at 5.) In other words, Carter believes the dismissal of the earlier Actions automatically advanced him to the first-filer position, even though he filed this case when those Actions were pending in 2011. For the following reasons, Carter interprets *Kellogg* too broadly.

The law of this case and Fourth Circuit precedent are contrary to Carter's automatic-first-filer argument.[2] The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) (quoting *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999)). Additionally,

[2] Additionally, Relator conceded at the October 15, 2015 oral argument that he cannot cite any pre-*Kellogg* case that interpreted the first-to-file bar to automatically disappear when the earlier-filed case is dismissed. Courts appear to have resoundingly rejected that argument before *Kellogg* was decided. *See United States* ex rel. *Palmieri v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 850 (D. Md. 2013) ("Precedent uniformly supports the view that the subsequent dismissal of a first-filed *qui tam* action, without more, cannot cure the filing of a second *qui tam* action while the first action was pending.").

"once the decision of an appellate court establishes the law of the case, it 'must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal.'" *Id.* (quoting *Aramony*, 166 F.3d at 661). The law of the case must be followed unless "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *Id.* (quoting *Aramony*, 166 F.3d at 661).

Looking to the prior proceedings in this case, it is clear this Court applied the first-to-file bar at the time a complaint was filed. The prior opinion dismissing this case stated that "whether a *qui tam* action is barred by § 3730(b)(5) is determined by looking at the facts as they existed when the action was brought." 2011 WL 6178878, at *8 (citing *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004)). The Fourth Circuit endorsed this view on appeal when it rejected the exact argument Relator makes here. The Fourth Circuit stated that "[f]ollowing the plain language of the first-to-file bar, Carter's action will be barred by *Duprey* or the Texas action if either case was pending when Carter filed suit." *Carter*, 710 F.3d at 183. The Fourth Circuit was explicit in this analysis, saying "we look at the facts as they existed when the claim was brought to determine whether an

action is barred by the first-to-file bar." *Id.* The Fourth Circuit applied this standard to reach the same conclusion as this Court; Carter's claim is barred by the earlier-filed Actions pending at the time Carter filed his suit in 2011. *Id.* The Fourth Circuit's endorsement of this Court's statement of the law created the law of this case and this Circuit. Under that law, the Court consider whether the first-to-file bar applies at the time a suit is filed, not mid-course whenever an earlier suit is dismissed.

Relator argues that the Court is not bound by the law of the case or Fourth Circuit precedent because the Supreme Court's *Kellogg* decision is controlling contrary authority on the issue.[3] *See TFWS, Inc.*, 572 F.3d at 191 (noting an exception to the law-of-the-case doctrine when "controlling authority has since made a contrary decision of law applicable to the issue"). That argument is contradicted by a proper reading of *Kellogg*, the state of the law at the time *Kellogg* was decided, and a sister court's recent interpretation of *Kellogg*.

[3] The Court notes that Carter's early interpretation of *Kellogg* was directly opposed to the argument he makes now. In an August 11, 2015 letter to this Court regarding a proposed briefing schedule, Carter's attorney wrote that "the District Court is obligated to follow the Supreme Court and Fourth Circuit's directives to dismiss the matter without prejudice." (August 11, 2015 Letter [Dkt. 96] at 2.)

The Supreme Court's statement of the issues before it in *Kellogg* indicates the narrow nature of its holding. The Supreme Court framed the issue as "whether the False Claims Act's first-to-file bar keeps new claims out of court only while related claims are still alive or whether it may bar those claims in perpetuity." *Kellogg*, 135 S. Ct. at 1973. This statement indicates the Supreme Court was considering whether "new claims" would be barred by dismissed cases. The issue statement does not purport to address what effect a dismissal has on existing claims that were previously barred. Viewed in this context, the holding that "a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed" does not support Carter's argument that an existing case may proceed to trial automatically when a first-filed suit is dismissed.

The state of the law on the meaning of "pending" before the *Kellogg* decision sheds additional light on how to interpret the Supreme Court's holding. In *Carter III*, the Fourth Circuit considered Relator's argument that "the district court erred when it dismissed his complaint with prejudice on the ground that his action was forever barred" by the Maryland Action. *Carter*, 710 F.3d at 183. The Fourth Circuit agreed with Relator, concluding that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a

related case." *Id.* Thus, dismissal under the first-to-file bar should be without prejudice so as to permit a possible refiling.

Thirteen months after the Fourth Circuit rejected the perpetual-bar theory in *Carter*, the Court of Appeals for the D.C. Circuit reached the opposite conclusion. In *United States ex rel. Shea v. Cellco Partnership*, the D.C. Court of Appeals held that "the first-to-file bar applies even if the initial action is no longer pending." *Shea*, 748 F.3d 338, 344 (D.C. Cir. 2014), *vacated by* 135 S. Ct. 2376 (2015). To the *Shea* court, "pending" meant that a first-filed action forever barred all subsequent related cases, even after the first-filed case was dismissed. Because of this interpretation, the *Shea* court affirmed the district court's dismissal *with prejudice* under the first-to-file bar. *Id.* The *Shea* holding created a 3-1 circuit split on the issue of whether a first-filed suit continues to bar all new suits in perpetuity, even after the first-filed suit is dismissed. *Id.*

The Supreme Court's holding in *Kellogg* is best viewed as a response to this circuit split and the arguments actually litigated before the Fourth Circuit in *Carter III*. The Supreme Court said it "agree[d] with the Fourth Circuit that the dismissal with prejudice of respondent's one live claim was error." *Id.* at 1979. The Supreme Court did not, however, comment on or displace the Fourth Circuit's conclusion that "we

look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Carter*, 710 F.3d at 183. When viewed in the proper context, it is clear that *Kellogg* did not alter the law of this case or the law in the Fourth Circuit. Thus, the dismissal of the earlier Actions does not automatically advance Carter's case to first-filer status.

The one other district court known to have considered this issue after *Kellogg* supports this interpretation of the Supreme Court's holding. The Supreme Court granted certiorari in the *Shea* case discussed above and remanded for proceedings consistent with *Kellogg*. *United States* ex rel. *Shea v. Cellco P'Ship*, 135 S. Ct. 2376 (2015). On remand, the U.S. District Court for the District of Columbia considered the effect of *Kellogg* and concluded that "[a]lthough several aspects of the first-to-file bar have recently been clarified by the Supreme Court and our Court of Appeals, its essence remains well-defined: Plaintiffs, other than the Government, may not file FCA actions while a related action is pending." *United States* ex rel. *Shea v. Verizon Comm'ns, Inc.*, No. 09-1050, slip op. at 25-26 (D.D.C. Oct. 6, 2015). Thus, the temporal focus of the first-to-file bar remains the time a later suit is *filed*. Because of this, the *Shea* court dismissed the relator's action without prejudice, even though the first-filed suit was no

longer pending. *Id.* at 29. This Court agrees with the outcome in *Shea* and follows the same course here.

In light of the foregoing, this Court must apply Fourth Circuit precedent and the law of this case to the current motion to dismiss.[4] Under that law, the Court considers whether Relator's case was barred at the time he filed suit. It is uncontested that the Maryland and Texas Actions were pending at that time. Nothing in the Supreme Court's decision leads the Court to find that the subsequent dismissal of a first-filed suit automatically advances *Carter III* to first-filer status without any action by Carter. Therefore, the Court rejects Carter's argument for jurisdiction on this ground.

