No. 10-

IN THE
Supreme Court of the United States

SCHINDLER ELEVATOR CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* DANIEL KIRK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal agency's response to a Freedom of Information Act request is a "report . . . or investigation" within the meaning of the False Claims Act public disclosure bar, 31 U.S.C. § 3730(e)(4).

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are as set forth in the caption of the case.

Petitioner Schindler Elevator Corporation is a direct subsidiary of Schindler Enterprises, Inc., which is in turn a subsidiary of Schindler Holding, Inc., a closely held company based in Switzerland. Schindler Elevator Corporation is not a publicly traded company, and no publicly held company owns more than 10% of its stock.

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Petitioner Schindler Elevator Corporation ("Schindler") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, which is reprinted in the Appendix to the Petition "Pet. App." 1a-48a, is reported at 601 F.3d 94. The opinion of the District Court, reprinted at Pet. App. 49a-87a, is reported at 606 F. Supp. 2d 448.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on April 6, 2010. By order dated June 24, 2010, Justice Ginsburg extended Schindler's time to file a petition for a writ of certiorari until August 5, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth at Pet. App. 88a-117a.

STATEMENT OF THE CASE

In this *qui tam* action brought under the False Claims Act ("FCA"), Respondent Daniel Kirk alleges that Schindler did not comply with reporting requirements imposed by a rarely cited statute known as the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA"). Kirk's claims are based on information he received from the U.S. Department of Labor in response to requests made under the Freedom of Information Act ("FOIA"). Expressly disagreeing with three other Circuits, the Court of Appeals held that responses to FOIA requests are not "reports" or "investigations" within the meaning of a provision barring FCA claims based on reports or investigations that have been publicly disclosed. Accordingly, the Court of Appeals reversed the district court's order dismissing the action and remanded for further proceedings.

1. a. *The False Claims Act.* The FCA, 31 U.S.C. § 3729 *et seq.*, imposes civil penalties and treble damages on any person who submits "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. § 3729(a)(1). Among the FCA's enforcement measures are *qui tam* provisions, which permit private plaintiffs, or relators, to bring claims in the name of the United States for frauds about which the relators had personal knowledge. See 31 U.S.C. § 3730(b)(1).[1] The incentives for a private citizen to come

1. A *qui tam* complaint must first be filed under seal and served on the government, which has sixty days to decide whether to intervene and proceed with the action. See 31 U.S.C. § 3730(b)(2)-(4). If the government declines to intervene, the relator may then unseal the complaint and prosecute the case on the government's behalf. 31 U.S.C. § 3730(c)(3).

forward with information revealing a fraud are substantial: a relator stands to gain at least 15% and as much as 30% of the government's recovery. 31 U.S.C. § 3730(d).

Along with these hefty rewards comes the danger that opportunistic plaintiffs will bring *qui tam* actions to pursue financial gain even if they have "contributed nothing to the discovery of [the] crime." *United States ex. rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943). To prevent such "parasitic" lawsuits, *Graham County Soil & Water Conservation Dist. v. United States ex. rel. Wilson*, 559 U.S. __, 130 S. Ct. 1396, 1406 (2010), the FCA bars certain *qui tam* claims based on publicly disclosed information. As relevant here, the statute bars FCA actions "based upon the public disclosure of allegations or transactions in a[n] . . . administrative . . . *report* . . . or *investigation* . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."[2] 31 U.S.C. § 3730(e)(4)(A) (emphasis added) (footnote omitted).

b. *The Vietnam Era Veterans Readjustment Assistance Act.* As relevant here, Kirk's complaint alleges that Schindler falsely certified compliance with regulatory reporting requirements imposed by VEVRAA, 38 U.S.C. § 4212. VEVRAA and its

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2. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 10104(j)(2), enacted March 23, 2010, amended the public disclosure bar in certain respects. The new statutory language is set forth at Pet. App. 105a-106a. As explained *infra* I.3, the amendments are not relevant to the question presented here.

implementing regulations require federal contractors to submit a report to the Secretary of Labor (a "VETS-100 report"), at least annually, stating the number of "qualified covered veterans" they employ. See 38 U.S.C. § 4212(d); 48 C.F.R. §§ 22.1310(b), 52.222-37(c).

A government agency may not, with certain exceptions, enter into contracts with a contractor that has not filed a VETS-100 report for the previous fiscal year, if the contractor was required to do so. See 31 U.S.C. § 1354. And "by submission of its offer, the offeror represents that, if it is subject to the reporting requirements [of VEVRAA] . . . it has submitted the most recent VETS-100 Report required" under the Act. 48 C.F.R. § 52.222-38.

2. Schindler manufactures, installs and maintains elevators and escalators in buildings throughout the world, including some buildings owned or operated by the federal government.

Respondent Kirk is a former Schindler employee. Kirk brought this action under the FCA alleging that between 1998 and 2006 Schindler entered into hundreds of contracts with the federal government that were subject to VEVRAA while failing to comply with certain VEVRAA requirements.[3] In particular, Kirk alleges that for several years during this period, Schindler failed to file any VETS-100 reports as required by VEVRAA. In other years, Kirk alleges, Schindler filed false VETS-100 reports.

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3. As provided for under the FCA, Kirk filed the initial complaint in this case under seal. After the government declined to intervene pursuant to 31 U.S.C. § 3730(b)(4)(B), the complaint was unsealed, and Kirk filed an amended complaint.

Kirk had no personal knowledge of Schindler's VETS-100 filings through his prior employment at the company. Rather, his allegations are based on responses to several requests that his wife, Linda Kirk, made to the Department of Labor ("DOL") pursuant to FOIA, 5 U.S.C. § 552, seeking Schindler's VETS-100 reports for various years. In response to these FOIA requests, a DOL official reported that the Department was unable to locate any VETS-100 reports filed by Schindler for the years 1998 to 2003, and provided Mrs. Kirk with Schindler's VETS-100 reports for the years 2004 to 2006.[4] Based on these responses, Kirk alleges that Schindler failed to file VETS-100 reports from 1998 to 2003. He also alleges that VETS-100 reports filed by Schindler after 2003 contained false information in that they purportedly undercounted the number of covered veterans that Schindler employed.

Kirk's complaint alleges damages to the federal government in excess of $100 million. If such damages were proved, the FCA's treble damages provision would increase Schindler's potential liability to more than $300 million, in addition to the statutory civil penalties ranging from $5,500 to $11,000 for each violation.[5]

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4. DOL also provided several reports for the year ending September 30, 2002. Kirk alleges that because DOL found these reports in 2005, Schindler belatedly filed them.

5. In addition to this FCA action, Kirk filed an administrative complaint against Schindler with the DOL Office of Federal Contract Compliance Programs (OFCCP), alleging violations of VEVRAA. After an investigation, the OFCCP rejected Kirk's complaint in its entirety. The OFCCP's findings were subsequently upheld upon administrative appeal. See Letter from Patsy Baker Blachsear, Director, OFCCP, Division of Program Operations, to Daniel Kirk (Nov. 24, 2009), attached to Kirk's Dec. 4, 2009, Fed. R. App. P. 28(j) letter to the Court of Appeals.

3. Schindler moved to dismiss Kirk's complaint, arguing, *inter alia*, that the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), deprived the district court of jurisdiction over certain claims because Kirk's allegations were based on responses to Mrs. Kirk's FOIA requests. The district court granted Schindler's motion in its entirety. The court first held that Kirk's allegations that Schindler had filed false VETS-100 reports failed to state a claim under the FCA because the accuracy of VETS-100 reports is not a condition to payment under the relevant statute and regulations. See Pet. App. 66a-67a.

The court then held that although Kirk's remaining allegations—that Schindler failed to file VETS-100 reports—did state a claim under the FCA, those claims were jurisdictionally barred under the public disclosure bar. Specifically, the court held that: the DOL letters responding to Mrs. Kirk's FOIA requests constituted "administrative . . . report[s] . . . or investigation[s]" within the meaning of 31 U.S.C. § 3730(e)(4); those reports or investigations were "publicly disclosed"; Kirk's allegations were "based upon" the information contained in the FOIA responses; and Kirk was not an "original source" of the information. See Pet. App. 74a, 75a-87a.

4. The Court of Appeals for the Second Circuit vacated the judgment and remanded for further proceedings. The court first considered the jurisdictional issue whether the public disclosure bar applies to FOIA responses, observing that its "sister Circuits are divided on this issue." Pet. App. 2a; see also Pet. App. 17a ("[O]ur sister Circuits have come to

differing conclusions regarding whether materials produced by a government agency pursuant to a FOIA request are administrative reports or investigations within the meaning of the FCA's jurisdictional bar."). After surveying the varying approaches taken by other Circuits, the court rejected the rule adopted by most Courts of Appeals to have considered the question—that FOIA responses are "reports" or "investigations" within the meaning of the public disclosure bar. See Pet. App. 24a-26a. Instead, the court adopted the minority view that whether documents disclosed in response to FOIA requests constitute "reports" or "investigations" depends on the nature of the documents themselves. Pet. App. 23a. Because it determined that the documents turned over in response to Mrs. Kirk's FOIA requests were not themselves administrative "reports" or "investigations," the court concluded that the FCA's jurisdictional bar did not apply to Kirk's claims. Pet. App. 33a.

After determining that it had subject matter jurisdiction, the court then analyzed whether Kirk had stated a claim under the FCA. It held that Kirk had validly stated a claim as to both his allegations that Schindler failed to file certain VETS-100 reports and his allegations that Schindler filed false VETS-100 reports.

REASONS FOR GRANTING THE PETITION

As the Court of Appeals acknowledged, the Circuit courts are in conflict as to whether a response to a FOIA request is a "report" or "investigation" under the FCA. Pet. App. 17a; see also *United States ex rel. Haight v. Catholic Healthcare W.*, 445 F.3d 1147, 1153 (9th Cir. 2006) (acknowledging Circuit split); *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 56 (1st Cir. 2009) (same). Two Circuits have expressly rejected the majority view—first articulated by then-Judge Alito in *United States ex rel. Mistick v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999)—that FOIA responses constitute "report[s]" or "investigation[s]."

The reach of the FCA's public disclosure bar, and its application to FOIA responses in particular, are important questions meriting this Court's attention. The public disclosure bar, which this Court has construed in two recent cases,[6] is designed to prevent opportunistic lawsuits based on public information while still allowing *qui tam* actions by genuine insiders with firsthand knowledge of fraud. As interpreted by the Second Circuit, the bar does not achieve that important objective: Anyone could use FOIA to attempt to learn whether any federal contractor had filed VETS-100 reports, and if reports were deemed missing, bring an

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6. See *Graham County*, 559 U.S. __, 130 S. Ct. 1396 (whether the bar encompasses disclosures from state and local sources as well as federal ones); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) (construing the "original source" exception to the bar).

FCA action that mirrors Kirk's. And the use of FOIA is not, of course, limited to assessing compliance with VEVRAA. The same could be done in regard to numerous other statutory or regulatory requirements relating to the payment of government funds under federal contracts or programs. Thus, not surprisingly, the question whether the public disclosure bar applies to FOIA responses has been raised not only in the five cases comprising this Circuit split and three other Court of Appeals decisions that have touched upon it, but in many other cases as well. More will inevitably follow.

Moreover, the Court of Appeals' decision is incorrect. The statutory terms "report" and "investigation" easily encompass FOIA responses, which are the results of a government search for records responsive to FOIA requests. The Second Circuit's holding to the contrary is based, among other things, on the court's erroneous premise that the public disclosure bar should be triggered only by sources indicating that the government itself is actively investigating a potential fraud or is under significant public pressure to do so. It is, however, the *public* nature of the information reported by the government or news media—not the government's treatment of that information as potentially actionable fraud—that implicates the public disclosure bar. 31 U.S.C. § 3730(e)(4)(A). Additionally, the Second Circuit's statutory interpretation cannot be squared with Congressional intent in enacting the public disclosure bar. *Qui tam* relators whose knowledge of an alleged fraud is based on what the government itself publicly reported to them in response to FOIA requests are not persons that Congress deemed deserving of the FCA's extraordinary financial rewards.

I. The Decision Below Widens a Direct, Irreconcilable Conflict Among the Courts of Appeals

The Court of Appeals' decision further entrenches an acknowledged Circuit split as to whether disclosures in response to FOIA requests are "report[s]" or "investigation[s]" within the meaning of the FCA. Three Circuits—the First, Third, and Fifth—have held categorically that a FOIA response is a "report" or "investigation." The Tenth Circuit has likewise held, without extensive analysis, that a FOIA response triggered the public disclosure bar. Two Circuits—the Second and the Ninth—have squarely ruled to the contrary.[7]

1. The majority of courts that have considered the question have adopted the view first articulated by then-Judge Alito in *Mistick*. There, the Third Circuit determined that FOIA responses fall within the "ordinary meaning" or "common understanding" of the terms "report" and "investigation." 186 F.3d at 383-85. A FOIA response is a "report," the court explained, because it "provides information and notification regarding the results of the agency's search for the requested documents and constitutes an official and formal statement concerning those results." *Id.* at 383-84. A FOIA response is an "investigation" because "[w]hen an agency receives a FOIA request, it is

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7. In an unpublished decision, the Fourth Circuit also concluded, without analysis, that "FOIA information . . . does not operate as a jurisdictional bar." See *United States ex rel. Bondy v. Consumer Health Found.*, 28 F. App'x. 178, 181 n.2 (4th Cir. 2001).

obligated to conduct a search that is reasonably calculated to uncover all relevant documents." *Id.* at 384.

The Fifth Circuit expressly adopted *Mistick*'s analysis. See *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004) ("we are persuaded by the reasoning of *Mistick* and hold that the response to Reagan's FOIA request is an administrative report").

The First Circuit also recently "adopt[ed] the majority view, and h[e]ld that a FOIA response is an administrative report within the purview of the FCA." *Ondis*, 587 F.3d at 56-75. To hold otherwise, the First Circuit concluded, would "fail[] to lend any independent significance to the act of responding to a FOIA request . . . . [T]he end product of the government's search (locating and compiling the requested documents) independently constitutes an administrative report—and this is so regardless of the character of the underlying documents." *Id.* at 56.

The Tenth Circuit, without citing *Mistick*, also held that a response to a FOIA request triggered the public disclosure bar, although there was apparently no dispute before the Tenth Circuit that the document disclosed pursuant to the FOIA request was a "report" for purposes of the FCA. *United States. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1049 (10th Cir. 2004).[8]

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8. The Sixth Circuit has noted the FOIA disclosure issue without fully resolving it. See *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 725 (6th Cir. 1999).

2. By contrast, the Ninth Circuit expressly "disagree[d]" with *Mistick*'s analysis, holding instead that "a response to a FOIA request is not necessarily a report or investigation, although it can be, if it is from one of the sources enumerated in the statute." *Haight*, 445 F.3d at 1153, 1156. In the Ninth Circuit's view, "responding to a FOIA request requires little more than duplication," and thus does not "involve extensive governmental work product" necessary to trigger the public disclosure bar. *Id.* at 1153. Treating all FOIA disclosures as "reports" or "investigations" also would be, according to the Ninth Circuit, "out of step with Congress's intentions in amending" the public disclosure bar in 1986. *Id.* at 1154. That amendment revised the statute to bar only *qui tam* actions based on publicly disclosed information from enumerated sources, whereas previously it had barred all *qui tam* actions based on information within the government's possession. The intent of the amendment, according to the court, was to make the bar applicable when "the government could be expected to be aware of information . . . because the information *originated* from the government or involved governmental work product." *Id.* at 1154.

In the decision below, the Second Circuit also considered and expressly rejected *Mistick*'s analysis, agreeing instead with the Ninth Circuit that "the FCA's jurisdictional bar applies only when the [disclosed] document is a 'congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." Pet. App. 32a. Acknowledging that the statutory language contains "potentially broad terms," the court reasoned that "their meaning is narrowed"

by association with neighboring statutory terms, which, in the court's view, "connote the synthesis of information in an investigatory context." Pet. App. 23a (internal quotation marks and alterations omitted). The court also looked to the statute's legislative history, concluding that permitting FOIA responses to trigger the public disclosure bar "would essentially resurrect, in a significant subset of cases, the government possession standard that Congress repudiated in 1986." Pet. App. 27a-28a. The court found support for its construction from the statutory purpose, stating that the contrary "approach adopted in *Mistick*" would yield a "result that is counterproductive to Congress' goal of striking a balance between encouraging private citizens to expose fraud and avoiding parasitic actions." Pet. App. 28a (internal quotation marks and alterations omitted).

The Second Circuit's decision thus deepens a true conflict among the federal Courts of Appeals. See *United States ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, No. 06 Civ. 7115(SAS), 2010 WL 2670829, at *6 n. 88 (S.D.N.Y. July 2, 2010) (noting that *Kirk* "expressly rejected" the reasoning of the First, Third and Fifth Circuits). Unquestionably, had the Second Circuit applied the rule adopted by the First, Third and Fifth Circuits, it would have reached the opposite conclusion: the government's responses to Mrs. Kirk's FOIA requests were "report[s]" or "investigation[s]" within the meaning of the public disclosure bar.

3. This issue would not benefit from further percolation in the lower courts. Both sides of the issue have been extensively analyzed in reported decisions by five Circuits, and three other Circuits have

considered the question as well. The text of the public disclosure bar, its purpose and legislative history, and surrounding policy arguments have been marshaled in support of flatly contradictory results. The conflict has been acknowledged by three different Circuits, each of which meaningfully engaged the reasoning in the divergent authority, and still no consensus has emerged. Instead, the Second Circuit's decision in this case only widens the split between the Courts of Appeals. Only this Court's review can resolve the conflict.

