No. 13-___

IN THE

Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; and MARC SMET,

Petitioners,

v.

UNITED STATES *EX REL.* KURT BUNK; UNITED STATES *EX REL.* RAY AMMONS; and UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Shipping Act exempts from federal antitrust laws any "agreement or activity relating to the foreign inland segment" of "through transportation" between the United States and a foreign country. 46 U.S.C. § 40307(a)(5). The question presented is whether the Fourth Circuit erred in holding, in conflict with the Ninth Circuit, that this immunity does not apply where a collusive agreement relating to the "foreign inland segment" indirectly affects prices for overall "through transportation"?

II. The False Claims Act ("FCA") provides that a person who submits to the Government a false claim for payment is liable for treble damages plus "a civil penalty of not less than $5,000." 31 U.S.C. § 3729(a)(1). Under *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), claims for payment that contain nothing untruthful may be deemed false for purposes of establishing a violation of the FCA, if submitted under a fraudulently obtained contract or in connection with some other fraudulent conduct. The question presented is whether the Fourth Circuit erred in holding, in conflict with this Court's jurisprudence and with decisions of other courts, that the FCA requires—and the Eighth Amendment's Excessive Fines Clause condones—mechanical imposition of a separate civil penalty for *each invoice* submitted to the Government (here, over 9,000), without regard to the defendant's culpability, even where the invoices are "false" only by operation of law under *Hess*?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Defendants-Appellees-Cross-Appellants below, are Gosselin World Wide Moving, N.V, Gosselin Group N.V., and Marc Smet. Gosselin World Wide Moving, N.V., which has never been a publicly-owned company, was reorganized in 2007 and renamed Gosselin Group N.V. Gosselin Group N.V. also has never been, and is not now, a publicly-owned company. The privately-owned shares of Gosselin Group N.V. are held by the company SAK Portielje, which is also not a publicly-owned company. SAK Portielje is a holding company trust with no operational activity.

Respondents, who were Plaintiffs-Appellants below, are relators Kurt Bunk and Ray Ammons, and the United States.

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OPINIONS BELOW

The Court of Appeals' opinion (Pet.App.1a) is published at 741 F.3d 390. The District Court's opinions granting petitioners' motion for a partial directed verdict (Pet.App.46a) and addressing respondents' post-trial motion for civil penalties (Pet.App.71a) can be found at 2011 U.S. Dist. LEXIS 158057 and 2012 U.S. Dist. LEXIS 18445, respectively.

JURISDICTION

The Fourth Circuit issued its decision on December 19, 2013, and denied rehearing en banc on February 14, 2014. Pet.App.167a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 40307(a) provides, in relevant part:

> The antitrust laws do not apply to — … (5) an agreement or activity relating to the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

31 U.S.C. § 3729(a)(1) provides, in relevant part:

> [A]ny person who — (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval … is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, …, plus 3 times the amount of damages which the Government sustains because of the act of that person.

STATEMENT OF THE CASE

This petition presents two distinct questions. As to each, the panel below (i) adopted statutory readings contrary to holdings of other courts; (ii) imposed substantial burdens on businesses in this country and around the world; and (iii) created rather than avoided constitutional concerns.

The case arises out of two distinct U.S. military shipping programs in which petitioners ("Gosselin") participated, leading to suits against them under the False Claims Act ("FCA"). First, the International Through Government Bill of Lading ("ITGBL") program involves shipping military household goods between the U.S. and abroad. U.S. companies subcontracted with Belgium-based Gosselin to handle the German component of international moves. The Government alleged that Gosselin and other European shippers entered into an unlawful pricing agreement for services in Germany. The Eastern District of Virginia dismissed these claims because the Shipping Act immunizes collusion on the "foreign inland segment" of international shipping. Over dissent, and in conflict with the Ninth Circuit, the Fourth Circuit reversed.