B. Motion to Amend

In a variation of the same argument, Carter asserts that his case would "certainly elevate" to first-filer status if he amended his complaint. (Pl.'s Mem. in Opp'n at 5.) Accordingly, Carter seeks to amend his complaint under two theories. First, he claims an "absolute right to amend his complaint for the first time as a matter of course" under Rule

[4] Plaintiffs do not argue that the law of this case should change due to new evidence or because the law is clearly erroneous and results in a manifest injustice. *See TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) (listing exceptions to the law of the case doctrine). Those exceptions do not apply in this case as there has been no trial to produce new evidence and the law in this case has not been shown to be clearly erroneous or manifestly unjust.

15(a)(1)(B)'s 21-day amendment window. (Pl.'s Reply in Supp. of Mot. to Amend at 6.) Second, in the alternative, Relator requests leave of court to file an amended complaint under Rule 15(a)(2). (*Id.* at 7.)

Defendants counter that 15(a)(1)(B) does not grant leave to amend because that right "expired 21 days after KBR filed its original motion to dismiss in October 2011." (Defs.' Reply in Supp. of Mot. to Dismiss at 32.) Furthermore, Defendants argue that the Court should not grant leave to amend under 15(a)(2) because any amendment would be futile, and Carter's delay in seeking leave to amend would prejudice Defendants and the Court. (*Id.* at 34.) As discussed below, amendment is not proper under 15(a)(1)(B) or 15(a)(2).

i. *Amendment as a Matter of Right*

Under Federal Rule of Civil Procedure 15(a)(1)(B), a plaintiff may amend his complaint once as a matter of course within "21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Neither side could produce a case indicating determinatively whether a Plaintiff retains this right to amend in response to a second 12(b) motion made years after the filing of the initial complaint. For the following reasons, the Court finds that 15(a)(1) does not permit such an amendment as a matter of right.

Relator claims that "every court which has dealt with this issue has upheld the right to amend as a matter of course in response to a motion to dismiss." (Pl.'s Reply at 7.) Carter's cited cases, however, all involved timely amendments made in response to a first defensive action. None of the cases in Carter's memoranda are informative of the question of when the 21-day amendment period begins in cases involving multiple motions to dismiss.[5] Thus, the Court looked elsewhere to resolve this issue and found guidance in the text of the rule, district court opinions addressing analogous amendment issues, and the policies underlying the 21-day amendment period. All of these sources indicate that amendment is not proper under 15(a)(1)(B).

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[5] *United States* ex rel. *D'Agostino v. EV3, Inc.*, No. 14-2145, 2015 WL 5719707, at *3-4 (1st Cir. Sept. 30, 2015) (Pl.'s Reply to Motion to Amend at 6) (rejecting argument that 2009 amendment created cumulative right to amend as matter of course); *Melvin v. Social Sec. Admin*, No. 5:14-cv-170-F, 2015 WL 5089054, at *5, 8 (E.D.N.C. Aug. 27, 2015) (Pl.'s Reply to Motion to Amend at 7) (recognizing amendment as matter of course in response to first motion to dismiss and denying leave for second amendment as futile in response to second motion to dismiss); *In re MI Windows & Doors, Inc. Prods. Liability Litig.*, 908 F. Supp. 2d 720, 724 (D.S.C. 2012) (Pl.'s Reply to Motion to Amend at 7) (denying Plaintiff's amendment as a matter of course because "there is simply no way that the amended complaint can be deemed to have been filed within 21 days of the filing of either the original complaint or the motion to dismiss"); *J.S.* ex rel. *Simpson v. Thorsen*, 766 F. Supp. 2d 695, 700 (E.D. Va. 2011) (Pl.'s Reply to Motion to Amend at 7) (noting plaintiff filed amendment as matter of course in response to defendant's first and only motion to dismiss); *Heinz Kettler GMBH & Co. v. Razor USA, LLC*, 750 F. Supp. 2d 660, 667 (E.D. Va. 2010) (Pl.'s Reply to Motion to Amend at 7) (treating motion to amend as motion to supplement and granting *leave* to supplement).

The text of the rule states that a party may amend a pleading requiring a response, like a complaint, "21 days after service of a responsive pleading or 21 days after service of a motion under 12(b), . . . whichever is earlier." Fed. R. Civ. P. 15(a)(1). From the committee notes, it is clear that this rule does not grant a cumulative right to amend after both a responsive pleading *and* a 12(b) motion. The commentary states, "[t]he 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period." Fed. R. Civ. P. 15 advisory committee's 2009 note. Thus, the text of the rule and the advisory committee notes strongly suggest that a party does not get multiple 21-day periods to amend.

Additionally, several courts have considered how to apply Rule 15(a)(1) when multiple defendants file separate motions to dismiss. Those courts concluded that "the twenty-one day period to amend as a matter of course begins on the date of the earliest defensive action." *See, e.g., Williams v. Black Entm't Television, Inc.*, No. 13-cv-1459, 2014 WL 585419, at *4 (E.D.N.Y. Feb. 14, 2014) (quoting *Schneider v. Cnty. of Sacramento*, No. 2:12-cv-2457, 2013 U.S. Dist. LEXIS 97295, at *2 (E.D. Cal. July 10, 2013)); *see also Kieffer v. Tundra Storage*

LLC, No. 14-3192 ADM/LIB, 2015 WL 5009012, at *3 (D. Minn. Aug. 21, 2015) ("The 21-day period to amend therefore began to run on April 13 and did not reset when subsequent pleadings and motions were filed."); *Trujilo v. City of Newton*, No. 12-2380-JAR-DJW, 2013 WL 535747, at *1 (D. Kan. Feb. 12, 2013) ("The advisory committee notes make clear that the 'whichever is earlier' language in Rule 15(a)(1) is not intended to be cumulative.").

The policies underlying Rule 15(a)(1) also support the conclusion that the 21-day period to amend as a matter of right began when Defendants filed their first motion to dismiss. In 2009, Rule 15(a) was changed to limit the time to amend as a matter of course after a 12(b) motion to 21 days. Under the former rule, the right to amend terminated upon the filing of a responsive pleading. *See Domino Sugar Corp. v. Sugar Wkrs. Local Union 392*, 10 F.3d 1064, 1068 n.1 (4th Cir. 1993) ("[U]nder Fed. R. Civ. P. 15(a), a complaint may be amended without leave of the court when the defendant has not filed a responsive pleading."). A 12(b) motion attacking the complaint, however, was not considered a "responsive pleading." *Id.* Thus, a plaintiff could sometimes retain the right to amend even after a case was dismissed. *See* Fed. R. Civ. P. 15 advisory committee's 2009 note ("The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend."). To address the concern from such late

amendments, the 21-day window was created to "force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion." *Id.* Thus, the current 21-day amendment window advances the goal of "expedit[ing] determination of issues that otherwise might be raised seriatim." Fed. R. Civ. P. 15 advisory committee's 2009 note. That goal is antinomical with Relator's request to amend nearly four years after he responded to Defendants' first motion to dismiss.