Recent legislation amending the public disclosure bar, see Pet. App. 105a-106a, did nothing to clarify or resolve the issue.[9] The disputed statutory terms—"report" and "investigation"—were left unchanged. As the Second Circuit explicitly noted in this case, it is the construction of these terms that has divided the Courts of Appeals. See Pet. App. 24a ("[W]e find that it strains the natural meaning of the statute to construe the terms 'report' and 'investigation' as broadly as some of our sister Circuits have done."). None of the points of

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9. The amendment changed one of the terms modifying "report" and "investigation": The term "Federal" was substituted for "administrative." This change is irrelevant to the question presented here because responses to FOIA requests are, without exception, both "Federal" and "administrative" in nature. FOIA imposes disclosure obligations only on federal "agenc[ies]," defined as "authorit[ies] of the Government of the United States," not including Congress, the courts, and certain other entities. 5 U.S.C. § 551(1). Because FOIA responses are, in all instances, given by federal administrative agencies, substituting the term "Federal" for "administrative" in the public disclosure bar has no effect on the issue presented in this petition.

disagreement regarding the interpretation of "report" or "investigation" is affected by the recent amendment, so there is no need to delay review to allow the Courts of Appeals to consider the question in light of the amended statutory language.

4. This case is an appropriate vehicle to determine whether the government's response to a FOIA request is a "report" or "investigation" for purposes of the FCA. No further factual development or other proceedings are necessary for this Court to resolve this important question dividing the lower courts.

II. The Scope of the Public Disclosure Bar, Particularly its Application to FOIA Materials, is an Important and Recurring Issue Warranting this Court's Attention

The FCA's *qui tam* provisions contain enormous financial incentives for private parties to allege fraud on behalf of the government. The public disclosure bar is designed to ensure that those rewards are available only to relators with firsthand knowledge of the alleged wrongdoing, not relators who base claims on publicly disclosed information. The Court of Appeals' holding that the bar does not apply to claims based on information reported by the government in response to FOIA requests will have far-reaching results. Any person will be able to use FOIA to probe any company's compliance with VEVRAA—or any other statutory or regulatory requirement relating to government payments. And, despite having no independent knowledge of the relevant events, such persons may then bring FCA actions against any company for which they

find evidence of non-compliance, even if the government itself does not view the alleged conduct as deserving of the FCA's draconian penalties.

1. a. As this Court observed last term, the public disclosure bar is intended to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham County*, 559 U.S. __, 130 S. Ct. at 1406 (internal quotation marks omitted). Striking the appropriate balance between these objectives is of critical importance: Too high a bar will preclude meritorious *qui tam* actions by whistle-blowers with independent knowledge of fraud; too low a bar will invite a flood of parasitic lawsuits. Because of the importance of this issue, the scope of the public disclosure bar has recently occupied both this Court and the Congress. See *Graham County*, 559 U.S. at __, 130 S. Ct. at 1396; *Rockwell*, 549 U.S. at 457; The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 10104(j)(2).

b. FOIA, which is designed to ensure that federal agencies make information "available to the public," 5 U.S.C. § 552(a), implicates the public disclosure bar in myriad contexts. The statute is rendered in broad terms: FOIA requires federal agencies to disclose extensive information regarding the government's activities to any member of the public, unless the material falls into one of a few, narrowly construed exceptions.

Because of the breadth of information made public under FOIA, disputes as to whether FOIA responses trigger the public disclosure bar surface in a wide range of contexts, and do so frequently. In addition to the eight Circuit Court decisions addressing the issue that were previously cited in this Petition, at least seventeen other federal court decisions have considered it.[10] More will

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10. See *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007); *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 334 (3d Cir. 2005); *United States ex rel. Brickman v. Bus. Loan Express LLC*, No. Civ. A. 1:05-CV-3147J, 2007 WL 4553474 (N.D. Ga. Dec. 18, 2007), *aff'd*, 310 F. App'x 322 (11th Cir. 2009); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester County*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007); *United States ex rel. Farmer v. City of Houston*, No. Civ. A. H-03-3713, 2005 WL 1155111 (S.D. Tex. May 5, 2005); *United States ex rel. Yannacopolous v. Gen. Dynamics*, 315 F. Supp. 2d 939 (N.D. Ill. 2004); *United States ex rel. Ervin & Assocs. v. Hamilton Sec. Group*, 332 F. Supp. 2d 1 (D.D.C. 2003); *United States ex rel. King v. F.E. Moran, Inc.*, No. 00 Civ. 3877, 2002 WL 2003219 (N.D. Ill. Aug. 29, 2002); *United States ex rel. Brown v. Merant Inc.*, No. Civ. A. 99-6481, 2002 WL 487160 (E.D. Pa. Mar. 29, 2002); *United States ex rel. Waris v. Staff Builders Inc.*, No. Civ. A. 96-1969, 1999 WL 788766 (E.D. Pa. Oct. 4, 1999); *United States ex rel. Richardson v. E-Sys.*, No. 3:90-CV-0607-P, 1999 WL 324666 (N.D. Tex. May 18, 1999); *United State ex rel. Haskins v. Omega Inst.*, 11 F. Supp. 2d 555 (D.N.J. 1998); *United States ex rel. Durcholz v. FKW Inc.*, 997 F. Supp. 1159 (S.D. Ind. 1998), *aff'd*, 189 F.3d 542 (7th Cir. 1999); *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999); *United States ex rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l, Inc.*, No. 94 Civ. 2925 (RLC), 1996 WL 11299 (S.D.N.Y. Jan. 4, 1996); *United States ex rel. Eitel v. Reagan*, 898 F. Supp. 734 (D. Or. 1995); *United States ex rel. Fine v. Advanced Scis.*, 879 F. Supp. 1092 (D.N.M. 1995), *aff'd*, 99 F.3d 1000 (10th Cir. 1996).

inevitably follow, leading to yet more disparate results and further confusion.

2. As this case illustrates, permitting FCA claims to proceed when based on information disclosed pursuant to FOIA requests has significant ramifications. In the VEVRAA context alone, allowing the Second Circuit's decision to stand would mean that any individual could file an FCA action alleging that a federal contractor did not file required VETS-100 reports based solely on a FOIA response reporting that no VETS-100 reports were found. Kirk's complaint against Schindler alleges liability of more than $300 million. Analogous complaints against entities that do more business with the government could seek even greater sums, with the relator retaining up to 30% of any recovery.

The relators in such suits would not be limited to whistle-blowers with independent knowledge of an alleged fraud. A person who had no prior acquaintance with a federal contractor or its practices could bring an FCA action against it merely because the DOL reported, in response to a FOIA request, that the contractor's VETS-100 reports could not be located—just as, in this case, "the DOL's responses to the Kirks' FOIA requests served as Kirk's sole basis for concluding that Schindler failed to file VETS-100 reports." Pet. App. 85a n.16.

The use of FOIA to discover grounds for FCA claims is, of course, not limited to cases involving VEVRAA. FOIA requests could be submitted to test compliance with a wide range of regulatory requirements potentially giving rise to FCA actions, as illustrated by the numerous other cases addressing whether FOIA

disclosures trigger the public disclosure bar. See, e.g., *Ondis*, 587 F.3d at 52 (FCA claim based on FOIA request for a city's federal grant applications for public works projects); *Haight*, 445 F.3d at 1149 (FCA claim based on FOIA request for a medical grant application and research); *Mistick*, 186 F.3d at 381 (FCA claim based on FOIA request for letters relating to a government-funded lead abatement project).

These potential applications of FOIA are multiplied significantly by an interpretation of the FCA by some Courts of Appeals that permits FCA liability to attach to so-called "legally false" claims—*i.e.*, claims "predicated upon a false representation of compliance with a federal statute or regulation or a prescribed contractual term," where compliance is a condition to receipt of a government payment. *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001).[11] Such liability, which appears to have never been considered by this Court, may be found even when the underlying statute or regulation contains its own enforcement mechanisms, with penalties far less severe than those available under the FCA.

VEVRAA is such a statute. Its prohibition against payment to contractors that have not filed required VETS-100 reports contains a cure provision: It "cease[s] to apply . . . on the date on which the contractor submits the report." 31 U.S.C. § 1354(a)(2). Administrative

11. Such "legally false" certification "differs from 'factually false' certification," also prohibited by the FCA, "which involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *Mikes*, 274 F.3d at 697.

remedies for material violations of VEVRAA include, among others, entry into conciliation agreements "if the contractor is willing to correct the violations and/or deficiencies." 40 C.F.R. § 60-250.62. It does not appear that the federal government has ever invoked the FCA to penalize a contractor for non-compliance with VEVRAA, including non-compliance relating to the filing of VETS-100 reports.

Private parties, however, will not utilize a more calibrated enforcement mechanism when an FCA claim might be available. They will not, as the government would, account for the possibilities that the FCA's draconian penalties may be unfair in relation to the gravity of the alleged regulatory non-compliance; or that the risk of such excessive penalties will deter companies from contracting with the government or induce them to charge the government higher prices to offset the risk, raising the government's costs of doing business. Rather, private parties will trundle out the heavy artillery of the FCA in every case in order to obtain the extraordinary financial rewards that the FCA makes available to *qui tam* relators. Here, in a case where the government declined to intervene, Kirk alleges that the government is entitled to recover more than $300 million. That amount, if awarded, may well be an unconstitutionally excessive fine for non-compliance with a regulatory requirement that has a cure provision, in a case in which there is no claim that the government did not receive the precise goods and services it paid for.

The Second Circuit's decision also means that FCA liability could attach even where the substance of a statutory reporting requirement—here, the number

of employed veterans—has no bearing on the government's payment decision. Here, for example, there is no requirement that a contractor employ a given number or percentage of veterans to receive payment. Nevertheless, under the Second Circuit's decision, FCA liability may still be imposed on a contractor's non-compliance with such a reporting requirement.

After the Second Circuit's decision here, relators need not base such FCA claims on any independent knowledge of the conduct alleged in the complaint. Any person, after obtaining a list of federal contractors from public sources, may, through FOIA, request the contractors' VETS-100 reports and then file FCA actions against any contractor whose reports are not found. They may do the same to monitor compliance with other statutory or regulatory requirements that could support a "legally false" theory of FCA liability.

III. The Court of Appeals' Holding that Responses to FOIA Requests Do Not Trigger the Public Disclosure Bar Is Incorrect

The government's response to a FOIA request constitutes a "report" or "investigation," as those terms are commonly used. The Court of Appeals, however, did not afford the disputed terms their ordinary meanings. Instead, the court gave the statute an unacceptably narrow reading that neither its text nor its purpose permit.

1. As demonstrated in then-Judge Alito's opinion in *Mistick*, the government's response to a FOIA request fits comfortably within the ordinary meanings

of "report" and "investigation." See 186 F.3d at 383-84. Such responses constitute the government's official notification, or "report," of the results of its search for documents responsive to the FOIA request. *Id.* And the government must examine, or "investigate," its records in order to find responsive documents and to determine whether any of FOIA's exceptions apply. *Id.* at 384. Not surprisingly, this interpretation of the FCA—grounded in well-accepted dictionary definitions and a "common understanding" of the ordinary usage of the terms "report" and "investigation"—has won the support of the majority of Circuits that have analyzed the issue.

The Second Circuit's contrary reading of the statute is not persuasive. It concluded that the meanings of "report" and "investigation" should be "narrowed" by application of the canon of *noscitur a sociis*, because the neighboring statutory terms purportedly connote a synthesis of information or analysis by the government. Pet. App. 23a. As an initial matter, the standard, even so narrowed, should have been deemed satisfied here because the government did synthesize information when responding to the Kirks' FOIA requests in this case. Among other things, it concluded, and reported to the Kirks, that it did not possess Schindler's VETS-100 reports for certain years, and its report of that conclusion is Kirk's sole ground for alleging that Schindler failed to file such reports.

In any event, just as in *Graham County*, the use of *noscitur a sociis* does not illuminate the meaning of the disputed text. Here, as there, "[t]he substantive connection, or fit, between the [statutory] terms . . . is not so tight or so self-evident as to demand that [the

Court] rob any one of them of its independent and ordinary significance." *Graham County*, 559 U.S. at __, 130 S. Ct. at 1403. This is especially so because "*all* of the sources listed in §3730(e)(4)(A) provide interpretive guidance," and one of those sources, "the news media," obviously does not require any synthesis of information or analysis by the government. *Id.* at __, 130 S. Ct. at 1404; see *id.* (rejecting argument, based on *noscitur a sociis*, that the term "administrative" in the public disclosure bar applies only to federal agency action because, *inter alia*, "[t]he 'news media' . . . plainly have a broader sweep").

2. The Second Circuit also mistakenly relied on the public disclosure bar's history and purpose to support its conclusion that FOIA responses are not "report[s]" or "investigation[s]."

What the Court of Appeals found "most problematic" about the approach taken by *Mistick* was that it supposedly reinstates in many cases the "government possession" standard in place before the 1986 amendment to the FCA. Pet. App. at 27a-28a. But *Mistick* does no such thing. Under the "government possession" standard, *qui tam* claims were barred if based on information possessed by the government, even if the government first learned the information from the relator himself. See *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1102-06 (7th Cir. 1984). *Mistick* does not resurrect that standard. It continues to require, as first set forth in the 1986 amendment, that the information be publicly disclosed (not merely possessed) by the government or that it be disclosed by the news media; that disclosures by the

government be contained in certain enumerated sources; and that the bar is inapplicable if the relator is an original source of the information.

It is, in fact, the Court of Appeals' decision in this case, not *Mistick*, that misapprehends Congress' intent in enacting the 1986 amendment. The Second Circuit sought to ensure that the public disclosure bar would not preclude an FCA claim by a plaintiff who used FOIA to discover a "key piece of information" relating to the alleged fraud. Pet. App. 28a. But under the balance struck by the 1986 amendment, a plaintiff who must resort to such public channels for "key" information does not have independent knowledge deserving of the extraordinary financial rewards provided to *qui tam* relators. See *Ondis*, 587 F.3d at 56 ("An individual who obtains information through FOIA disclosures in order to uncover fraud is not a person with firsthand knowledge (and, thus, not a person whom Congress chose to reward under the FCA).").

The government, as amicus curiae in this case, argued—and the Second Circuit agreed—that the public disclosure bar should apply only when "the government is either actively investigating the alleged fraud or . . . there is sufficient public awareness of the allegations to pressure the government to start an investigation." Pet. App. 30a. Whatever the merits of this test, it is not the one that Congress enacted. Rather, it is the public nature of information, not the government's commencement of an investigation, which makes the information unsuitable as a basis for a *qui*

tam action. As this Court put it, "[t]he statutory touchstone . . . is whether the allegations of fraud have been 'publicly disclosed,' not whether they have landed on the desk of a DOJ lawyer." *Graham County*, 559 U.S. at __, 130 S. Ct. at 1410.

An earlier Second Circuit decision recognizes the true intent of the public disclosure bar: It "was designed to preclude *qui tam* suits based upon information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992) (internal quotation marks and citation omitted). *Mistick* gives effect to this intent; the Second Circuit's decision here conflicts with it. This Court should grant review to ensure that the correct interpretation of the FCA's public disclosure bar is applied uniformly among the Circuits.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 6, 2010

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 09-1678-cv

UNITED STATES OF AMERICA *ex rel.*
DANIEL KIRK,

Plaintiff-Appellant,

v.

SCHINDLER ELEVATOR CORPORATION,

Defendant-Appellee.

Argued: Dec. 10, 2009
Decided: April 6, 2010

Before: McLAUGHLIN, KATZMANN, and LYNCH, Circuit Judges.

KATZMANN, Circuit Judge:

The Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA"), 38 U.S.C. § 4212, requires contractors doing business with federal government entities to submit annual reports to the Secretary of Labor providing information about the number of veterans employed by the contractor (the "VETS-100

reports"). Plaintiff-Appellant Daniel Kirk brought this *qui tam* action on behalf of the United States government under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, alleging that his former employer, Defendant-Appellee Schindler Elevator Corp.. ("Schindler"), obtained government contracts while representing that it had filed the required VETS-100 reports, when in fact it either had failed to file a report or had filed a false report for the relevant years. Kirk based his allegations in large part on information he obtained after submitting requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

This case calls on us to decide a question of first impression in this Circuit: whether the FCA's jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A), which provides that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in ... a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," applies when the plaintiff's allegations are based on materials produced in response to a FOIA request. Our sister Circuits are divided on this issue. If the jurisdictional bar does not apply, this case also presents the question whether Schindler may be held liable under the FCA for (1) failing to file VETS-100 reports, and (2) filing false VETS-100 reports.

We hold that the answer to the question whether a document obtained in response to a FOIA request qualifies as an enumerated source under 31 U.S.C.

§ 3730(e)(4)(A) depends on the nature of the document itself; the FCA's jurisdictional bar applies only when the document is a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation." We further hold that Kirk stated valid claims under the FCA when he alleged that (1) Schindler had failed to file VETS-100 reports for certain years, and (2) Schindler had filed false VETS-100 reports for certain years. We vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

BACKGROUND

The FCA is designed to help combat fraud against the federal government by persons who provide goods and services to it. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir.1992). It establishes liability for persons who submit false claims for payment to the government, 31 U.S.C. § 3729(a)(1), and it contains a variety of measures designed to enhance deterrence and enforcement. These include, for example, a treble damages provision, *id.*, and-central to this case-*qui tam* provisions that allow private citizens who learn of fraud to bring suit in the name of the government and to share in any recovery, *id.* § 3730(b)-(d). Plaintiff-relator Daniel Kirk brought such an action based on his belief that his employer, Schindler, had obtained contracts and payments from the federal government while failing to comply with the requirements of VEVRAA.

Appendix A

Kirk served in the United States Army from 1969 to 1971, performing part of his service in Vietnam. In 1978, he took a job at Millar Elevator Industries, Inc. ("Millar"). Millar was bought by Schindler in 1989, but the two companies operated separately until 2002. In the years preceding 2002, Kirk was promoted several times, eventually (in 2001) becoming Vice President responsible for the Modernization, Repair, and Maintenance Support Departments of Millar. After Schindler integrated Millar's operations into its own in 2002, Kirk was initially named Schindler's Regional Modernization Manager for New York City and Long Island, in which capacity he managed over 100 employees. In July 2003, however, Kirk discovered, apparently without being informed directly, that he was being demoted to the non-managerial position of Field Superintendent. He resigned from Schindler in August 2003.