The second program, the Direct Procurement Method ("DPM"), involves the military directly contracting with European shippers to transport goods exclusively within Europe. In 2001, Gosselin won the DPM contract. Relators alleged that every invoice submitted under this 3-year contract was a false claim, because Gosselin's initial bid certified that its prices had been arrived at independently. Although Gosselin arrived at its overall price independently, a group of European shippers had

agreed on what the winning bidder would pay the others for one item of the required subcontracting work. Notwithstanding this agreement, the military twice renewed Gosselin's contract. The District Court, finding that the Government had suffered no monetary harm and there was substantial, uncontested mitigating evidence, held that imposing the FCA's $5,500 statutory minimum civil penalty for *each* of the 9,136 invoices, as Fourth Circuit precedent required, would violate the Eighth Amendment's Excessive Fines Clause because it would be grossly disproportional to Gosselin's culpability regarding the DPM contract. The panel below, hands tied by its statutory precedent, reversed by rejecting the constitutional holding.

A. The ITGBL Claims.

The shipping of goods between the United States and abroad under the ITGBL program is called "through transportation"—the goods move door-to-door from the U.S. "through" to a foreign destination, or vice versa. Pet.App.49a, 59a. "Carriers" in the United States act as general contractors with the government—here, the Department of Defense ("DOD"). Pet.App.49a, 51a. They obtain prices for each segment of the move—domestic, ocean, and foreign—and combine them and their own markup into a single "through rate." Pet.App.49a-51a. Carriers bid for specific routes, or "channels," and the bids cover six-month cycles. Pet.App.49a-50a.

Between the U.S. and Germany (the country at issue here), there are in each cycle 104 channels—52 Eastbound and 52 Westbound. Pet.App.49a-50a. In 2004, the Government alleged criminal antitrust violations as to 12 of those channels in one cycle, due

to Gosselin's directly contacting U.S. carrier Cartwright, the low through-rate bidder on those channels, convincing it to withdraw its bid, and directly pressuring other U.S. carriers not to match Cartwright's bid. Pet.App.13a. The District Court held Gosselin's conduct immune under the Shipping Act, 46 U.S.C. § 40307, but the Fourth Circuit reversed on the ground that the conduct was "aimed at the entire through transportation market, rather than just the foreign inland segment." *United States v. Gosselin World Wide Moving N.V.*, 411 F.3d 502, 510 (4th Cir. 2005) ("*Gosselin I*").

In 2008, the Government intervened in two sealed FCA *qui tam* suits against Gosselin, which raised three distinct ITGBL claims. Pet.App.15a-16a. One claim was based on the Cartwright conduct, and another alleged nearly identical conduct (in 2001) on 14 other U.S.-Germany channels, known as the Covan channels. Pet.App.47a n.1.

At issue here is a third claim, alleging that Gosselin and its European competitors had agreed to handle all ITGBL business in 2001 and 2002 using bundled (or "landed") rates, which combined packing, trucking, storage, and other German services into a single fee. Pet.App.52a, 57a. There was no allegation that charging a landed rate is itself unlawful, either in Germany or the U.S., or that the companies had agreed to charge any particular landed rate. And, unlike with the Cartwright and Covan conduct, there was no allegation that Gosselin had contacted U.S. carriers to influence the through-rate bids; rather, the landed rate agreement was limited to services for the German portion of these international moves. Pet.App.52a-53a, 56a-57a.

The Government contended that the agreement to provide services only under landed rates violated U.S. antitrust law and "had the effect of increasing the price that the United States paid," because the carriers' through-rate bids incorporating the foreign segment were higher as a result. Pet.App.56a. The Government argued that because the landed rate agreement was a "fraudulent course of conduct, all claims for payment resulting from that conduct are false as a matter of law." Pet.App.57a.

Invoking the Shipping Act, which immunizes from U.S. antitrust law collusive agreements concerning "the foreign inland segment of through transportation," 46 U.S.C. § 40307(a)(5), Gosselin moved for judgment as a matter of law on both the landed rate agreement claim and the Covan claim.[1] The District Court denied the motion as to the Covan claim, relying on *Gosselin I*, and submitted that claim to the jury, which found Gosselin not liable. Pet.App.47a n.1. But the Court granted the motion as to the landed rate agreement, which was limited to the German component of through transportation moves, *i.e.*, the "foreign inland segment," to which the immunity applies. Pet.App.64-65a.

