IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AIKEN DIVISION

UNITED STATES OF AMERICA, Plaintiff, *ex rel.* PETER MICHAEL WANCO, JR., Plaintiff-Relator, v. MOX SERVICES, LLC, and ORANO FEDERAL SERVICES, LLC, Defendants.	)	Cause No.: 1:19-CV-00196-JMC

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

I. Introduction.

On January 23, 2019, a former Areva Federal Services (now Orano Federal Services, LLC "Orano")) employee, Peter M. Wanco, Jr., filed a sealed Complaint in this Court alleging that the Defendants "defrauded the U.S. Department of Energy through the fraudulent payment of relocation [packages] to workers that never intended to relocate in order to entice those workers to accept employment with [Orano]." D. #1, Complaint, ¶ 1. He also alleged that he was the victim of "retaliatory employment conduct and constructive discharge following his refusal to approve inspection protocols he believed to be inadequate to ensure safety under federal regulations and professional standards during the construction of the SRS facilities." D. #1, Complaint, ¶ 2.

Based on these allegations, Mr. Wanco presented two legal claims under the federal False Claims Act in his Complaint:

- Count I: FCA Violations under 31 U.S.C. § 3729(a)(1)(A) & (B);
- Count II: FCA Retaliatory Discharge in violation of 31 U.S.C. § 3730(h) [erroneously designated in the Complaint as "§ 3729(h)"].

This matter remained under seal for almost a year while the United States Department of Justice investigated Mr. Wanco's allegations. Following the conclusion of this year-long investigation, on January 2, 2020, the United States apparently found little merit to the claims, and filed a "Notice of Election to Decline Intervention" in this Court. D. # 10. On that same date the Court issued an "Order to Unseal Case" and the case was unsealed.

The Defendants now move for judgment on the pleadings based on the fact that there is no merit to either the underlying FCA claim in Count I or the FCA retaliation claim contained in Count II.

II. Facts as Pled in the Complaint.

A. The MOX Project.

According to the Complaint, "[o]n March 22, 1999, NNSA awarded Contract No. DE-AC02-99CH10888 to MOX Services' predecessor in interest, Duke Cogema, Stone & Webster, LLC." D. #1, Complaint, ¶ 14. Under this contract MOX Services LLC was "to design, build, and operate the MFFF at SRS. Once complete, the facility was designed to transform 34 metric tons of weapons-grade plutonium into fuel for commercial reactors. DOE authorized construction to begin in 2007." *Id.*, ¶ 16. "In October 2018, the MFFF project was halted and federal contractors were told to shut down construction of the facility." *Id.*, ¶ 22.

B. The Plaintiff, Peter Michael Wanco, Jr.

Mr. Wanco "was hired by Orano [Areva] in December 2016, and worked as a Quality Control Inspector until March 26, 2018, when he was forced to resign." D. # 1, Complaint, ¶ 9.

Prior to being hired by Areva in 2016, Mr. Wanco worked at the Virgil C. Summer Nuclear Power Station near Jenkinsville, South Carolina and lived in Irmo, South Carolina. *Id.*, ¶ 33.

C. The Defendants.

According to the Complaint, "Defendant MOX Services, LLC is a limited liability corporation whose members are non-defendant CB&I Project Services Group, LLC, which is organized under the laws of the state of Delaware and has its principal place of business in South Carolina, and Defendant Orano Federal Services, LLC. MOX Services was formerly known as CB&I AREVA MOX Services, LLC. At all times relevant to this action, MOX Services had contracted with NNSA to design, build, and operate the MFFF at SRS and did so thought [sic] its partners, like Orano, and subcontractors." D. # 1, Complaint, ¶ 10.

Similarly, in paragraph 11 of the Complaint it is alleged that "Defendant Orano Federal Services, LLC (Orano) is a limited liability company organized under the laws of the State of Delaware with its principal place of business believed to be in Washington, D.C. Orano was previously known as "AREVA Federal Services." Orano claims to be a leading technology and services provider for decommissioned nuclear facilities and used nuclear fuel management. At all times relevant to this action, Orano was a key MOX Services partner with personnel working at the SRS." D. # 1, Complaint, ¶ 11.

For purposes of this brief the Defendants, MOX Services, LLC and Orano Federal Services, LLC are referred to collectively as "MOX" unless otherwise separately designated.

D. Mr. Wanco's initial hiring.

On October 27, 2016 Mr. Wanco applied for a position with Areva as a "Federal Services Quality Specialist III (position no. DES02300) a welding and mechanical quality control inspector." D. # 1, Complaint, ¶ 32. Mr. Wanco claims that on that same day he received a call

to schedule an interview with Areva for the position. *Id.* On November 15, 2016, Mr. Wanco interviewed for the position. He claims that on November 28, 2016, he received an e-mail offering him the position at a salary of $95,000.00. *Id.*, ¶ 34.