In April 2004, Kirk filed a complaint with the Office of Federal Contract Compliance Programs ("OFCCP") at the Department of Labor ("DOL"), claiming that he had been improperly demoted and constructively terminated by Schindler despite the fact that he was a Vietnam veteran in violation of VEVRAA. The OFCCP provided Schindler with a copy of Kirk's complaint and began an investigation of Schindler's compliance with VEVRAA. In February 2005, OFCCP found that there was insufficient evidence to support Kirk's claim. Kirk appealed this finding, and in November 2009, the DOL

affirmed the OFCCP's finding that Schindler had not violated VEVRAA when it took an adverse employment action against him.

In March 2005, meanwhile, Kirk filed the instant case under the FCA in the name of the U.S. government. As provided for by the FCA, *see* 31 U.S.C. § 3730(b), the case was initially filed under seal; in June 2007, after the government had decided not to intervene, the action was unsealed and Kirk was permitted to pursue it as relator. He then filed the Amended Complaint.

Before turning to the factual allegations in the Amended Complaint, it is useful to review the relevant requirements of VEVRAA. VEVRAA and its accompanying regulations impose several specific requirements on contracts "entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction)," when the value of the contract exceeds a certain monetary threshold.[1] 38 U.S.C. § 4212(a)(1). Contracts subject to VEVRAA

1. The monetary threshold at which VEVRAA becomes applicable to a contract has changed several times during the time period relevant to this lawsuit. For contracts signed before November 13, 2001, the minimum amount of a contract subject to VEVRAA was $10,000; for contracts signed on or after November 13, 2001 and before September 28, 2006, the minimum amount was $25,000; and for contracts signed on or after September 28, 2006, the minimum amount is $100,000. 66 Fed.Reg. 51,998, 51,998 (Oct. 11, 2001); 71 Fed.Reg. 57,363, 57,369 (Sept. 28, 2006) (amending 48 C.F.R. § 52.222-37).

must contain provisions obligating the contractor (1) to "take affirmative action to employ and advance in employment qualified covered veterans,"[2] 38 U.S.C. § 4212(a)(1); (2) to invite eligible veterans to identify themselves voluntarily to their employer, 48 C.F.R. §§ 22.1310(b), 52.222-37(e); and (3) to submit annual reports to the Secretary of Labor (the "VETS-100 reports") providing data about the qualified covered veterans in the contractor's workforce, including the number of qualified covered veterans in each job category and hiring location and the number of new employees who are qualified covered veterans, 38 U.S.C. § 4212(d); 48 C.F.R. §§ 22.1310(b), 52.222-37(c).

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2. The term "covered veteran" designates

(i) Disabled veterans.

(ii) Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.

(iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985 (61 Fed.Reg. 1209).

(iv) Recently separated veterans.

38 U.S.C. § 4212(a)(3)(A). "The term 'qualified,' with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability." *Id.* § 4212(a)(3)(B).

Appendix A

In 1998, Congress passed the Veterans Employment Opportunities Act, 31 U.S.C. § 1354, which provides that "no agency may obligate or expend funds . . . to enter into a contract [covered by VEVRAA] with a contractor from which a [VETS-100] report was required. . . if such contractor did not submit such report," *id.* § 1354(a)(1). In turn, 48 C.F.R. § 52.222-38 provides that "[b]y submission of its offer, the offeror represents that, if it is subject to the reporting requirements [of VEVRAA] . . . it has submitted the most recent VETS-100 Report required by [the Act]." This regulation issued in October 2001 and became effective December 21, 2001. *See* 66 Fed.Reg. 53,487-01, 53,487 (Oct. 22, 2001).

Kirk's Amended Complaint alleges that Schindler, while entering into numerous contracts with the federal government that were subject to the requirements of VEVRAA, failed to comply with it in several salient ways. Because the district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6) and 12(b)(1), we accept as true the material facts alleged in the complaint and draw all reasonable inferences in Kirk's favor. *Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir.2008); *Freedom Holdings, Inc. v. Spitzer*, 363 F.3d 149, 151 (2d Cir.2004).

Kirk alleges that from 1998 to the present, he was never asked to identify himself as a veteran and that when Schindler integrated its operations with Millar's, the approximately 400 former Millar employees were not given an opportunity to self-identify as veterans. He further alleges that as a manager of 100 employees at Schindler with responsibility for hirings, firings, and

promotions, he was never informed of any affirmative action program aiding veterans. A copy of Schindler's employee manual makes no reference to an affirmative action program for veterans.

In addition, Kirk alleges that Schindler failed to submit VETS-100 reports from 1998 until late 2004 and that the reports it did file in 2004, 2005, and 2006 are false. These latter allegations are based in significant part on the results of several FOIA requests submitted to the DOL by his wife, Linda Kirk. In November 2004, Mrs. Kirk submitted a FOIA request seeking copies of any VETS-100 reports filed by Schindler for the years 2002, 2003, or 2004. In a letter dated February 11, 2005, the Office of the Assistant Secretary for Veterans Employment and Training informed Mrs. Kirk that the DOL had located no VETS-100 reports from 2002 or 2003 and enclosing copies of three VETS-100 reports filed by Schindler in 2004. In January 2005, Mrs. Kirk submitted a second FOIA request seeking copies of any VETS-100 reports filed by Schindler for the years 1998, 1999, 2000, and 2001. By letter dated September 29, 2005, the Office of the Assistant Secretary for Veterans Employment and Training informed her that the DOL had located no VETS-100 reports for 1998, 1999, or 2000, but enclosed copies of 28 VETS-100 reports filed by Schindler for the 12-month period ending September 30, 2002.[3] Finally, in April 2007, Mrs. Kirk submitted a

3. The applicable regulations require that VETS-100 reports be filed no later than September 30 of each year, 48 C.F.R. § 52.222-37(c), and that they report on the number of

(Cont'd)

third FOIA request to the DOL, this time seeking copies of any VETS-100 reports filed by Schindler for the years 2005 and 2006. Under cover of a letter dated May 14, 2007, the Office of the Assistant Secretary for Veterans Employment and Training provided copies of 19 VETS-100 reports filed in 2005 and 49 filed in 2006.

> This ambiguity makes it unclear whether the September 29, 2005 response to Mrs. Kirk's second FOIA request is complete, in that no mention is made of VETS-100 reports filed in 2001. The reports filed in 2002 do cover some portion of 2001 and in this way are responsive to Mrs. Kirk's request for VETS-100 reports "*for*" 2001. However, the September 29, 2005 letter does not explicitly state that the DOL located no reports filed *in* 2001, and it is conceivable that while such reports did exist, it understood the production of the 2002 reports to satisfy Mrs. Kirk's request. Drawing all reasonable inferences in light of the plaintiff, however, we conclude that the DOL located no reports filed in 2001.

(Cont'd)
veterans in the employer's workforce in various categories during the 12-month period preceding a date chosen by the employer but falling between July 1 and August 31, *id.* § 52.222-37(d). The parties, and the FOIA responses from the DOL, generally refer to a VETS-100 report "for" a given year, but we note that under the regulations the report filed *in* a given year necessarily covers a 12-month period extending into two calendar years and is not, strictly speaking, the report *for* the year in which it was filed.

On the basis of these facts, Kirk alleged that Schindler was not in compliance with VEVRAA in that it (1) did not offer its employees the opportunity to identify themselves as Vietnam-era veterans, (2) failed to implement an affirmative action program aiding covered veterans, and (3) failed to file VETS-100 reports for the years 1998 through 2003, and filed false VETS-100 reports for 2002, 2004, 2005, and 2006. Kirk based his allegation that Schindler did not file VETS-100 reports in 1998-2003 on the responses Mrs. Kirk received to her FOIA requests; with regard to the 2002 reports, Kirk alleged that the fact that these reports were not produced in response to Mrs. Kirk's November 2004 request but were eventually produced in response to her January 2005 request indicates that the 2002 reports were belatedly filed. Kirk also alleged that the 2002 reports were, in any event, false. Kirk's allegation that Schindler's 2002, 2004, 2005, and 2006 VETS-100 reports were false was based on his comparison of the information contained in the reports produced pursuant to Mrs. Kirk's FOIA request with his personal knowledge of Schindler's operations. For example, he alleged that while the 2004 reports cover only eighteen unspecified locations, Schindler has more than eighteen locations in the United States. He also alleged that while the 2004, 2005, and 2006 reports listed no covered veterans who are technicians or craft workers in New York, he personally knows (and named in the complaint) a number of covered veterans working for Schindler in those job categories. Moreover, he alleged, the filed reports must be false because, as his personal experience demonstrated, Schindler never asked Vietnam-era veterans to self-identify.

Appendix A

During the years in which Schindler was not in compliance with VEVRAA, Kirk alleged, it entered into hundreds of contracts with the federal government that were subject to VEVRAA's requirements. Appended to the Amended Complaint are lists of specific contracts between Schindler and various agencies of the U.S. government dating from 1999 to the time the Amended Complaint was filed in 2007, all of which exceed VEVRAA's minimum value. Kirk charged that each claim for payment submitted by Schindler under one of these contracts was a false claim within the terms of the FCA.

In September 2007, Schindler filed a motion to dismiss the Amended Complaint. The three stated grounds for Schindler's motion were (1) that under the jurisdictional provision of the FCA, 31 U.S.C. § 3730(e)(4), the district court lacked jurisdiction over Kirk's suit because the information on which his allegations were based-specifically, the information garnered through Mrs. Kirk's FOIA requests-had been publicly disclosed, (2) that Kirk had failed to plead his fraud claims with adequate specificity under Fed.R.Civ.P. 9(b), and (3) that in light of Kirk's pending complaint before the OFCCP, the district court should defer to the agency and dismiss the action under the doctrine of "primary jurisdiction." The district court granted Schindler's motion to dismiss. First, the district court found that there could be no liability for those of Kirk's allegations that were based on Schindler's filing of false or inaccurate VETS-100 reports because Schindler never certified the accuracy of the reports. Second, the district court assessed the applicability of the FCA's

jurisdictional bar to Kirk's remaining claims. Recognizing that it faced a question that had not been decided in this Circuit, the district court found that the FOIA reports constituted a "public disclosure" via one of the sources enumerated in 31 U.S.C. § 3730(e)(4)(A). It concluded, accordingly, that it lacked jurisdiction to consider Kirk's claims based on Schindler's failure to file VETS-100 reports because all of the material information on which these claims were based was contained in the DOL's responses to Mrs. Kirk's FOIA requests.

This appeal followed.

DISCUSSION

While the district court addressed the question of subject matter jurisdiction only after concluding that Kirk's claims with respect to the allegedly false or inaccurate VETS-100 reports were not viable under the FCA, "the first question for an appellate court ordinarily is that of its jurisdiction and the jurisdiction of the lower court in the cause under review." *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497 (2d Cir.2002); *see also United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1155-56 (2d Cir.1993) (citing *Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir.1990)) (stating, in the context of a suit under the FCA, that "[w]here . . . the defendant moves for dismissal under Rule 12(b)(1), . . . as well as on other grounds, the court should consider the Rule 12(b)(1) challenge first

since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined" (internal quotation marks omitted)). Accordingly, we first analyze whether the FCA's jurisdictional bar is applicable here.

I. Subject Matter Jurisdiction

We review a district court's determination of subject matter jurisdiction *de novo*. *DiTolla v. Doral Dental IPA of N. Y.*, 469 F.3d 271, 275 (2d Cir.2006).

Title 31, Section 3730(e)(4)(A) of the United States Code provides that

> No court shall have jurisdiction over an action under [the FCA] 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.[4]

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4. This provision has recently been amended to specify that in order for the jurisdictional bar to apply, "substantially the same allegations or transactions" must be publicly disclosed in a *federal* criminal, civil, or administrative hearing, a congressional, Government Accountability Office, or other (Cont'd)

As we have previously explained, in order for the FCA's jurisdictional bar to apply there must be "public disclosure" of the information on which the allegation of fraud rests, and this "public disclosure" must occur through one of the sources enumerated in the statute. *Doe*, 960 F.2d at 322-23. In addition, the statute indicates that the public disclosure (via an enumerated source) must be of the material elements of the "allegations or transactions" on which the claim is based. 31 U.S.C. § 3730(e)(4)(A); *see United States ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730, 736 (7th Cir.2007) (stating that "[a] 'public disclosure' exists under § 3730(e)(4)(A) when the critical elements exposing the transaction as fraudulent are placed in the public domain" (internal quotation marks omitted)), *overruled on other grounds by Glaser v. Wound Care Consultants*, 570 F.3d 907 (7th Cir.2009); *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1049-51 (10th Cir.2004) (finding that "allegations or transactions" have been disclosed when "[a]ll of the material elements of the fraudulent transaction were already in the public domain"); *United States ex rel. Springfield Terminal*

(Cont'd)

federal report, hearing, audit, or investigation, or by the news media. Patient Protection and Affordable Care Act, Pub.L. 111-148, § 10104(j)(2), 124 Stat. 119 (2010). Because this amendment was not made retroactive, *see Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S.Ct. 1396, 1400 n. 1 (2010), we do not address the new statutory language here. Throughout this opinion, we will use the present tense to refer to the version of the statute that applies in this case.

Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C.Cir.1994) ("The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain."). If it is established that the allegations or transactions at issue were publicly disclosed through an enumerated source, a *qui tam* plaintiff may avoid dismissal under the jurisdictional bar by establishing that she was an "original source" of the relevant information. *Kreindler*, 985 F.2d at 1158-59. The statute defines an "original source" as one 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)(B).

Kirk does not concede that the information contained in the responses Mrs. Kirk received to her FOIA requests was "publicly disclosed." However, every circuit to have considered this issue has determined that information produced in response to a FOIA request becomes public once it is received by the requester. *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 55 (1st Cir.2009); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175-76 (5th Cir.2004); *United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir.1999); *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir.1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512,

1519-20 (9th Cir.1995), *vacated on other grounds*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997). Moreover, in the context of construing the term "public disclosure" in the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), the Supreme Court has held that the term encompasses materials released in response to a FOIA request. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). Finally, this conclusion is consistent with our own prior discussions of what constitutes a "public disclosure" under the FCA. In *Doe*, we found that once innocent employees of a company being investigated for fraud were informed of the allegations, public disclosure of those allegations had occurred. 960 F.2d at 323. We rejected the contention that, in order for public disclosure to have taken place, the information must be more broadly disseminated. *Id.* *Doe* therefore undermines Kirk's argument that the information contained in the FOIA materials was not public because it had been disclosed only to the Kirks. Accordingly, we find that the information produced to Mrs. Kirk in response to her FOIA requests, once she had received it, was "publicly disclosed" within the meaning of 31 U.S.C. § 3730(e)(4)(B).

However, the question remains whether any or all of the FOIA materials qualify as an enumerated source under the statute. "Section 3730(e)(4)(A) furnishes an exclusive list of the ways in which a public disclosure must occur for the jurisdictional bar to apply." *Id.* Here, the potentially applicable categories are "administrative . . . report . . . or investigation." 31 U.S.C. § 3730(e)(4)(A).

Our sister Circuits have come to differing conclusions regarding whether materials produced by a government agency pursuant to a FOIA request are administrative reports or investigations within the meaning of the FCA's jurisdictional bar.

The Third Circuit, in *Mistick*, concluded that they are. Relying largely on dictionary definitions of the terms of the statute, the Third Circuit held that when a relator's claim was based on files released by the Department of Housing and Urban Development ("HUD") in response to a FOIA request, including letters submitted to HUD containing allegedly false claims, the FCA's jurisdictional bar applied. *Mistick*, 186 F.3d at 383-84. After finding that the word "administrative" refers "only to those administrative reports that originate with the federal government," *id.* at 383, the court reasoned,

> [a] "report" is defined as, among other things, "something that gives information" or a "notification," *Webster's Third New International Dictionary* 1925 (1971), and an "official or formal statement of facts or proceeding." *Black's Law Dictionary* 1300 (6th ed.1990). A response to a FOIA request falls within these definitions. Such a response provides information and notification regarding the results of the agency's search for the requested documents and constitutes an official and formal statement concerning those results.

Id. at 383-84. The court continued,

> [w]e also believe that this response occurred "in a[n] . . . administrative . . . investigation." 31 U.S.C. § 3730(e)(4)(A). For the reasons already explained, HUD's search for the documents sought under the FOIA and its decision to disclose them clearly satisfied our court's interpretation of the term "administrative," and we believe that these processes should be viewed as constituting an "investigation" within the meaning of 31 U.S.C. § 3730(e)(4)(A). Accepted definitions of the term "investigation" include "a detailed examination," *Webster's Third New International Dictionary* 1189 (1971), and the "making of a search." 1 *The Compact Edition of the Oxford English Dictionary* 457 (1971). When an agency receives a FOIA request, it is obligated to conduct a search that is reasonably calculated to uncover all relevant documents.

Id. at 384. Accordingly, the *Mistick* court found that jurisdiction was barred by the statute. *Id.* at 382-84. *Mistick*'s analysis has since been followed by the First and Fifth Circuits.[5] *Ondis*, 587 F.3d at 56-57; *Reagan*, 384 F.3d at 175-76.

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5. The Tenth Circuit has also found that a letter from the Department of the Interior Minerals Management Service disclosed pursuant to a FOIA request constituted an administrative report under § 3730(e)(4)(A), although the court's reasoning is not set forth at length because the issue does not appear to have been disputed by the parties. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1049 (10th Cir.2004). *Grynberg* does not cite *Mistick. See id.*

Appendix A

The Ninth Circuit, in *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir.2006), took a different approach. Rather than relying on the dictionary definition of the words "report" and "investigation," the *Haight* court looked at the words in the context of § 3730(e)(4)(A) as a whole. The court reasoned that

> a FOIA request is a mechanism for duplicating records that are in the possession of the federal government and that are not otherwise excludable from members of the public. In contrast, reports and investigations generally involve independent work product. "Report" denotes a document that includes an analysis of findings; "investigation" implies independent governmental leg-work. Moreover, the FCA's jurisdictional bar groups "report" and "investigation" with a series of other enumerated sources that each involve extensive governmental work product and involvement. Because responding to a FOIA request requires little more than duplication, labeling any response to a FOIA request a "report" or "investigation" would ignore the way in which each of the enumerated sources [in the statute] involves governmental work product.