Over Judge Shedd's dissent, the Fourth Circuit reversed this last ruling. The majority described the landed rate agreement as "materially similar" to the Cartwright conduct addressed in *Gosselin I*, because price-fixing on a foreign inland segment affects the overall "through rate." Pet.App.44a.

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[1] The District Court had earlier entered summary judgment against Gosselin as to the Cartwright channels, based on *Gosselin I*. Pet.App.18a.

B. The DPM Claims.

Qui tam relator Kurt Bunk alleged that Gosselin violated the FCA due to conduct on the separate DPM program. The Government did not intervene in this claim until the Fourth Circuit appeal.

Unlike the ITGBL program, DPM contracts involve transporting military household goods between installations entirely within Europe. Pet.App.73a-74a. The Army solicits bids from European companies and contracts with them directly. Pet.App.74a.

In 1999, DOD discovered that Bunk, who handled pricing and bidding for another DPM contractor, was significantly overcharging the Army. In response to Bunk's "abusive pricing and billing," DOD overhauled its DPM program in 2000. Pet.App.88a. Among other changes, DOD moved from regional contracts to a single DPM contract for all of Europe. Pet.App.74a. Because no one company could fulfill the new requirements by itself, the new rules anticipated significant subcontracting or joint ventures between bidders. Pet.App.91a-92a. They also required bidders to list the names and warehouse and truck capacities of subcontractors in each geographic area covered by the contract. The new program was to take effect for the 2001 DPM contract. Pet.App.74a.

To explain these and other changes, DOD met with potential bidders at an Army installation in Europe. *Id.* Immediately thereafter, the bidders met in the Army's cafeteria, discussed the necessary subcontracting, and agreed on a subcontracting price for one line item. *Id.* Each bidder then independently determined its own offer prices on all

50 other line-items as well as its own total offer price. Pet.App.90a-91a, 93a. As required, Gosselin filed with its bid a certification that it had arrived at its offer prices independently. Pet.App.76a. Gosselin was awarded the 2001 DPM contract. *Id.*

Bunk, eventually as relator, subsequently alleged that Gosselin's certification violated the FCA on the "sole basis" that Gosselin had agreed with other shippers on a subcontracting price for the one line item. Pet.App.83a-84a. Bunk reported this allegation to a DOD contracting officer, who nevertheless renewed the contract with Gosselin for a second year (and a year later it was renewed again). Pet.App.92a. Renewals depended on the Army's affirmatively determining that "[t]he exercise of the option is the most advantageous method of fulfilling the Government's need." 48 C.F.R. § 17.207(c).

A jury found that the single certification of independent pricing in Gosselin's original bid violated the FCA. Pet.App.77a, 93a. The District Court then held that each of the 9,136 invoices Gosselin had submitted under the contract had to be deemed "false" by operation of law, even though "none . . . contained any factually false information." Pet.App.93a; *see United States ex rel. Marcus v. Hess*, 317 U.S. 543-44 (1943). The District Court recognized that the number of invoices was determined by happenstance: "the number of jobs the government assigned to Gosselin over the life of the contract; and how Gosselin decided to bill those jobs." Pet.App.93a. Therefore, the court found that "the number of invoices, in and of themselves, is not reflective of Defendants' level of culpability." *Id.*

A prior Fourth Circuit case, *Harrison v. Westinghouse Savannah River Co.*, had held that a company that falsely induced approval of a subcontract must face separate penalties "for each claim for payment under" it, even though the invoices contained no distinct falsities. 176 F.3d 776, 793-94 (4th Cir. 1999). Under this precedent, the minimum statutory penalty here was $50,248,000—one $5,500 penalty for each invoice Gosselin submitted—even though the Government suffered *no* monetary harm. Pet.App.81a, 89a.[2] In fact, the District Court found "strong evidence" that Gosselin's "pricing [was] more favorable to the government than [DPM contracts] in prior years," and DOD paid "about the same or less" than it had paid to Gosselin in previous years on Gosselin's prior DPM contracts. Pet.App.89a. The court also found DOD paid only $3.3 million for the relevant line item through the life of the three-year contract, and that Gosselin's overall profit on the contract was only 4.4%—which, when applied to the relevant line item, amounted to only about $150,000. Pet.App.96a.

