

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MAR - 1 2000

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

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7 UNITED STATES OF AMERICA, *ex rel*, )  
CHARLES D. TRICE and DAVID R. ) NO. CS-96-0171-WFN  
8 CARBAUGH, )  
9 Plaintiffs, )  
10 -vs- ) ORDER  
11 WESTINGHOUSE HANFORD COMPANY; )  
FLUOR DANIEL HANFORD, INC.; and )  
12 BOEING COMPUTER SERVICES RICHLAND, )  
13 Defendants. )  
14

15 A hearing was held in this matter on January 19, 2000. Plaintiff  
16 Charles Trice participated pro se; Jeffrey Sprung, Steve Berman, and  
17 Michael Kanovitz participated on behalf of Plaintiff David Carbaugh;  
18 Thomas McLane and Mark Meagher participated on behalf of Defendant  
19 Westinghouse Hanford Company [WHC]; William Symmes, John Chierichella,  
20 and Otto Klein participated on behalf of Defendant Fluor Daniel Hanford,  
21 Inc. [FDH]; and, Marc Boman participated on behalf of Defendant Boeing  
22 Computer Services Richland [BCSR]. The Court has reviewed the file and  
23 the briefing, considered the oral arguments of counsel, and is fully  
24 informed.

25 Each Plaintiff filed a separate Complaint, although the Complaints  
26 are substantially similar. Mr. Trice's Complaint names WHC and BCSR as

1 Defendants, and Mr. Carbaugh's Complaint names WHC and FDH as Defendants.  
2 All Defendants filed various Motions to Dismiss against both Plaintiffs.  
3 WHC and FDH also filed Motions for Summary Judgment, and a Motion to  
4 Strike two Declarations of Jeffrey Sprung. All Motions are addressed in  
5 this Order.

#### 6 I. BACKGROUND

7 This matter presents a *qui tam* cause of action under the False  
8 Claims Act [FCA], 31 U.S.C. § 3729, *et seq.* Plaintiffs Trice and  
9 Carbaugh properly filed their original, joint Complaint under seal on  
10 March 19, 1996, and submitted it to the U.S. Attorney for review. The  
11 USA's office declined to intervene on April 21, 1998, and the complaint  
12 was unsealed. Plaintiff Carbaugh moved for several extensions of the  
13 deadline for service of the Complaint. A Second Amended Complaint  
14 finally was filed and served on WHC and FDH on April 6, 1999, by  
15 Plaintiff Carbaugh only. Plaintiff Trice became re-involved in the  
16 case at the September 13, 1999 hearing. Thus, the current complaints  
17 are Plaintiff Trice's Second Amended Complaint, and Plaintiff  
18 Carbaugh's Third Amended Complaint. The allegations are essentially  
19 identical.

20 Count 1 of Plaintiffs' Complaints alleges that Defendants defrauded  
21 the United States government of over \$85 million by using a flawed  
22 accounting practice to estimate operating costs, which resulted in  
23 consistent over-billing and over-recovery. Both Plaintiffs also bring  
24 an FCA claim for retaliation, and state law claims for retaliatory  
25 discharge and negligent infliction of emotional distress. Plaintiff  
26 Carbaugh additionally alleges discrimination on the basis of disability.

1 Defendants WHC and FDH, respectively, were and are the prime  
2 contractors for the clean-up of the Hanford Nuclear Reservation. WHC  
3 managed the site from June 1, 1987, until September 30, 1996. FDH  
4 assumed management on October 1, 1996. BCSR was a subcontractor under  
5 WHC's management. Plaintiff Carbaugh worked as an accountant for first  
6 WHC and then FDH until his termination by FDH in April, 1997. Plaintiff  
7 Trice worked as an accountant and manager for WHC until his termination  
8 during approximately November, 1995. He also worked for BCSR starting  
9 some time in 1995, and continuing until his termination in November,  
10 1995.

11 The financing of the Hanford clean-up project is complicated.  
12 Essentially, Congress determines an annual budget for the project, based  
13 in part on Defendants' annual cost estimates.<sup>1</sup> Then, the Department of  
14 Energy creates a letter of credit equal to the budgeted amount.  
15 Defendants receive compensation for their work by submitting  
16 reimbursement claims against the letter of credit, thereby drawing down  
17 the amount. These claims are submitted and reimbursed on an on-going  
18 basis. At the end of each fiscal year, Defendants must submit a report  
19 of actual costs incurred, return any excess monies received, and bear any  
20 costs incurred above the letter of credit amount. Defendants receive a  
21 portion of any surplus funds remaining at the end of the year as a reward  
22 for efficient operation.

23  
24  
25 <sup>1</sup>All general references to "Defendants" in this Background section  
26 refer only to WHC and FDH.

1 One of Defendants' reimbursable costs is employee labor. Defendants  
2 are reimbursed for their total labor costs, including "absence costs"  
3 such as vacation, sick leave, and holiday leave. WHC apparently created,  
4 and certainly used, an elaborate accounting system to determine current  
5 costs and estimated future costs. One calculation in this system, the  
6 "Absence Adder," was used to estimate the absence portion of total labor  
7 costs. The Absence Adder operates by first determining a ratio of  
8 average compensated productive employee hours to compensated non-  
9 productive (i.e. absence cost) hours. Then, it applies this ratio to all  
10 productive hours of all site employees to determine the reimbursement  
11 estimate for absence costs as a portion of total labor costs.

12 FDH assumed the accounting system when it assumed management of the  
13 Hanford clean-up. Defendants periodically certified to the Department  
14 of Energy that reimbursement estimates were accurate, and that the  
15 Absence Adder ratio was based on historical absence averages for all  
16 employees.

17 Plaintiffs' basic contention is that Defendants overcharged the  
18 United States for their labor costs because they recovered absence costs  
19 for regular and overtime employee hours, but they incurred no absence  
20 costs for overtime hours. Plaintiffs did not organize any of the  
21 following into specific claims under the FCA, but allege all of the  
22 following under Count 1:

23 (a) The Absence Adder system is fraudulent because it calculates  
24 estimated absence costs for regular and overtime hours, even though  
25 Defendants incur no absence costs for overtime hours, and thus  
26 overcompensates Defendants;

1 (b) The Absence Adder figures are not accurately based on historical  
2 employee absence data as certified in Cost Accounting Standards Board  
3 Disclosure Statements, which are statutorily required to be submitted  
4 with each bid to receive a management contract. Instead, the figures are  
5 higher due to the inclusion of overtime hours in the ratio;

6 (c) The Absence Adder calculations resulted in improper draw downs  
7 against the letter of credit;

8 (d) The Absence Adder's fraudulent effect is magnified as costs  
9 progress through four different "cost pools" in Defendants' overall  
10 accounting system, thus poisoning Defendants' entire billing process;

11 (e) By inflating reimbursement estimates through use of the Absence  
12 Adder, Defendants caused the federal budget for the Hanford clean-up to  
13 increase each year. The fictitiously increased budget made Defendants'  
14 costs appear under budget, which allowed Defendants to recover erroneous  
15 bonuses for efficient operation;

16 (f) Defendants improperly "passed back" reimbursements to improper  
17 internal accounts;

18 (g) Defendants drew down the letter of credit for unallowable costs  
19 hidden under headings for allowable costs;

20 (h) Defendants knowingly and intentionally made their costs appear  
21 higher:

22 (1) they kept internal records of the cost variances that were  
23 not shared with the DOE, and used these more detailed internal  
24 records to reallocate funds between accounts through improper  
25 passbacks. The DOE knew of the passback policy, but not of the  
26 internal cost variance records;

1 (2) DOE requested information about Defendants' passback policy  
2 cost variances, but Defendants never provided the information

3 (3) Defendants falsely certified representations of their  
4 passback procedures in Disclosure Statements; and,

5 (4) Defendants' internal accounting rate (designed to reflect  
6 current costs) was a lower rate than one externally used for  
7 budget planning

8 (i) Defendants over-billed "work for others" including a "host of  
9 federal agencies and contractors" and private companies with the same  
10 fraudulent system.

11 Plaintiffs also complain that the DOE failed to properly  
12 monitor, supervise and investigate the accounting procedures used by  
13 Defendants. These allegations usually arise where Plaintiffs concede  
14 that the DOE was informed of or approved accounting procedures used by  
15 Defendants.

## 16 II. STANDARDS OF REVIEW FOR THE MOTIONS

17 Motion to Dismiss for Lack of Subject Matter Jurisdiction. Fed. R.  
18 Civ. P. 12(b)(1) permits a party to move for dismissal of a claim due to  
19 a court's "lack of jurisdiction over the subject matter." Plaintiffs  
20 must carry the burden of persuading the Court that subject matter  
21 jurisdiction exists. See, e.g., *Hexom v. Oregon Dept. of Transpor-*  
22 *tation*, 177 F.3d 1134, 1135 (9th Cir. 1999), citing *Thornhill Publication*  
23 *Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th  
24 Cir. 1979). A court must construe a complaint broadly and liberally  
25 when subject matter jurisdiction is challenged. See, e.g., *Aversa*  
26 *v. United States*, 99 F.3d 1200, 1209-10 (1st Cir. 1996); 5A CHARLES

1 WRIGHT & ALLEN MILLER, FEDERAL PRACTICE & PROCEDURE § 1350, p. 218 (2d ed.  
2 1990).

3 Motion to Dismiss for Failure to State a Claim. Fed. R. Civ. Pro.  
4 12(b)(6) provides for dismissal of causes of action for "failure to state  
5 a claim upon which relief can be granted . . . ." Fed. R. Civ. P.  
6 12(b)(6). The issue is not whether the plaintiff is likely to succeed  
7 on the merits, but only if the complaint is legally sufficient to entitle  
8 the plaintiff to proceed beyond the pleadings in an attempt to establish  
9 his claim. *De La Cruz v. Torney*, 582 F.2d 45, 58 (9th Cir. 1978), cert.  
10 denied, 441 U.S. 965 (1979). Plaintiff's material allegations in the  
11 Complaint must be accepted as true, and the Complaint is construed in the  
12 light most favorable to him. *Love v. United States*, 915 F.2d 1242, 1245  
13 (9th Cir. 1989). A district court's dismissal is affirmed "only if it  
14 is clear that no relief could be granted under any set of facts that  
15 could be proved consistent with the allegations." *Hishon v. King &*  
16 *Spalding*, 467 U.S. 69, 73 (1984).

17 Motion for Summary Judgment. A party is entitled to summary  
18 judgment where the documentary evidence produced by the parties permits  
19 only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
20 250 (1986). The party seeking summary judgment must show that no  
21 genuine issue of material fact exists and that he is entitled to judgment  
22 as a matter of law by "pointing out" to the Court that there is an  
23 absence of evidence to support the non-moving party's case. *Celotex*  
24 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "A material issue of fact  
25 is one that affects the outcome of the litigation and requires a trial  
26 to resolve the parties' differing versions of the truth." *SEC v.*

1 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The court must  
2 construe all facts in favor of the non-moving party. *Anderson*, 477 U.S.  
3 at 255.