Id. at 1153 (internal quotation marks and citation omitted).

The Ninth Circuit also reviewed the legislative history of the FCA's jurisdictional provisions: The original version of the Act, enacted in 1863, allowed *qui tam* suits with no limitations based on how the relator came to know of the false claim, even if the government was already in possession of the relevant information. *Id.* at 1154. In 1943, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943), the Supreme Court found that a *qui tam* suit was permitted even when the allegations in the complaint were copied directly from a publicly filed criminal indictment. *See Haight*, 445 F.3d at 1154. In response to *Marcus*, Congress enacted a strict jurisdictional provision prohibiting *qui tam* suits "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time" the case was brought. Pub.L. No. 78-213, 57 Stat. 608, 609 (1943) (superseded 1986); *see also Haight*, 445 F.3d at 1154. Under this provision, even if the relator had obtained the information through independent effort and then submitted it to the government, the fact that the government then possessed the information would bar a *qui tam* action. The high water mark of this restrictive approach was *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir.1984), in which the Seventh Circuit found that the state of Wisconsin was barred from pursuing a *qui tam* action to recover the proceeds of a Medicaid fraud that the state had discovered through its own investigation when Wisconsin had previously, as required by federal law, submitted information concerning the fraud to the U.S. government. *See Haight*, 445 F.3d at 1154. In 1986,

Congress again took action, this time to relax the jurisdictional bar, and the current language was instituted. Pub.L. No. 99-562, 100 Stat. 3153, 3157 (1986). Summing up the lesson to be taken from this history, the *Haight* court stated, "the jurisdictional bar provisions must be analyzed in the context of these twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." 445 F.3d at 1154 (internal quotation marks omitted); *see also Doe*, 960 F.2d at 321-22 (reviewing the same legislative history and concluding that "[t]he 1986 amendments attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud").

The Ninth Circuit concluded that construing the terms "report" and "investigation" to refer to work product that represents governmental analysis or leg-work rather than the mechanistic production of documents that follows upon a FOIA request is in keeping with the goals of the FCA's jurisdictional provision, as demonstrated by this history:

> Congress sought to bar suits in which the government could already be expected to be on notice of the fraud. . . .
>
> > [W]hen responding to a FOIA request, the government need not

> assimilate the information contained in the requested documents. The duplication of FOIA-requested documents does not require the degree of familiarity and cognizance that the drafting of a report or the conducting of an investigation would. Accordingly, prohibiting *qui tam* relators from basing their allegations on any information obtained in a FOIA response would damage the fraud-detection purpose of the FCA while failing to serve its twin goal of preventing opportunism.

Haight, 445 F.3d at 1154-55. The *Haight* court therefore held that the question whether a document obtained through a FOIA request qualifies as one of the enumerated sources under the FCA's jurisdictional bar should be answered by assessing the nature of the document itself. *Id.* at 1156.

> If the document obtained via FOIA request is a public disclosure of a "criminal, civil, or administrative hearing, . . . a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or [is] from the news media," then the jurisdictional bar is applicable. If, as was the case here, the document obtained via FOIA does not *itself* qualify as an enumerated source, its

> disclosure in response to the FOIA request does not make it so.

Id.

After undertaking our own review of the statute and its legislative history, as well as considering the analyses undertaken by our sister Circuits, we agree with the Ninth Circuit that whether a document obtained through a FOIA request is an enumerated source within the meaning of § 3730(e)(4)(A) depends on the nature of the document itself. Our conclusion is compelled, first, by the language of the provision. The specific question we face is whether a document produced in response to a FOIA request is always an "administrative . . . report . . . or investigation." In order to ascertain the import of these potentially broad terms, however, we do not focus on them in isolation; rather, their "meaning[ ] [is] narrowed by the commonsense canon of *noscitur a sociis*-which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 1839, 170 L.Ed.2d 650 (2008). All of the other terms in the list of enumerated sources connote the synthesis of information in an investigatory context. "[C]riminal, civil, [and] administrative hearings," for instance, all entail a government inquiry into a given subject, here into an alleged case of fraud. Similarly, government "hearing[s and] audit[s]" are processes by which information is compiled with the concerted aim of deepening a government entity's knowledge of a given subject or, often, determining whether a party is in compliance with applicable law.

Given this company of "neighboring words," we find that it strains the natural meaning of the statute to construe the terms "report" and "investigation" as broadly as some of our sister Circuits have done, so that they include any and all materials produced in response to a FOIA request. In this context, the term "report" most readily bears a narrower meaning than simply "something that gives information." *Ondis*, 587 F.3d at 56 (citing *Webster's Third New Int'l Dict.* 1925 (2002)); *see also Mistick*, 186 F.3d at 383 (finding that a response to a FOIA request is a "report" because it "provides information and notification regarding the results of the agency's search"). Rather, it connotes the compilation or analysis of information with the aim of synthesizing that information in order to serve some end of the government, as in a "hearing" or "audit." It does not naturally extend to cover the mechanistic production of documents in response to a FOIA request made by a member of the public. Similarly, the term "investigation," in the context of the statute, must be construed more narrowly than simply a "detailed examination" or "search." *Mistick*, 186 F.3d at 384. Instead, an "investigation" here implies a more focused and sustained inquiry directed toward a government end-for example, uncovering possible noncompliance or assembling information relevant to a problem of particular concern to the government.[6]

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6. In applying the *noscitur a sociis* canon, we have taken guidance from the Supreme Court's decision in *Graham County Soil and Water Conservation District v. United States ex rel.*

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Those of our sister Circuits who have come to the opposite conclusion have emphasized that an agency responding to a FOIA request conducts a review of its records and compiles all responsive documents before providing them to the requester. *See Ondis*, 587 F.3d at 56; *Mistick*, 186 F.3d at 383-84. But what the agency does *not* do in such a case is synthesize the documents or their contents with the aim of itself gleaning any insight or information, as, in contrast, it necessarily

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Wilson, __ U.S. __, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010), in which the Court directly addressed the application of this canon to the FCA's jurisdictional bar. Our interpretation follows the Court's counsel that "*all* of the sources listed in § 3730(e)(4)(A) provide interpretive guidance," *id.* at 1404, not merely the immediate neighbors of the term. We also have not used the canon to inject into a word a meaning that would otherwise be wholly absent. *See generally id.* at 1401-05. Rather, we use it as a guide in sifting through the common understandings of "report" and "investigation" to discover their intended meaning within the FCA. *See Williams*, 128 S.Ct. at 1839 (holding that where terms "are susceptible of multiple and wide-ranging meanings . . . those meanings are narrowed by the commonsense canon of *noscitur a sociis*"); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961) ("The maxim *noscitur a sociis* . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."). We likewise have not used the canon to impose commonality on terms that "do not share any . . . core of meaning," *Graham County*, 130 S.Ct. at 1404 n. 7. To the contrary, the terms "hearing," "report," "audit," and "investigation" all refer to processes of uncovering and analyzing information or to the products of those processes. Our interpretation focuses on their shared "core of meaning."

would in conducting a "hearing" or "audit." FOIA is simply a mechanism for granting the public access to information in the possession of an agency.[7] *See FBI v. Abramson*, 456 U.S. 615, 641-42, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982) ("[T]he principal purpose of the FOIA was to establish a general philosophy of full agency disclosure, in order to permit access to official information long shielded unnecessarily from public view . . . ." (internal quotation marks and citation omitted)); *Mistick*, 186 F.3d at 393 (Becker, *C.J.*, dissenting) ("[FOIA] does not compel an agency to 'investigate' a request, in the sense that an agency of the federal government normally investigates such things as allegations of fraud, crimes, or other wrongdoing. Rather, the Act simply forces agencies to 'make [their] records promptly available,' upon request." (citing 5 U.S.C. § 552(a)(3)(A))).

Our reading of the statute is buttressed by the legislative history of § 3730(e)(4)(A). Although, as the Supreme Court recently noted, the legislative history does not indicate the drafters' reasons for adopting the specific language contained in the final version of the bill, *Graham County Soil and Water Conservation*

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7. In this connection, we note that FOIA itself nowhere uses the term "report" to describe the end product generated by an agency in response to a request, nor does it use the term "investigation" to describe the process of searching for records. Instead, it describes the process as one of "mak[ing] . . . records promptly available" to a party who has requested them, 5 U.S.C. § 552(a)(3)(A), or "production of . . . agency records," *id.* § 552(a)(4)(B).

District v. United States ex rel. Wilson, __ U.S. __, 130 S.Ct. 1396, 1407-10, 176 L.Ed.2d 225 (2010), the history does make clear that the 1986 amendments to the FCA's jurisdictional provision were a reaction against the previous version of the statute, which had barred any *qui tam* action that was based on information in the possession of the government, *id.* at 1406; *see also Haight*, 445 F.3d at 1154-55; *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684 (D.C.Cir.1997) ("When Congress amended the Act in 1986, . . . the focus of the jurisdictional bar [changed] from evidence of fraud inside the government's overcrowded file cabinets to fraud already exposed in the public domain."). Congress's avowed goal was, generally, to "encourage more private enforcement" of the FCA through expansion of its *qui tam* provisions, S.Rep. No. 99-345, at 23-24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89, and, more specifically, to "correct[ ] restrictive interpretations of the act's . . . *qui tam* jurisdiction," *id.* at 4, *as reprinted in* 1986 U.S.C.C.A.N. at 5269. As the D.C. Circuit noted in *Findley*, the legislators sought "to prod the government into action" by allowing *qui tam* suits when "evidence or information of fraud was buried somewhere in a government file." *Findley*, 105 F.3d at 684 n. 4.

What we find most problematic about an interpretation that construes FOIA materials as "administrative reports" or the product of an "administrative investigation" within the meaning of § 3730(e)(4)(A) is that it would essentially resurrect, in a significant subset of cases, the government possession

standard that Congress repudiated in 1986. As a practical matter, it is likely that in a substantial number of cases involving fraud against the government, some key piece of information-such as a contract, a record of orders placed, etc.—will be in the government's possession. Under the approach adopted in *Mistick*, the moment a motivated individual seeking to uncover fraud receives such a document through FOIA, it becomes a publicly disclosed "administrative report" or the product of an "administrative investigation," triggering the FCA's jurisdictional bar. Such an individual would then be barred from bringing an FCA claim when any of the pertinent information is possessed solely in the government's files, a result that is counterproductive to Congress's goal of "strik[ing] a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud," *Doe*, 960 F.2d at 321.[8]

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8. At oral argument, counsel for Schindler noted, in addressing whether a finding that FOIA materials are an enumerated source under the statute would reinstate the government possession standard, that not all information in the government's possession is subject to disclosure under FOIA. We see no reason of logic or policy, however, why the presence or absence of jurisdiction in a suit under the FCA should turn on the question of whether one of the exceptions to FOIA applies. *See* 5 U.S.C. § 552(b) (providing that FOIA does not apply to classified information, information relating to the internal personnel rules and practices of an agency, information

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Certainly, in some cases a *qui tam* plaintiff will herself possess all of the relevant information, and in such cases the mere fact that some or all of the information was also possessed by the government would not be a bar to a suit. Similarly, in some cases a *qui tam* plaintiff will qualify as an "original source" under 31 U.S.C. § 3730(e)(4)(B), in which case the jurisdictional bar's exception applies and the status of FOIA documents under the provision becomes irrelevant, *id.* § 3730(e)(4)(A). *See Graham County*, 130 S.Ct. at 1410-11 (noting that even under the Court's broader reading of the FCA's jurisdictional bar the rights of "original source" *qui tam* plaintiffs are preserved). But the facts of this case belie the assertion that individuals who are not original sources and who obtain information through FOIA requests will generally not be persons with firsthand knowledge of fraud but rather will be opportunistic litigators. *See Ondis*, 587 F.3d at 56. The facts also illustrate how an overbroad reading of the jurisdictional bar would prevent an individual with independent but partial knowledge of a possible fraud

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specifically exempted from disclosure by statute, trade secrets, inter or intra-agency memoranda, personnel and medical files, certain law enforcement records, certain reports of financial regulatory agencies, or geological and geophysical information concerning wells). Moreover, it makes little sense to find that a party is able to bring a suit because the information he attempted to obtain from the government was not subject to disclosure under FOIA when that party will, in such a case, necessarily not have in her possession all of the information she requires to bring her lawsuit.

would be barred from bringing a lawsuit that is neither parasitic nor frivolous. Here, Kirk became suspicious, based on his own experience as a Vietnam veteran employed by Schindler, that Schindler was not in compliance with VEVRAA. To confirm this suspicion, however, he needed copies of Schindler's VETS-100 reports, and the readiest lawful means through which he could obtain them was a FOIA request. Once he had received copies of the existing reports, and learned that no reports had been filed for certain years, he was able to put the pieces of his lawsuit together. The assumption that such a case will be a rare exception is questionable.

Finally, we note that our interpretation of § 3730(e)(4)(A) accords with that urged by the government as amicus curiae. The government states that the "more limited" jurisdictional bar enacted in 1986 is "predicated upon the public disclosure of allegations in specific categories demonstrating that the government is either actively investigating the alleged fraud or that there is sufficient public awareness of the allegations to pressure the government to start an investigation." Brief for *Amicus Curiae* the United States of America in Support of Appellant at 24-25. In other words, the government advocates an interpretation of the statute under which citizen relators will be able to bring suit in those instances in which the government itself is not pursuing, or considering the pursuit of, an investigation.[9] *See Findley*, 105 F.3d at

9. We note that the FCA's provisions specifying that *qui tam* suits be filed under seal and that the government be allowed

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688 (finding that a *qui tam* action was barred where the complaint was based on publicly disclosed information that "already enable[d] the government to adequately investigate the case and to make a decision whether to prosecute"); *Springfield Terminal Ry.*, 14 F.3d at 655 (finding that the FCA's jurisdictional bar is best understood as applying when the government is already, or can reasonably be expected to be, "on the trail" of fraud); *see also United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir.1995) (quoting *Springfield Terminal Railway*). While the "public disclosure" standard that Congress enacted is distinct from an actual notice standard, *see Graham County*, 130 S.Ct. at 1410 (noting that "[t]he statutory touchstone . . . is whether the allegations of fraud have been 'publicly disclosed,' not whether they have landed on the desk of a DOJ lawyer" (brackets and citation omitted)), we note

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the opportunity to intervene and pursue the action itself, as well as to move for an extension of time during which the complaint remains under seal, to move to dismiss the action, or to settle the action, 31 U.S.C. § 3730(b)-(c), protect the government's ability to maintain control of cases in which it is pursuing an investigation or otherwise wishes to assert its own interests against those of the *qui tam* relator. In one sense the jurisdictional bar, as we interpret it, serves a similar purpose, in that it prevents *qui tam* actions where the government has initiated an investigation of its own. However, the provisions also address different situations, as the intervention provisions allow the government a measure of control over a *qui tam* suit based on allegations that have not been made public in any way, while the jurisdictional bar saves the government the trouble of intervening in a parasitic case based on public allegations.

that the forms of public disclosure that trigger the jurisdictional bar are all forms that can reasonably be expected to indicate that some branch of government has turned its attention to the potential fraud in question, such as a hearing, audit, report, or investigation. Under this reading, *qui tam* relators would not duplicate government efforts to crack down on fraud but would bring their own resources to bear where the government was not in a position to act. This division of labor will maximize efficient enforcement of the FCA in the manner envisioned by the authors of the 1986 amendments. *See* S.Rep. No. 99-345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. at 5267 ("In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.").

For all of the foregoing reasons, we hold that a document obtained in response to a FOIA request qualifies as an enumerated source under 31 U.S.C. § 3730(e)(4)(A) only when the document itself is a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," reflecting the government's efforts to compile or synthesize information to serve its own investigative or analytic ends. The mere fact that a government agency has assembled and duplicated records, or noted the absence of records, in responding to a FOIA request does not itself render the material produced an "administrative . . . report . . . or investigation" within the meaning of § 3730(e)(4)(A).

In this case, the materials produced to the Kirks by the DOL in response to Mrs. Kirk's FOIA requests consisted only of Schindler's VETS-100 filings as well as letters indicating that for certain years no responsive records had been found, neither of which constitutes an "administrative . . . report . . . or investigation" under the statute. Accordingly, the materials are not enumerated sources, and the FCA's jurisdictional bar does not apply.[10]

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10. Because we find that the FOIA materials are not enumerated sources, the parties' dispute over whether the "allegations or transactions" requirement of § 3730(e)(4)(A) is satisfied is moot. Similarly, we need not address the question of whether Kirk qualifies as an "original source" of the information within the meaning of § 3730(e)(4)(A).

> For the first time on appeal, Schindler raises the additional argument that the information on which Kirk's claims are based was publicly disclosed because the DOL is required by law to "make available in a database a list of the contractors that have complied with [VEVRAA's requirement that VETS-100 reports be filed]," 31 U.S.C. § 1354(b). However, "[i]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir.2005) (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir.1994)). While we have discretion to consider waived arguments in order to avoid a manifest injustice or where a question of law is at issue and there is no need for additional factfinding, *id.*, this is not an instance in which it would be appropriate
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II. The Validity of Kirk's Claims Under the FCA

We next address whether Kirk stated valid claims under the FCA when he alleged that (1) Schindler did not file, or did not timely file, any VETS-100 reports for the years 1998 through 2003, and (2) Schindler filed false VETS-100 reports for 2002,[11] 2004, 2005, and 2006.[12] We review *de novo* a district court's decision to dismiss a plaintiff's claims for failure to state a claim. *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir.2001). In doing so, we accept as true all factual allegations contained in the complaint and draw all inferences in favor of the plaintiff. *Id.*

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> to exercise that discretion. Kirk contends that the database is not available to the public but rather is password-protected and available only to certain agency officials. Given that there is nothing in the record indicating what the nature of this database is or to whom it is available, we are not in a position to evaluate Schindler's argument.

11. As noted above, Kirk's complaint alleges that Schindler failed to file a VETS-100 report for 2002 by the applicable deadline, and it also alleges that Schindler's VETS-100 report was false. We assume for the purposes of this analysis that both allegations are potentially true, and simply address the legal validity of each theory of liability.