In light of the foregoing, the time period for amending the complaint as a matter of course under 15(a)(1) began when Defendants filed their *first* motion to dismiss on October 21, 2011. [Dkt. 10.] The current motion to dismiss, filed nearly four years later on August 17, 2015, did not create a cumulative 21-day period for amendment. Therefore, the Court determines that Plaintiff has not timely amended his complaint under 15(a)(1)(B). Thus, the Court will consider the motion to amend as a request for leave to amend under Rule 15(a)(2).

ii. *Amendment Under Rule 15(a)(2)*

Under Rule 15(a)(2), a court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "[L]eave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment

would be futile." *Johnson v. Oroweat Foods Co.*, 785 F.2d 504, 510 (4th Cir. 1986) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Defendants argue that leave to amend is not proper because an amendment would be futile and prejudicial. Specifically, Defendants argue that any amendment would not remove the first-to-file bar and that the statute of limitation and repose would render any amendment untimely. Relator rebuts that an amendment would not be futile because amending his complaint would allow him to avoid the first-to-file bar and the doctrine of relation back would make his amended complaint timely. For the following reasons, the Court finds that amendment would not cure the first-to-file bar. Therefore, the Court would continue to lack jurisdiction over Relator's amended complaint, making amendment futile. Because this is a sufficient ground to decide this issue, the Court does not consider Defendants' alternative futility and prejudice arguments.

A court should only deny an amendment due to futility "when the proposed amendment is clearly insufficient or frivolous on its face." *Id.* The standard for futility is the same as for a motion to dismiss under Rule 12(b)(6). *See United States* ex rel. *Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (affirming denial of motion to amend

because "proposed amended complaint does not properly state a claim under Rule 12(b)(6) and lacks sufficient particularity under Rule 9(b)"). For example, courts have found amendment to be futile when the amended claims would be time-barred and would not relate back to the original filing, *see Barnes v. Prince George's Cnty.*, 214 F.R.D. 379, 380-82 (D. Md. 2003), and when an immunity would bar the amended complaint, *see Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995); *Woods v. Bennett*, No. 2:12-03592, 2013 WL 4779018, at *4 (S.D.W. Va. Sept. 5, 2013).

Amending the complaint would not cure the first-to-file bar and therefore is futile. As the earlier discussion made clear, the law in this case and the Fourth Circuit requires this Court to "look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Carter*, 710 F.3d at 183. Accordingly, "if an action is later filed that is based on the facts underlying the pending case, the court must dismiss the later case for lack of jurisdiction." *Id.* at 181. Furthermore, as discussed above, the Supreme Court affirmed the Fourth Circuit's ruling with respect to the first-to-file bar. *See Kellogg*, 135 S. Ct. at 1979. Therefore, the Supreme Court did not alter the law of the case governing the temporal focus of the first-to-file analysis.

Relator, however, cites two district court cases from this circuit that applied the first-to-file analysis at the time a relator filed an amended complaint. *See United States* ex rel. *Kurnik v. PharMerica Corp.*, No. 3:11-cv-1464, 2015 WL 1524402 (D.S.C. Apr. 2, 2015); *United States* ex rel. *Palmeri v. Alpharma, Inc.*, 928 F. Supp. 2d 840 (D. Md. 2013). One of those cases, *Kurnik*, was decided after the Fourth Circuit decided *Carter III*. *Kurnik* distinguished *Carter III* by noting that no amended complaint was before the Fourth Circuit. *Kurnik*, 2015 WL 1524402, at *6.

It is true that the Fourth Circuit did not have to consider how an amended complaint affects the first-to-file analysis. None-the-less, the plain text of the first-to-file statute convinces the Court that "the filing of an amended complaint does not create an exception to the time-of-filing rule." *United States* ex rel. *Moore v. Pennrose Props., LLC*, No. 3:11-cv-121, 2015 WL 1358034, at *13 (S.D. Ohio Mar. 24, 2015). At least three recent district courts to consider the issue agree. *See United States* ex rel. *Shea v. Verizon Comm'ns, Inc.*, No. 09-1050, slip op. at 25-26 (D.D.C. Oct. 6, 2015) ("The only way to cure this particular defect is for the Court to dismiss Plaintiff's action—not merely his Complaint—so that he may file a new action now that Verizon I is no longer pending."); *Moore*, 2015 WL 135804, at *13; *United States* ex rel. *Branch Consultants*

v. Allstate Ins. Co., 782 F. Supp. 2d 248, 259-64 (E.D. La. 2011) (finding that amending a complaint could not cure first-to-file bar). The jurisdictional nature of the first-to-file bar and policy concerns also support that conclusion. Thus, the Fourth Circuit's statement remains controlling; "we look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar." *Carter*, 710 F.3d at 183.

The plain text of the first-to-file statute indicates that an amendment will not cure the first-to-file bar. That statute reads as follows: "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." 31 U.S.C. § 3730(b)(5). Thus, the statute plainly bars a person from "bring[ing] a related action." *Id.* A plaintiff does not "bring an action" by amending a complaint, "[o]ne brings an action by commencing suit." *United States* ex rel. *Chovanec v. Apria Healthcare Grp. Inc.*, 606 F.3d 361, 362 (7th Cir. 2010). The Fourth Circuit, in this very case, stated that "[f]ollowing the plain language of the first-to-file bar, Relator's action will be barred by [earlier cases] if either case was pending when Relator *filed suit*." *Carter*, 710 F.3d at 183 (emphasis added). Furthermore, in the post-*Kellogg* case of *Shea*, the district court noted that

"the language of § 3730(b)(5) itself . . . requires the Court to look to the moment when Plaintiff filed his *initial Complaint*." *Shea*, No. 09-1050, slip op. at 27 (emphasis added). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Crespo v. Holder*, 631 F.3d 130, 133 (4th Cir. 2011) (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)). Thus, the first-to-file statute is sufficiently plain to provide an independent basis to conclude that "[n]o matter how many times Plaintiff amends his Complaint, it will still be true that he 'br[ought] a related action based on the facts underlying the [*then*] *pending* action.'" *Shea*, No. 09-1050, slip op. at 29 (reaching this holding despite nonjurisdictional treatment of first-to-file bar in D.C. Circuit). Additional reasons also persuade this Court of the soundness of applying the first-to-file bar at the time the initial complaint was filed.