4 The party opposing summary judgment must go beyond the pleadings to  
5 designate specific facts establishing a genuine issue for trial. *Celotex*,  
6 477 U.S. at 324; *Marks v. United States*, 578 F.2d 261, 263 (9th Cir.  
7 1978) (genuine issues are not raised by mere conclusory allegations).  
8 The non-moving party may do this by use of affidavits (including his  
9 own), depositions, answers to interrogatories and admissions. *Celotex*,  
10 477 U.S. at 323-24. Summary judgment is required against a party who  
11 fails to make a showing sufficient to establish an essential element of  
12 a claim, even if there are genuine factual disputes regarding other  
13 elements of the claim. *Celotex*, 477 U.S. at 322-23. There is no issue  
14 for trial "unless there is sufficient evidence favoring the non-moving  
15 party for a jury to return a verdict for that party." *Anderson*, 477 U.S.  
16 at 249.

17 **III. FALSE CLAIMS ACT, 31 U.S.C. §§ 3729, ET SEQ.**

18 Defendant's Motions focus almost entirely upon Count 1 of Trice's and  
19 Carbaugh's Complaints. This Count alleges that the Defendants made false  
20 or fraudulent claims for payment to the United States in violation of the  
21 False Claims Act, 31 U.S.C. § 3729(a)(1) and (2). This section states  
22 in relevant part:

23 (a) Any person who (1) knowingly presents, or causes to be  
24 presented, to an officer or employee of the United States Government  
25 . . . a false or fraudulent claim for payment or approval; [or] (2)  
26 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 . . . is liable to the United States Government for  
[a civil penalty plus treble damages].

1 31 U.S.C. § 3729(a) (1) and (2). "Knowingly" is defined as actual know-  
2 ledge of the information, or deliberate ignorance or reckless disregard  
3 of the truth or falsity of the information, presented to the Government.  
4 31 U.S.C. § 3729(b).

5 A false certification of compliance with a law, rule or regulation  
6 creates liability when the certification is a prerequisite to obtaining  
7 payment. *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir.  
8 1996), *cert. denied*, 519 U.S. 1115 (1997); *see, also, United States ex*  
9 *rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th  
10 Cir. 1997) ("where the government has conditioned payment of a claim upon  
11 a claimant's certification of compliance, . . . a claimant submits a  
12 false claim when he or she falsely certifies compliance"). The claim or  
13 false certification must contain "falsities made with scienter." *See*  
14 *Hooper*, 91 F.2d at 1265.

15 A private party may bring a civil action under § 3729 on behalf of  
16 themself and the United States Government after the Government has been  
17 properly presented with the complaint and declines to intervene. 31  
18 U.S.C. § 3730(b). However, a person may not "bring an action under  
19 subsection (b) which is based upon allegations or transactions which are  
20 the subject of a civil suit or an administrative civil money penalty  
21 proceeding in which the Government is already a party." 31 U.S.C.  
22 § 3730(e) (3). Additionally, a court does not have jurisdiction over a  
23 *qui tam* claim in certain situations:

24 (A) No court shall have jurisdiction over an action under this  
25 section based upon the public disclosure of allegations or  
26 transactions in a criminal, civil, or administrative hearing,  
in a congressional, administrative, or Government (General)  
Accounting Office report, hearing, audit, or investigation

1 . . . unless . . . the person bringing the action is an  
2 original source of the information.

3 (B) For purposes of this paragraph, "original source" means an  
4 individual who has direct and independent knowledge of the  
5 information on which the allegations are based and has  
6 voluntarily provided the information to the government before  
7 filing an action under this section which is based on the  
8 information.

9 31 U.S.C. § 3730(e)(4).

10 **IV. MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(1):**

11 **PRIOR PUBLIC DISCLOSURE**

12 All Defendants argue that prior public disclosure of the information  
13 and allegations in Plaintiffs' Complaints eliminates this Court's subject  
14 matter jurisdiction. WHC and BCSR argue that Plaintiff Carbaugh's Second  
15 Amended Complaint publicly disclosed the allegations in Plaintiff Trice's  
16 Second Amended Complaint. Additionally, FDH alleged two Defense Contract  
17 Audit Agency audits of FDH's accounting system were conducted and  
18 publicly disclosed prior to Plaintiff Carbaugh's Second Amended  
19 Complaint. FDH believed this Complaint was the first one naming FDH.

20 A *qui tam* plaintiff bears the burden of establishing subject matter  
21 jurisdiction by a preponderance of the evidence. *See, e.g., United*  
22 *States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford Jr.*  
23 *University*, 161 F.3d 533, 540 (9th Cir. 1998), *cert. denied*, \_\_\_ U.S.  
24 \_\_\_, 119 S. Ct. 1457 (1999). To defend a motion to dismiss, a plaintiff  
25 must make a *prima facie* showing of jurisdictional facts. *Lake v. Lake*,  
26 817 F.2d 1416, 1420 (9th Cir. 1986). The FCA eliminates a court's  
subject matter jurisdiction in certain circumstances:

(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 or

1 Government Accounting Office report, hearing, audit, or  
2 investigations, or from the news media, unless the action is  
brought by the attorney general or the person bringing the  
action is an original source.

3 31 U.S.C. § 3730(e)(4).

4 Information disclosed through civil litigation and on file with the  
5 clerk's office is a public disclosure for purposes of 31 U.S.C.  
6 § 3730(e)(4)(A). *United States ex rel. Siller v. Becton Dickinson & Co.*,  
7 21 F.3d 1339, 1350-51 (4th Cir. 1994). Once public disclosure of  
8 information occurs, any subsequent action is "based upon" the publicly  
9 disclosed information. *Biddle*, 161 F.3d at 539-40. The Ninth Circuit  
10 consciously chose this interpretation of "based upon," rather than  
11 interpreting "based upon" to mean the relator's allegations must be  
12 derived from the prior public disclosure to preclude jurisdiction. *Id.*  
13 at 536-39. A "derived from" approach is too narrow--it would allow an  
14 opportunistic plaintiff to bring an unnecessary *qui tam* suit simply by  
15 alleging that his allegations were derived from something other than the  
16 public disclosure. *Id.*

17 "[I]f at the time a relator files a *qui tam* complaint, the  
18 allegations or transactions of the complaint have been publicly  
19 disclosed, then the allegations are "based upon" the publicly disclosed  
20 information, and the relator must show that he is an original source of  
21 the information in order for a district court to have jurisdiction over  
22 the lawsuit." *Biddle*, 161 F.3d at 539. An "original source" is someone  
23 "who has direct and independent knowledge of the information on which the  
24 allegations are based, and has voluntarily provided the information to  
25 the Government before filing an action under this section which is based  
26 on the information." 31 U.S.C. § 3730(e)(4)(B); *Wang v. FMC Corp.*, 975

1 F.2d 1412, 1417 (9th Cir. 1992). The Ninth Circuit recognizes four  
2 elements that a plaintiff must show to satisfy the original source  
3 requirement: (1) the plaintiff "had a hand" in the public disclosure of  
4 the allegations that are part of his suit; (2) the plaintiff's knowledge  
5 is independent; (3) the plaintiff's knowledge is direct; and, (4) the  
6 plaintiff voluntarily provided the government with the information prior  
7 to filing his action. *United States v. Alcan Elec. & Engineering Co.*,  
8 197 F.3d 1014, 1020 (9th Cir. 1999), citing *United States ex rel.*  
9 *Aflatooni v. Kitsap Physician Services*, 163 F.3d 516, 525 (9th Cir.  
10 1999); *United States ex rel. Devlin v. California*, 84 F.3d 358, 360 n.3  
11 (9th Cir. 1996). See also *Wang*, 975 F.2d at 1418.

12 Someone else's public disclosure does not rob a plaintiff of his own  
13 independent knowledge. *Id.* Also, the Ninth Circuit has interpreted  
14 "voluntary disclosure" as requiring a *qui tam* plaintiff to "directly or  
15 indirectly [have] been a source to the entity that publicly disclosed the  
16 allegations on which a suit is based." *Wang*, 975 F.2d at 1418, citing  
17 *United States ex re. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16  
18 (2nd Cir. 1990). The focus on the disclosure of the allegations or  
19 transactions, rather than of the information underlying them, is a rarely  
20 necessary but nonetheless important distinction. *Id.*; 31 U.S.C. § 3730  
21 (e)(4). When the public knows of information proving an allegation, it  
22 necessarily knows of the allegation itself. *Id.* However, an allegation  
23 may be made public even if its proof remains hidden. *Id.* Overall, the  
24 history of the FCA makes clear that *qui tam* jurisdiction was meant to  
25 extend only to those who had played a part in publicly disclosing the  
26 allegations and information on which their suits were based. *Id.*

1        Trice Complaint. Plaintiffs' allegations were publicly disclosed  
2 when their original joint complaint was unsealed on April 22, 1998. BCSR  
3 and WHC argue that Plaintiff Carbaugh's Second Amended Complaint filed  
4 April 6, 1999, was a prior public disclosure that precludes Trice's  
5 Second Amended Complaint. See, e.g., *Alcan*, 197 F.3d at 1019-20 (holding  
6 that a complaint in a previously filed action constituted a public  
7 disclosure of allegations in a later *qui tam* action).

8        Trice's Second Amended Complaint is an *amended* complaint. It is  
9 under the same cause number as the initial public disclosure in which  
10 Trice undisputedly had a hand. The original joint Complaint, which named  
11 both WHC and BCSR as Defendants, delineates eight pages of allegations  
12 relating to false application of fringe benefit rates to overtime labor,  
13 fraudulent fee proposals, and fraudulent cost savings initiatives and  
14 incentive fees. Carbaugh's Second Amended Complaint delves into these  
15 allegations in greater detail, and includes more supporting information.  
16 Nonetheless, Trice's participation in the original Complaint (the first  
17 public disclosure) establishes he played a part in the public disclosure  
18 of the allegations. Trice may also have been a source to Carbaugh and  
19 Carbaugh's Second Amended Complaint. However, the Court need not find  
20 that Trice was a source for Carbaugh's Second Amended Complaint to find  
21 that he had a hand in the public disclosure of the allegations. "[A]ll  
22 those who 'directly or indirectly' disclose an allegation might qualify  
23 as its original source." *Wang*, 975 F.2d at 1419, citing *Dick*, 912 F.2d  
24 at 18.

25        Trice's Second Amended Complaint is not an unrelated, new action as  
26 contemplated by the ban created by public disclosure provisions. The

1 prior public disclosure arguments do not apply to Trice's Second Amended  
2 Complaint. Instead, Trice's current Complaint is a continuation of the  
3 original joint Complaint.

4 Carbaugh's Complaint. FDH originally argued that Carbaugh joined  
5 FDH as a Defendant after two Defense Contract Audit Agency [DCAA] audits  
6 were publicly disclosed, and the audits preclude Carbaugh from joining  
7 FDH as a Defendant. In response, Carbaugh asserts that FDH was named in  
8 the First Amended Complaint, filed under seal on April 16, 1997.  
9 Furthermore, Carbaugh asserts he was involved in preparing the first DCAA  
10 audit report.

11 FDH was indeed named as a Defendant in Carbaugh and Trice's  
12 Joint Amended Complaint filed April 16, 1997. Ct. Rec. 24. FDH's  
13 Motion makes no mention of this Amended Complaint. In its reply, FDH  
14 withdraws its prior public disclosure argument. A review of the docket  
15 shows that Carbaugh twice successfully moved for an extension of the Fed.  
16 R. Civ. P. 4(m) time limit for service of the Complaint on Defendants  
17 after this Court's April 22, 1998 Order unsealed the Complaint. There  
18 is no summons or return of service executed upon any Defendant until  
19 after the Second Amended Complaint was filed and served. Ct. Recs. 62,  
20 63. FDH was simply unaware that it was named in a previous complaint--  
21 while the original Complaint is listed as unsealed in the docket, the  
22 Amended Complaint is not listed as unsealed.