12. On appeal, Kirk does not pursue his claims based on Schindler's alleged failure to implement an affirmative action plan for veterans and to offer veterans an opportunity to self-identify.

As an initial matter, the parties each make arguments that we either should not or need not reach this issue. Schindler argues, for the first time on appeal, that the provisions of VEVRAA on which Kirk relies are not applicable to its contracts with the government because the applicable regulations exempt "contracts for commercial items" from the requirement of filing VETS-100 reports. *See* 48 C.F.R. § 22.1302(b) (exempting "contracts for commercial items" from filing VETS-100 reports and other VEVRAA filing requirements); 66 Fed.Reg. 53,487, 53,487 (Oct. 22, 2001) (noting that 31 U.S.C. § 1354, which prohibits the government from entering into contracts with contractors who have not filed their VETS-100 reports, does not apply to "acquisitions of commercial items"). Because this argument was not raised before the district court, however, it is waived. *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir.2005). We further observe that the question of whether Schindler's contracts to install and maintain elevators and escalators are properly considered "contracts for commercial items" rather than contracts for construction, which are not exempted from the VETS-100 filing requirements, is fact-specific and therefore does not present an appropriate occasion for us to exercise our discretion to consider an argument that has been waived. *See id.*

Kirk, for his part, argues that it was improper for the district court to consider the substantive validity of his FCA claims because Schindler did not move to dismiss these claims under Fed.R.Civ.P. 12(b)(6) and asserted instead that the action should be dismissed on

jurisdictional and Rule 9(b) grounds. Kirk characterizes the district court's dismissal of certain of his claims as a *sua sponte* dismissal for failure to state a claim on which relief can be granted, and asks that, if we do not reinstate his dismissed claims on substantive grounds, we vacate this aspect of the district court's decision in order to afford him an opportunity to be heard. It is true that "[p]roviding a plaintiff with notice and an opportunity to be heard is often necessary to establish the fairness and reliability of a dismissal," *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir.2007), and failure to afford plaintiff an opportunity to be heard can be grounds for reversal, *see Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir.1985). Because, for the reasons explained below, we reverse the district court's determination that certain of Kirk's claims were substantively invalid and reinstate those claims, however, we need not address this alternative argument. We therefore draw no conclusions as to whether the district court's dismissal is properly characterized as *sua sponte* or whether it is in fact the case that Kirk did not receive a meaningful opportunity to be heard below.

Turning, then, to the validity of Kirk's claims, we first review the elements of liability under the FCA. At the time Kirk filed his claim, the potentially applicable provisions of the FCA were 31 U.S.C. § 3729(a)(1)[13]

13. This provision imposed liability on any person who "knowingly presents, or causes to be presented, to an officer or

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and (a)(2).[14] In 2009, Congress passed the Fraud Enforcement and Recovery Act ("FERA"), Pub.L. No. 111-21, 123 Stat.. 1617 (2009), which amended and renumbered these provisions as §§ 3729(a)(1)(A) and (a)(1)(B), respectively, *see* FERA § 4(a), 123 Stat. at 1621. The amendment to § 3729(a)(2), but not the amendment to § 3729(a)(1), was made retroactive to June 7, 2008, applicable to "all claims under the False Claims Act . . . that [were] pending on or after that date," FERA § 4(f), 123 Stat. at 1625. Because Kirk's claim was filed in March 2005, and was pending as of June 7, 2008, the potentially applicable provisions in this case are former § 3729(a)(1), establishing liability for "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," and current § 3729(a)(1)(B), establishing liability for "knowingly mak[ing], us [ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim," *see* FERA § 4(a), 123 Stat. at 1621.

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employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub.L. No. 111-21, 123 Stat.. 1617 (2009).

14. This provision imposed liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2) (2006), *amended by* Fraud Enforcement and Recovery Act of 2009, Pub.L. No. 111-21, 123 Stat.. 1617 (2009).

We first address Kirk's claims based on Schindler's alleged failure to file VETS-100 reports for the years 1998 through 2003. We will begin our analysis, as the district court did, with an assessment of whether liability arises under former § 3729(a)(1), employing the analysis set forth in *Mikes v. Straus*, 274 F.3d 687 (2d Cir.2001). As we construed former § 3729(a)(1) in *Mikes*, in order to establish liability a plaintiff must show "that defendants (1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." *Id.* at 695. The central dispute with regard to Kirk's claims based on Schindler's failure to file VETS-100 reports is whether its subsequent claims for payment were "false" within the meaning of the statute, as construed by *Mikes*.[15] In some cases, a claim made to the government is "factually false," meaning that a

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15. Schindler makes much of the materiality requirement contained in current § 3729(a)(1)(B). As we have explained, however, former § 3729(a)(1) is equally applicable to Kirk's claims. While, prior to the adoption of the new provision, the First, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits had all held that the FCA includes a materiality requirement, *see United States v. Bourseau*, 531 F.3d 1159, 1170-71 (9th Cir.2008) (listing Circuits that have adopted a materiality requirement and similarly adopting one), this Court has never so held, *see Mikes*, 274 F.3d at 697 (noting that some Circuits have adopted a materiality requirement but refraining from deciding whether "a false statement or claim must be material to the government's funding decision"). Rather, *Mikes* focused on the question of when a claim for payment may be construed as "false" under former § 3729(a)(1). *See id.* at 696. Its analysis remains applicable to claims under that provision.

contractor supplies "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided," *id.* at 697-in other words, the contractor bills for something it did not provide. In such a case, application of the FCA is fairly straightforward. More difficult to assess, however, are cases in which a contractor falsely represents that it is in compliance with a particular federal statute or regulation or an applicable contractual term. *See id.* at 696. Because "[t]he language of [the FCA] plainly links the wrongful activity to the government's decision to pay," *id.*, the statute "does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions," *id.* at 697. In other words, not every instance in which a false representation of compliance with a regulatory regime is made will lead to liability.

Mikes extensively addressed the "legally false certification theory" of liability under the FCA, as distinct from a "factually false" claim. *Id.* at 696-97. Legally false certification occurs "where a party certifies compliance with a statute or regulation as a condition to governmental payment." *Id.* at 697. In some cases, there will be an "express false certification," where "a claim . . . falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Id.* at 698. In other cases, however, where no express certification is required, there may still be liability under an "implied certification theory":

> implied false certification is appropriately applied . . . when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid. . . . Liability under the Act may properly be found therefore when a defendant submits a claim for [payment] while knowing . . . that payment expressly is precluded because of some noncompliance by the defendant.

Id. at 700. In other words, the contractor itself need not certify compliance for a legally false certification to have occurred, although when it does so there will be an *express* false certification. An *implied* false certification takes place where a statute expressly conditions payment on compliance with a given statute or regulation, and the contractor, while failing to comply with the statute or regulation (and while knowing that compliance is required), submits a claim for payment.

Title 31, Section 1354(a)(1) of the United States Code provides that "no agency may obligate or expend funds appropriated for the agency for a fiscal year to enter into a contract [covered by VEVRAA] with a contractor from which a [VETS-100] report was required . . . with respect to the preceding fiscal year if such contractor did not submit such report.." In addition, 48 C.F.R. § 52.222-38 provides that "[b]y submission of its offer, the offeror represents that, if it is subject to the reporting requirements of [VEVRAA], it has submitted the most recent VETS-100 Report required

by that [Act]." This regulation was adopted in October 2001 and became effective December 21, 2001. *See* 66 Fed.Reg. 53,487 (Oct. 22, 2001). The district court found that Kirk stated a valid claim under the FCA when he alleged that Schindler submitted bids covered by 48 C.F.R. § 52.222-38 without having submitted a VETS-100 report for the preceding fiscal year and then won a contract. We agree. The effect of the regulation is that any contractor covered by VEVRAA certifies that it has submitted its most recent VETS-100 report when it makes a bid for government business. If it has not submitted the report, such a certification would be false. In the terms of the *Mikes* analysis, then, such a contractor would have made an express false certification (albeit by operation of the regulation rather than by making the certification directly).

The district court also, however, dismissed those of Kirk's claims based on contracts awarded before the regulation's effective date, implicitly holding that liability cannot be predicated on 31 U.S.C. § 1354(a) alone. We respectfully disagree with this aspect of the district court's holding. As *Mikes* explained, implied false certification takes place "when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid" and the defendant, while not in compliance, submits a claim for payment. 274 F.3d at 700. Our discussion, in *Mikes*, of a provision of the Medicare statute offers a useful illustration:

> Section 1395y(a)(1)(A) of the Medicare statute states that "no payment may be made under the Medicare statute for any expenses incurred for items or services which . . . are not *reasonable and necessary* for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." 42 U.S.C. § 1395y(a)(1)(A) (emphasis added). Because this section contains an express condition of payment-that is, "no payment may be made"-it explicitly links each Medicare *payment* to the requirement that the particular item or service be "reasonable and necessary." . . . Since § 1395y(a)(1)(A) *expressly* prohibits payment if a provider fails to comply with its terms, defendants' submission of the claim forms implicitly certifies compliance with its provision.

Id. at 700-01 (brackets omitted). Similarly, 31 U.S.C. § 1354(a)(1) provides that "no agency may obligate or expend funds" to enter a contract covered by VEVRAA when the contractor has not submitted the requisite VETS-100 report. Because the statute expressly states that the contractor must have submitted the report in order to be paid, a contractor that requests payment under such a contract "implicitly certifies compliance" with the VETS-100 reporting requirement. Kirk therefore states a valid claim under the FCA when he alleges that Schindler submitted bids and won contracts without having filed the requisite report, even before 48 C.F.R. § 52.222-38 became effective.

Next, we address the validity of Kirk's claims based on Schindler's filing of allegedly false VETS-100 reports. Here, the district court, relying on former §§ 3729(a)(1) and (2) as construed by *Mikes*, found that there could be no liability for filing allegedly false VETS-100 reports because none of the applicable statutes or regulations makes filing an *accurate* report a precondition to payment or provides that a contractor, by submitting a bid or a request for payment, certifies the *accuracy*, as opposed to the submission, of its reports. We need not determine whether this analysis is correct, however, because we find that Kirk states a valid claim under the new § 3729(a)(1)(B).[16]

The new provision establishes liability when a party "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Accepting as true all of the factual allegations set forth in the complaint and drawing all inferences in the light most favorable to plaintiff, *see Gregory* 243 F.3d at 691, in 2002, 2004, 2005, and 2006 Schindler filed false VETS-100 reports, necessarily knowing that they were false because Schindler in fact had no mechanism in place to

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16. We note that amicus curiae the United States takes the position that "the plain language of the FCA establishes that, where a contractor knowingly submits a false report to the government in order to obtain contracts (and payments on those contracts), no statute or regulation has to separately require that the report be accurate" for liability to attach. Brief for *Amicus Curiae* the United States of America in Support of Appellant at 29.

identify covered veterans. It did so in order to procure contracts or obtain payment under existing contracts, as it could do neither without filing the reports. *See* 31 U.S.C. § 1354(a)(1); 48 C.F.R. § 52.222-38. Accordingly, it knowingly used a false record in order to obtain payment from the government. *See* S.Rep. No. 99-345 at 9, *as reprinted in* 1986 U.S.C.C.A.N. at 5274 ("[A] false claim may take many forms, [including] a claim for goods or services . . . provided in violation of contract terms, specification, statute, or regulation. . . . [C]laims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program.")

Schindler argues that the materiality requirement of § 3729(a)(1)(B) is not met here. It notes that the government does not require, before entering into a contract or making payment under an existing contract, that some threshold number of Vietnam veterans be employed by any given contractor. Because the government's funding decisions are not predicated on the content of the reports, Schindler reasons, the allegedly false statements in the reports were not "material" as defined by § 3729(b)(4)-*i.e.*, "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." Schindler maintains that it does not take the position that the government is entirely indifferent to the accuracy of VETS-100 reports; rather, Congress simply did not contemplate using the FCA to ensure the accuracy of the reports. Instead, according to

Schindler, their accuracy is best monitored through existing administrative mechanisms.[17]

We are not persuaded by Schindler's arguments. While it is clear that the statute imposes a materiality requirement, we find that that requirement is met under the circumstances alleged in the complaint. Kirk does not merely allege that Schindler filed inaccurate reports, he alleges that Schindler failed to take any steps whatsoever to monitor the number of covered veterans in its workforce and instead fabricated the numbers it supplied in its VETS-100 reports, essentially plucking them out of thin air.[18] We need not now define the precise

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17. Presumably Schindler has in mind such measures as oversight by the OFCCP. *See* 41 C.F.R. § 60-250.60 (providing that the OFCCP conduct compliance evaluations to determine whether contractors are complying with their obligations under VEVRAA, including their obligation to file VETS-100 reports).

18. Indeed, reports prepared in the manner alleged by Kirk are arguably not VETS-100 reports at all within the definition set forth in VEVRAA. VEVRAA requires that contractors submit reports detailing

> (A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans;
>
> (B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and

(Cont'd)

contours of the materiality requirement in order to hold that in such a case, the VETS-100 reports constitute "false . . . statement [s] material to a false . . . claim." 31 U.S.C. § 3729(a)(1)(B). The reporting requirements of VEVRAA are sufficiently important to Congress that it made fulfillment of them a precondition to payment. *See id.* § 1354(a)(1). Schindler allegedly submitted VETS-100 reports that gave the impression that it was complying with these requirements while in fact it was entirely disregarding them. Such a false statement would certainly have a tendency to "influence, or be capable of influencing, the payment or receipt of money or property."[19] *Id.* § 3729(b)(4).[20] *Cf. United States ex rel.*

(Cont'd)

> (C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

38 U.S.C. § 4212(d)(1). In turn, 31 U.S.C. § 1354(a) provides that no payment can be made to a contractor "from which a report was required under section 4212(d) of [title 38] with respect to the preceding fiscal year if such contractor did not submit such report." A contractor that has submitted a report containing entirely fabricated numbers has arguably not submitted "such report" within the meaning of 31 U.S.C. § 1354(a).

19. A mere misreporting of the relevant figures from a company that had taken some imperfect measures to ascertain the number of veterans in its workforce, on the other hand, might not fulfill the materiality requirement of § 3729(a)(1)(B).

20. Kirk further asks us to decide in his favor the two issues that were not reached by the district court but that Schindler

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Longhi v. Lithium Power Technologies, Inc., 575 F.3d 458, 470 (5th Cir.2009) (construing the materiality requirement, as defined in § 3739(b)(4), as "requir[ing] only that the false or fraudulent statements either (1) make the government prone to a particular impression, thereby producing some sort of effect, or (2) have the ability to [a]ffect the government's actions, even if this is a result of indirect or intangible actions on the part of the Defendants"). Kirk's FCA claims based on Schindler's filing of allegedly false reports are thus valid.

CONCLUSION

We have considered the other arguments made by Schindler and find them to be without merit. We hold that whether documents produced in response to a FOIA request are enumerated sources under 31 U.S.C. § 3730(e)(4)(A) is to be determined by assessing the nature of the documents themselves; they are not "administrative . . . report[s] . . . or investigation[s]" simply by virtue of having been gathered by an agency

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(Cont'd)

raised in its motion to dismiss: whether he pleaded his claims with sufficient particularity under Fed.R.Civ.P. 9(b), and whether the district court should dismiss the case under the doctrine of "primary jurisdiction." However, "[i]n general, we refrain from analyzing issues not decided below." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir.2004). Although we have discretion to reach such issues where the circumstances favor so doing, *id.*, we do not find that such circumstances exist here.

responding to a FOIA request. We further hold that Kirk stated valid claims under the FCA when he asserted (1) that Schindler had failed to file VETS-100 reports in certain years, and (2) that Schindler had filed false VETS-100 reports in certain years because it had filed reports that purported to detail the number of covered veterans in its workforce while in fact the company took no measures to identify such veterans. We therefore **VACATE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 30, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 2917 (SHS)

UNITED STATES OF AMERICA *ex rel.*
DANIEL KIRK,

Plaintiff,

v.

SCHINDLER ELEVATOR CORPORATION,

Defendant.

March 30, 2009

OPINION AND ORDER

SIDNEY H. STEIN, District Judge.

Daniel Kirk ("Kirk" or "relator") brings this action on behalf of the United States under the *qui tam* provisions of the False Claims Act (the "FCA"), 31 U.S.C. §§ 3729-33, against defendant Schindler Elevator Corporation. Schindler is a party to numerous contracts with the federal government for the manufacture, installation, and maintenance of elevators and escalators

in government buildings. As a government contractor, Schindler is subject to the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA"), 38 U.S.C. § 4212. VEVRAA and its implementing regulations require government contractors such as Schindler to establish affirmative action programs for covered veterans, invite their employees to identify themselves as covered veterans, and file annual reports—known as "VETS-100" reports—with the United States Department of Labor detailing the number of covered veterans they employ. 38 U.S.C. § 4212; 41 C.F.R. § 61-250.10; 48 C.F.R. §§ 52.222-35 to -38. According to Kirk, Schindler has failed to comply with these requirements for a number of years.

Kirk alleges that, despite its noncompliance with VEVRAA, Schindler nevertheless submitted to agencies of the United States hundreds of requests for payment under its government contracts, each of which was a "false or fraudulent claim" rendering Schindler liable to the United States for a civil penalty of $5,500 to $11,000 as well as three times any damages sustained by the government. 31 U.S.C. § 3729(a)(1)-(2); 28 C.F.R. § 85.3(a)(9).[1] Kirk seeks to share in the government's recovery pursuant to 31 U.S.C. § 3730(d)(2), which provides that a *qui tam* relator who brings a successful

1. The civil penalties authorized by statute were slightly lower for false claims presented to the government between 1986 and September 29, 1999. They were set at not less than $5,000 and not more than $10,000. *See* False Claims Amendments Act of 1986 § 2, Pub.L. 99-562, 100 Stat 3153 (codified at 31 U.S.C § 3729(a)); 28 C.F.R. § 85.3.

suit without government intervention is entitled to a "reasonable" portion of not less than twenty-five and not greater than thirty percent of the government's proceeds.