In this Circuit, the first-to-file bar is jurisdictional. *See Carter*, 710 F.3d at 182 ("Section 3730(b)(5) is jurisdictional and if an action is later filed that is based on the facts underlying the pending case, the court must dismiss the later case for lack of jurisdiction.")[6]

[6] All circuit courts to consider the issue except one appear to agree that the first-to-file bar is jurisdictional. *See Ven-*

It is consistent with a jurisdictional limitation to apply the first-to-file bar at the time the initial complaint is filed, rather than when the complaint is amended. *See* Carter, 710 F.3d at 183 ("[W]e look at the facts as they existed when the claim was brought to determine whether an action is barred by the first-to-file bar."); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276 (10th Cir. 2004) ("[W]hether § 3730(b)(5) barred [the relator's] qui tam action by looking at the facts as they existed at the time that action was brought."); *Morongo Band of Mission Indians v. Ca. State Bd. of Equalization*, 858 F.2d 1376,

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A-Care of the Fla. Keys, Inc. v. Baxter Healthcare Corp., 772 F.3d 932, 936 (1st Cir. 2014) ("The 'first-to-file' rule is, at least in this Circuit, jurisdictional."); *United States* ex rel. *Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009) (referring to "the FCA's first-to-file jurisdictional bar"); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("This provision is a jurisdictional limit on the courts' power to hear certain duplicative qui tam suits."); *United States* ex rel. *Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186 (9th Cir. 2001) (conducting jurisdictional analysis for first-to-file question). The only circuit to decide otherwise is the Court of Appeals for the D.C. Circuit, which recently relied on the text of the first-to-file statute and the order in which the Supreme Court considered the issues in *Kellogg* to conclude that the first-to-file bar is nonjurisdictional. *See United States* ex rel. *Heath v. AT&T, Inc.*, 791 F.3d 112, 121 (D.C. Cir. 2015) ("The first-to-file rule is not jurisdictional . . . ."). Despite this recent circuit split, this Court finds no authority to deviate from clearly established circuit precedent absent contrary controlling law on the issue. The Court does not find such controlling law in *Kellogg*'s consideration of the WSLA before the first-to-file bar, as the Fourth Circuit also addressed the WSLA first in *Carter* despite referring to § 3730(b)(5) as jurisdictional.

1381 (9th Cir. 1988) ("In determining federal court jurisdiction, we look to the original, rather than to the amended, complaint. Subject matter jurisdiction must exist as of the time the action is commenced.").

Relator contends, however, that a court may assess jurisdiction at the time a complaint is amended because an amendment is a "subsequent event of jurisdictional significance." (*See* Pl.'s Mem. in Opp'n at 7 (quoting *Palmieri*, 928 F. Supp. 2d at 850).) At first blush, the Supreme Court decision of *Rockwell International Corp. v. United States* appears to support Relator's argument. In that opinion, the Supreme Court stated that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." 549 U.S. 457, 473-74 (2007). At least two district courts have looked to this language when concluding that a relator may avoid the first-to-file bar by amending. *See Kurnik*, 2015 WL 1524402, at *5; *Palmeri*, 928 F. Supp. 2d at 851. Upon close inspection, however, *Rockwell* does not persuade this Court to assess the first-to-file bar at the time of an amended complaint.

In *Rockwell* the Supreme Court considered the application of another jurisdictional limitation in the FCA, the public disclosure bar. Under that bar, federal courts have no jurisdiction over *qui tam* suits "based upon the public

disclosure of allegations or transactions 'unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.'" *Rockwell*, 549 U.S. at 460 (quoting 31 U.S.C. § 3730(e)(4)(A)). The relator in *Rockwell* amended his complaint during the case. The relator then asked the Court to consider only his initial complaint to determine whether he was an original source. *Id.* at 473. The Supreme Court instead determined that it would consider "(at a minimum) the allegations in the original complaint *as amended*." *Id.* This statement, however, did not interfere with the "rule that subject-matter jurisdiction 'depends on the state of the things at the time of the action brought.'" *Id.* (quoting *Mullan v. Torrance*, 22 U.S. 534, 539 (1824)).

Two recent district court opinions have convincingly concluded that *Rockwell* does not make an amended complaint the relevant point of focus for the first-to-file bar. *See Moore*, 2015 WL 1358034, at *15; *Branch*, 782 F. Supp. 2d at 261-62. As those opinions make clear, *Rockwell* demonstrates that a plaintiff may "amend himself or herself out of jurisdiction by withdrawing allegations that appeared in the original complaint," but did not state that a court may acquire jurisdiction through amendment. *See Moore*, 2015 WL 1358034, at *15; *Branch*, 782 F. Supp. 2d at 261. In other words, "*Rockwell*

does not suggest that a plaintiff can establish jurisdiction by amendment when jurisdiction did not previously exist." *Branch*, 782 F. Supp. 2d at 261-62. Furthermore, in *Rockwell* jurisdiction depended upon the actual substance of the complaint's allegations. In the first-to-file context, however, the timing of the filing carries the weight of jurisdictional relevance. *See Moore*, 2015 WL 1358034, at *15 (making this distinction). Thus, the Court agrees with *Branch* and *Moore* that the Supreme Court's statements in *Rockwell* are inapplicable to the first-to-file context; the relevant point of jurisdictional focus for first-to-file remains the time the initial complaint is filed.

Lastly, the Court finds that allowing a relator to avoid the first-to-file bar by amending would interfere with the efficient operation of *qui tam* suits. As noted in *Branch*, allowing a relator to avoid § 3730(b)(5) by amending could prevent the timely resolution of meritorious claims. *Branch*, 782 F. Supp. 2d at 263. This could occur where a relator files a skeletal complaint to secure a place in the "jurisdictional queue . . . only to then file an amended complaint after actually becoming an original source, and thereby trump any meritorious, related actions that were filed in the meantime." *Id.* Contrary to this undesirable outcome, keeping the emphasis

on the time the initial complaint was filed "has the advantage of simplicity." *Id.* at 264.

In summary, the Court agrees with *Moore*, *Branch*, and *Shea* that an amended complaint does not save a *qui tam* suit that was barred when the relator filed the initial complaint. Therefore, regardless of the substance of the amendments, Carter can only cure the first-to-file bar that attached at the time he filed the initial complaint by dismissing the case. In other words, any amendment would be futile and not proper under Rule 15(a)(2).

C. Statute of Limitations and Equitable Tolling Arguments

Under the belief that his case is not barred by § 3730(b)(5), Relator argues that equitable principles should "either toll the statute of limitations or provide for relation-back in order to allow Relator to proceed on the merits with respect to *all* of his claims." (Pl.'s Mem. in Opp'n at 9 (emphasis added).) This argument is rendered moot by the Court's denial of leave to amend and its conclusion that the first-to-file bar requires dismissal without prejudice.

D. Dismissal Without Prejudice

In Defendants' memoranda in support of this motion, they argued that the "only question remaining" for this Court to resolve on remand is whether this case "must be dismissed with prejudice because Benjamin Carter is barred from refiling by the

False Claims Act's statutes of limitations and repose." (Defs.' Mem. in Supp. at 1.) In the 2011 opinion dismissing with prejudice, this Court stated that even Relator's timely allegations of $673.56 in claims made on June 15, 2005, "would be untimely were Carter to again file a new action." 2011 WL 6178878, at *12. Nearly four years have passed since the Court made that statement. With the passage of time, the FCA's 10-year statute of repose may have arisen to create an additional bar on Relator's refiling. *See* 31 U.S.C. § 3731(b); *Kellogg*, 135 S. Ct. at 1974 ("In no circumstances, however, may a suit be brought more than 10 years after the date of a violation." (citing § 3731(b))). Defendants ask us to consider the merits of these limitations and conclude that Relator's refiling will be time-barred. Thus, Defendants asks the Court to dismiss this case with prejudice due to the statutes of limitations and repose. In contrast, Relator argues that discussion of these issues "would be improper until Relator re-filed, since this Court is not in a position to provide advisory opinions on issues that are not squarely before it." (Pl.'s Mem. in Opp'n at 14.)