23 The Court notes that Plaintiffs filed the action against FDH prior  
24 to the earliest public disclosure that FDH alleges. The allegations in  
25 the First Amended Complaint are less detailed than those in Carbaugh's  
26 Second Amended Complaint, but the core allegations remain the same.

1 Thus, the Court need not reach the question of whether Carbaugh was an  
2 original source because he played a part in the initial public disclosure  
3 of the allegations. Also noteworthy is that a DCAA auditor asked  
4 Carbaugh to assist him with the first audit of FDH. Decl. of Jeffrey  
5 Sprung, Exh. U. Carbaugh participated in the first public disclosure  
6 alleged by FDH.

7 **V. MOTION TO DISMISS PURSUANT TO RULE 12(b)(1):**

8 **POLITICAL QUESTION DOCTRINE**

9 FDH asserts that this Court's subject matter jurisdiction over Mr.  
10 Carbaugh's Complaint is precluded for another reason: Carbaugh's  
11 allegations that FDH "padded" its budget submissions to the DOE and  
12 Congress present a non-justiciable political question. Because FDH's  
13 budget estimate submissions were presented by the DOE to Congress and  
14 ultimately to the President, FDH argues that the allegations in  
15 Carbaugh's Complaint ask this Court to inquire into the decision-making  
16 processes and budget allocations of Congress.

17 The Political Question Doctrine assumes there are certain questions  
18 that are inherently non-justiciable, and that courts lack jurisdiction  
19 to review these matters. The Doctrine excludes from judicial review  
20 "those controversies which revolve around policy choices and value  
21 determinations constitutionally committed for resolution to the halls of  
22 Congress or the confines of the Executive Branch." *Japan Whaling Assn.*  
23 *v. American Cetacean Society*, 478 U.S. 221, 230 (1986). Conversely, "one  
24 of the judiciary's characteristic roles is to interpret statutes," and  
25 the potential political implications a statutory interpretation or  
26 decision may have do not limit this responsibility. *Id.*

1           The standard for evaluating whether an issue presents a non-  
2 justiciable political question is long established. At least one of the  
3 following factors must be inextricably present in order for the Political  
4 Question Doctrine to apply: (1) a textually demonstrable constitutional  
5 commitment of the issue to a coordinate political department; (2) a lack  
6 of judicially discoverable and manageable standards for resolving it;  
7 (3) impossibility of deciding an issue without an initial policy  
8 determination of a kind clearly for non-judicial discretion;  
9 (4) impossibility of a court undertaking independent resolution without  
10 expressing lack of respect due coordinate branches of government; (5) an  
11 unusual need for unquestioning adherence to a political decision already  
12 made; or, (6) the potential of embarrassment from multifarious  
13 pronouncements by various departments on one question. *Baker v. Carr*,  
14 369 U.S. 186, 217 (1962).

15           None of these factors are present in the instant case. Carbaugh's  
16 Complaint asks the Court to determine whether the Defendants violated the  
17 FCA. The FCA is a statute, the interpretation of which is soundly within  
18 the Court's purview. Specifically, under Count 1, Carbaugh asks the  
19 Court to determine whether Defendants submitted "a false or fraudulent  
20 claim for payment or approval" or "knowingly [made] a false record or  
21 statement to get a false or fraudulent claim paid or approved by the  
22 government." 31 U.S.C. § 3729(a)(1) and (2). The Court's inquiry  
23 examines Defendants' knowledge and actions. To determine liability under  
24 the FCA, the Court need look no further than Defendants' interactions  
25 with the DOE (i.e., draw-downs on the letter of credit and allegedly  
26 improper, certified budget estimate submissions). Analysis under the FCA

1 stops at the point at which Defendants presented an allegedly false  
2 claim. The process by which Defendants' submissions proceeded from the  
3 DOE to Congress, how Congress evaluated those submissions, or how  
4 Congress allocated funds to the Hanford Project are beyond the scope of  
5 this Court's inquiry. Therefore, Carbaugh's Third Amended Complaint does  
6 not present a non-justiciable political question.

7 **VI. MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(1):**

8 **STANDING FOR PRO SE QUI TAM PLAINTIFFS**

9 WHC and BCSR both argue that Trice may not pursue a *qui tam* claim  
10 pro se because the Government is the real party in interest. A pro se  
11 litigant may only represent himself. Defendants' arguments present a  
12 novel question: May a pro se plaintiff proceed with a *qui tam* action when  
13 the Government chooses not to intervene?

14 Either the Attorney General or a private person may bring a civil  
15 FCA action. 31 U.S.C. § 3730(a) and (b). A private party may bring the  
16 action "for the person and for the United States government." 31 U.S.C.  
17 § 3730(b). "The action shall be brought in the name of the government."  
18 *Id.* A private person must file his complaint in camera and serve it upon  
19 the government. 31 U.S.C. § 3730(b)(2). It is then the Government's  
20 option to "proceed with the action, in which case the action shall be  
21 conducted by the government" or to "notify the court that it declines to  
22 take over the action, in which case the person bringing the action shall  
23 have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(A) and  
24 (B). While a *qui tam* plaintiff has an interest in an FCA action, the  
25 government clearly has priority as a plaintiff. For example, the  
26 government is not bound by any action of the person bringing the suit,

1 may dismiss the action notwithstanding the objections of the private  
2 plaintiff, and may settle the action notwithstanding the objections of  
3 the private plaintiff. 31 U.S.C. § 3730(c).

4 Generally, courts view a relator as an agent for the Government in  
5 an action brought under the *qui tam* provisions of the FCA because the  
6 Government is the real party in interest. *United States ex rel. Hyatt*  
7 *v. Northrup Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996) (citations  
8 omitted). Additionally, the Ninth Circuit has held in great detail  
9 "that the FCA effectively assigns the government's claims to *qui tam*  
10 plaintiffs . . . who then may sue based upon an injury to the federal  
11 treasury." *United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743,  
12 748 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) (holding that *qui*  
13 *tam* plaintiffs have Article III standing). The Court adopted an  
14 assignment theory of *qui tam* actions by holding that several courts have  
15 embraced an assignment theory, federal courts routinely find fraud  
16 claims are assignable, and federal courts consistently recognize that  
17 an assignee of a fraud claim can assert the claim. *Id.* The court  
18 was unconcerned that the FCA statute does not use the term 'assignment,'  
19 that the government retains the right to intervene, that the government's  
20 claim is contingent on a *qui tam* plaintiff filing suit, or that the  
21 *qui tam* plaintiff is assigned only part of the government's claim. *Id.*  
22 "If the government declines to prosecute the alleged wrongdoer, the  
23 *qui tam* plaintiff effectively stands in the shoes of the government."  
24 *Id.* The government's right to intervene is interpreted as a conditional  
25 assignment. *Id.* In sum, the Ninth Circuit held "Congress intended  
26 to assign the government's fraud claims to individual *qui tam* plain-

1 tiffs in cases where the government itself chooses not to pursue such  
2 claims." *Id.*

3 Defendants argue that a non-lawyer may not represent any person  
4 or entity other than himself. See *Rowland v. California Mens Colony*,  
5 506 U.S. 194, 201-03 (1993). This principle is true as a general matter,  
6 and is stated in the cases cited by Defendants. However, *Rowland* and  
7 the many other cases cited by Defendants focus on established rules  
8 and statutory bars prohibiting corporations, partnerships, or associa-  
9 tions appearing in federal court through someone other than a licensed  
10 attorney. See, e.g., *In Re America West Airlines*, 40 F.3d 1058, 1059  
11 (9th Cir. 1994); *United States v. High Country Broadcasting Co.*, 3  
12 F.3d 1244, 1245 (9th Cir. 1993), *cert. denied*, 513 U.S. 826  
13 (1994). Defendants assert that the policy arguments that support  
14 precluding pro se individuals from appearing on behalf of corporations  
15 also apply to *qui tam* actions. See *Jones v. Niagara Frontier*  
16 *Transportation Authority*, 722 F.2d 20, 22 (2nd Cir. 1983) (noting "that  
17 the conduct of litigation by a non-lawyer creates unusual burdens not  
18 only for the party he represents but as well as for his adversaries and  
19 the court").

20 Defendants' concerns are well-founded. *Qui tam* cases, like the  
21 instant one, frequently involve complex factual and legal issues. A  
22 licensed attorney is best equipped to present arguments surrounding  
23 these issues to the Court and opposing counsel. However, the FCA  
24 meticulously addresses the procedure by which a *qui tam* plaintiff may  
25 bring an action. Congress easily could have inserted a provision  
26 requiring a *qui tam* plaintiff to retain counsel. Congress even could

1 have forsaken *qui tam* plaintiff standing altogether, deciding instead  
2 that only the Attorney General can properly bring an FCA claim on  
3 behalf of the Government. Congress did neither of these. *Qui tam*  
4 plaintiffs are accorded standing under the FCA, and their partici-  
5 pation is described in such a way that it is easily interpreted as an  
6 assignment of a fraud claim by the Government to a private plaintiff.  
7 The Court finds the analysis in *Kelly* most applicable to the instant  
8 case. *Kelly* directly addresses a *qui tam* plaintiff's standing, and  
9 holds the basis for that standing is the assignment of a fraud claim.  
10 That characterization is critical because a corporation may not assign  
11 its claim to a lay person proceeding pro se. *Jones*, 722 F.2d at 23.  
12 Also, case law and statutes prohibit a corporation's claims from  
13 being pursued by a pro se individual. No such bar exists for the  
14 Government's claims. The analysis in *Kelly* is more appropriate to  
15 the instant case than Defendants' analogy to rules regarding represen-  
16 tation of corporations.

17 Defendants also cite an Eighth Circuit Court of Appeals decision  
18 from 1951:

19 [W]e do not think that Congress could have intended to  
20 authorize a layman to carry on [an FCA] suit as attorney for  
21 the United States, but must have had in mind that such a  
22 suit would be carried on in accordance with the estab-  
lished procedure which requires that one licensed to practice  
law may conduct proceedings in court for anyone other than  
himself.

23 *United States v. Onan*, 190 F.2d 1, 6 (8th Cir.), cert. denied, 342 U.S.  
24 869 (1951). This holding was based on the old FCA, 31 U.S.C. § 232. The  
25 FCA subsequently has been amended five times. Also, this decision was  
26 rendered far before the Ninth Circuit finding that an FCA claim is an

1 assignable fraud claim. Citing *Onan*, another court held as dicta that  
2 a *qui tam* action filed by a pro se litigant should be dismissed unless  
3 an attorney is retained. *Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2nd  
4 Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). This dicta is not binding  
5 on this Court.

6 Assignment of a claim places the assignee in the shoes of the  
7 assignor. Essentially, the claim becomes the assignee's claim. An  
8 assignee may litigate his own claim if he wishes. In light of the Ninth  
9 Circuit's view that FCA claims are fraud claims assigned by the  
10 Government to the private litigant when the Government declines to  
11 intervene, Trice is allowed to proceed pro se.