Following the offer, Mr. Wanco alleges that he contacted "Shakir Jones, an Areva recruiter" and told him "he was looking for more money and, because he planned to commute from Irmo, [he asked for] a per diem." D. # 1, Complaint, ¶ 35. He claims that Mr. Jones told him he could not offer more money, but could offer a "relocation package" and that he "did not need to move and could 'use the relocation package any way [he] like[d]" because "[w]e don't require proof of receipts on how you use the money. If you decide to rent a place, that would be fine." *Id.*, ¶ 37-38.

Mr. Wanco contends that based on this representation he accepted the position at a salary of $7,500.00 a month, with a $5,000.00 signing package, and a $21,000.00 relocation payment. However, he never relocated and instead commuted between Irmo and the job site. *Id.*, ¶ 34, 39-40. He began working at the MFFF project on December 19, 2016. *Id.*, ¶ 39. He also alleges that when he "left his position over a year later, Defendant Orano demanded return of the relocation money." *Id.*, ¶ 41.

C. Mr. Wanco's employment.

Mr. Wanco only worked on the MFFF project for about a year.[1] During that time he was one of between twenty and thirty quality inspectors on the project, and specifically worked "as a welding quality inspector of pipe and structure". D. # 1, Complaint, ¶ 50-51, 53. By September

[1] Under the Relocation Agreement Mr. Wanco was required to work for two (2) years to receive the full benefits. Because he only worked one year and then quit, he was required, under the Agreement, to return half of the amounts paid to him, but has never repaid anything. Defendants' Answer, ¶41.

of 2017 his main duties had shifted to "updating [welding] IP's for use by quality inspectors." *Id.*, ¶ 54.

Mr. Wanco alleges that in October of 2017 he was assigned to "revise a mechanical piping inspection plan No. M335-1." *Id.*, ¶ 55. This revised plan took several months to complete, and was a "40+ page IP" which his immediate supervisor believed to be far too long to be used. *Id.*, ¶ 58. Mr. Wanco states that he was directed to revise it to a more manageable length, but only reduced it by five (5) pages. As a consequence, "Andy Johnson, a Level 3 Special Projects and Quality Control Manager" was eventually forced to "revise[ ] the IP himself down to just 16 pages." *Id.*, ¶ 60.

Mr. Wanco alleges that the revisions by his supervisor "omitted a significant number of instructions and attachments designed to alert inspectors to critical engineering requirements" thus creating safety issues, but that nevertheless "in January of 2018 Johnston's IP was approved for use in the field." D. # 1, Complaint, ¶ 61-62. He further alleges that "a change to the project specifications require[d] an alteration in Johnston's IP" and that he (Mr. Wanco) was asked to revise it. Mr. Wanco refused to do so because he felt it was inadequate, and thus he "would not sign his name to the revisions" and told his supervisors that they could sign their names to the revisions if they wanted it done. *Id.*, ¶ 65. Mr. Wanco alleges that Kevin Carter told him that "if you can't do this, we will have to find someone who can do this." *Id.*, ¶ 67. Thereafter Mr. Wanco alleges he was advised that he was "placed back in the field to obtain a certification for review of civil engineering work" which would have allowed him to inspect other areas such as concrete work. However, Mr. Wanco believed this "was a demotion from [his] area of expertise and would not benefit him professionally in any way." *Id.*, ¶ 68.

"Mr. Wanco took the remainder of the week off [calling in sick] and resigned the following Monday." D. # 1, Complaint, ¶ 69. He alleges that he resigned because the "Defendants created a hostile work environment by retaliating against Mr. Wanco for raising safety concerns about quality inspections." *Id.*, ¶ 70.

III. Discussion.

The Complaint presents two legal claims against the Defendants, both purportedly based on violations of the False Claims Act:

- Count I: FCA Violations of 31 U.S.C. § 3729(a)(1)(A) & (B);
- Count II: FCA Retaliatory Discharge in violation of 31 U.S.C. § 3730(h).

The Defendants move for judgment on the pleadings with respect to both of these FCA claims.

A. Standard of Review.

1. Rule 12(c) Standard.

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, "[a]fter the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." "'In reviewing the grant of a Rule 12(c) motion, we must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.' *Hanover*, 806 F.3d at 764; *see Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (drawing "all reasonable factual inferences" in favor of the nonmovant)." *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Beach Mart, Inc.*, 932 F.3d 268, 274 (4th Cir. 2019).

This standard is identical to that utilized under Rule 12(b)(6) , "[w]e also 'review de novo the district court's ruling on a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), and in doing so, apply the standard for a Rule 12(b)(6) motion.' *W.C. &*

A.N. Miller Dev. Co. v. Cont'l Cas. Co., 814 F.3d 171, 175–76 (4th Cir. 2016)." *Edwards v. Genex Coop., Inc.*, 777 F. App'x 613, 624 (4th Cir. 2019).