Despite Defendants' compelling briefing on the issue, the Court views its role within this remand as more limited than Defendants suggest. Having determined that jurisdiction is lacking, the Court will not now reach out to opine on whether

refiling would be barred by the statutes of limitations or repose. *See Keys v. Donahoe*, No. 14 C 1297, 2014 WL 7332826, at *3 n.5 (N.D. Ill. Dec. 19, 2014)("[D]efendants argue that Ms. Keys' case, even if refiled, would be subject to dismissal on the basis of judicial estoppel and sovereign immunity. We do not express any view on those arguments; however, Ms. Keys may wish to consider them in deciding whether she wishes to refile her complaint."); *Schaefer v. Aetna Life & Cas. Co.*, 910 F. Supp. 1095, 1104 (D. Md. 1996) (dismissing without prejudice and declining to "reach, discuss, and/or decide any of defendants' positions as to certain non-jurisdictional issues such as limitations"). Therefore, the Court dismisses this case without prejudice pursuant to the first-to-file bar.

IV. Conclusion

For the reasons set forth above, the Court will deny Relator's motion to amend and will dismiss this case without prejudice.

An appropriate order will follow.

/s/

November 12, 2015
Alexandria, Virginia

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

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

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
v.	)	1:11cv602 (JCC/JFA)
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

O R D E R

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Relator's Motion for Leave to File an Amended Complaint [Dkt. 105] is DENIED;

(2) Relator's case is DISMISSED WITHOUT PREJUDICE pursuant to 31 U.S.C. § 3730(b)(5) [Dkt. 99];

(3) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

November 12, 2015
Alexandria, Virginia

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

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
v.	)	1:11-cv-0602 (JCC/JFA)
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

M E M O R A N D U M O P I N I O N

This matter came before the Court on Relator Benjamin Carter's ("Relator") Motion for Reconsideration of this Court's November 12, 2015 Memorandum Opinion ("November 12 Opinion"). [Dkt. 129.] Relator argues that an intervening change in law indicates that the False Claims Act's first-to-file bar would not apply to his amended complaint. Additionally, Relator seeks clarification on whether the Court would deny leave to amend based on three arguments that were raised, but not addressed, in the November 12 Opinion. As described below, those alternative arguments would not preclude amendment, but the first-to-file bar continues to make amendment futile.

I. Background

The Court's many prior opinions describe the facts and procedural history of this case in full. That background is

presumed known and repeated here only to the extent necessary to resolve the current motion.

On October 15, 2015, this Court held a hearing on how this case should proceed on remand from the Court of Appeals for the Fourth Circuit and the United States Supreme Court. Defendants moved to dismiss the case with prejudice, arguing that the False Claims Act's first-to-file bar requires dismissal and the statutes of limitations and repose would prevent the filing of a new lawsuit. Relator, by contrast, sought to amend his complaint in the belief that, according to the Supreme Court's decision in this case, amendment would clear away the first-to-file bar attached to the Original Complaint. *See Kellogg Brown & Root Servs., Inc. v. United States* ex rel. *Carter*, 135 S. Ct. 1970 (2015) [hereinafter *Kellogg*]. The Court agreed with Defendants and issued its November 12 Opinion concluding that the first-to-file bar renders amendment futile. Because this was a dispositive ground for denying leave to amend, the Court did not address Defendants' alternative arguments that the statute of limitations, the statute of repose, and the prejudice of delay should also preclude amendment.

Relator motioned for the Court to reconsider its denial of leave to amend,[1] or in the alternative, to decide whether Defendants' alternative arguments have merit. Relator contends that such a clarification would promote judicial economy by presenting a complete record and reduce the need for additional motions practice if he successfully appeals to the Fourth Circuit. Defendants oppose this motion, arguing that Relator seeks an advisory opinion that does not satisfy any of the Rule 59(e) grounds for reconsideration. For the following reasons, the Court agrees with Relator that a clarification of the November 12 Opinion is necessary to prevent manifest injustice.

II. Standard of Review

Amending a judgment "is an extraordinary remedy that should be applied sparingly." *Mayfield v. NASCAR, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012). A court may amend a judgment under Rule 59(e) "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Merely attempting to "reargue the facts and law originally argued in the parties' briefs," however, is not a proper use of Rule 59(e). *Projects Mgmt. Co. v. DynCorp Int'l*,

[1] Relator supplemented the motion to reconsider on December 18, 2015, based on the First Circuit's opinion in *United States ex rel. Gadbois v. Pharmerica Corp.*, 809 F.3d 1 (1st Cir. 2015).

LLC, 17 F. Supp. 3d 539, 541 (E.D. Va. 2014) (quoting *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 977 (E.D. Va. 1997)).

With those principles in mind, the Court turns now to Relator's arguments that a change in law and the need to prevent manifest injustice support reconsideration in this case.

III. Analysis

A. Intervening Change in Law

The Court first addresses Relator's argument that the First Circuit opinion in *United States* ex rel. *Gadbois v. Pharmerica Corp.*, 809 F.3d 1 (1st Cir. 2015), is an intervening change in controlling law justifying reconsideration. For several reasons, *Gadbois* does not convince the Court to reconsider its judgement that the first-to-file bar renders amendment futile.

As an initial and dispositive point, *Gadbois* is not "controlling law" for this Court. Rule 59(e)'s "controlling law" prong "refers specifically to binding precedent only." *McNamara v. Royal Bank of Scotland Grp, PLC*, No. 11-cv-2137, 2013 WL 1942187, at *3 (S.D. Cal. May 9, 2013). Although the Court may consider nonbinding opinions as persuasive authority, they certainly do not "control" this Court's decisions. Thus, *Gadbois* does not justify reconsideration under Rule 59(e). *See Local 703 v. Regions Fin. Corp.*, No. CV 10-2847-IPJ, 2011 WL

4431154, at *1 (N.D. Ala. Sept. 7, 2011) ("[A] decision by the Second Circuit Court of Appeals is not binding on this Court, and therefore, is not an intervening change in controlling law."); *D&D Assocs., Inc. v. Bd. of Educ. of N. Plainfield*, No. 03-1026, 2009 WL 904054, at *2 (D.N.J. Mar. 31, 2009) ("[A] decision that is not controlling precedent is not an intervening change in the controlling law for purposes of a motion for reconsideration.").

Furthermore, even considering *Gadbois*, the Court would have denied Relator's motion to amend due to the first-to-file bar. In *Gadbois*, the First Circuit found that an FCA relator could avoid the first-to-file bar by supplementing his complaint to note that an earlier related case was dismissed. *Gadbois*, 809 F.3d at 3. The court reasoned that Federal Rule of Civil Procedure 15(d)[2] permits supplements to a complaint, even to correct jurisdictional deficiencies. *Id.* at 5. Additionally, the court noted that the "familiar rule that jurisdiction is determined by the facts existing at the time of filing of an original complaint" primarily governs in diversity jurisdiction cases. *Id.* And, because *Kellogg* and the dismissal of the

[2] Federal Rule of Civil Procedure 15(d) permits "a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Additionally, "[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed. R. Civ. P. 15(d).

earlier-filed action "dissolved the jurisdictional bar that the court below found dispositive," dismissal and refiling would be a "pointless formality." *Id.* at 6. Therefore, the court concluded that the first-to-file bar does not preclude supplementing the complaint.