12 **VII. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6):**

13 **STATUTE OF LIMITATIONS**

14 WHC also filed a Motion to Dismiss Claims in Count 1 of Carbaugh's  
15 Third Amended Complaint Predating March 19, 1999 as prohibited by the  
16 statute of limitations.

17 The FCA establishes time limitations within which an action must be  
18 brought. A civil FCA action may not be brought:

19 (1) More than 6 years after the date on which the violation of  
20 § 3729 is committed, or

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

whichever occurs last.

31 U.S.C. § 3731(b)(1) and (2). The Ninth Circuit has held that the  
tolling provision applicable to an "official of the United States charged

1 with responsibility to act in the circumstances" in § 3731(b)(2) also may  
2 apply to a *qui tam* plaintiff. *United States ex rel. Saaf v. Lehman*  
3 *Bros.*, 123 F.3d 1307, 1307 (9th Cir. 1997); *Hyatt*, 91 F.3d at 1216.  
4 Other courts have found that the tolling provision does not apply to *qui*  
5 *tam* plaintiffs. *United States ex rel. Amin v. George Washington*  
6 *University*, 26 F. Supp. 2d 162, 172-73 (D.D.C. 1998).

7 This Court need not address whether the tolling provision  
8 applies to Carbaugh. Carbaugh's own Complaint alleges knowledge of FCA  
9 violations more than three years prior to the filing of the original  
10 Complaint on March 19, 1996. For example, Carbaugh alleges that he  
11 "attempted to disclose the fraud to external government sources" in 1991.  
12 Third Amended Compl. at ¶ 114. Carbaugh also alleges he notified a DOE  
13 staff accountant and others outside of WHC "of improperly applied  
14 overhead rates charged by WHC" in July, 1992. *Id.* at ¶¶ 115 and 116.  
15 Carbaugh's own allegations show that he knew of allegedly fraudulent acts  
16 committed by Defendants more than three years prior to filing this  
17 action.

18 Carbaugh argues that applicability of an equitable tolling provi-  
19 sion, such as the FCA's provision, is not appropriate for determination  
20 on a Rule 12(b)(6) motion and that, at a minimum, Carbaugh is entitled  
21 to discovery to prove he is entitled to the tolling period. However, the  
22 allegations in his Complaint preclude any reasonable argument that the  
23 tolling provision would apply. *Cf. Supermail Cargo, Inc. v. United*  
24 *States*, 68 F.3d 1204, 1206 (9th Cir. 1995). While equitable tolling  
25 periods normally may be inappropriate for a 12(b)(6) motion, such is not  
26 the case here. The six year statute of limitations applies to Carbaugh's

1 Third Amended Complaint. Therefore, any claims of FCA violations by  
2 Defendants prior to March 19, 1990 are time-barred.

3 **VIII. MOTIONS TO DISMISS: INSUFFICIENCY OF SERVICE OF PROCESS**

4 WHC and BCSR both argue that Trice's Second Amended Complaint should  
5 be dismissed for insufficiency of service of process because service was  
6 untimely and was not effected on an appropriate agent. They further  
7 argue that his egregious errors in this regard support a dismissal with  
8 prejudice. BCSR also argues that Trice's attempt to serve BCSR by mail  
9 is inadequate even if it were timely because special service requirements  
10 attach to service upon corporations.

11 Fed. R. Civ. P. 12(b)(2) and 12(b)(5) allow an action to be  
12 dismissed for lack of jurisdiction over the person or for insuffi-  
13 ciency of service of process, respectively. "A federal court is  
14 without personal jurisdiction over a defendant unless the defendant has  
15 been served in accordance with Fed. R. Civ. P. 4." *Benny v. Pipes*,  
16 799 F.2d 489, 492 (9th Cir. 1986), cert. denied, 484 U.S. 870 (1987),  
17 citing *Jackson v. Hayakawa*, 692 F.2d 1344, 1347 (9th Cir. 1982). Fed.  
18 R. Civ. P. 4 provides that "[a] summons shall be served together with a  
19 copy of the complaint. The plaintiff is responsible for service of a  
20 summons and complaint within the time allowed under subdivision  
21 (m) . . . ." FED. R. CIV. P. 4(c)(1). Service of the summons and  
22 complaint must be made upon a defendant within 120 days after the  
23 filing of the complaint. *Id.* at 4(m). Failing that, the Court  
24 "shall dismiss the action without prejudice as to that defendant or  
25 direct that service be effected within a specified time" upon motion  
26 by a party. *Id.* If the Plaintiff shows good cause for the failure,

1 the Court shall extend the time for service for an appropriate  
2 period. *Id.*

3 To avoid costs of serving the summons, "the plaintiff may notify  
4 . . . a defendant of the commencement of the action and request that the  
5 defendant waive service of a summons." FED. R. CIV. P. 4(d)(2). The  
6 notice and request shall be in writing, addressed to an officer or  
7 appropriate agent of a corporate defendant, dispatched through first  
8 class mail or other reliable means, accompanied by a copy of the  
9 complaint, and shall allow the defendant a reasonable time to return  
10 the waiver (at least 30 days from the date on which the request is  
11 sent). *Id.* If a waiver of service is not obtained from a corporation,  
12 service shall be effected pursuant to local law, or by delivering a  
13 copy of the summons and complaint to an appropriate officer or agent  
14 of the company and by also mailing a copy to the defendant if the statute  
15 authorizing the agent to receive service so requires. FED. R. CIV. P.  
16 4(h)(1).

17 Rule 4 is a flexible rule that should be liberally construed if a  
18 party receives sufficient notice of the complaint; however, neither  
19 "actual notice nor naming the defendant in the complaint provides  
20 personal jurisdiction without substantial compliance with Rule 4."  
21 *Benny*, 799 F.2d at 492 (citations omitted). Dismissal based on failure  
22 to comply with Rule 4 generally is not justified absent a showing of  
23 prejudice. *United Food & Commercial Workers Union Locals 197, 373, 424,*  
24 *588, 775, 839, 870, 1119, 1179 and 1532 v. Alpha-Beta Co.*, 736 F.2d 1371,  
25 1382 (9th Cir. 1984). Thus, dismissal of a complaint is not required in  
26 every instance where there is a failure to comply with Rule 4(d)'s

1 technical requirements. *Borzeka v. Heckler*, 739 F.2d 444, 446 (9th Cir.  
2 1984); *see, also, Whale v. United States*, 792 F.2d 951 (9th Cir. 1986).  
3 Failure to comply with Rule 4(d) is excusable and does not require  
4 dismissal of the complaint if the following four factors are present:

5 (a) the party that had to be served personally received actual  
6 notice, (b) the defendant would suffer no prejudice from the  
7 defect in service, (c) there is a justifiable excuse for the  
failure to serve properly, and (d) the plaintiff would be  
severely prejudiced if his complaint was dismissed.

8 *Borzeka*, 739 F.2d at 447. A factor a court may consider when determining  
9 whether there was a justifiable excuse for failure to serve properly is  
10 a plaintiff's pro se status. *Id.* at 448 fn.2.

11 The lengthy, detailed Motions and briefs submitted by both WHC and  
12 BCSR in relation to Trice's Second Amended Complaint show the parties who  
13 had to be served personally received actual notice of Trice's suit.  
14 While both Defendants state generally that they were prejudiced by  
15 Trice's technically improper service, neither Defendant argues any  
16 specific instance or example of prejudice. The Court also notes that  
17 Trice is a pro se Plaintiff, and made a good faith attempt to properly  
18 serve Defendants by inquiring at the District Court Executive's office  
19 about how to effect service. While reliance upon employees of the  
20 District Court Executive for substantive legal advice is not an excuse,  
21 *see, e.g., Strock v. VanHorn*, 919 F. Supp. 172, 173 (E.D. Pa. 1996), the  
22 office is a natural place to which a pro se plaintiff might turn for  
23 instructions about how to serve a party. Finally, it appears Trice could  
24 raise arguments addressing severe prejudice if his Complaint were  
25 dismissed. The Court notes that, assuming *arguendo* Trice's Complaint  
26 were dismissed pursuant to Rule 4, such dismissal would be without

1 prejudice. A dismissal with prejudice is not warranted on a non-  
2 substantive issue such as failure to technically comply with Rule 4, and  
3 Rule 4 does not contemplate a dismissal with prejudice. Thus, the Court  
4 finds that WHC and BCSR received sufficient notice of Trice's Complaint,  
5 that they made no showing of prejudice, and that Trice's Complaint is  
6 deemed served on WHC and BCSR.

7 **VIII. BCSR'S MOTION TO DISMISS COUNT 1 OF TRICE'S COMPLAINT**

8 Count 1 of Trice's Second Amended Complaint alleges that WHC and  
9 BCSR violated the False Claims Act, 31 U.S.C. §§ 3729(a)(1) and (2).  
10 BCSR argues that Trice wholesale copied Carbaugh's Second Amended  
11 Complaint. Since Carbaugh's Second Amended Complaint was against WHC and  
12 FDH, not BCSR, Trice's copying results in allegations against BCSR  
13 insufficient to meet Rule 9(b) specificity requirements. In response,  
14 Trice alleges that BCSR was a full participating bid partner with WHC in  
15 a 1986-87 management contract bid. He also argues "they were intimately  
16 aware of over-liquidation status" and requested and received payment  
17 knowing that the reporting of their activities was distorted and  
18 incorrect. Plaintiff's Memorandum in Opposition to Defendants' Motions  
19 to Dismiss Plaintiff Trice's Second Amended Complaint at 7.

20 Federal Rule of Civil Procedure 9(b) provides that "[i]n all  
21 averments of fraud or mistake, the circumstances constituting fraud or  
22 mistake shall be stated with particularity. Malice, intent, knowledge  
23 and other condition of mind of a person may be averred generally." A  
24 pleading is sufficient under Rule 9(b) if it identifies the circumstances  
25 of the alleged fraud such as the time, place, and nature of the alleged  
26 fraudulent activities. *Moore v. Kayport Package Express, Inc.*, 885 F.2d

1 531, 540 (9th Cir. 1989) citing *Wool v. Tandem Computers, Inc.*, 818 F.2d  
2 1433, 1439 (9th Cir., 1987). Rule 9(b) is properly applied to FCA  
3 actions because such matters involve claims of fraud. *United States ex*  
4 *rel. Roby v. Boeing Co.*, 184 F.R.D. 107, 109 (S.D. Ohio 1998).  
5 Furthermore, "numerous courts have applied Rule 9(b)'s particularity  
6 requirement, without modification, in addressing a motion to dismiss a  
7 qui tam complaint under Rule 9(b)." *California ex rel. Mueller v.*  
8 *Walgreen Corp.*, 175 F.R.D. 631, 636 (N.D. Cal. 1997) (citations omitted).  
9 Where more than one defendant is named, Rule 9(b) mandates that the  
10 fraudulent activity of each defendant be identified with particularity.  
11 *Lancaster Comm. Hospital v. Antelope Valley Hospital*, 940 F.2d 397, 405  
12 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992). If the plaintiff  
13 requests leave to amend, such leave should be granted with "extreme  
14 liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074,  
15 1079 (9th Cir. 1990).