Judgment on the pleadings is therefore appropriate if a complaint or a specific claim sets forth no viable cause of action upon which relief can be granted. A complaint must allege enough facts to state a claim that is plausible on its face: "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

> [L]egal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for Rule 12(b)(6) purposes. *See Iqbal*, 129 S.Ct. at 1949. We also decline to consider "unwarranted inferences, unreasonable conclusions, or arguments." *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 615 n. 26 (4th Cir. 2009); *see also Iqbal*, 129 S. Ct. at 1951-52.
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> Ultimately, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility is established once the factual content of a complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, the complaint's factual allegations must produce an inference of liability strong enough to nudge the plaintiff's claims "across the line from conceivable to plausible." *Id.* at 1952 (*quoting Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).
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> Satisfying this "context-specific" test does not require "detailed factual allegations." *Id.* at 1949-50 (quotations omitted). The complaint must, however, plead sufficient facts to allow a court, drawing on "judicial experience and common sense," to infer "more than the mere possibility of misconduct." *Id.* at 1950. Without such "heft," *id.* at 1947, the plaintiff's claims cannot establish a valid entitlement to relief, as facts that are "merely consistent with a defendant's liability," *id.* at 1949, fail to nudge claims "across the line from conceivable to plausible." Id. at 1951.

Nemet Chevrolet, LTD v. Consumeraffairs.com, Inc., 591 F.3d 250, 255-56 (4th Cir. 2009).

In the present case, in addition to the *Twombly/Iqbal* standard, because the Plaintiff brings his claims under the False Claims Act, he faces a much higher pleading requirement, needing to

plead his FCA claims "with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b)." *Escobar*, 136 S.Ct. at 2004.

> Rule 9(b)'s particularity requirement serves as a necessary counterbalance to the gravity and "quasi-criminal nature" of FCA liability. An entity found in violation of the FCA may be liable for treble damages, *See* 31 U.S.C. § 3729(a)--a punishment which carries potentially crippling consequences, particularly to private employers. Thus, Rule 9(b)'s purposes of providing defendants notice of their alleged misconduct, preventing frivolous suits, and eliminating fraud actions in which all the facts are learned after discovery apply with special force to FCA claims and the accompanying presentment requirement.

United States ex rel. Grant v. United Airlines Inc., 912 F.3d 190, 197 (4th Cir. 2018).

2. Heightened pleading requirement under Rule 9(b).

This Court recently summarized the application of the heightened pleading burden that Rule (9)(b) places on plaintiffs in FCA cases such as this one:

> In addition, claims under the FCA 'must also meet the more stringent particularity requirement of Federal Rule of Civil Procedure 9(b).'" *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 634 (4th Cir. 2015) (*quoting United States ex rel. Ahumada v. NISH*, 756 F.3d 268, 280 (4th Cir. 2014)), *vacated on other grounds*, 136 S. Ct. 2504 (2016); *see also United States ex rel. v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013) ("We have adhered firmly to the strictures of Rule 9(b) in applying its terms to cases brought under the [FCA]."). "Rule 9(b) requires that 'an FCA plaintiff must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Triple Canopy*, 775 F.3d at 634 (*quoting United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008)). "More precisely, the complaint must allege 'the who, what, when, where and how of the alleged fraud.'" *Ahumada*, 756 F.3d at 280 (*quoting Wilson*, 525 F.3d at 379). "Requiring such particularized pleading ... 'prevents frivolous suits, eliminates fraud actions in which all the facts are learned after discovery, and protects defendants from harm to their goodwill and reputation.'" *Id.* at 280-81 (brackets and ellipses omitted) (*quoting Takeda*, 707 F.3d at 456).

United States v. Savannah River Nuclear Sols., LLC, 2016 WL 7104823, at *9 (D.S.C. 2016).

Thus in the present case in order to survive this motion for judgment on the pleadings, Mr. Wanco "must, at a minimum, describe the time, place, and contents of the false representations, as

well as the identity of the person making the misrepresentation and what he obtained thereby" and link those facts to the elements of the cause of action, with "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal,* 129 S.Ct. at 1949.

As the 7th Circuit recently put it, "[t]he plaintiff must describe the 'who, what, when, where, and how' of the fraud—the first paragraph of any newspaper story. What constitutes 'particularity,' however, may depend on the facts of a given case. Plaintiffs must 'use some ... means of injecting precision and some measure of substantiation into their allegations of fraud.' The heightened pleading requirement in fraud cases 'forces the plaintiff to conduct a careful pretrial investigation' to minimize the risk of damage associated with a baseless claim." *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 839–40 (7th Cir. 2018). *See also United States ex rel. Mateski v. Raytheon Co.*, 745 F. App'x 49, 50 (9th Cir. 2018) ("Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged.")