Schindler now moves to dismiss the complaint, contending, first, that most of Kirk's allegations fail to state a claim under the FCA, and second, that this Court lacks subject-matter jurisdiction over the remaining allegations. In particular, Schindler argues that because relator's properly stated FCA claims stem from information obtained through responses to a series of Freedom of Information Act ("FOIA") requests submitted by him[2] to the U.S. Department of Labor ("DOL"), the action is "barred" by 31 U.S.C. § 3730(e)(4)(A), which strips federal courts of jurisdiction over *qui tam* actions "based upon the public disclosure of allegations and transactions in a [n] . . . administrative . . . report, hearing, audit, or investigation unless the . . . person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A).[3]

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2. As discussed below, each of the FOIA requests was actually submitted by relator's wife, Linda Kirk. It is undisputed that the requests were submitted on relator's behalf, and accordingly, on occasion, for the purposes of brevity and clarity, the Court refers to the requests as submitted by relator.

3. Schindler also contends dismissal is appropriate because, first, relator has failed to plead fraud with the specificity required by Fed.R.Civ.P. 9(b), and second, pursuant to the doctrine of "primary jurisdiction," the Court should defer to an ongoing administrative investigation of Schindler's claims. However, neither contention is necessary to resolve defendant's motion, and accordingly, the Court does not address either.

Kirk contends that all of his allegations state FCA claims and that the jurisdictional bar does not apply to any of them for at least four reasons. Kirk claims, first, that the FOIA requests did not "publicly disclose" the information; second, that the DOL's responses to those requests were not "administrative reports" or "investigations" within the meaning of the statute; third, that the FOIA responses did not reveal the fraudulent "allegations or transactions" underlying his claims; and finally, that his action is not "based upon" the information obtained through his FOIA requests since Kirk, as a former Schindler employee, had independent knowledge of the alleged false claims.

The Court finds, first, that most of Kirk's allegations fail to state a claim upon which relief can be granted pursuant to the FCA, and second, that those of Kirk's allegations that do properly state FCA claims are barred by section 3730(e)(4)(A) as "publicly disclosed." Accordingly, defendant's motion to dismiss the amended complaint is granted.

I. BACKGROUND

Unless otherwise noted, the following facts are taken from the amended complaint and are presumed to be true:

A. *The Parties*

Schindler Elevator Corporation manufactures, installs, and services elevators and escalators and has offices throughout the United States. (Am. Compl. ¶¶ 2,

12-13.) In 1989, Schindler acquired Millar Elevator Industries, Inc., and the two companies merged in 2002. (*Id.* ¶ 12.)

Relator Daniel Kirk, a veteran of the United States Army who served on active duty during the Vietnam War, has worked in the elevator industry since 1968. (*Id.* ¶¶ 19, 25.) From 1978 until 2003, Kirk was employed by Millar and Schindler (collectively, "Schindler") in various supervisory, managerial, and executive capacities. (*Id.* ¶¶ 11, 19-21, 28.) In August 2003, Kirk resigned from Schindler as a result of what he characterizes as Schindler's attempts to "force[ ] [him] out of the company." (*Id.* ¶ 24.) Since then, Kirk has been an active litigant against his former employer, commencing four separate legal or administrative proceedings against Schindler, all alleging claims stemming from his employment with and separation from the company. (Aff. of Daniel E. Kirk, Jr. dated Sept. 27, 2007 ("Kirk Aff.") ¶¶ 12-24); (Def. Mem. of Law in Supp. of Summ. J. at 3-4.)

B. *VEVRAA and Schindler's Alleged Noncompliance*

All federal procurement contracts for non-personal services including construction that meet or exceed certain monetary thresholds are subject to VEVRAA. 38 U.S.C. § 4212(a)(1). That Act and its various implementing regulations set forth a series of requirements for all contracts subject to its provisions, three of which are relevant to this litigation: First, each

contract subject to VEVRAA must "contain a provision requiring that the [contractor] take affirmative action to employ and advance in employment [certain covered] veterans." 38 U.S.C. § 4212(a)(1). Second, every such contract must include language requiring the contractor to "invite all . . . eligible veterans who wish to benefit under the affirmative action program . . . to identify themselves to the [c]ontractor." 48 C.F.R. §§ 22.1310(b), 52.222-37(e). Third, to satisfy VEVRAA's requirement that all covered contractors "report, at least annually, to the Secretary of Labor" on such issues as "the number of such employees, by job category and hiring location, who are qualified covered veterans," 38 U.S.C. § 4212(d), VEVRAA-covered contracts must contain a clause providing that the "[c]ontractor shall submit VETS-100 Report[s] . . . no later than September 30 of each year." 48 C.F.R. §§ 22.1310(b), 52.222-37(c).

With regard to the third requirement, Congress passed the Veterans Employment Opportunities Act in 1998, which supplemented VEVRAA by providing that "no agency may obligate or expend funds . . . to enter into a contract [covered by VEVRAA] with a contractor from which a [VETS-100] report was required . . . with respect to the previous fiscal year if such contractor did not submit such report." 31 U.S.C. § 1354(a). To facilitate compliance, an implementing rule provides that "by submission of its offer, the offeror represents that, if it is subject to the reporting requirements [of VEVRAA] . . . it has submitted the most recent VETS-100 Report required of that [act]." 48 C.F.R. § 52.222-38.

Appendix B

During the period covered by the complaint, Schindler entered into hundreds of contracts with agencies of the federal government that were subject to VEVRAA and its various requirements. (Am. Compl. ¶¶ 3, 13, 20, 44(a), 56, 81-87.) While Kirk does not have access to any of the actual contracts or to a comprehensive list of all of Schindler's government contracts (*id.* ¶ 81), he submits, based on the requirements imposed by VEVRAA, that each contract must have contained provisions requiring Schindler to develop affirmative actions for veterans, to allow veterans to self-identify, and to submit annual VETS-100 Reports. (*Id.* ¶¶ 81-87.)

Kirk proceeds to allege that Schindler failed to comply with all three requirements. First, Kirk alleges generally that Schindler has no affirmative action program for veterans. (*Id.* ¶ 29.) In support of the claim, Kirk asserts that while he was employed by Schindler as a supervisor and manager with responsibility for employment decisions within his department, he was never informed that Schindler had any policy to take affirmative action with respect to veteran employees. (*Id.* ¶¶ 28, 57.) Further, Kirk claims that Schindler's employee manual makes no mention of any affirmative action program for veterans. (*Id.* ¶ 28.)

Second, Kirk alleges generally that Schindler failed to invite any of its employees to self-identify as veterans (*id.* ¶¶ 27, 58-59) and asserts in support of the claim that during his tenure as a Schindler employee he was never asked to self-identify as a veteran. (*Id.* ¶ 26.)

Third, Kirk alleges that during several years covered by the complaint Schindler failed to comply with VEVRAA's reporting requirements, by either not filing the required VETS-100 reports with the DOL or by filing reports containing false or partial information. (*Id.* ¶¶ 4, 60.)

In support of that third claim, Kirk relies on the DOL's responses to a series of FOIA requests submitted by his wife, Linda Kirk, seeking past VETS-100s filed by defendant with the DOL. Relator's FOIA requests, and the DOL's responses, were as follows:

First FOIA Request: On November 4, 2004, Mrs. Kirk wrote to the DOL seeking VETS-100 reports filed by defendant in the years 2002, 2003, and 2004. (Letter from Linda Kirk to Robert Wilson dated Nov. 5, 2004, Ex. G to Kirk Aff.)[4] On February 11, 2005, Robert Wilson, the Chief of the Investigation and Compliance Division for DOL's Office of Veteran's Employment and Training

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4. While each of the Kirks' FOIA requests was referenced in the complaint, the actual requests-and the DOL's responses-were not provided with the complaint, but were instead attached to relator's affidavit submitted in conjunction with this motion. Because the requests and the DOL's responses pertain primarily to defendant's motion to dismiss for lack of jurisdiction, the court can and does look beyond the pleadings in order to satisfy itself that it has the authority to hear the action. *See Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998) (in resolving challenges to subject-matter jurisdiction, court can look beyond pleadings to satisfy itself that it has the authority to hear the case).

responded, providing the report for 2004 and indicating that "no records . . . for the years 2002 and 2003 were found." (Letter from Wilson to Kirk dated Feb. 11, 2005, Ex. G to Kirk Aff.)

Second FOIA Request: On January 17, 2005, Mrs.. Kirk wrote to the DOL seeking VETS-100 reports filed by defendant for the years 1998, 1999, 2000, and 2001. (Letter from Kirk to Wilson dated Jan. 17, 2005, Ex. H to Kirk Aff.) In response, the DOL provided Schindler's 2001 report, and indicated that "no records . . . for the years 1998, 1999 and 2000" were found. (Letter from Wilson to Kirk dated Sept. 29, 2005, Ex. H to Kirk Aff.) The 2001 report, which covered the twelve-month period ending September 30, 2002, is referred to by Kirk as Schindler's "2002 Report."

Third FOIA Request: On April 10, 2007, Mrs. Kirk submitted a FOIA request for defendant's VETS-100 reports for the years 2005 and 2006. (Facsimile from Kirk to Wilson dated Apr. 4, 2007, Ex. I to Kirk Aff.) In response, the DOL provided each of the requested reports. (E-mail from Eric Rudert, Ass't Dir., Office of Agency Mgmt. and Budget, U.S. Dep't of Labor, to Kirk dated May 14, 2007, Ex. I to Kirk Aff.)

In light of this correspondence and the reports produced to relator as a result, Kirk alleges the following: first, that defendant never submitted VETS-100 reports for the years 1998 to 2001, and 2003 (Am. Compl. ¶ 60); second, that defendant initially failed to submit a report for 2002, but, upon learning of Kirk's

complaint to the DOL regarding this matter in 2004, belatedly submitted a 2002 Report (*id.* at ¶ 5); third, that the reports defendant did submit for the years 2002, 2004, 2005, and 2006, and that the DOL produced in response to the Kirks' FOIA requests, were incomplete, inaccurate, and improperly prepared. (*See e.g. Id.* ¶¶ 63, 68, 71-72.) Accordingly, Kirk concludes that during the entire period covered by the complaint, Schindler was not in compliance with VEVRAA's reporting requirements and therefore was "not eligible" for any of the contracts it received. (*Id.* ¶ 8.)

C. *Schindler's Submission of Allegedly False or Fraudulent Claims for Payment to the United States*

The complaint alleges that "[s]ince at least March 1999, Schindler has submitted hundreds of claims to agencies of the United States government seeking payment for construction services" and that "those claims were false" (Am. Compl. ¶ 2) because "at all times . . . Schindler was in violation of VEVRAA and was not eligible for payment." (*Id.* ¶ 8.) While Kirk "cannot . . . identify all of the false claims for payment that were caused by Schindler's conduct," (*id.* ¶ 95) he does advance at least three ways by which Schindler's course of conduct resulted in false claims. First, pursuant to 48 C.F.R. § 52.222-38, defendant "expressly certified to the United States that it was in compliance" with the VETS-100 reporting requirement each time it submitted a bid for a VEVRAA-covered contract. (*Id.* ¶¶ 75, 92.) Those certifications were "false statements [made] to

induce the government to enter into contracts for which Schindler was ineligible because it had not, in fact, complied with VEVRAA." (*Id.* ¶ 79.) Accordingly, Kirk argues that not only each bid, but also any claim for payment on a contract obtained as a result of those bids, constituted a false claim.

Second, because Schindler allegedly filed VETS-100 reports for several of the years covered by the complaint that were inaccurate, incomplete, or otherwise not in conformity with VEVRAA's requirements, it "knowingly made, used, or caused to be made or used false or fraudulent records and statements, and omitted material facts to induce the Government to approve and pay such false or fraudulent claims." (*Id.* ¶ 91.) Accordingly, Kirk contends that "each claim . . . seeking payment on a contract subject to VEVRAA for a fiscal year when [Schindler] had not filed an *accurate* VETS-100 represents a false or fraudulent claim for payment." (*Id.* ¶ 93.)

Finally, Kirk implies that because Schindler did not have an affirmative action program for veterans or allow veterans to self-identify, each claim submitted was a false claim because "Schindler was in violation of VEVRAA and was not eligible for payment." (*Id.* ¶ 74.)

II. ANALYSIS

A. *The Motion to Dismiss Standard*

Dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is appropriate where a plaintiff has failed to plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). For purposes of that motion, a court assumes the truth of all facts asserted in the complaint and draws all reasonable inferences from those facts in favor of the plaintiff. *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 154 (2d Cir.2006).

By contrast, on a motion to dismiss for lack of subject-matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), "the party invoking federal jurisdiction bears the burden of establishing that jurisdiction exists." *Sharkey v. Quarantillo*, 541 F.3d 75, 82-83 (2d Cir.2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). While the Court must accept as true all material facts alleged in the complaint, in resolving challenges to subject-matter jurisdiction the Court may look beyond the pleadings in order to satisfy itself that it has the authority to hear the action. *Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998) (citing *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir.1991)).

Appendix B

B. *The False Claims Act*

The FCA empowers the United States or private citizens on behalf of the United States to recover treble damages from those who knowingly make false claims for money or property to the United States government. The Act is designed to ensure that the federal government recovers "losses sustained as a result of fraud," S.Rep. No. 99-345, at 1 (1986) *reprinted in* 1986 U.S.C.C.A.N. at 5226, and provides an incentive to private citizens to bring suit on behalf of the government for a fraud about which they had personal knowledge by rewarding them with a portion of the government's recovery should they prevail.

To establish liability under the FCA, a plaintiff-whether the Attorney General or a relator-must establish that the defendant "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." *Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir.2001). The term "claim" is defined by the Act to cover "any request or demand, whether under contract or otherwise, for money or property." 31 U.S.C. § 3729(c). The phrase "false or fraudulent" is not statutorily defined. However, because the FCA is "intended to reach all types of fraud ... that might result in financial loss to the Government," *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968), the U.S. Court of Appeals for the Second Circuit has held that the phrase "false or fraudulent" claim is limited to "only those claims with

the potential wrongfully to cause the government to disburse money." *Mikes*, 274 F.3d at 696; *see also id.* ("[A]n improper claim is aimed at extracting money the government otherwise would not have paid.").[5]

A false claim may take several forms. In particular, the Second Circuit has recognized a distinction between "factually false" and "legally false" claims. While the former involves a request for reimbursement for goods or services not actually provided or not accurately described, the latter—often referred to as the "false certification theory"—applies where the defendant has falsely certified compliance with federal regulations as a condition to payment of its claim. *See Mikes*, 274 F.3d at 697.

Kirk here makes no allegation that Schindler submitted factually false claims, i.e., claims for work not actually provided or inaccurately described. Instead, Kirk seeks to invoke the false certification theory, alleging that Schindler either expressly or impliedly certified that it was in compliance with VEVRAA's requirements in order to receive payments for which it was ineligible.

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5. It is well established that for purposes of the FCA, the claim must be knowingly false, that is, made with "actual knowledge" or through "deliberate indifference" to the truth or falsity of the information, or in "reckless disregard" thereof. "Mere negligence" or an "innocent mistake" is insufficient. *Chen-Cheng Wang ex. rel. United States v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir.1992) (citing 31 U.S.C. § 3729(b)).

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1. False Certification Theory

First recognized by the Second Circuit in *Mikes*, 274 F.3d at 687, the false certification theory of liability is predicated on a false representation of compliance with a federal statute or regulation. The theory is finite in scope, and claims may be legally false "only where a party certifies compliance with a statute or regulation as a *condition to* government payment." *Id.* at 697 (emphasis added). Accordingly, the theory does not apply to all instances of noncompliance. In particular, it "does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions." *Id.*

The Second Circuit has further delineated between "express" and "implied" false certification. An express false certification claim is one "that falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." *Id.* at 698. By contrast, an implied false certification occurs where defendant submits a claim that does not include an express representation of compliance but from which a factfinder could conclude that the defendant impliedly certified its continuing compliance with the relevant statute. The Circuit has cautioned courts "not to read [the implied false certification] theory expansively" and accordingly, it is "appropriately applied only where the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." *Id.* at 699-700 (emphasis in original).

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Determining whether Kirk has stated a claim under the false certification theory requires a close evaluation of VEVRAA and its implementing regulations in the context of each class of false claims alleged.

2. Kirk's False Certification Claims

As noted, Kirk's complaint can be read to set forth three different ways in which Schindler allegedly submitted false certification claims. First, Schindler falsely certified compliance with its VETS-100 reporting requirements each time it submitted a bid pursuant to 48 C.F.R 52.222-38, rendering the ensuing contracts issued in reliance on those certifications false claims. Second, Schindler falsely certified its compliance with VEVRAA by submitting claims for payment on VEVRAA-covered contracts despite knowing that its VETS-100 reports were inaccurate, thereby rendering those claims false claims. Third, Schindler falsely certified its compliance with VEVRAA by submitting claims for payment on VEVRAA-covered contracts while knowing it did not have affirmative action programs for veterans or a procedure to allow veterans to self-identify as required by the statute.

Defendant, in its motion to dismiss, contends that the "only allegation that provides a basis for a claim under the FCA is the allegation that Schindler failed to file . . . 'VETS-100 Reports.' " (Def.'s Mem. of Law. in Supp. of Summ. J. at 1.) The Court agrees-only Kirk's first theory validly states a claim under the FCA.

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First promulgated in 2001, 48 C.F.R 52.222-38 provides that "[b]y submission of its offer, the offeror represents that, if it is subject to the reporting requirements of [VEVRAA], it has submitted the most recent VETS-100 Report required by that [Act]." The language of the rule is clear-each bid submitted must contain an express representation that the offeror has complied with a particular provision of VEVRAA, i.e., that it has submitted its most recent VETS-100 report. The rule followed the mandate of Congress that "no agency may obligate or expend funds . . . to enter into a contract [covered by VEVRAA] with a contractor from which a [VETS-100] report was required . . . with respect to the previous fiscal year if such contractor did not submit such report." 31 U.S.C. § 1354(a). The certification required by 48 C.F.R. § 52.222-38 was therefore a condition to receiving a contract because no agency could enter into a contract with a bidder unless that bidder represented that it had submitted its most recent VETS-100 report. Accordingly, as a matter of law, Kirk's allegation that (1) Schindler submitted a bid covered by the rule,[6] and (2) therefore expressly certified that it had submitted its most recent VETS-100 report, (3) while knowing it had not submitted that report, (4) to win a contract it would otherwise not have been entitled to, and (5) that it was actually

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6. Because 48 C.F.R. 52.222-38 imposes the certification requirement critical to Kirk's claim, any contracts awarded before its adoption in October 2001 which were not covered by its express certification requirement fail to state a claim under the FCA. Those claims, therefore, are dismissed pursuant to Rule 12(b)(6).

awarded[7] validly states a claim of express false certification under the FCA.