16 Trice copied all of Carbaugh's Third Amended Complaint with  
17 virtually no substantive change. Carbaugh's Third Amended Complaint  
18 refers generally to "Defendants" when describing his allegations against  
19 WHC and FDH. The general term "Defendants" works well for Carbaugh  
20 because both WHC and FDH were prime contractors at Hanford and served in  
21 the exact same role. In fact, FDH assumed all of WHC's accounting  
22 systems at issue. However, BCSR was a subcontractor, a fact that Trice  
23 recognizes. Trice Opposition at 6. No specific allegations are before  
24 the Court that BCSR had a direct contractual relationship with the  
25 government or that it directly submitted claims for payment to the  
26 Government. Therefore, BCSR may be liable under the FCA only with

1 respect to its specific conduct that causes a prime contractor to submit  
2 a false claim. *United States v. Bornstein*, 423 U.S. 303, 309, 313  
3 (1976). Specific conduct of a subcontractor must be alleged. *Id.*

4 BCSR correctly asserts that only three paragraphs in Trice's Second  
5 Amended Complaint mention it by name, excluding allegations pertaining  
6 to Trice's FCA retaliation and state law claims. Trice Compl. at ¶¶ 16,  
7 71, 72. Trice's most specific allegation against BCSR is made in  
8 paragraph 16, when he states that "BCSR knowingly modified the FDS . . .  
9 for WHC to systematically over-estimate labor costs, and made false and  
10 fraudulent statements concerning the function of the FDS and the  
11 statements it produced [to federal agencies]." As discussed in Sections  
12 III and XI of this Order, an FCA claim may only address "a call upon the  
13 government fisc," which includes a direct claim for payment, underlying  
14 fraud tainting every claim for payment, or a statutorily-required false  
15 certification of accuracy that is a predicate to payment. Trice's  
16 general assertion that BCSR knowingly modified the FDS and made false  
17 and/or fraudulent statements concerning its function does not satisfy an  
18 FCA claim. The FCA does not address all possible illegal action, but  
19 rather only some form of a claim for payment. Trice does not allege that  
20 BCSR's modification resulted in a claim for payment being submitted to  
21 the Government by BCSR, nor that its alleged false and fraudulent  
22 statements were certifications required by statute as prerequisites to  
23 receive a contract or funds.

24 Trice's other two allegations against BCSR in relation to Count 1  
25 have no legal import. Trice alleges WHC and BCSR submitted Cost  
26 Accounting Board Disclosure Statements in connection with each bid to

1 receive a management contract. However, BCSR never received a management  
2 contract. BCSR was always a subcontractor. Also, Trice alleges BCSR  
3 collaborated with WHC in 1986 for its Consolidated Management Contract.  
4 Trice Compl. at ¶ 73. There is no relationship between BCSR's alleged  
5 collaboration with WHC and its potential liability under an FCA claim.  
6 Even if there were, the statute of limitations would preclude this claim.  
7 See, supra at § VII. Again, an FCA claim must allege a claim for  
8 payment, or a requisite certification as a predicate for a claim for  
9 payment, in order to succeed. Trice's Second Amended Complaint does not  
10 make any such allegations against BCSR with the specificity required by  
11 Rule 9(b).

#### 12 IX. BCSR'S MOTION TO DISMISS COUNT 2 OF TRICE'S COMPLAINT

13 Count 2 of Trice's Second Amended Complaint alleges retaliation by  
14 WHC and BCSR against Trice in violation of the False Claims Act, 31  
15 U.S.C. § 3730(h). BCSR argues that Trice does not tie any actions by  
16 BCSR to alleged retaliation for activities protected by the FCA, nor does  
17 Trice allege that BCSR knew he was furthering an FCA claim against BCSR.  
18 Therefore, Trice's claim should be dismissed pursuant to Fed. R. Civ. P.  
19 12(b)(6). In response, Trice asserts that BCSR participated in  
20 retaliation by not warning Trice that a layoff of WHC/BCSR staff was  
21 forthcoming, and by laying off Trice while retaining someone less  
22 qualified than he.

23 The FCA provides in relevant part as follows:

24 Any employee who is discharged, demoted, suspended, threatened,  
25 harassed, or in any other manner discriminated against in the  
26 terms and conditions of employment by his or her employer  
because of lawful acts done by the employee on behalf of the  
employee or others in furtherance of an action under this

1 section, including investigation for, initiation of, testimony  
2 for, or assistance in an action filed or to be filed under this  
section, shall be entitled to all relief necessary to make the  
employee whole.

3 31 U.S.C. § 3730(h).

4 A plaintiff must allege three elements to sustain a § 3730(h) claim:

5 (1) the employee was engaging in conduct protected under the FCA, (2) the  
6 employer knew that the employee was engaging in such conduct, and (3) the  
7 employer discriminated against the employee because of his protected  
8 conduct. *Hopper*, 91 F.3d at 1269. A plaintiff must be investigating  
9 matters which are calculated or reasonably could lead to a viable FCA  
10 action in order to be protected against retaliation under the FCA. *Id.*  
11 Also, an employer must be aware that an employee is investigating fraud  
12 in order to be liable under the FCA--otherwise, the employer cannot  
13 possess the retaliatory intent required. *Id. citing Robertson v. Bell*  
14 *Helicopter Textron*, 32 F.3d 948, 952 (5th Cir. 1994), cert. denied, 513  
15 U.S. 1154 (1995). Frequent written or oral complaints about a practice,  
16 or activism to encourage an employer to commence or cease a practice, is  
17 not equivalent to investigating fraud under the FCA. *Hopper*, 91 F.3d at  
18 1269.

19 In the "History of Mr. Trice's Employment at Hanford" section of  
20 Trice's Second Amended Complaint, BCSR warrants only a mention. He  
21 merely identifies two BCSR employees who supervised him in the final  
22 position he held at Hanford. Trice Compl. at ¶ 105. In the subsequent  
23 "The Defendants' Harassment and Retaliation Against the Relator" section,  
24 Trice discusses WHC's and BCSR's alleged retaliation. *Id.* at ¶ 114-122.  
25 BCSR is named in only one paragraph in this section. *Id.* at ¶ 121. In  
26 this paragraph, Trice never alleges that BCSR knew he was investigating

1 or planning an FCA claim. Trice alleges only one activity that might  
2 disclose to either employer that he was planning on revealing their  
3 financial information: On January 23, 1995, Trice wrote a letter to the  
4 Secretary of the Department of Energy stating that he planned to disclose  
5 information about "the discrimination and the financial integrity of  
6 WHC." *Id.* at ¶ 121. The letter was copied to several individuals,  
7 including the President of WHC. BCSR apparently neither was copied on  
8 nor mentioned in the letter, and the letter appears to be sent before  
9 Trice was employed by BCSR.<sup>2</sup> Trice's response to BCSR's Motion contains  
10 his most in-depth treatment of BCSR. However, his response simply  
11 alleges how BCSR participated in his retaliation. It offers no reason  
12 for retaliation.

13 The Plaintiff bears the burden of alleging the elements of a claim.  
14 A retaliation claim under the FCA has three elements. The second  
15 element, knowledge by the employer that the Plaintiff was engaging in  
16 conduct protected under the FCA, never is alleged against BCSR. Further-  
17 more, the third element, that the employer discriminated against the  
18 employee because of his protected conduct, never is alleged. While Trice  
19 argues that BCSR engaged in discriminatory conduct, he presents no nexus  
20 between the discriminatory conduct and any actions taken in pursuit of  
21 an FCA claim. Accordingly, Count 2 of Trice's Second Amended Complaint  
22 is dismissed under Rule 12(b)(6).

---

23  
24 <sup>2</sup>Trice began his employment at BCSR sometime during 1995. Though  
25 unclear when, he began working for BCSR, in addition to his employment  
26 with WHC, sometime in the spring or summer of 1995.

1 BCSR argues that this Court should decline to exercise supple-  
2 mental jurisdiction over the state law claims alleged in Trice's  
3 Second Amended Complaint if the claims arising under federal law are  
4 dismissed. Counts 1 and 2 of Trice's Complaint, as relating to BCSR, are  
5 dismissed.

6 Supplemental jurisdiction allows a federal district court with  
7 original jurisdiction over a matter to consider closely related claims  
8 arising under state law. The relevant statute provides as follows:

9 [I]n any civil action of which the district courts have  
10 original jurisdiction, the district courts shall have  
11 supplemental jurisdiction over all other claims that are so  
12 related to claims in the action within such original  
13 jurisdiction that they form part of the same case or  
controversy under Article III of the United States  
Constitution. Such supplemental jurisdiction shall include  
claims that involve the joinder or intervention of additional  
parties.

14 28 U.S.C. § 1367(a). It is within a district court's discretion to  
15 decline to exercise supplemental jurisdiction in several instances,  
16 including when a claim raises a novel or complex issue of state law, a  
17 claim substantially predominates over the claims over which the district  
18 court has original jurisdiction, the district court has dismissed all  
19 claims over which it has original jurisdiction, or when compelling  
20 reasons for declining jurisdiction arise in exceptional circumstances.

21 28 U.S.C. § 1367(c).

22 Pendent party jurisdiction is included in supplemental jurisdiction.  
23 It allows a federal court to hear claims against additional parties over  
24 whom it otherwise would not have jurisdiction because the claims arise  
25 from a common nucleus of operative fact as the claims over which the  
26 court has original jurisdiction. Pendent party jurisdiction is

1 specifically contemplated by § 1367(a): "Such supplemental jurisdiction  
2 shall include claims that involve the joinder or intervention of  
3 additional parties."

4 Here, the federal law claims against BCSR are dismissed. The  
5 dismissals deprive this Court of original jurisdiction over BCSR.  
6 However, the Court has original jurisdiction over Trice's federal law  
7 claims against WHC, one of which is the FCA retaliation claim that arises  
8 from a common nucleus of operative fact with the state law claims against  
9 BCSR. The intensive focus on the FCA claims by all parties to date  
10 indicates federal, rather than state, law concerns dominate. The Court  
11 finds no complex state law issues or exceptional circumstances exist  
12 to support declining to exercise supplemental jurisdiction. Indeed,  
13 § 1367 and the interests of judicial economy support exercise of  
14 this Court's supplemental jurisdiction over Trice's state law claims  
15 against BCSR.

16 **IX. MOTION TO STRIKE DECLARATIONS OF JEFFREY SPRUNG**

17 Defendants WHC and FDH jointly move to strike two Declarations by  
18 Carbaugh's counsel, Jeffrey Sprung. Declaration of Jeffrey T. Sprung  
19 pursuant to Fed. R. Civ. P. 56(f) and in Opposition to Defendants' Motion  
20 for Partial Summary Judgment, Ct. Rec. 189; Declaration of Jeffrey T.  
21 Sprung in Support of *Qui Tam* Plaintiff's Memorandum in Opposition to  
22 Defendants' Motion to Dismiss, Ct. Rec. 99. Defendants argue that Mr.  
23 Sprung is an attorney who lacks personal knowledge of the documents  
24 attached to his Declarations--at best, the Declarations affirm the  
25 attachments are true and correct copies of what Mr. Carbaugh gave him.  
26 Since the Affidavits cannot authenticate the attached documents, the

1 documents offered as exhibits do not satisfy the Rules of Evidence and  
2 may not be considered in support of Carbaugh's Opposition to the  
3 Defendants' Motions for Summary Judgment.