B. Count I: FCA Violations of 31 U.S.C. § 3729(a)(1)(A) & (B).

In Count I of the Complaint Mr. Wanco alleges that Areva's (Orano's) actions in paying him a $21,000.00 relocation package after he advised Mr. Jones that he would be commuting from his home in Irmo and then seeking and obtaining reimbursement of that amount from the United States was a violation of "the terms of the MFFF contract and the FAR concerning cost-reimbursement contracts." D. # 1, Complaint, ¶ 76. He further alleges that Areva (Orano) did this as part of a scheme to use "relocation packages to incentivize persons with necessary skills to accept employment at SRS when Defendants otherwise were unable to entice these workers to accept employment by offering the approved salaries for these positions." *Id.*, ¶ 78. He alleges that these actions caused the United States to improperly reimburse these false relocation expenses

thus violating the False Claims Act, and that "Defendants' conduct is a violation of 31 U.S.C. §3729(a)(1)(A) & (B)." *Id.*, ¶ 81.

The FCA imposes civil liability on "any person who ... knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval. § 3729(a)(1)(A)." *Universal Health Servs., Inc. v. United States ex rel Escobar*, 136 S. Ct. 1989, 1996 (2016).

> **31 U.S.C.A. § 3729. False claims**
> (a) Liability for certain acts.--
> (1) In general.--Subject to paragraph (2), any person who--
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
> * * *
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-4101), plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C.A. § 3729(a)(1)(A).

Under this statute, "[t]he essential elements of an FCA claim are (1) a false statement or fraudulent course of conduct [**falsity element**], (2) made with requisite scienter [***scienter* or knowledge element**], (3) that was material, [**materiality element**] causing (4) the government to pay out money or forfeit moneys due [**presentment element**]." *United States v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011) (parenthetical and emphasis supplied).

On its face the Complaint alleges a fraudulent course of conduct, *i.e.* Mr. Jones' alleged offer to pay a relocation package even though Mr. Wanco told him he was not relocating, thus meeting the **falsity** element. The Complaint also alleges actual knowledge by Mr. Jones that offering the relocation package under these circumstances was fraudulent thus meeting the ***scienter***

or knowledge element. Third, for purposes of this motion, MOX will assume his relocation is **material** under FAR to whether the payment was an allowable cost.

Thus, based purely on the allegations of the Complaint Mr. Wanco has made at least a threshold showing of the first three elements of an FCA violation. However, his Complaint fails to clear the last hurdle, the **presentment** element, as his Complaint is not pled with the requisite particularity the fourth factor, *i.e.* that this conduct caused "the government to pay out money or forfeit moneys due." He simply alleges generally as follows:

> 42. Reimbursement for contract costs under FAR is dependent upon whether the costs were actually incurred, meaning actual relocation was necessary for Mr. Wanco to receive the relocation package he was offered and material for the government's decision to reimburse those purported costs.
>
> 43. Thus, by recruiting and hiring necessary employees by offering relocation packages to individuals who did not intend to relocate, the Defendants violated the FAR and submitted (or caused to be submitted) false claims for reimbursement.

D. # 1, Complaint, ¶ 42-43.

As noted earlier, because the Complaint is bought under the FCA, it is subject to a heightened pleading requirement under Rule (9)(b) of the Federal Rules of Civil Procedure. *Savannah River Nuclear Sols.,* *9.

Under this heightened pleading requirement Mr. Wanco was required to do more to meet the presentment requirement than just generally aver that Areva/Orano must have submitted the relocation claim to MOX, which must then have submitted the relocation claim for reimbursement to the NNSA, which must then have been paid by the United States. He is required at a minimum to allege specific invoices or requests for payment as well as specific payments made from the United States to MOX and Orano for this specific relocation expense. Without this level of

particularity, he has not properly alleged his presentment claim and Count I, the FCA claim must be dismissed.

> Grant fails to state a claim under § 3729(a)(1)(A) because while the allegations state with particularity that United engaged in at least some fraudulent conduct, the SAC fails to provide the last link which is critical for FCA liability to attach: namely, that this scheme necessarily led to the presentment of a false claim to the government for payment.

Grant, 912 F.3d at 197. In the present case Mr. Wanco fails to even allege that his relocation expenses were ever actually presented to the United States or that the United States ever actually paid them: "[T]he SAC fails to allege how, or even whether, the bills for these fraudulent services were presented to the government and how or even whether the government paid United for the services. Merely alleging fraudulent conduct and an umbrella payment, without more, is insufficient." *Id.*,

912 F.3d at 198. As the 4th Circuit noted in *Grant*, this level of detail at the pleading stage is very important:

> Absent some explanation of the billing structure or how or whether the government paid for repairs in this subcontracting scheme, Grant has not shown that false claims were necessarily presented to the government for payment for two reasons.
>
> First, the SAC leaves open the possibility that the government was not billed for and accordingly never paid for the particular alleged fraudulent repairs. It is possible that P&W and Boeing, the intervening subcontractors, declined to bill the government for all the repairs or that the government refused to pay the full amount.
>
> Second, even assuming that Grant properly alleged that the government was billed for all the repairs--which he has not--the SAC leaves open the possibility that any fraudulent repairs were remedied prior to government payment. P&W or Boeing may have caught any defects and fixed them prior to billing the government. United itself also could have remedied fraudulent repairs. * * * Accordingly, though Grant's allegations could have led to presentment, because the SAC fails to explain how United billed for its work or when the government paid for repairs, we cannot determine even from circumstantial allegations that United's conduct would have necessarily led to a false claim being submitted to the government for payment.