Despite its virtues, the *Gadbois* decision does not directly address many of the concerns that influenced this Court's interpretation of the first-to-file bar. First, *Gadbois* referred to *Kellogg* as part of a shifting of "tectonic plates" regarding the first-to-file bar. *Id.* at 3. The court's assessment of *Kellogg*, however, was very brief and failed to consider the context of the Supreme Court's analysis. By contrast, this Court's November 12 Opinion relied upon the nature of the circuit split motivating the *Kellogg* decision, the Supreme Court's statement of the issues before it, and the law of this case and this circuit. Second, *Gadbois* did not give sufficient weight to the plain language of 31 U.S.C. § 3730(b)(5), which the Fourth Circuit has emphasized and this Court considered dispositive. *Compare Gadbois*, 809 F.3d at 4-5 (noting this argument but not addressing it at length), *with United States* ex rel. *Carter v. Halliburton*, 710 F.3d 171, 183 (4th Cir. 2013) ("Following the plain language of the first-to-file bar, [relator's] action will be barred by *Duprey* or the Texas action if either case was pending when Carter filed

suit."), *United States* ex rel. *Shea v. Verizon Commc'ns, Inc.*, No. 09-1050, 2015 WL 7769624, at *10 (D.D.C. Oct. 6, 2015) ("[T]he language of § 3730(b)(5) itself, nevertheless, requires the Court to look to the moment when Plaintiff filed his initial Complaint . . . ."), *and United States* ex rel. *Branch Consultants, L.L.C. v. Allstate Inc. Co.*, 782 F. Supp. 2d 248, 259 (E.D. La. 2011) ("The first-to-file bar . . . refer[s] specifically to jurisdictional facts that must exist when an 'action,' not a complaint, is filed."). Third, the *Gadbois* court believed it to be a "pointless formality" to require dismissal and refiling. *Gadbois*, 809 F.3d at 6. In the present case, however, dismissal and refiling could implicate significant statute of limitations and repose problems. This posture made the Court mindful of developing an administrable rule. Accordingly, *Gadbois* would not persuade this Court to grant Relator's motion to amend or deny Defendants' motion to dismiss.

B. Manifest Injustice

Relator also argues that failing to address Defendants' alternative arguments for denying amendment results in a manifest injustice and justifies reconsideration or clarification. Specifically, Relator contends that leaving these alternative arguments unresolved would provoke additional motions practice on remand if he successfully appeals to the

Fourth Circuit. For reasons that are unique to this case, the Court agrees and will take this opportunity to clarify its November 12 Opinion.

Before discussing Defendants' alternative arguments for denying amendment, the Court must explain why it is taking this extraordinary step. First, the Court notes that it is regular and proper to leave alternative arguments unresolved after a court finds a dispositive basis for resolving an issue. *See, e.g., Mueller v. AT&T Techs., Inc.*, No. 87-1545, 1987 WL 44601, at *2 (4th Cir. Aug. 21, 1987) ("We hold that the district court correctly granted summary judgment on the latter ground, and we need not consider the former ground."); *Sheppard v. Geren*, No. 1:07cv1279, 2008 WL 4919460, at *1 n.4 (E.D. Va.), *aff'd*, 282 F. App'x 232 (4th Cir. 2008) ("As the Court concludes that the instant complaint should be dismissed for lack of jurisdiction, it is unnecessary to address whether plaintiff has failed to state a claim upon which relief can be granted."). It is also common, however, for courts to reach alternative grounds for dismissal, even after concluding that jurisdictional deficiencies exist. *See, e.g., Settlers Crossing, L.L.C. v. U.S. Home Corp.*, 383 F. App'x 286, 288 (4th Cir. 2010) (affirming district court's finding of lack of subject matter jurisdiction and alternative dismissal on the merits); *Foxworth v. United States*, No. 3:13-cv-291, 2013 WL 5652496, at *4-6

(E.D. Va. Oct. 16, 2013) ("Accordingly, even if the Court found jurisdiction to be proper, Foxworth's Complaint fails to state a claim upon which relief can be granted."). Thus, either course is proper, and a court's decision not to reach alternative grounds is not a recognized basis for reconsideration. The circumstances of this case, however, are *sui generis*.

In March 2010, this case had completed discovery and was poised for trial when the Government informed the Court of an earlier pending case similar to Relator's case. Thus, after proceeding through two motions to dismiss, two amended complaints, and a contentious and protracted discovery period, the Court granted Defendants' third motion to dismiss. That dismissal occurred on May 10, 2010. Since that time, the case has undergone what the Supreme Court described as "a remarkable sequence of dismissals and filings." *Kellogg*, 135 S. Ct. at 1974. In short, this case has consumed an immense amount of resources from the parties and the many courts that have sought to resolve the disputes between these parties. To the extent a clarification of the November 12 Opinion will provide a more direct route to finality in this case, it would be a manifest injustice to deny that clarification.

The Court also notes that resolving the alternative arguments for denying amendment does not prejudice either party. The issues analyzed below were orally argued and fully briefed

in the memoranda on Defendants' motion to dismiss and Relator's motion to amend. Therefore, the Court will now clarify its November 12 Opinion by addressing Defendants' alternative arguments for denying leave to amend.

C. Amendment Under Rule 15(a)(2)

Federal Rule of Civil Procedure 15(a)(2) requires courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). "This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). In light of that policy, courts should deny leave to amend in only three circumstances: (1) bad faith on the part of the moving party; (2) prejudice to the opposing party; or (3) futility. *Johnson v. Oroweat Foods Co.*, 785 F.2d 504, 510 (4th Cir. 1986) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Defendants argue that prejudice and futility prevent amendment in this case. The Court agrees that the first-to-file bar renders amendment futile. The Court's November 12 Opinion, however, did not address whether the statutes of limitations and repose also make amendment futile. The Court also did not address whether the amendment is prejudicial. The Court turns to those issues now.

1. Prejudice

Although Relator substantially delayed in bringing this motion, the prejudice from that delay does not justify denying leave to amend. If this case's age is marked by the months and years that have passed since the filing of the original complaint, then the motion indeed comes late in this case's life. Over four and a half years ticked away before Relator motioned to amend. But the passage of time seems a poor indicator of the prejudice caused by permitting an amendment. *Cf. Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 117-18 (4th Cir. 2013) (finding no prejudice in amended complaint filed "over three years" after original complaint); *A Helping Hand v. Baltimore Cty., Md.*, No. CCB-02-2568, 2009 WL 5219725, at *1 (D. Md. Dec. 3, 2009) (permitting amendment "years after" the original complaint was filed). The better measure of delay appears to be the time remaining between the amendment and a resolution of the case on the merits. This point of reference provides more insight into the defendant's ability to properly defend against the amended complaint. Viewed from this perspective, the present case has undergone substantial motions practice, but remains far from mature in terms of resolution. Defendants face no looming deadline of trial that might prevent them from adequately responding to the amended complaint. Thus, although substantial time and opportunity for amendment has passed, the Court finds no improper prejudice from this delay.