4 In response, Mr. Carbaugh submits a Declaration authenti-  
5 cating exhibits B through J and Q through T to the January 6, 2000  
6 Sprung Declaration based on his personal knowledge. The Declaration  
7 also authenticates public documents taken from government web  
8 sites, which are admissible under Fed. R. Evid. 901(b)(7). Exhibits M  
9 through O. The Declaration authenticates Exhibit L as a document  
10 Carbaugh obtained from the FDH computer information system after  
11 his employment ceased. Carbaugh asks the Court to take judicial  
12 notice of the remainder of the attachments to the January 6, 2000  
13 Sprung Declaration as official government records. Exhibits A, K and T.  
14 Finally, Carbaugh argues that paragraphs 23-25 of the January 6,  
15 2000 Sprung Declaration do not introduce exhibits, but rather state  
16 the basis for Carbaugh's Rule 56(f) request for discovery. Defendants  
17 have no basis for striking these paragraphs. Carbaugh does not  
18 separately oppose the Motion to Strike Mr. Sprung's August 9, 1999  
19 Declaration. However, one document attached to the August 9, 1999  
20 Declaration also is attached to the January 6, 2000 Sprung Declaration,  
21 and Carbaugh's Declaration attempts to authenticate it. Carbaugh  
22 argues the other document attached to the August 9, 1999 Declaration,  
23 the Form 2000 Suspected Irregularity Referral Form, is an official  
24 government report of which the Court can take judicial notice. *Qui Tam*  
25 Plaintiff Carbaugh's Memorandum in Opposition to Motion to Strike  
26 Declaration at 6.

1           The Court finds Exhibits B and C admissible pursuant to Fed. R.  
2 Evid. 901(b)(1) and 1003. The Court finds Exhibits D through J, Exhibit  
3 L, and Exhibits Q through S are admissible pursuant to Fed. R. Evid.  
4 901(b)(1) and 801(d)(2)(A). Exhibits M through O also are admissible  
5 pursuant to Fed. R. Evid. 901(b)(7) and 801(d)(2)(A) and (C). The Court  
6 takes judicial notice pursuant to Fed. R. Evid. 201 of Exhibit P.  
7 Exhibits A, K, T and Exhibit A to the August 9, 1999 Sprung Declaration  
8 present a more difficult question. Exhibit T shall be discussed first.

9           Portions of Exhibit T are admissible. Bates Stamp Numbers 102001  
10 through 102003, 102006 through 102011, 102013, 102017, 102018, the  
11 document immediately following Number 102018, and 102200 are documents  
12 of which Mr. Carbaugh has personal knowledge pursuant to Fed. R. Evid.  
13 901(b)(1). All of these documents also appear admissible under Fed. R.  
14 Evid. 801(d)(2). However, Plaintiff Carbaugh argues that Bate Stamp  
15 Number 102004 of Document T, as well as Exhibits A, K, and the Form 2000  
16 Referral, are documents of which it is appropriate this Court take  
17 judicial notice. Fed. R. Evid. 201(b) allows a court to take judicial  
18 notice of a fact that either is "generally known within the territorial  
19 jurisdiction of the trial court" or "capable of accurate and ready  
20 determination by resort to sources whose accuracy cannot be reasonably  
21 be questioned." These documents do not contain generally known facts,  
22 nor is the Court able to easily ascertain the accuracy of these  
23 documents. In his Complaint, Carbaugh himself questions the knowledge  
24 and accuracy of the DOE's Richland office. See, e.g., Carbaugh's Third  
25 Amended Complaint at ¶¶ 64, 69, 73. All documents of which Carbaugh  
26 requests the Court to take judicial notice are generated by the DOE's

1 Richland office except for the Form 2000 Referral. None of these  
2 documents are official public records, nor do they bear signatures and  
3 seals that might certify their authenticity. The absence of signatures,  
4 seals, or indicia that these documents are authorized or required to be  
5 recorded as public records indicate that Fed. R. Evid. 803(8), 901(b)(7),  
6 and 902(b) do not apply. Therefore, the Court finds Mr. Carbaugh's and  
7 Mr. Sprung's Declarations insufficient to render Exhibits A, K, Bate  
8 Stamp Number 102004 of Exhibit T, and the Form 2000 Referral admissible.  
9 All other Exhibits and paragraphs 23-25 of Sprung's 1/6/00 Declaration  
10 shall be considered by the Court.

11 **X. WHC'S MOTION FOR SUMMARY JUDGMENT AGAINST**

12 **CARBAUGH'S THIRD AMENDED COMPLAINT--COUNT 1**

13 WHC moves for summary judgment on Count 1 of Carbaugh's Third  
14 Amended Complaint on the grounds that WHC never used estimated labor  
15 costs, such as those generated by application of the Absence Adder, to  
16 obtain payment from the DOE. Through several affidavits, WHC declares  
17 that its labor costs incurred under its Hanford Management Contract were  
18 reimbursed through use of a letter of credit arrangement. *See, e.g.,*  
19 *Decl. of Ernest P. Vodney at ¶ 8.* A special bank account established at  
20 U.S. Bank held the funds disbursed through the letter of credit. *Id.*  
21 This account had various designated sub-accounts, including a payroll  
22 account from which direct labor costs were paid. *Id.* WHC employees all  
23 submitted physical, and later electronic, timecards that reflected the  
24 employee's actual paid hours worked, including regular, overtime,  
25 vacation, sick leave, holiday, and other paid absence hours. *Decl. of*  
26 *Janyce M. Shelt at ¶¶ 7(a) and 8.* The payroll department calculated the

1 net salary owed to an employee, as well as statutory withholdings and  
2 voluntary deductions, based upon these employee timecard submissions.  
3 Shelt Decl. at 7(b) through 7(c). The letter of credit was drawn down  
4 in an amount to cover only these actual payroll costs--the DOE paid WHC  
5 only its actual labor costs, represented by actual payroll costs, which  
6 did not include Absence Adder or other estimated calculations. Shelt  
7 Decl. at 7(e) through 7(h) and ¶ 6. This payroll system was the only  
8 method used by WHC to request or recover payment from the DOE for labor  
9 costs under the contract. Shelt Decl. at ¶ 5; Vodney Decl. at ¶ 10.

10 The Absence Adder was used as part of the Financial Data System at  
11 the Hanford site. Decl. of Richard A. Pouley at ¶ 6. The Financial Data  
12 System [FDS] used estimated costs, including estimated labor costs  
13 calculated in part by application of the Absence Adder, to evaluate a  
14 project's performance and to plan future work. *Id.* These estimated  
15 costs were separate from the payroll system, and were not used to draw  
16 down labor costs from the DOE letter of credit. Pouley Decl. at ¶ 6 and  
17 ¶ 14.

18 Carbaugh makes two arguments in response to the Motion and  
19 supporting Declarations. First, he argues that a Motion for Summary  
20 Judgment is inappropriate at this time because he did not have an  
21 opportunity for Fed. R. Civ. P. 56(f) discovery. Fed. R. Civ. P. 56  
22 governs motions for summary judgment, and Rule 56(f) addresses one  
23 instance in which a court may refuse or continue a motion for summary  
24 judgment to permit various forms of discovery:

25 Federal Rule of Civil Procedure 56(f) allows, but does not  
26 require, a district court to grant a continuance when a party  
opposing summary judgment wishes to conduct further discovery.

1 Ordinarily, summary judgment should not be granted when there  
2 are relevant facts remaining to be discovered, but the party  
3 seeking a continuance bears the burden to show what specific  
4 facts it hopes to discover that will raise an issue of material  
5 fact.

6 *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades*  
7 *District Council*, 817 F.2d 1391, 1395 (9th Cir. 1987). In support of  
8 denying or continuing summary judgment, Carbaugh cites to several cases  
9 finding summary judgment inappropriate when the relevant facts were  
10 exclusively in the control of the opposing party and when a defendant had  
11 not answered pending discovery requests. *Weir v. Anaconda Co.*, 773 F.2d  
12 1073, 1081 (10th Cir. 1985); *Visa International Service Assn. v. Bank*  
13 *Card Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986).

14 The Court makes two observations in light of Plaintiff's arguments.  
15 First, limited discovery was permitted by the Court prior to Defendants'  
16 summary judgment motions. On September 13, 1999, the Court held that  
17 "discovery in this matter shall be limited to information reasonably  
18 related to the calculation, application, and use of the Absence Adder"  
19 until January 19, 2000 (the date scheduled for oral argument on  
20 Defendants' Motions). September 14, 1999 Order, Ct. Rec. 122, at ¶ 6.  
21 The parties informed the Court that document discovery could include up  
22 to 15 million documents. Therefore, the Court prohibited requests  
23 for production of documents until March 1, 2000, but allowed all  
24 other permissible forms of discovery. *Id.* Defendants assert, and  
25 Plaintiff does not controvert, that Carbaugh did not engage in any  
26 discovery during the intervening four months. Therefore, Carbaugh's  
argument that he did not have an opportunity for Rule 56(f) discovery  
before summary judgment motions were filed is overstated. He had an

1 opportunity to propound discovery regarding the calculation, application,  
2 and use of the Absence Adder--a key element to his complaint. The  
3 instant situation is unlike one in which discovery requests are pending  
4 when defendants file a summary judgment motion. In fact, permissible  
5 discovery was not attempted.

6 Second, *qui tam* litigation does not present a situation where  
7 the relevant facts are exclusively in control of the opposing party.  
8 *Cf. Weir*, 773 F.2d at 1081. *Qui tam* plaintiffs are allowed to bring  
9 suit on behalf of the government due to their unique "insider" knowledge.  
10 For example, a relator may not bring a suit based upon public  
11 disclosure. 31 U.S.C. § 3730(e)(4)(A). Instead, a relator must be a  
12 "original source" who has direct and independent knowledge of the  
13 information on which the allegations are based. 31 U.S.C. § 3720(e)  
14 (4)(B). It is assumed that a *qui tam* plaintiff, while perhaps not  
15 possessing extensive documents or testamentary evidence, can declare  
16 facts in opposition to a motion for summary judgment from his own  
17 personal knowledge.

18 Carbaugh also argues that summary judgment is inappropriate because,  
19 even if the draw downs for labor costs submitted by the payroll  
20 department were accurate, they nonetheless constitute a false claim under  
21 the FCA because each claim for payment submitted under a fraudulently  
22 obtained contract is tainted. *See United States, ex rel. Marcus v. Hess*,  
23 317 U.S. 537 (1943); *United States v. Neifert-White*, 390 U.S. 228 (1968).

24 In *Marcus*, the court considered a contract obtained through a  
25 collusive bidding scheme. Contractors in the Pittsburgh area conspired  
26 to rig bidding on certain projects by privately meeting to average the

1 prospective bids that might have been submitted by each contractor, and  
2 choosing one contractor to submit a bid for an averaged amount while all  
3 others submitted higher estimates. *Marcus*, 317 U.S. at 539 fn.1. The  
4 court found that contracts awarded under this process were violations of  
5 the predecessor statute to the FCA because bidding for the contract was  
6 a federal requirement, and "many if not most of the respondents certified  
7 that their bids were 'genuine and not sham or collusive.'" *Id.* at 543.

8 The court held:

9       The government's money would never have been placed in the  
10       joint fund for payment to respondents had its agents known the  
11       bids were collusive. By their conduct, the respondents thus  
12       caused the government to pay claims of the local sponsors in  
13       order that they might in turn pay respondents under contracts  
14       found to have been executed as the result of the fraudulent  
15       bidding. This fraud did not spend itself with the execution  
16       of the contract. Its taint entered into every swollen estimate  
17       which was the basic cause for payment of every dollar paid by  
18       [the government] into the joint fund for the benefit of  
19       respondents.