Grant, 912 F.3d at 198.

Specificity in this case, as in the *Grant* case, is especially important when Mr. Wanco himself concedes that he was required to repay the allegedly fraudulent relocation package: "Defendant Orano demanded the return of the relocation money." D. # 1, Complaint, ¶ 41. Given the failure to plead "presentment" with the particularity required under Rule 9(b), "[a]ccordingly, though [Mr. Wanco's] allegations could have led to presentment, because [Mr. Wanco failed] to explain how [Orano billed MOX and how MOX] billed for its work or when the government paid for [the relocation expense], we cannot determine even from circumstantial allegations that [MOX's] conduct would have necessarily led to a false claim being submitted to the government for payment." *Grant*, 912 F.3d at 198 (parenthetical supplied).

Instead of providing this level of specificity, Mr. Wanco has just generally alleged that a scheme existed and that the United States must have reimbursed the expenses causing a loss to the United States. D. # 1, Complaint, ¶ 42-43. This is insufficient as a matter of law:

> We agree with the Eleventh Circuit's observation that the particularity requirement of Rule 9(b) "does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." *Id.* at 1311. Rather, Rule 9(b) requires that "some indicia of reliability" must be provided in the complaint to support the allegation that an actual false claim was presented to the government. *Id.* Indeed, without such plausible allegations of presentment, a relator not only fails to meet the particularity requirement of Rule 9(b), but also does not satisfy the general plausibility standard of *Iqbal*. *See Clausen*, 290 F.3d at 1313 ("If Rule 9(b) is to carry any water, it must mean that an essential allegation and circumstance of fraudulent conduct cannot be alleged in such conclusory fashion."); *cf. United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (requiring relator to "provide some representative examples of [the defendants'] alleged fraudulent conduct").

U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc., 707 F.3d 451, 456–57 (4th Cir. 2013). *See also*

Grant, 912 F.3d at 199 ("*Nathan* tells us clearly that an FCA plaintiff may not merely describe a private scheme and then 'allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government.'")

As a consequence, Count I of Mr. Wanco's Complaint must be dismissed: "Grant therefore fails to allege an impact on the government fisc with the requisite particularity to survive a motion to dismiss under Rule 9(b)'s heightened pleading standard." *Grant*, 912 F.3d at 199.

B. Count II: Violation of 31 U.S.C. § 3730(h).[2]

In Count II of the Complaint Mr. Wanco alleges that he sought to "ensure inspectors at MFFF applied appropriate criteria when reviewing project specifications for compliance with professional standards" and that he was asked to sign "an inadequate protocol." D. # 1, Complaint, ¶ 83-84. He alleges that when he refused to sign off on these deficient procedures based on "Mr. Wanco's safety concerns", he "was demoted by being reassigned to a civil engineering position—an area outside and below his expertise" which "was a constructive termination." *Id.*, ¶ 87. He alleges that this demotion for raising safety concerns violated 31 U.S.C. § 3730(h). *Id.*, ¶ 89. MOX vigorously disputes that Mr. Wanco ever raised any safety concerns, but under Rule 12(c), for purposes of this motion, MOX must accept these allegations as true.

31 U.S.C. § 3730 is entitled "Civil actions for false claims". "Section 3730(h) creates a cause of action for an employee who suffers retaliation for, among other things, assisting with the

[2] The Plaintiff's Complaint has a variety of mistaken or erroneous citations. For example, its states "For a Second Cause of Action – FCA Violation of 31 U.S.C.A. § 3729(h)" as Count II. D. # 1, Complaint, p. 15. Yet later, in the same Count the Complaint instead states that the alleged conduct violates 31 U.S.C. § 3730(h), a different section. *Id.*, ¶ 89.

prosecution of a False Claims Act action." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019). This section provides as follows:

> **(h) Relief from retaliatory actions.--**
> **(1) In general.**--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment **because of lawful acts done by the employee**, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.
> **(2) Relief.**--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.
> **(3) Limitation on bringing civil action.**--A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C.A. § 3730(h).