None of Kirk's other theories of liability under FCA state a claim because no other aspect of VEVRAA or its implementing regulations imposes either express or implied certification requirements. Kirk's second theory of liability alleges that Schindler submitted false claims by seeking payment despite having filed *inaccurate* VETS-100 reports. However, Kirk fails to point to any provision of VEVRAA that required defendant to expressly attest to the accuracy of the reports. Kirk relies on the same rule-48 C.F.R § 52.222-38-and statute-31 U.S.C. § 1354(a). However, neither the rule nor the statute speaks to the accuracy of the report: the rule requires only a representation that the latest report was filed, and the statute bars agencies from contracting only "if [the] contractor did not submit a [VETS-100] report." 31 U.S.C. § 1354(a). Accordingly, the Court finds neither a basis for concluding that Schindler expressly certified that its reports were accurate nor a basis for concluding such a certification would have been a condition to payment.

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7. Numerous courts in this and other circuits have found that merely submitting a bid does not constitute a "claim" under the FCA. Instead, a bid becomes a "claim" when the bid is accepted and the bidder granted the contract. *See*, *e.g.*, *United States ex rel. Taylor v. Gabelli*, 345 F.Supp.2d 313, 335-36 (S.D.N.Y.2004) (dismissing FCA action brought against *unsuccessful* bidders) (collecting cases). For purposes of this Opinion, the Court follows that body of precedent and limits relator's false certification theory claims to those instances where Schindler's bids were successful.

The Court also finds no basis for concluding that Schindler impliedly certified the accuracy of its reports. A claim of implied false certification exists only where the underlying statute "*expressly* states the provider must comply in order to be paid." *Mikes*, 274 F.3d at 700 (emphasis in original). Here, as noted, the statute says nothing about the accuracy of the report, and certainly does not state as an express condition to payment that the reports be accurate.[8]

Finally, Kirk's third theory of liability—that Schindler falsely certified its compliance with VEVRAA by submitting claims for payment while knowing that it did not have an affirmative action program for veterans or a procedure to allow veterans to self-identify as required by the statute—fails for similar reasons. Kirk can point to no statutory provision or implementing rule requiring Schindler to expressly certify-as a condition to payment-that it had an affirmative action program. Instead, Kirk argues that because VEVRAA mandates that each contract "shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment

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8. For the same reasons, the allegedly inaccurate reports also cannot state a claim under 31 U.S.C. § 3729(a)(2), which creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." Even assuming the VETS-100 reports constituted a "false record," those falsities did not "get a false or fraudulent claim paid" since the accuracy of the reports was not a condition to payment.

qualified covered veterans," 38 U.S.C. § 4212(a)(1), each time Schindler submitted a claim for a VEVRAA-covered contract, it impliedly certified compliance with the Act's provisions. Kirk's argument fails because section 4212(a)(1) does not *expressly* state that a provider must comply-that is, must actually institute an affirmative action program-as a condition of payment. Therefore, Schindler's submission of claims does not as a matter of law give rise to implied false certifications claims.[9]

None of the above is meant to suggest that "false is OK." (Pl.'s Mem. of Law. in Opp. to Summ. J. at 3.) It is simply to confirm that the FCA is not the appropriate avenue for challenging every alleged falsity submitted to the government or every instance of regulatory noncompliance. *See Mikes*, 274 F.3d at 697 ("[A] claim for reimbursement made to the government is not legally false simply because the [contractor] failed to comply with mandates of a statute, regulation, or contractual term that is *only tangential to* the service

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9. At most, section 4212(a)(1) creates what the Second Circuit in *Mikes* termed "conditions of participation, rather than prerequisites to receiving reimbursement." *Mikes*, 274 F.3d at 701-02. As the *Mikes* court explained, while a continuing failure to comply with a condition of participation may be grounds to render a contractor ineligible for future participation in the government program, alleged individual instances of noncompliance with a condition of participation do not give rise to claims under the FCA. *Id.* at 702. Moreover, in this case, VEVRAA, much like the Medicare statute at issue in *Mikes*, creates an express procedure for bringing allegations of noncompliance with conditions of participation to the attention of the government. *See* 38 U.S.C. § 4212(b).

for which reimbursement is sought." (emphasis added)). Instead, VEVRAA itself provides aggrieved veterans with a direct avenue for challenging a contractor's alleged noncompliance with the statute's requirements. *See* 38 U.S.C. § 4212(b). Specifically, "the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action." *Id.* Moreover, the Court notes that Kirk has in fact availed himself of that very procedure: on April 15, 2004, Kirk filed a complaint with the Secretary of Labor, the DOL's Office of Federal Contract Compliance Programs conducted an investigation, the investigation resulted in an official report finding no evidence of non-compliance, and Kirk has appealed that finding. (Exs. A-C to Kirk Aff.)[10]

Accordingly, the Court concludes that Kirk has stated a claim cognizable under the FCA only with regard to bids submitted after adoption of 48 C.F.R. 52.222-38 in October 2001 that led to the award of contracts covered by VEVRAA. All of Kirk's other claims, including his second and third theories of liability, fail as a matter of law to allege a violation of the FCA and should therefore be dismissed.

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10. Because the Court, in considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), cannot look beyond the pleadings, the facts surrounding relator's administrative hearing, all of which were submitted with affidavits in conjunction with this motion, cannot and do not serve as a basis for the Court's ruling. However, because they are undisputed and were submitted by the non-moving party, the Court includes them here simply for purposes of completing the narrative of the history of this case.

Appendix B

C. *The FCA Jurisdictional Bar*

As a limitation on the FCA's otherwise broad grant of authority to private citizens to bring actions on behalf of the United States, section 3730(e)(4)(A) of the Act strips courts of jurisdiction over claims that are:

> [B]ased upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] 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.

31 U.S.C. § 3730(e)(4)(A).

To evaluate whether a claim is in fact barred, courts consider three questions: "(1) whether there has been a 'public disclosure' of allegations or transactions, (2) whether the *qui tam* action is 'based upon' such publicly disclosed allegations, and (3) if so, whether the relator is the 'original source' of the information." *United States ex rel. Reagan v. E. Tex. Med. Ctr.*, 384 F.3d 168, 173 (5th Cir.2004) (quoting *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 352 (5th Cir.2003)). The first—whether there has been a "public disclosure" of the allegations or transactions—is the "bedrock of 3730(e)(4)(A)'s jurisdictional bar," *United States ex rel. Doe v. John Doe*

Corp., 960 F.2d 318, 322 (2d Cir.1992), and consideration of it requires a two-step inquiry: first, a court must determine whether the "allegations or transactions" underlying the fraud were publicly disclosed, and second, it must find that the disclosure came via a manner set forth in the statute, that is, through an "enumerated source." *Id.* at 323.[11]

Schindler contends that Kirk's properly stated FCA claims are based entirely upon information obtained through the DOL's responses to the Kirks' FOIA requests, that those responses constituted administrative investigations or reports as those terms are used in section 3730(e)(4)(A), that those investigations or reports publicly disclosed the allegations or transactions underlying his claims, and accordingly, that relator's claims are barred by statute. Kirk, for his part, contends that a response to a FOIA request is not an administrative investigation or report, and therefore, that DOL's responses did not publicly disclose the allegations or transactions via one of the statute's enumerated sources. Moreover, Kirk argues his claims are not "based upon" those disclosures

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11. As discussed below, the question of whether the statute's list of sources is exclusive is the subject of a split of authority. However, the Second Circuit has determined that section 3730(e)(4)(A)'s list of enumerated sources is exclusive. Accordingly, for relator's claims to be barred, this Court must determine not only that a public disclosure occurred but also that it occurred through an enumerated source. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir.1992).

because he provides additional, independent evidence in support of his claims. Alternatively, Kirk contends he is an "original source" of the information.

While the parties are thus in disagreement regarding each of the elements of the jurisdictional inquiry, the core of their dispute lies in how the Court should construe information obtained through a FOIA request for purposes of the section 3730(e)(4)(A) bar. Both parties find support for their respective positions in the case law-while the Second Circuit has never addressed the issue, the question of whether information obtained through a FOIA request is "publicly disclosed" for purposes of section 3730(e)(4)(A) remains the subject of a split of authority among the other circuits[12] as well

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12. The Third Circuit, in a widely cited opinion, has held that information obtained through a FOIA request was publicly disclosed through one of the statute's enumerated sources because the response constituted an administrative investigation and report. *See United States ex rel. Mistick PBT v. Hous. Auth. of the City of Pittsburgh*, 186 F.3d 376, 382-84 (3d Cir.1999) (Alito, J.); *see also United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175-76 (5th Cir.2004) (same). The Sixth and Tenth Circuits have taken the position that information obtained through a FOIA request is publicly disclosed for purposes of section 3730(e)(4)(A) without determining whether that section's list of enumerated sources is exclusive, and accordingly, whether a response to a FOIA request constitutes an administrative investigation or produces an administrative report. *See United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir.2004); *United States v. A.D. Roe Co.*, 186 F.3d 717 (6th Cir.1999) (same). By contrast,

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as the trial courts in this district.[13]

A distinct split in authority also exists over whether the statute's enumerated list of sources of disclosure is exclusive. Specifically, several courts have held that a response to a FOIA request is a "public disclosure" triggering the jurisdictional bar without finding the need to additionally consider whether it is a public disclosure via one of the statute's enumerated sources, *see*, *e.g.*, *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir.2004), while others have found that a response to a FOIA request was not a disclosure via one of section 3730(e)(4)(A)'s enumerated sources and

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the Ninth Circuit has held that a response to a FOIA request is not a public disclosure for purposes of the statutory bar unless the response "is from one of the sources enumerated in the statute." *United States ex rel. Haight v. Catholic Healthcare W.*, 445 F.3d 1147, 1153 (9th Cir.2006). And the Fourth Circuit, in a footnote to an unpublished opinion, has suggested that a response to a FOIA request is not an enumerated source, and accordingly, information thereby obtained is not barred by section 3730(e)(4)(A). *United States ex rel. Bondy v. Consumer Health Found.*, 28 Fed.Appx. 178, 181 n. 2 (4th Cir.2001).

13. *See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc.*, 495 F.Supp.2d 375, 380 (S.D.N.Y.2007) (suggesting in dicta that information obtained through state Freedom of Information Law request was publicly disclosed for purposes of § 3730(e)(4)). *But see United States ex rel. Pentagen Techs. Int'l. Ltd. v. CACI Int'l., Inc.*, No. 94-Civ.-2925, 1996 WL 11299, at *9 (S.D.N.Y. Jan. 4, 1996) (documents acquired under the FOIA are not publicly disclosed within the meaning of section 3730(e)(4)(A)).

have stopped without addressing whether information obtained through a FOIA request was "publicly disclosed." *See United States ex rel. Bondy v. Consumer Health Found.*, 28 Fed.Appx. 178, 181 n. 2 (4th Cir.2001).

The Second Circuit has held, in the context of a different form of disclosure, that section 3720(e)(4)(A)'s list of sources is "exclusive," *see Doe*, 960 F.2d at 323, and so for Kirk's claim to be barred, the allegations or transactions underlying his claims must have been publicly disclosed via one of section 3720(e)(4)(A)'s enumerated sources. Resolving this motion, therefore, requires the Court to address two questions left open in this Circuit and subject to dispute in other circuits and the courts of this district: first, whether a response to a FOIA request qualifies as an administrative investigation or report within the meaning of section 3730(e)(4)(A) and, if so, whether information thereby obtained has been "publicly disclosed" for purposes of the statutory bar.

Because the Court finds, on these facts, (1) that the DOL's responses to the Kirks' FOIA requests constituted administrative investigations and reports, (2) that those investigations and reports publicly disclosed the allegations or transactions underlying Kirk's claims, (3) that those claims are "based upon" the public disclosure, and (4) that Kirk was not an original source of the information, it concludes that Kirk's remaining claims are statutorily barred.

Appendix B

1. Public Disclosure via an Enumerated Source

As noted, the public disclosure inquiry consists of two distinct components. First, a court must determine whether the allegations or transactions have been publicly disclosed, and second, if so, whether they have been disclosed through one of section 3730(e)(4)(A)'s enumerated sources.

a. Public Disclosure . . . .

Allegations of fraud are "publicly disclosed when they are placed in the 'public domain.' " *Doe*, 960 F.2d at 322 (quoting *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir.1990)). However, they need not be "widespread" or "widely disseminated." *Id.* at 323. In fact, the Second Circuit has cited approvingly the finding of another court that actual access by anyone other than the relator is irrelevant, because only "*potential* accessibility by those not a party to the fraud [is] the touchstone of public disclosure." *Id.* at 322 (emphasis added) (citing with approval *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir.1991)). Accordingly, the Second Circuit has construed the public disclosure bar to preclude "*qui tam* suits based on information that would have been equally available to strangers to the fraudulent transaction had they chosen to look for it as it was to the relator." *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir.1993) (quotations and citations omitted).

Applying that standard, the Second Circuit has held that information obtained through civil discovery has been "publicly disclosed" for purposes of the statutory bar because it was filed with the court and available to anyone who wished to inspect the court file. *Id.* It has also found that allegations of corporate fraud disclosed by federal agents to a limited number of corporate employees in the course of executing a search warrant were publicly disclosed, emphasizing the fact that even a limited disclosure was sufficient to put the allegations or transactions in the "public domain." *Doe*, 960 F.2d at 322-23.

In light of the Second Circuit's articulated standard and its past application, this Court concludes that information provided in response to the Kirks' FOIA requests was "publicly disclosed" for purposes of section 3730(e)(4)(A). The information, while not "widely disseminated," was in the public domain. It was potentially accessible to anyone capable of submitting a FOIA request. And critically, for purposes of assessing whether the information was sufficiently publicly disclosed to trigger the statutory bar, it "would have been equally available to strangers to the fraudulent transaction had they chosen to look for it as it was to" the Kirks. *Accord United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester County*, 495 F.Supp.2d 375, 380-81 (S.D.N.Y.2007) (information obtained through state law FOIL request "is publicly disclosed information since it was as 'equally available'

to others as it was to the Center, had others 'chosen to look for it' " (quoting *Kreindler & Kreindler*, 985 F.2d at 1158)).

The conclusion that the information provided in response to the Kirks' FOIA requests was "publicly disclosed" is bolstered by the fact that the very purpose of the FOIA is to ensure that agencies "make available *to the public* " certain categories of information. 5 U.S.C. § 552(a) (emphasis added); *see also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (the "central purpose" of FOIA is to ensure that government records are "opened to the sharp eye of public scrutiny"). Accordingly, the U.S. Supreme Court has held that information obtained in response to a FOIA request was a "public disclosure" for purposes of the Consumer Product Safety Act, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-09, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). Finding that the DOL's response to the Kirks' requests publicly disclosed the information in question, therefore, is consistent not only with this Circuit's FCA precedent, but also with both the statutory language and the Supreme Court's understanding of the purpose behind the FOIA.

For similar reasons, the overwhelming majority of courts to address the question have concluded that information obtained in response to a FOIA request constitutes a "public disclosure" for purposes of section 3730(e)(4)(A). *See*, *e.g.*, *Mistick*, 186 F.3d at 383; *Grynberg*, 389 F.3d at 1049; *Burns*, 186 F.3d at 723.

Indeed, the Court is aware of no circuit-level finding to the contrary.[14]

One court in this district has concluded that information obtained through a FOIA request was not "publicly disclosed." *See United States ex rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.*, No. 94-Civ.-2925, 1996 WL 11299 (S.D.N.Y. Jan. 4, 1996). That court reasoned that information obtained through FOIA, unlike information obtained through civil discovery, was not in the public domain because it was not lodged with a court but merely disclosed to a private citizen. *Id.* at *9. This Court finds that reasoning unpersuasive. When the DOL responded to the Kirks' FOIA requests, it disclosed "to the public" the information sought. 5 U.S.C. § 552(a). That only one person placed the FOIA requests rather

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14. As discussed below, the Ninth Circuit has held that information obtained through a FOIA request is not disclosed through one of section 3730(e)(4)(A)'s enumerated sources, that the list statute's list is "exclusive," and accordingly, that information obtained through a FOIA request does not bar an FCA action unless the information "is from one of the enumerated sources." *Haight*, 445 F.3d at 1152. However, that Court did not dispute that if the response to a FOIA request included information from one of the statute's enumerated sources, the response "publicly disclosed" that information for purposes of the jurisdictional bar. *Id.* at 1156. The Fourth Circuit similarly observed, in a footnote to an unpublished opinion, that section 3730(e)(4)(A)'s list of sources was exclusive and that a response to a FOIA request was not on it. But like the Ninth Circuit, it expressed no opinion as to whether or not the information obtained through a FOIA request was "publicly disclosed." *See Bondy*, 28 Fed.Appx. at 181 n. 2.

than one thousand does not render the responses "private." It merely means the disclosures were not widespread. And as noted, the Second Circuit has clearly considered—and rejected—a "widespread" or "widely disseminated" public disclosure requirement, instead requiring, at most, the *potential* for more widespread accessibility. That requirement is satisfied on these facts because the information in question here was just as accessible to any member of the public as it was to the Kirks had others chosen to look for it. Accordingly, the information disclosed by the DOL to the Kirks pursuant to their FOIA requests was in the public domain, and therefore, was "publicly disclosed" for purposes of section 3730(e)(4)(A).

b. . . . of the Allegations or Transactions . . .