20 *Id.*

21       In the instant case, Carbaugh alleges that WHC submitted fraudu-  
22       lently increased budget projections for the Hanford project which  
23       increased the overall budget of the project. Like *Marcus*, required  
24       certifications made during the process of awarding the contract are  
25       allegedly fraudulent, tainting the entire contract. However, unlike  
26       *Marcus*, this taint did not enter into any "swollen estimates." All  
27       claims for payment under the type of collusive bidding scheme described  
28       in *Marcus* would be inaccurate. Each contractor had differing base costs.  
29       By averaging the costs of all bids, the contractors increased the amount  
30       of the lowest bid submitted to the Government. All costs under the  
31       contract were thereby increased. There is no evidence that that is the

1 case here. Affidavits establish that the payroll draw downs were  
2 accurate, i.e., they were not improperly inflated. Carbaugh does not  
3 contest this fact. *Qui tam* Plaintiff Carbaugh's Response to Defendants'  
4 Statement of Material Fact at 2 ("Plaintiff does not allege that  
5 Defendants violated the False Claims Act by drawing down the fraudulently  
6 inflated budget monies to pay payroll or labor costs"). Rather,  
7 Plaintiff alleges WHC profited from fraudulent use of the Absence Adder  
8 "by shifting budgeted funds to avoid penalties or earned fees, by paying  
9 for unallowable costs, and by inflating its fees under the Hanford  
10 contract." *Id.* at 3. Essentially, Plaintiff alleges that improper  
11 claims were submitted under the letter of credit, and that WHC profited  
12 from its fraud by recovering incentive fees under the contract. There  
13 is no allegation that payroll draw downs, or other direct requests for  
14 payment, were "swollen."

15 The Fourth Circuit recently distinguished "false certification"  
16 cases, like the instant one, from "fraud in the inducement" cases.  
17 *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir.  
18 1999). False certification cases involve situations where receipt of a  
19 Government contract requires certification of compliance with certain  
20 conditions as a prerequisite to receipt. *Id.* at 786. Fraud in the  
21 inducement cases, on the other hand, involve fraudulent pricing such as  
22 collusive bidding and fraud surrounding the efforts to obtain the  
23 contract. *Id.* at 786-87, citing *Marcus*, 317 U.S. at 543. The instant  
24 case is a false certification case. WHC (and FDH) was required to submit  
25 an estimated budget under its Hanford Management Contract. Those budget  
26 submissions included requisite certifications, in the form of Disclosure

1 Statements, that their accounting practices were in compliance with the  
2 Cost Accounting Standards Board standards. These certifications did not  
3 increase the price of individual services received under the contract.  
4 Rather, by certifying that the accounting system was accurate, Defendants  
5 allegedly submitted a false certification that allowed them to receive  
6 and keep the contract and, ultimately, to receive unwarranted fees on the  
7 back end. This allegedly false certification is one of the bases for FCA  
8 liability. However, this false certification would not increase the cost  
9 of individual labor cost reimbursements.

10 Accordingly, WHC's Motion for Summary Judgment is granted in part.  
11 The Court finds there are no material issues of fact relating to whether  
12 WHC used the Absence Adder to draw down the DOE letter of credit for  
13 payroll or labor costs. WHC is entitled to summary judgment as a matter  
14 of law on this narrow issue. All draw downs for labor costs are  
15 eliminated from this suit.

16 WHC moves for summary judgment on Count 1 of Trice's Second Amended  
17 Compliant on the same grounds as the Motion against Carbaugh's Complaint.  
18 Trice did not file appropriate opposition. However, he agreed entirely  
19 with Carbaugh's arguments and evidence, and adopted them at oral  
20 argument. WHC's Motion for Summary Judgment on Count 1 of Trice's Second  
21 Amended Complaint is granted and denied on the same grounds and for the  
22 same reasons as the Motion against Carbaugh's Complaint.

23 **XI. FDH'S MOTION FOR PARTIAL SUMMARY JUDGMENT OR,**

24 **IN THE ALTERNATIVE, TO DISMISS PURSUANT TO RULE 12(b)(6)**

25 FDH moves for summary judgment against Carbaugh's Third  
26 Amended Complaint on substantially the same grounds as WHC. FDH submits

1 various affidavits declaring that it is reimbursed for its costs by  
2 drawing down a letter of credit established by DOE, that the payroll  
3 system does not use the Absence Adder, and that the payroll system  
4 requests draw downs for only actual labor costs incurred. Fluor's  
5 Statement of Undisputed Facts Pursuant to Local Rule 56 at ¶ 13, 20, 22.  
6 Again, Carbaugh does not contest these facts, conceding that the  
7 "Plaintiff does not allege that Defendants violated the Federal Claims  
8 Act by drawing down the fraudulently inflated budget monies to pay  
9 payroll or labor costs." *Qui tam* Plaintiff Carbaugh's Response to  
10 Defendants' Statements of Material Facts at 4.

11 Finding no material issues of fact regarding these particular  
12 allegations, the Court finds as a matter of law that FDH is entitled to  
13 summary judgment on this portion of Count 1 of Carbaugh's Third Amended  
14 Complaint. The Court finds there are no material issues of fact relating  
15 to whether FDH used the Absence Adder to draw down the DOE letter of  
16 credit for payroll or labor costs. All draw downs for labor costs are  
17 eliminated from this suit.

18 FDH argues several additional points in its Motion for Summary  
19 Judgment that are not raised by WHC. First, no one related to any of  
20 Defendants received Trice's complaint until November 4, 1999, three days  
21 after this Court's Order specified that any amended complaint be served.  
22 The same Order set all deadlines for motions to dismiss to be filed and  
23 served. Defendants lost time to prepare the motions.

24 **Damages to the United States are Not Required to Proceed with a**  
25 **Suit.** FDH briefly argues that Carbaugh cannot show any damages to the  
26 United States as a result of the alleged false claims, and therefore he

1 cannot maintain an FCA claim. Ninth Circuit case law is to the contrary.  
2 One "who submits a false claim for payment may still be liable under the  
3 FCA for statutory penalties, even if it did not actually induce the  
4 Government to pay out funds or to suffer any loss." *United States v.*  
5 *Rivera*, 55 F.3d 703, 709 (9th Cir. 1995); *see, also, United States ex*  
6 *rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 416, 421 (9th Cir.  
7 1991).

8 FDH cites a recent Supreme Court case as overruling these Ninth  
9 Circuit cases by holding that the imposition of penalties where the  
10 Government has not been harmed is violative of the Excessive Fines Clause  
11 of the Eighth Amendment of the Constitution. *United States v.*  
12 *Bajakajian*, 524 U.S. 321 (1998). However, *Bajakajian* was a criminal case  
13 in which a defendant pled guilty to failure to report exported currency,  
14 and the district court determined that the defendant was required to  
15 forfeit only a small fraction of the total improperly exported amount.  
16 The Court held that forfeitures are "fines" within the meaning of the  
17 Excessive Fines Clause if they constitute punishment for an offense.  
18 *Bajakajian*, 524 U.S. at \_\_\_\_, 118 S. Ct. at 2033. "The amount of the  
19 forfeiture must bear some relationship to the gravity of the offense that  
20 it is designed to punish" in order to comply with the Excessive Fines  
21 Clause. *Id.* at 2036 (citations omitted). In determining a constitu-  
22 tional excessiveness standard, the Court found that judgments about the  
23 appropriate punishment for an offense belong first to the legislature.  
24 *Id.* at 2037. Also, civil sanction may be considered punitive if it can  
25 be explained as serving in part to punish. *Lewis v. Commissioner*, 170  
26 F.3d 1252, 1236 (9th Cir. 1999). Factors bearing on such a finding

1 include the language of the applicable statute, the sanction's  
2 purpose(s), the circumstances in which the sanction can be imposed, and  
3 its historical context. *Id. citing Bajakajian*, 118 S. Ct. at 2033-35.

4 Congress established a "civil penalty" of not less than \$5,000 and  
5 not more than \$10,000 for each false claim in violation of the FCA in  
6 addition to treble actual damages. 31 U.S.C. § 3729(a). The language  
7 of the statute establishes the sanction for each false claim is a  
8 penalty. Unlike the mere "reporting violation" in *Bajakajian*, a  
9 violation of the FCA involves scienter and an affirmative act, i.e.,  
10 submission of a claim. A more severe remedy appears appropriate.  
11 Congress determined that this was the proper penalty, and does not seem  
12 "grossly disproportional" to a defendant's violation.

13 Plaintiffs' inability to show damages sustained by the Government  
14 does not preclude an FCA claim. The Excessive Fines Clause and  
15 *Bajakajian* do not render the FCA civil penalty unconstitutional.

16 FDH next argues that, unlike WHC, it never earned "Base," "Award,"  
17 or "Incentive" Fees under its Hanford Management Contract. Decl. of J.  
18 L. Jacobson at 3. While FDH always earned "Performance Fees" under its  
19 contract, the Complaint itself eliminates these fees from this action.  
20 Jacobson Decl. at 3; Carbaugh's Third Amended Complaint at ¶ 74 ("FDH can  
21 also earn additional 'Performance Fees'--not a part of this suit--based  
22 on meeting certain quality of performance benchmarks"). FDH argues that,  
23 since it did not receive any fee other than a Performance Fee, it is  
24 entitled to summary judgment on the portion of Count 1 that alleges  
25 excess fees were recovered under FDH's Management Contract. In response,  
26 Carbaugh cites to Exhibit M of the January 6, 2000 Sprung Declaration.

1 This Exhibit is a January 12, 1999 modification to FDH's management  
2 contract. It allows FDH to recover Incentive Fees during the 1999 fiscal  
3 year. Citing this document, Carbaugh argues that the Jacobson  
4 Declaration is incorrect. Mr. Jacobson declared that "Fluor has never  
5 had any Cost Savings Program, nor earned any kind of Incentive Fees as  
6 a result of such a program, throughout its tenure as the prime contractor  
7 at the Hanford Reservation." Jacobson Decl. at ¶ 9.

8 It appears the parties are arguing over semantics, or over technical  
9 terminology specific to the contract. Clearly, they dispute what a  
10 "Performance Fee" is in relation to what fees FDH may have received.  
11 Exhibit M also calls into question what contract modifications may have  
12 occurred on this issue. These are material questions of fact. Summary  
13 judgment on these grounds is not appropriate.

14 FDH next argues that, since the Absence Adder is not used to  
15 actually draw down the letter of credit, there is no allegation of a  
16 false claim under the FCA. FDH focuses its argument on the requirement  
17 of a claim for payment. If a claim for payment is required, and the  
18 Absence Adder did not result in any claim for payment, then FDH argues  
19 there are no claims alleged under the FCA. FDH maintains that the  
20 Absence Adder is the focus of Carbaugh's Third Amended Complaint. Once  
21 it is established that the Absence Adder was not used as a claim for  
22 payment, Count 1 fails in its entirety. The alleged pool of excess money  
23 recovered by FDH under the contract could not exist and, as previously  
24 argued, FDH could not recover excess fees under the contract.