"[T]o sufficiently plead a § 3730(h) retaliation claim and thus survive a motion to dismiss, a plaintiff must allege facts sufficient to support a 'reasonable inference' of three elements: (1) he engaged in protected activity; (2) his employer knew about the protected activity; and (3) his employer took adverse action against him as a result. *See Iqbal*, 556 U.S. at 678; *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 433 (4th Cir. 2015)." *Grant*, 912 F.3d at 200. *See also United States ex rel. Cody v. ManTech Int'l, Corp.*, 746 F. App'x 166, 176 (4th Cir. 2018) ("In order to establish a prima facie case of retaliation under § 3730(h), the plaintiff must prove the following: (1) that "he engaged in '**protected activity**' by acting in furtherance of a *qui tam* suit;" (2) that "his **employer knew** of these acts;" and (3) that a causal link exists—that "his employer took **adverse action** against him as a result of these acts." (emphasis supplied)).

1. Mr. Wanco has not pled that he engaged in "protected activity" as required under 31 U.S.C.A. § 3730(h).

In order to present a whistleblower retaliation claim under the False Claims Act, the first element of his case requires Mr. Wanco to prove that "he engaged in protected activity". This is not just any protected activity, instead the activity protected under 31 U.S.C.A. § 3730(h) has to be related to an FCA claim: "As to the first element, § 3730(h) defines two types of protected activity--acts 'in furtherance of an [FCA action]' (the "first prong"), or 'other efforts to stop 1 or more [FCA violations]' (the "second prong"). 31 U.S.C. § 3730(h)(1)." *Grant*, 912 F.3d at 200.

Looking to the first prong, Mr. Wanco cannot argue that the alleged retaliation was "in furtherance of an [FCA action]" because his FCA Complaint was not filed until January 23, 2019, almost two years after he quit. The second prong asks whether Mr. Wanco made "other efforts to stop 1 or more [FCA violations]" before he was allegedly constructively discharged. The key to Mr. Wanco's burden on the second prong is that he must demonstrate objectively reasonable facts that show that he was opposing the presentation of false claims to the United States in order to succeed:

> Under this standard, an act constitutes protected activity where it is motivated by an objectively reasonable belief that the employer is violating, or soon will violate, the FCA. A belief is objectively reasonable when the plaintiff alleges facts sufficient to show that he believed his employer was violating the FCA, that this belief was reasonable, that he took action based on that belief, and that his actions were designed to stop one or more violations of the FCA. However, while the plaintiff's actions need not "lead to a viable FCA action" as required under the distinct possibility standard, they must still have a nexus to an FCA violation.

Grant, 912 F.3d at 201–02.

The problem for Mr. Wanco is that he never opposed or reported anything related to the FCA claims, *i.e.* the alleged fraudulent relocation cost charges to the United States by MOX as pled in Count I. Indeed, as noted earlier, he never mentioned these potential FCA violations to

anyone until he filed the Complaint in January of 2019. Rather Count II makes it very clear that Mr. Wanco's alleged "protected speech" was solely based on his allegations that the changes made to his proposed Inspection Plan No. M335-1 relating to steel welds was improperly changed by his supervisors resulting in potential safety issues. When he refused to sign off on what he believed to be an improper IP he alleges he was demoted. The simple fact is that these concerns did not touch on the FCA and thus are not actionable under the FCA.

> Of course, under both standards of protected activity, the employee's conduct must relate to stopping real or suspected fraud. Indeed, "'without fraud, there can be no FCA action' or violation." *Carlson*, 657 Fed.Appx. at 174 (*quoting Mann*, 630 F.3d at 345–46).13 This is so because the FCA prohibits "any person" from "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment" to the federal government, 31 U.S.C. § 3729(a)(1)(A), and from "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," id. § 3729(a)(1)(B). And as the Fourth Circuit in *Carlson* observed, "it is axiomatic that fraud involves '[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.'" 657 Fed.Appx. at 174 (quoting Fraud, Black's Law Dictionary (10th ed. 2014)). In this vein, mere "expressions of concern that do not raise the reasonable prospect of false or fraudulent claims under the FCA ... do not constitute 'protected activity.'" *United States ex rel. Cody v. Mantech Int'l Corp.*, 207 F.Supp.3d 610 (E.D.Va. 2016) (*citing Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911, 914 (4th Cir. 1997)).

Nifong v. SOC, LLC, 234 F. Supp. 3d 739, 753 (E.D.Va. 2017).

In fact Mr. Wanco has actually pled himself out of a claim under 31 U.S.C. § 3730(h) in that he specifically alleges that his protected activity expressly involved something other than potential FCA violations. D. # 1, Complaint, ¶ 71. Based on his own Complaint the alleged conduct could not reasonably be said to be the basis for an FCA claim.

> We nevertheless affirm the district court's determination that NIKA was entitled to summary judgment on the § 3730(h) claim. A *prima facie* case of retaliation under § 3730(h) requires the plaintiff to prove, among other things, that he was engaged in "protected activity." *Zahodnick v. IBM Corp.*, 135 F.3d 911, 914 (4th Cir. 1997). We have previously held that this standard requires the whistleblower to demonstrate that the conduct he disclosed reasonably could have led to a viable

> FCA action. *Mann v. Heckler & Koch Def., Inc.*, 630 F.3d 338, 344 (4th Cir. 2010). The undisputed facts in this case demonstrate that O'Hara did not disclose any conduct that could have led to a viable FCA action. We are therefore compelled to hold that NIKA is entitled to judgment as a matter of law.