Having so found, the Court pauses briefly to consider whether the public disclosure included the "allegations or transactions" underlying relator's claims. The Second Circuit has not yet addressed the question of what disclosure is necessary to meet that standard, but courts that have considered the issue have all adopted similar approaches. The D.C. Circuit has articulated a "mathematical illustration" endorsed by several other courts whereby:

> [I]f X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed from which readers or

> listeners may infer Z, i.e. the conclusion that fraud has been committed.

United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 654 (D.C.Cir.1994). As the D.C. Circuit explained more generally, "Congress sought to prohibit *qui tam* actions only when either the allegation of fraud or the critical elements of the fraudulent transaction were in the public domain." *Id.* The Tenth Circuit, while declining to adopt a "mathematical formula," has similarly found claims barred where, after the relevant disclosure, "the public domain contained *all* the elemental aspects of the allegedly fraudulent transaction." *Grynberg*, 389 F.3d at 1050.

Adopting that reasoning, this Court looks to whether, after the relevant disclosure, all the critical elements of the alleged fraudulent transaction were in the public domain. *Accord United States ex rel. Huangyan Imp. & Exp. Corp. v. Nature's Farm Prods., Inc.*, No. 00-6593, 2004 WL 74310, at *3 (S.D.N.Y. Jan. 15, 2004)(SHS) ("Put in words rather than single letters, a *qui tam* action is barred where there is enough information in the public domain to expose the fraud.") The "critical elements" of Kirk's claim are: (1) Schindler obtained contracts (2) requiring an express certification pursuant to 48 C.F.R. § 52.222-38 that Schindler had filed VETS-100 reports, and (3) Schindler had not actually filed those reports. Indisputably, the first element has long been in the public domain. Indeed, in his pleadings, Kirk provides lists of Schindler's government contracts that he obtained from the

Department of Veterans Affairs public website. (Exs. B-F to Am. Compl.) Similarly, the second element can be readily deduced from the public domain—the same website Kirk relies on lists the value of each contract and the date it was entered into, all the information necessary to determine whether the contract would be covered by VEVRAA and 48 C.F.R. § 52.222-38, both of which are also in the public domain.

The third element, to the extent relator avers he can establish it, must come directly from the DOL's series of responses to the Kirks' FOIA requests because Kirk offers no other basis for a factfinder to conclude that Schindler failed to file VETS-100 reports. Since the Court has already determined that those FOIA responses "publicly disclosed" the information contained therein for purposes of section 3730(e)(4)(A), after those responses, each element of Kirk's claim was in the public domain, and accordingly, the "allegations or transactions" underlying this action had been publicly disclosed.

c. . . . Via an Enumerated Source

Having determined that the DOL's response to Kirk's FOIA requests constituted a "public disclosure of [the] allegations or transactions" underlying relator's claims, the Court must next consider whether the disclosure was made via one of the statute's enumerated sources. Schindler contends that the Kirks' FOIA requests prompted administrative investigations within the meaning of the statute, and that the DOL's responses constituted administrative reports. The Court agrees.

Appendix B

Each time the DOL received one of the Kirks' FOIA requests, it was required to look into the matters underlying the request; determine what, if any, information was responsive to the request; and produce to the requesting party the documents sought, or an explanation for why the documents could not be provided or were exempt from disclosure. As the Third Circuit concluded on very similar facts, that process, which was undertaken by the DOL (unquestionably an "administrative" body), entailed an "investigation" and produced a "report" as those words are commonly used and defined. *See Mistick*, 186 F.3d at 383-84. Indeed, the Oxford English Dictionary defines an "investigation" as the "making of a search or inquiry" and a "report" as "a formal statement of the results of an investigation." *Accord id.* (collecting definitions of both terms). Here, the Kirks' requests were handled by the Chief of the Investigation and Compliance Division within the DOL's Office of Veteran's Employment and Training, who, in his own words, conducted a "search," made a "determination" and produced, on official stationary, a document setting forth the results of his inquiry. (*See*, *e.g.*, Ex. G to Kirk Aff.) Consistent with standard definitions of both terms, that process entailed an "investigation" and produced a "report."[15]

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15. While the first two FOIA requests where handled for the DOL by the Chief of the Investigation and Compliance Division, the Kirks' third FOIA request was handled by the Assistant Director of the Office of Agency Management and Budget for the Veterans Employment and Training Service. That official responded by describing a similar investigatory process and producing a similar report (Ex. I to Kirk Aff.), and for purposes of this analysis, the difference is irrelevant.

Relying heavily on one Ninth Circuit opinion, Kirk argues that a response to a FOIA request is "not necessarily a report or investigation, although it can be, if it is from one of the sources enumerated in the statute." *Haight*, 445 F.3d at 1153. Kirk argues that since the information requested and produced in this case did not itself stem from one of section 3730(e)(4)(A)'s enumerated sources, the DOL's responses to the Kirks' FOIA requests are likewise not from an enumerated source. The argument is unconvincing.

The Ninth Circuit's opinion rests on a distinction it sought to draw between FOIA requests on the one hand and government investigations and reports on the other. As that court argued, "a FOIA request is a mechanism for duplicating records that are in the possession of the federal government" while, "[i]n contrast, reports and investigations generally involve independent work product" and "independent governmental leg-work." *Id.* (internal citations and quotations omitted). Accordingly, "labeling any response to a FOIA request a 'report' or 'investigation' would ignore the way in which each of the enumerated sources involves government work product." *Id.*

Whatever validity that general distinction might have in other contexts, it is belied by the facts presented here. In this case, the DOL's Chief of Investigation and Compliance within the DOL's Office of Veteran's Employment and Training conducted a search and prepared a letter detailing that search and its results, a work process that produced a substantive government

work product, facts Kirk does not appear to dispute. That the investigation and the resulting report may not have been lengthy does not obscure the fact that an administrative body conducted an investigation and produced a report disclosing to members of the public the critical elements of Kirk's claims. Simply put, before the DOL responded to the Kirks' FOIA requests, this relator had no claim-no personal knowledge sufficient to support even an allegation that Schindler had defrauded the government. *Cf. United States ex rel. Lamers v. City of Green Bay*, 998 F.Supp. 971, 977 (E.D.Wis.1998) ("The basic *qui tam* idea is that private citizens with *personal knowledge* of fraud against the government may bring suit on the government's behalf in return for a cut of the judgment proceeds should they prevail." (emphasis added)); *see also United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc.*, No. 95-civ.1363, 2003 WL 21998968, at *4 (S.D.N.Y. Aug. 21, 2003) (same).

Therefore, on these facts, the Court finds that the allegations or transactions underlying Kirk's claims were publicly disclosed via one of section 3730(e)(4)(A)'s enumerated sources.

2. "Based Upon"

For the jurisdictional bar to apply, the relator's claims must also be "based upon" the public disclosure. That requirement is satisfied if "the *qui tam* action . . . is based *in any part* upon publicly disclosed allegations or transactions." *Kreindler & Kreindler*, 985 F.2d at 1158

(quoting *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 553 (10th Cir.1992)) (emphasis added).

Here, Kirk's claims are plainly "based upon" the publicly disclosed allegations or transactions. As noted in detail above, the public disclosures form the core of Kirk's claims, serving as his only evidence of the most critical element of his claim-that Schindler allegedly failed to file VETS-100 reports for several of the years covered by this action.[16] That Kirk claims to be able to supplement the publicly disclosed information by contributing additional knowledge gleaned during his time as an "insider" is irrelevant, since the standard is met if the FCA action is based "in any part" on the publicly disclosed allegations or transaction.

The Court therefore finds Kirk's action to be "based upon" the publicly disclosed allegations or transactions.

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16. Lest there be any dispute that the DOL's responses to the Kirk's FOIA requests served as Kirk's sole basis for concluding that Schindler failed to file VETS-100 reports for the years covered by the complaint, the Court takes note of the fact that Kirk's administrative challenge to Schindler's VEVRAA compliance, filed several months *before* the DOL responded to the Kirks' FOIA requests, makes no mention of Schindler's alleged failure to file VETS-100 reports in a timely fashion, despite otherwise alleging every other complaint and VEVRAA violation specified in this action. (Ex. A to Kirk Aff.)

Appendix B

3. Original Source

Finally, Kirk argues that even if his claim is based upon allegations or transactions that were publicly disclosed via an enumerated source, his action is not barred because he is the "original source" of the information. An original source is 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 prior to filing an action . . . which is based on the information." 31 U.S.C. § 3730(e)(4)(B). The Supreme Court has recently clarified that the phrase "information on which the allegations are based" in the statute refers to the "information upon which the [relator's] allegations are based." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 470-71, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007).

Kirk fails to qualify as an original source because he cannot establish "direct and independent knowledge" of the information on which his allegations were based prior to the DOL's response to his FOIA request. As the Second Circuit has explained, "a *qui tam* plaintiff does not satisfy the [direct and independent knowledge] requirement if a third party is 'the source of the core information' upon which the *qui tam* complaint is based." *United States ex rel. Dhawan v. N.Y. Med. College*, 252 F.3d 118, 121 (2d Cir.2001) (quoting *Kreindler & Kreindler*, 985 F.2d at 1159). Here, as set forth at length above, the DOL-through its responses to the Kirks' FOIA requests-was the source of the "core information" upon which his complaint is based.

Moreover, the fact that Kirk did some "independent research" to compile the information relevant to his allegations by submitting a FOIA request or obtaining lists of Schindler's government contracts from a government website does not render him the original source of those claims. *See Kreindler & Kreindler*, 985 F.2d at 1159 ("The fact that [relator] conducted some collateral research and investigations regarding the [fraud] . . . does not establish 'direct and independent knowledge of the information on which the allegations are based' within the meaning of § 3730(e)(4)(B)."); *see also United States ex rel. Alcohol Found., Inc. v. Kalmanovitz*, 186 F.Supp.2d 458, 463 (S.D.N.Y.2002) (relator not an "original source" despite contending that it's allegations constituted a " 'mosaic' of information that shows a fraud that an average member of the public could neither understand . . . nor perceive a fraud" from).

Therefore Kirk cannot qualify as an "original source" of the information upon which the allegations are based.

III. CONCLUSION

Because the Court finds that many of Kirk's allegations fail to state a claim under the FCA and that Kirk's remaining claims are barred as "publicly disclosed" pursuant to 31 U.S.C. § 3730(e)(4)(A), defendant's motion to dismiss the amended complaint is granted. The Clerk of Court is directed to enter judgment dismissing the complaint.

SO ORDERED.

APPENDIX C — RELEVANT STATUTES AND REGULATIONS

31 U.S.C. § 3729

§ 3729. False claims

(a) Liability for certain acts.—

(1) In general.—Subject to paragraph (2), any person who—

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

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

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

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

(E) is authorized to make or deliver a document certifying receipt of

property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

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

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

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

(2) Reduced damages.—If the court finds that—

> **(A)** the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> **(B)** such person fully cooperated with any Government investigation of such violation; and
>
> **(C)** at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,
>
> the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

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

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

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

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

(i) has actual knowledge of the information;

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

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

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

(2) the term "claim"—

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

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

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

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

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

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

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-

based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

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

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

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

31 U.S.C. § 3730

§ 3730. Civil actions for false claims

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

(b) Actions by private persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action

shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

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

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

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

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

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

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

(c) Rights of the parties to qui tam actions.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the

action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

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

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

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

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

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

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

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without

limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

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

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if

the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation,

or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

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

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

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

Appendix C

(e) Certain actions barred.—

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

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

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

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

(4) **(A)** 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.

(f) Government not liable for certain expenses.— The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.— In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

Appendix C

(h) Relief from retaliatory actions.—

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

(2) Relief.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

Appendix C

UNITED STATES PUBLIC LAWS
111th Congress - Second Session
Convening January 05, 2010

PL 111-148 (HR 3590)
March 23, 2010
PATIENT PROTECTION AND
AFFORDABLE CARE ACT

An Act Entitled The Patient Protection
and Affordable Care Act.
Be it enacted by the Senate and House of
Representatives of the United States of America
in Congress assembled,

* * *

SECTION 10104.

(j)(2) Section 3730(e) of title 31, United States Code, is amended by striking paragraph (4) and inserting the following:

"(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

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

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

"(iii) from the news media,

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

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

Appendix C

31 U.S.C. § 1354

§ 1354. Limitation on use of appropriated funds for contracts with entities not meeting veterans' employment reporting requirements

(a) **(1)** Subject to paragraph (2), no agency may obligate or expend funds appropriated for the agency for a fiscal year to enter into a contract described in section 4212(a) of title 38 with a contractor from which a report was required under section 4212(d) of that title with respect to the preceding fiscal year if such contractor did not submit such report.

(2) Paragraph (1) shall cease to apply with respect to a contractor otherwise covered by that paragraph on the date on which the contractor submits the report required by such section 4212(d) for the fiscal year concerned.

(b) The Secretary of Labor shall make available in a database a list of the contractors that have complied with the provisions of such section 4212(d).

Appendix C

38 U.S.C. § 4212

§ 4212. Veterans' employment emphasis under Federal contracts

(a) **(1)** Any contract in the amount of $100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of $100,000 or more entered into by a prime contractor in carrying out any such contract.

(2) In addition to requiring affirmative action to employ such qualified covered veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the Secretary of Labor shall prescribe regulations requiring that—

(A) each such contractor for each such contract shall immediately list all of its employment openings with the appropriate employment service delivery system (as defined in section 4101(7) of this title), and may also list

such openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor), except that the contractor may exclude openings for executive and senior management positions and positions which are to be filled from within the contractor's organization and positions lasting three days or less;

(B) each such employment service delivery system shall give such qualified covered veterans priority in referral to such employment openings; and

(C) each such employment service delivery system shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of this title.

(3) In this section:

(A) The term "covered veteran" means any of the following veterans:

(i) Disabled veterans.

(ii) Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.

(iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985 (61 Fed. Reg. 1209).

(iv) Recently separated veterans.

(B) The term "qualified", with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.

(b) If any veteran covered by the first sentence of subsection (a) believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

(c) The Secretary of Labor shall include as part of the annual report required by section 4107(c) of this title the number of complaints filed pursuant to subsection (b) of this section, the actions taken thereon and the resolutions thereof. Such report shall also include the number of contractors listing employment openings, the nature, types, and number of positions listed and the number of veterans receiving priority pursuant to subsection (a)(2)(B).

(d) **(1)** Each contractor to whom subsection (a) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on—

> **(A)** the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans;

(B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and

(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

(2) The Secretary of Labor shall ensure that the administration of the reporting requirement under paragraph (1) is coordinated with respect to any requirement for the contractor to make any other report to the Secretary of Labor.

Appendix C

48 C.F.R. § 22.1310

22.1310 - Solicitation provision and contract clauses.

(a) (1) Insert the clause at 52.22235, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, in solicitations and contracts if the expected value is $25,000 or more, except when (i) Work is performed outside the United States by employees recruited outside the United States; or (ii) The Deputy Assistant Secretary of Labor has waived, in accordance with 22.1305(a) or the head of the agency has waived, in accordance with 22.1305(b) all of the terms of the clause.

(2) If the Deputy Assistant Secretary of Labor or the head of the agency waives one or more (but not all) of the terms of the clause, use the basic clause with its Alternate I.

(b) Insert the clause at 52.22237, Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, in solicitations and contracts containing the clause at 52.22235, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans.

(c) Insert the provision at 52.22238, Compliance with Veterans' Employment Reporting Requirements, in solicitations when it is anticipated the contract award will exceed the simplified acquisition threshold and the contract is not for acquisition of commercial items.

Appendix C

48 C.F.R. § 52.222-37

52.222-37 Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans.

As prescribed in 22.1310(b), insert the following clause:

Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (SEP 2006)

(a) Unless the Contractor is a State or local government agency, the Contractor shall report at least annually, as required by the Secretary of Labor, on—

> (1) The number of special disabled veterans, the number of veterans of the Vietnam era, and other eligible veterans in the workforce of the Contractor by job category and hiring location; and
>
> (2) The total number of new employees hired during the period covered by the report, and of the total, the number of special disabled veterans, the number of veterans of the Vietnam era, and the number of other eligible veterans; and
>
> (3) The maximum number and the minimum number of employees of the Contractor during the period covered by the report.

(b) The Contractor shall report the above items by completing the Form VETS–100, entitled "Federal Contractor Veterans" Employment Report (VETS–100 Report)".

(c) The Contractor shall submit VETS–100 Reports no later than September 30 of each year beginning September 30, 1988.

(d) The employment activity report required by paragraph (a)(2) of this clause shall reflect total hires during the most recent 12-month period as of the ending date selected for the employment profile report required by paragraph (a)(1) of this clause. Contractors may select an ending date—

> (1) As of the end of any pay period between July 1 and August 31 of the year the report is due; or
>
> (2) As of December 31, if the Contractor has prior written approval from the Equal Employment Opportunity Commission to do so for purposes of submitting the Employer Information Report EEO–1 (Standard Form 100).

(e) The Contractor shall base the count of veterans reported according to paragraph (a) of this clause on voluntary disclosure. Each Contractor subject to the reporting requirements at 38 U.S.C. 4212 shall invite all special disabled veterans, veterans of the Vietnam

era, and other eligible veterans who wish to benefit under the affirmative action program at 38 U.S.C. 4212 to identify themselves to the Contractor. The invitation shall state that—

(1) The information is voluntarily provided;

(2) The information will be kept confidential;

(3) Disclosure or refusal to provide the information will not subject the applicant or employee to any adverse treatment; and

(4) The information will be used only in accordance with the regulations promulgated under 38 U.S.C. 4212.

(f) The Contractor shall insert the terms of this clause in all subcontracts or purchase orders of $100,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor.

Appendix C

48 C.F.R. § 52.222-38

52.222-38 Compliance with Veterans' Employment Reporting Requirements.

As prescribed in 22.1310(c), insert the following provision:

COMPLIANCE WITH VETERANS' EMPLOYMENT REPORTING REQUIREMENTS (DEC 2001)

By submission of its offer, the offeror represents that, if it is subject to the reporting requirements of 38 U.S.C. 4212(d) (i.e., if it has any contract containing Federal Acquisition Regulation clause 52.222-37, Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans), it has submitted the most recent VETS-100 Report required by that clause.