25 A "false or fraudulent claim" is construed more broadly than  
26 Defendants suggest. "[W]here the government has conditioned payment of

1 a claim upon a claimant's certification of compliance with, for example,  
2 a statute or regulation, a claimant submits a false or fraudulent  
3 claim when he or she falsely certifies compliance with that statute or  
4 regulation." *Thompson*, 125 F.3d at 902. *See, also, Hopper*, 91 F.3d at  
5 1266 (holding violations of laws, rules and regulations do not constitute  
6 an FCA violation, but false certifications of compliance with such laws  
7 in order to receive payment are a violation).

8 In the instant case, Carbaugh alleges that Defendants were required  
9 to submit Cost Accounting Standards Board Disclosure Statements  
10 describing Defendants' cost accounting system in order to receive and  
11 keep the Hanford Management Contract. *See*, 48 C.F.R. § 52.230-1, 52.230-  
12 2, and 9903.202-1; 10 U.S.C. § 2306(a). Carbaugh contends that  
13 Defendants submitted false certifications required under these  
14 regulations and statutes by certifying that the Absence Adder was based  
15 upon projections of historical absence averages for all employees.  
16 Carbaugh Third Amended Compl. at ¶¶ 85-87. Thus, the estimated budget  
17 was falsely certified to be accurate in relation to anticipated costs.  
18 Defendants also allegedly falsely claimed that the proper liquidation  
19 base for the Absence Adder is one that includes both regular and overtime  
20 costs. *Id.* at ¶ 90.

21 Defendants were required to submit disclosure statements prior to  
22 receiving the contract. 48 C.F.R. § 9903.202-1(b)(1) ("any business unit  
23 that is selected to receive a CAS-covered contract or subcontract of \$25  
24 million or more shall submit a Disclosure Statement before award").  
25 There is no dispute that FDH was required to submit Disclosure  
26 Statements. By submitting and receiving approval on these certified

1 Disclosure Statements, Defendants received approval of their accounting  
2 practices as required by regulation, and thus were eligible to be awarded  
3 the contract.

4 Granting summary judgment as to the use of the Absence Adder in  
5 relation to direct draw downs of the letter of credit does not eliminate  
6 all false claims alleged in Count 1 of the Complaint. A false  
7 certification allegedly allowed FDH to obtain the contract and recover  
8 excess fees. Also, Plaintiff alleges Defendants submitted claims for  
9 direct draw downs for unallowable costs.

10 FDH makes an additional argument regarding allegedly false  
11 certifications. It argues that it could not violate the Truth in  
12 Negotiations Act [TINA], 10 U.S.C. § 2306A, or the False Claims Act.  
13 Under the Truth in Negotiations Act, a defense to an alleged violation  
14 is that "the United States did not rely on the defective data submitted  
15 by the contractor." 10 U.S.C. § 2306A(e)(2). FDH argues that the  
16 Government could not have relied upon any defective data submitted by FDH  
17 because Carbaugh and Trice's original Complaint was filed in March, 1996,  
18 but FDH did not assume management of Hanford until October 1, 1996.  
19 Since the Government knew of the allegations regarding the Absence Adder  
20 and the accounting system at Hanford, it could not have relied upon  
21 submissions by FDH. Under the FCA, many courts have found that an  
22 element of liability for a false claim, or false statement in support of  
23 a claim, is whether the claim was material to the Government's decision  
24 to award the contract. For example, allegedly false statements made in  
25 connection with an application are not material if the Government knew  
26 of allegedly false statements made but decides to grant the application

1 anyway. See *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d  
2 1013 (7th Cir. 1999). FDH argues these reliance and materiality factors  
3 cannot be present here.

4 The *Lamers* court considered similar false certifications of  
5 compliance with federal statutes. A public school district that  
6 previously contracted with a private bus line to provide school bus  
7 service for its students attempted to switch to use of public buses  
8 for student transportation. The public transit system received  
9 funding under the Federal Transit Act. In order to receive such funding,  
10 the city was required to certify it complied with all applicable  
11 statutes and regulations, including certifying that it did not  
12 provide school buses exclusively for transporting students and  
13 school personnel in competition with private school bus operators.  
14 *Lamers*, 186 F.3d at 1014; 49 U.S.C. § 5323(f). Early in the pilot  
15 program, the FTA was informed that certain bus routes were directly  
16 servicing schools in violation of certified compliance. During the next  
17 three years, the FTA and the City were in frequent communication  
18 regarding potential violations and on-going efforts to comply with  
19 federal regulations. The court found that alleged FCA certification  
20 violations were, in fact, "promises of future compliance that were  
21 knowingly false only if the city never intended to comply with the  
22 applicable regulations." *Id.* at 1018. Additionally, the court found  
23 that the government was fully apprised of the bus routes at issue, never  
24 complained about them, and that any untruths were immaterial. *Id.* at  
25 1019. The Court characterized any violations as "minor technical viola-  
26 tions." *Id.*

1           The instant case differs in several respects. The Disclosure  
2 Statements certified current accuracy, not future compliance. DOE was  
3 never "fully apprised" of the accounting system used by WHC and FDH, or  
4 any alleged problems with it. The only information in the Government's  
5 possession was Plaintiff's Complaint. The allegations in the original  
6 Complaint were much more conclusory than those currently before the  
7 Court, and the Government required two years to investigate the Complaint  
8 in order to determine whether it wished to intervene. FDH assumed  
9 management of Hanford on October 1, 1996, just over six months after the  
10 Complaint was filed. Also, FDH was not listed in the original Complaint.  
11 It is unclear to what extent the Government was aware of the alleged  
12 false certifications at the time FDH assumed management, and unclear  
13 whether the Government relied on FDH's certification that the accounting  
14 system was accurate. Some knowledge of what FDH was certifying can be  
15 imputed on FDH, and the Government may have assumed that changes were  
16 made if it was aware of the nature of the possible problem.

17           Reliance and materiality are questions of fact. There is insuffi-  
18 cient evidence before the Court to evaluate what the DOE knew when FDH  
19 assumed management of Hanford. Summary judgment on this ground is not  
20 appropriate.

21           Finally, FDH argues it simply could not have committed an FCA  
22 violation by falsely inflating the Hanford budget. WHC submitted the  
23 cost estimates for fiscal year 1997, the first year of FDH's management.  
24 Jacobsen Decl. at ¶ 10. Furthermore, FDH worked with the DOE to  
25 establish a new accounting system for Hanford. Starting with fiscal  
26 year 2000, the Absence Adder is applied only to regular-time hours.

1 Adamson Decl. at ¶ 6. The Court notes that FDH's declarations do not  
2 address fiscal years 1998 or 1999. The Court also notes that FDH  
3 allegedly signed Disclosure Statements relating to its Hanford Management  
4 Contract as early as July 21, 1995. Carbaugh's Third Amended Compl. at  
5 ¶ 83. FDH's offered facts do not preclude liability. Accordingly,

6 **IT IS ORDERED** that:

7 1. Defendant FDH's Motion for Waiver of Page Limitations, **Ct. Rec.**  
8 **177**, is **GRANTED**. FDH's Motion for Summary Judgment, **Ct. Rec. 165**, and  
9 Motion to Dismiss Pursuant to Rule 12(b)(1), **Ct. Rec. 173**, are **ACCEPTED**  
10 **AS FILED**.

11 2. Plaintiff Carbaugh's Motion for Waiver of Page Limitations, **Ct.**  
12 **Rec. 190**, is **GRANTED**. Carbaugh's Memorandum in Opposition to Defendants'  
13 Motions for Partial Summary Judgment, **Ct. Rec. 186**, is **ACCEPTED AS FILED**.

14 3. Defendants WHC and FDH's Joint Motion for Expedited Hearing, **Ct.**  
15 **Rec. 202**, is **GRANTED**.

16 The Court considers Defendants' Joint Motion to Strike Jeffrey  
17 T. Sprung's Declaration in Opposition to Motion for Partial Summary  
18 Judgment, attached Exhibits, and Declaration of Jeffrey T. Sprung filed  
19 8/9/99 and attached Exhibit A, **Ct. Rec. 209**, along with the rest of the  
20 Motions in this Order.

21 4. Defendant FDH's Motion to Dismiss Carbaugh's Third Amended  
22 Complaint Pursuant to Rule 12(b)(1), **Ct. Rec. 173**, is **DENIED**.

23 5. Defendant FDH's Motion for Partial Summary Judgment on Plaintiff  
24 David Carbaugh's Third Amended Complaint or, in the Alternative, to  
25 Dismiss Pursuant to Rule 12(b)(6), **Ct. Rec. 165**, is **GRANTED IN PART** and  
26 **DENIED IN PART** as delineated in Section XI. of this Order.

1           6. Defendant WHC's Motion for Summary Judgment against Carbaugh's  
2 Third Amended Complaint--Count 1, Ct. Rec. 137, is **GRANTED IN PART** and  
3 **DENIED IN PART** as delineated in Section X of his Order.

4           7. Defendant WHC's Motion to Dismiss Claims in Count 1 of Carbaugh's  
5 Third Amended Complaint predated March 19, 1990 as Prohibited by the  
6 Statute of Limitations, Ct. Rec. 143, is **GRANTED**.

7           8. Defendants WHC and FDH's Joint Motion to Strike Jeffrey T.  
8 Sprung's Declaration in Opposition to Motion for Partial Summary  
9 Judgment, attached Exhibits, and Declaration of Jeffrey T. Sprung filed  
10 8/9/99 and attached Exhibit A, Ct. Rec. 209, is **GRANTED IN PART** and  
11 **DENIED IN PART** as delineated in Section IX of this Order.

12           9. Defendant WHC's Motion to Dismiss Trice's Second Amended  
13 Complaint for Lack of Subject Matter Jurisdiction and Standing, 146, is  
14 **DENIED**.

15           10. Defendant WHC's Motion for Summary Judgment against Trice's  
16 Second Amended Complaint--Count 1, Ct. Rec. 148, is **GRANTED IN PART** and  
17 **DENIED IN PART** as delineated in Section X of this Order.

18           11. Defendant WHC's Motion to Dismiss Trice's Second Amended  
19 Complaint for Improper Service, Ct. Rec. 151, is **DENIED**.

20           12. Defendant BCSR's Motion to Dismiss Plaintiff Trice's Second  
21 Amended Complaint for Insufficiency of Service of Process and Lack of  
22 Jurisdiction, Ct. Rec. 154, is **DENIED**.

23           13. Defendant BCSR's Motion to Dismiss Plaintiff Trice's *Qui Tam*  
24 Under the False Claims Act, Ct. Rec. 157, is **GRANTED**. Count 1 of Trice's  
25 Second Amended Complaint is **DISMISSED WITHOUT PREJUDICE AS TO DEFENDANT**  
26 **BCSR**.

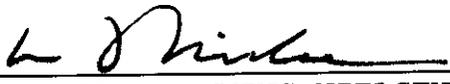
1 14. Defendant BCSR's Motion to Dismiss Plaintiff Trice's Retaliation  
2 Claim Under 31 U.S.C. § 3730(h), Ct. Rec. 160, is **GRANTED**. Count 2 of  
3 Plaintiff Trice's Second Amended Complaint is **DISMISSED WITHOUT PREJUDICE**  
4 **AS TO DEFENDANT BCSR.**

5 The District Court Executive is directed to file this Order and  
6 provide copies to counsel **AND TO** pro se Plaintiff Trice.

7 **DATED** this 1 day of March, 2000.

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WM. FREMMING NIELSEN  
CHIEF UNITED STATES DISTRICT JUDGE

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