Furthermore, the substance of Relator's amendments should not surprise Defendants or undermine the many judicial opinions shaping the scope of this case. The amendments provide details about award fee presentations Defendants allegedly made in March and July 2005 and corresponding award payments of $55,846,736 and $21,168,998 received in April and August 2005, respectively. (Am. Compl. ¶¶ 144-49, 161-79.) These presentations allegedly incorporated information about Defendants' "excellent work purifying water at the bases in Ar Ramdi and Al Asad." (*Id.* ¶ 145.) Similar allegations of award fees related to these water purification tasks are plainly present in the Original Complaint, where Relator described the award fee process at length, (Compl. ¶¶ 140-49), noted that fraudulent time recording can inflate the fee award, (*id.* ¶ 154), alleged that Defendants' fraudulent claims resulted in "an enhanced award fee under the contract," (*id.* ¶ 167(e)), and even claimed that Defendants "received $120 million in LogCAP award fees" in 2006 alone, (*id.* ¶ 148). In a prior opinion, this Court interpreted the Original Complaint to allege a connection between Defendants' false claims and the award fees cited in the Amended Complaint. *See Carter*, No. 1:08cv1162, 2009 WL 2240331, at *7 ("[A] further result of these allegedly false time cards and invoices, the government also paid Defendants greater indirect costs, a higher base fee, *and a*

higher award fee." (emphasis added)) Thus, the similarity between the Original Complaint and the amendments further persuade the Court of the absence of prejudice. *See Matrix Cap. Mgmt. Fund, v. BearingPoint, Inc.*, 576 F.3d 172, 195 (4th Cir. 2009) (finding no prejudice where "Plaintiffs simply seek to add specificity to scienter allegations in a situation where defendants are aware of the circumstances giving rise to the action"); *Laber*, 438 F.3d at 427 ("An amendment is not prejudicial . . . if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery has occurred."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980) ("Because defendant was from the outset made fully aware of the events giving rise to the action, an allowance of the amendment could not in any way prejudice the preparation of the defendant's case.").

2. Futility

Turning to futility, Defendants argue that the Amended Complaint is time barred by the statute of limitations and will not relate back to the Original Complaint. Additionally, Defendants contend that the FCA's ten-year statute of repose bars the Amended Complaint and statutes of repose are categorically not subject to relation back under Rule 15(c).

For the following reasons, the Court finds that these arguments do not render amendment futile.

a) Relation Back of Statute of Limitations

A claim barred by the applicable statute of limitations is futile, and an untimely amendment can be denied on that basis. *See United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000). Federal Rule of Civil Procedure 15(c), however, allows an amended complaint to relate back to the date the original complaint was filed when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(2).[3] "In this circuit, it is well-settled that Rule 15 is chiefly concerned with ensuring (i) that there is a factual nexus between the amendments and the prior pleading, and (ii) that a defendant had sufficient notice of these new claims such that he will not suffer prejudice if the amendments are found to relate back." *Vitullo v. Mancini*, 684 F. Supp. 2d 747, 754 (E.D. Va. 2010). In this case, the Original Complaint satisfies both of these requirements. Therefore, relation back is proper.

As described above, the amendments have a strong factual nexus to the Original Complaint. It is well recognized

[3] The additional circumstances for relation back in Rule 15(c) are not applicable to this case.

that "amendments that do no more than restate the original claim with greater particularly or amplify the details of the transaction alleged in the proceeding fall within Rule 15(c)(1)(B)." 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1497 (3d ed. 2015). Although Relator's amendments might do slightly more than add particularly, the facts in the Amended Complaint are directly referenced or clearly alluded to in the Original Complaint.

Additionally, Defendants were on notice that Relator would include portions of the award fees within its claims for damages. The Original Complaint stated explicitly that Defendants' "fraudulent claims resulted in . . . an enhanced award fee under the contract." (Compl. ¶ 167(e).) In 2009, this Court interpreted these allegations to mean that as "a further result of these allegedly false time cards and invoices, the government also paid Defendants greater indirect costs, a higher base fee, *and a higher award fee*." *Carter*, 2009 WL 2240331, at *7 (emphasis added). Thus, even the Court understood the Original Complaint to potentially implicate the allegedly inflated fee awards Defendants received based on their timecard and billing practices among Ar Ramadi and Al Asad ROWPU employees. Accordingly, Defendants were sufficiently on notice of the new facts alleged. Thus, the Amended Complaint would relate back to the time of filing of the Original Complaint.

The relation-back doctrine, however, is not without limitations. Relation back may only save a claim that would have been timely raised within the original complaint. *See Williams v. Lampe*, 399 F.3d 867, 870 (7th Cir. 2005) ("In order to benefit from Fed. R. Civ. P. 15(c)'s 'relation back' doctrine, the original complaint must have been timely filed."). Some of Relator's amendments allege acts occurring more than six years before the Original Complaint was filed. Absent equitable tolling, these claims would be untimely. Because the Court has reserved its ruling on the application of equitable tolling to this remanded case, however, the better practice at this stage is to permit amendment and allow Defendants to raise statute of limitations as an affirmative defense in a motion to dismiss.

b) Effect of the Statute of Repose

Defendants next argue that amendment is futile because relation back cannot apply to the FCA's ten-year statute of repose. Defendants cite several cases supporting their interpretation of Rule 15(c).[4] Despite these persuasive authorities to the contrary, the Court finds that the statute of repose does not prevent relation back.

[4] Defendants cite the following cases: *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013); *Bensinger v. Denbury Res. Inc.*, 31 F. Supp. 3d 503, 510 (E.D.N.Y. 2014); *In re Lehman Bros. Sec. & Erisa Litig.*, 800 F. Supp. 2d 477, 483 & n.27 (S.D.N.Y. 2011); *Resolution Tr. Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991).

Before diving into this issue, the Court will briefly note the differences between a statute of limitations and a statute of repose. The Fourth Circuit has described statutes of limitations as "primarily instruments of public policy and of court management," and aimed at the "prevention of stale claims." *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987). As such, statutes of limitations "do not confer upon defendants any right to be free from liability, although this may be their effect." *Id.* Statutes of repose, by contrast, "make the filing of suit within a specified time a substantive part of plaintiff's cause of action." *Id.* The purpose of a statute of repose is then "primarily to relieve potential defendants from anxiety over liability for acts committed long ago." *Id.*

The Court finds little guidance from federal courts of appeals as to whether a statute of repose may be avoided through relation back. Neither the parties nor the Court identified a Fourth Circuit opinion considering the application of Rule 15(c) to a statute of repose. Defendants located a Second Circuit opinion implying that Rule 15(c) could not apply to a statute of repose without violating the Rules Enabling Act, 28 U.S.C. § 2972(b). *See Police & Fire Retirement Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013). The Second Circuit, however, expressly declined to determine whether

Rule 15(c) was categorically inapplicable to statutes of repose. *See id.* at 110 n.18 ("[W]e need not address this issue, or whether Rule 15(c) allows 'relation back' of claims otherwise barred by a statute of repose . . . ."). Thus, *Police & Fire* does not advance the Court's analysis of Rule 15(c) very far.