O'Hara v. Nika Techs., Inc., 878 F.3d 470, 476–77 (4th Cir. 2017).

Simply complaining about construction concerns to a supervisor is not engaging in a "protected activity" under 31 U.S.C. § 3730(h). The FCA requires quite a bit more:

> Here, there is no evidence that Zahodnick initiated, testified for, or assisted in the filing of a *qui tam* action during his employment with IBM and Lockheed. In fact, the record discloses that Zahodnick merely informed a supervisor of the problem and sought confirmation that a correction was made; he never informed anyone that he was pursuing a *qui tam* action. Simply reporting his concern of a mischarging to the government to his supervisor does not suffice to establish that Zahodnick was acting "in furtherance of" a *qui tam* action. *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir.1994).

Zahodnick v. Int'l Bus. Machines Corp., 135 F.3d 911, 914 (4th Cir. 1997). *See also Nifong*, 234 F.Supp.3d at 753 (dismissing an employee's claims under 31 U.S.C. § 3730(h) because "[t]hese communications were not 'in furtherance of' an FCA action because Nifong's activity did not occur 'in a context where ... [Nifong's] conduct reasonably could lead to a viable FCA action, or when ... litigation is a reasonable possibility.' *Mann*, 630 F.3d at 344.")

The courts have unequivocally rejected the notion that complaints like those raised by Mr. Wanco qualify as FCA matters such that the complaints are protected under the FCA and 31 U.S.C.A. § 3730(h):

> Significantly, the Relator's activity must "have a nexus to an FCA violation." *Id.* at 201-202. An "employee's investigation must concern 'false or fraudulent claims' or it is not protected activity under the FCA." *Glynn v. EDO Corp.*, 710 F.3d 209, 214 (4th Cir. 2013); *Mann v. Heckler & Koch Def.*, 630 F.3d 338, 347 (4th Cir. 2010) (holding relator "still would not qualify for FCA protection because the FCA requires fraud, not mere regulatory violations"); *United States ex rel. Brooks v. Lockheed Martin Corp.*, 423 F. Supp. 2d 522, 530 (D.Md. 2006) ("Under the FCA, a general allegation of fraud does not suffice; there must be a submission of a false claim"). Merely expressing concerns about regulatory non-compliance is

> insufficient; instead, the Relator's complaints must allege specific illegal, fraudulent conduct against the government. *Grant*, 912 F.3d at 202. (allowing an FTC retaliation claim to proceed based on complaints concerning fraud on the Air Force through falsified airplane maintenance).

Patt v. Greer Labs., Inc., 2019 WL 3987762, at *10 (W.D.N.C. 2019).

Given that Mr. Wanco has specifically pled that the complaints that caused his constructive discharge were not "relate[d] to stopping real or suspected fraud", those complaints cannot support an FCA claim under 31 U.S.C.A. § 3730(h) as a matter of law. Thus Count II of the Complaint should be dismissed for this reason as Mr. Wanco cannot meet the first element of his complaint, *i.e.* that he engaged in "protected activity" under the FCA.

2. Mr. Wanco has not pled that MOX had knowledge that he engaged in "protected activity" under 31 U.S.C.A. § 3730(h).

Even if Mr. Wanco can get over the "protected activity" hurdle, he also has serious problems with the second element of his whistleblower/retaliation case under 31 U.S.C. § 3730(h), *i.e.* that "his employer knew about the protected activity." *Grant*, 912 F.3d at 200. In the present case Mr. Wanco simply refused to sign the revised IP for what he alleged were "safety concerns." That is not the type of conduct necessary to meet the knowledge requirement. Instead, the type of protected activity knowledge required to support a retaliation claim under 31 U.S.C. § 3730(h) is similar to that found in *Herman v. Miller*, 2019 WL 4643573, (D.S.C. 2019) which involved direct knowledge of false billing:

> The Court finds that these allegations, viewed in a light most favorable to Plaintiff, adequately assert that Dr. Miller was aware that Plaintiff had reported him to federal agencies with her suspicions that he was defrauding the federal government and, furthermore, that he, acting on Palmetto Cardiology's behalf, fired her as a result.

Herman, at *5. Similarly, the 4th Circuit in *Grant* addressed the knowledge standard:

> As to the second element, Grant sufficiently pleaded that United knew about his protected activity. Here, Grant complained to United management on numerous occasions in person and in writing about the company's allegedly fraudulent conduct. At least some of his complaints triggered an investigation into whether "the machine shop was operating faulty equipment and failing to train employees." J.A. 144. This suffices to satisfy the knowledge prong.