Left to consider the issue as a matter of first instance, district courts have reached conflicting opinions about the application of Rule 15(c) to a statute of repose. *See Acierno v. New Castle County*, No. C.A. 92-385, 2000 WL 718346, at *9 (D. Del. May 23, 2000) ("[T]here is disagreement over whether relation back under Rule 15(c) is permissible when a statute of repose otherwise prevents assertion of the claim.").[5] Some district courts have even applied relation back to a statute of repose without any apparent concern that this use of Rule 15(c) might be improper. *See, e.g., Jenkins v. Novartis Pharm. Corp.*, No. 3:11-cv-342, 2013 WL 1760762, at *3 (E.D.

[5] *Compare Jenkins v. Novartis Pharm. Corp.*, No. 3:11-cv-342, 2013 WL 1760762, at *3 (E.D. Tenn. Apr. 24, 2013) (permitting relation back of statute of repose), *Reddick v. Bloomingdale Police Officers*, No. 96 C 1109, 2001 WL 630965, at *5 (N.D. Ill. May 29, 2001) (same), *Chumney v. U.S. Repeating Arms Co., Inc.*, 196 F.R.D. 419, 428 (M.D. Ala. 2000) (same), *and In re Sharps Run Assocs., L.P.*, 157 B.R. 766, 784 (D.N.J. 1993) (same), *with Bensinger v. Denbury Res. Inc.*, 31 F. Supp. 3d 503, 510 (E.D.N.Y. 2014) (declining to apply relation back to avoid statute of repose), *In re Lehman Bros. Sec. & Erisa Litig.*, 800 F. Supp. 2d 477, 483 & N.27 (S.D.N.Y. 2011) (citing cases concluding that Rule 15(c) does not apply to statute of repose), *and Resolution Tr. Corp. v. Olson*, 768 F. Supp. 283, 285 (D. Ariz. 1991).

Tenn. Apr. 24, 2013); *Reddick v. Bloomingdale Police Officers*, No. 96 C 1109, 2001 WL 630965, at *5 (N.D. Ill. May 29, 2001). After careful consideration, the Court concludes that the statute of repose does not prevent relation back in this case.

Starting with the text of Rule 15(c), the rule makes no distinction between statutes of limitations and statutes of repose. The Rule merely states that an "amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). As other courts have found, the absence of limiting language within Rule 15(c) indicates that it applies to statutes of limitations and repose alike. *See Chumney*, 196 F.R.D. at 428 ("[T]he language of Federal Rule 15(c) indicates that it applies to both statutes of creation and statutes of limitations . . . ."); *In re Sharps Run Assocs., L.P.*, 157 B.R. at 784 ("We also do not accept the assertion that calling a statute one of repose rather than limitations automatically proscribes relation back. Certainly nothing in the language of either Rule 15(c) or R. 4:9-3 suggests such a rule.").

Furthermore, Defendants' strict interpretation of Rule 15(c) would have anomalous results. Under Defendants' interpretation, an expired statute of repose would preclude *all*

amendments, regardless of the substance of the amendment. Thus, an amendment that does nothing more than add specificity or clarify a complaint would not relate back. Similarly, an amendment that removed a cause of action would not relate back to the original complaint. These results strike the Court as illogical and contrary to Rule 15(c)'s liberal policy of resolving issues on the merits. *See Acierno*, 2000 WL 718346, at *9 ("The court shall permit the amended complaint to relate back under Rule 15(c)(2) because doing so will further the federal goal of deciding controversies on their merits."); *Chumney*, 196 F.R.D. at 428 (permitting relation back, in part, because "the policy behind Federal Rule 15(c) is not hindered by applying it to statutes of creation").

Lastly, the application of Rule 15(c) in this case does not violate the Rules Enabling Act's prohibition on rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rules that "incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules." *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 (1987). The effect on Defendants' substantive rights appear incidental here, as Relator does little more than clarify and add specificity to his Original Complaint and the substantive right of repose is fairly critiqued as minimal in this case. *See Shadburne-Vinton v.*

Dalkon Shield Claimants Trust, 60 F.3d 1071, 1074 (4th Cir. 1992) (treating statute of repose "the same as statutes of limitations" despite the "substantive" nature of a statute of repose). Additionally, relation back appears reasonably necessary to promote the "spirit of the Federal Rules of Civil Procedure for decisions on the merits." *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Thus, even if relation back would affect Defendants' substantive rights, that effect would not violate the Rules Enabling Act.

In summary, the Court finds no basis to reconsider its November 12, 2015 holding that the first-to-file bar applies to Relator's current Complaint and would continue to apply to Relator's Amended Complaint. Therefore, amendment is denied as futile and Relator's case is dismissed without prejudice. Despite that holding, the Court finds it would cause a manifest injustice to leave unresolved the alternative grounds for denying amendment. Accordingly, the foregoing discussion modifies the Court's November 12 Opinion to clarify that neither prejudice, the statute of limitations, nor the statute of repose defeat Relator's motion to amend. Therefore, if the first-to-file bar did not to apply, Relator could amend.[6]

[6] Nothing herein should be read to prevent Defendants from motioning to dismiss the Amended Complaint for reasons not inconsistent with this Opinion, should the Fourth Circuit remand with instructions to amend.

IV. Conclusion

For the foregoing reasons, the Court will deny Relator's request for reconsideration. But, the Court modifies its November 12 Opinion as described above. Relator's case remains dismissed without prejudice.

An appropriate order will issue.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

February 17, 2016
Alexandria, Virginia

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

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
v.	)	1:1-cv-0602 (JCC/JFA)
HALLIBURTON CO., *et al.*,	)	
Defendants.	)	

O R D E R

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Relator's Motion for Reconsideration [Dkt. 129] is DENIED;

(2) The Court's November 12, 2015 Memorandum Opinion is modified in accordance with the Memorandum Opinion accompanying this Order;

(3) The Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

February 17, 2016
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria, Virginia

UNITED STATES OF AMERICA *ex rel.* Benjamin Carter, Plaintiff, v. HALLIBURTON CO., *et al.*, Defendants.	Civil Action No. 11-cv-602 (JCC/JFA)

NOTICE OF APPEAL

Notice is hereby given that Plaintiff-Relator Benjamin Carter appeals to the United States Court of Appeals for the Fourth Circuit from the Order entered in this action on the 17th day of February, 2016 (Dkt. No. 137), granting in part and denying in part Relator's Motion for Reconsideration dated December 10, 2016 (Dkt. No. 129) and the Order entered in this action on the 12th day of November, 2015 (Dkt. No. 125), granting without prejudice Defendant's Motion to Dismiss dated August 17, 2015 (Dkt. No. 99) and denying Relator's Motion for Leave to File an Amended Complaint dated September 8, 2015 (Dkt. No. 105).

Dated: March 11, 2016

Respectfully submitted,

By: */s/ David Ludwig*

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2016, I caused the foregoing to be served on the following by means indicated:

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of July, 2016, the Joint Appendix Volume I was electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. Counsel who are not so registered were served two (2) copies by first-class U.S. mail, postage prepaid.

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