Grant, 912 F.3d at 203. Mr. Wanco's claims are nowhere near this standard of knowledge, of fraudulent claims presented to the United States, he never identified or complained about fraudulent billing.

3. Mr. Wanco has not pled that he suffered an "adverse action because of" protected activity under 31 U.S.C.A. § 3730(h).

The third and final element of Mr. Wanco's whistleblower/retaliation case under 31 U.S.C. § 3730(h) requires him to show that "his employer took adverse action against him as a result" of his protected activity." *Grant*, 912 F.3d at 200.

i. Mr. Wanco has not alleged an "adverse action".

In the present case Mr. Wanco claims he suffered an adverse action after he complained about the welding IP, in that he "was demoted by being reassigned to a civil engineering position – an area outside and below his expertise. This demotion was a constructive termination from the position he was promoted to fill at the time this dispute arose." D. # 1, Complaint, ¶ 86-87.

With respect to constructive discharge as an adverse action under 31 U.S.C. § 3730(h), the Fourth Circuit has held that "[a]n employee is entitled to relief absent a formal discharge, 'if an employer deliberately makes the working conditions intolerable in an effort to induce the employee to quit.'" *Honor v. Booz–Allen & Hamilton, Inc.*, 383 F.3d 180, 186 (4th Cir. 2004) (*quoting Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1354 (4th Cir. 1995)). To prove constructive discharge Mr. Wanco must therefore demonstrate "(i) deliberateness of the employer's action, and (ii) intolerability of the working conditions." *Whitten v. Fred's Inc.*, 601 F.3d 231, 248 (4th Cir. 2010).

Importantly, "[d]emotion can constitute a constructive discharge, especially where the demotion is essentially a career-ending action or a harbinger of dismissal." *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994) (*citing Jurgens v. E.E.O.C.*, 903 F.2d 386, 391–92 (5th Cir. 1990)).

The simple fact is that Mr. Wanco under his own pleadings was not "demoted". Instead he was "placed back in the field to obtain a certification for review of civil engineering work" which would have allowed him to expand his capabilities beyond welding and into other areas, "e.g., anchor bolts installed in concrete". D. # 1, Complaint, ¶ 67. While Mr. Wanco did not agree with the need for him to get this additional certification to allow him to inspect more areas and believed that "[t]his civil certification was a demotion from Mr. Wanco's area of expertise and would not benefit him professionally in any way" this was hardly "a career-ending action or a harbinger of dismissal" as required under 4th Circuit precedent to make out a constructive discharge claim. As a consequence he cannot demonstrate the adverse action prong of his claim.

ii. Mr. Wanco cannot show that he was demoted "because of" his "protected activity."

Even if Mr. Wanco can demonstrate that the change in responsibilities was an adverse action, he nevertheless loses since he cannot demonstrate that this change took place "because of" any protected activity under the FCA.

"Nesbitt loses under the but-for standard because it requires him to do what he cannot, which is to 'show that the harm would not have occurred in the absence of[,] that is, but for' his protected conduct. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013)." *Nesbitt v. Candler Cty.*, 2020 WL 38525, at *2 (11th Cir. 2020). The 4th Circuit applies the "because of" / "but for" analysis: "[O]our conclusion is consistent with the majority position of the circuit courts

of appeal which construes FCA's 'because of' language to require 'but for' causation." *United States ex rel. Cody v. ManTech Int'l, Corp.*, 746 F. App'x 166, 177 (4th Cir. 2018).

In order to meet this standard Mr. Wanco must establish that the change in job responsibilities was "motivated solely" by his protected conduct under the FCA. *See, e.g., United States ex rel. Strubbe v. Crawford Cty. Mem. Hosp.*, 915 F.3d 1158, 1167 (8th Cir. 2019); *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 933 (8th Cir. 2002). The problem for him is twofold. First, as noted above, he has not engaged in any FCA protected conduct. Second, even if he had at some point, he does not even allege that any FCA protected conduct was the **sole** motivation for his alleged demotion. Indeed quite the opposite. Mr. Wanco's Complaint makes it quite clear that in his opinion the sole motivation (or at least the primary motivation) for the alleged demotion was his raising safety concerns over the weld IP. Indeed he actually captions the retaliation section of his Complaint to that effect: **"Mr. Wanco's Safety Concerns and Defendants' Retaliatory Conduct."** D. # 1, Complaint, p. 11.

Mr. Wanco's own Complaint contends that the sole motivating factor for the "adverse employment actions against [him was] for raising safety concerns as a chilling effect on reports of safety concerns." D. # 1, Complaint, ¶ 72. These admissions doom Mr. Wanco's retaliation claim under 31 U.S.C. § 3730(h).

IV. Conclusion.

For the foregoing reasons, the Defendants, MOX Services, LLC and Orano Federal Services, LLC, pray that the Court enter judgment in their favor and against the Plaintiff's Complaint, together with all other just and proper relief in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 12 February 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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