At the penalty phase, Relator Bunk offered to accept $24 million in penalties instead of the full $50 million. Pet.App.23a. The District Court evaluated both amounts under the Excessive Fines Clause.

After a full-day evidentiary hearing, the District Court found additional and uncontested evidence mitigating Gosselin's culpability regarding the DPM contract. Among other things, (1) the contract and

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[2] Due to inflation adjustments, the minimum statutory penalty was $5,500, and the maximum was $11,000. *See* Pet.App.22a n.10.

DOD required communications among competing bidders; (2) the subcontracting agreement on a single line item did not extend to overall bids; (3) Gosselin performed well on the contract; and (4) Gosselin designed and implemented a tracking program, under no obligation and at its own expense, that saved the Government additional money. Pet.App.90a-93a. Further, the District Court found that DOD's contract renewals despite Bunk's allegations—which necessarily increased the number of invoices—were "probative of how the government viewed the merits of Gosselin's bid, the value of the 2001 DPM contract to the government, Gosselin's performance under that contract, and the propriety of the solicitation process that resulted in that bid and contract." Pet.App.92a. The District Court also expressly found that the DPM claim was "distinct from and unrelated to" the ITGBL allegations. Pet.App.94a.

The District Court held that even a $24-million penalty would be grossly disproportionate to the gravity of Gosselin's offense and thus unconstitutionally excessive; and therefore the court did not impose a penalty. Pet.App.108a, 110a.

The Fourth Circuit reversed, holding that $24 million in civil penalties was not excessive given the intangible harm that fraud causes to the government contracting process and the general importance of "deterrence." Pet.App.40a-41a. The panel did not address any of the above evidence specific to, and mitigating, Gosselin's culpability.

REASONS FOR GRANTING THE PETITION

As to both questions that this petition presents, the panel below wrongly interpreted federal statutes in conflict with other courts, gravely impacting numerous industries in this country and beyond.

I. To avoid extraterritorial application of U.S. antitrust law in the context of international shipping, Congress enacted an immunity for collusive agreements that relate to the "foreign inland segment" of "through transportation." This ensures that foreign shippers are not brought under U.S. antitrust law simply by handling foreign components of shipping originating or terminating in the United States. But that is precisely the impact of the panel majority's construction, which squarely conflicts with that of the Ninth Circuit.

According to the panel majority here, Gosselin's participation in the "landed rate agreement," which addressed pricing for moving services exclusively within Germany, was not immune because that agreement inflated the overall cost of international shipping—and thus was not limited to just a "foreign inland segment" of through transportation. But that would be true in *every* case in which this immunity might apply, because the price of a *component* always affects the price of the *whole*. The panel majority thus effectively repealed the immunity.

The Ninth Circuit—which analyzed the same statute under materially identical circumstances and which the District Court here followed—properly immunized a pricing agreement on ITGBL services in the Philippines that was similarly incorporated into the carriers' through-rate bids. That court found the statute "clear and unambiguous" and held that it

immunized "precisely" this conduct. The decision below thus creates a clear conflict between circuits situated on two U.S. coasts, together accounting for nearly a third of the Nation's ocean shipping.

This Court often grants review when lower courts disturb well-established immunities. *See, e.g.*, *N.C. Bd. of Dental Examiners v. FTC*, 134 S. Ct. 1491 (2014) (state-action antitrust immunity); *Air Wisconsin Airlines Corp. v. Hoeper*, 133 S. Ct. 2824 (2013) (Aviation and Transportation Security Act immunity); *Clark v. Rameker*, 134 S. Ct. 678 (2013) (bankruptcy immunity for tax-exempt retirement accounts); *Plumhoff v. Rickard*, 134 S. Ct. 635 (2013) (qualified immunity); *United States v. Bormes*, 132 S. Ct. 1088 (2012) (sovereign immunity). It certainly should do so here. The Fourth Circuit's evisceration of the Shipping Act immunity conflicts with the Ninth Circuit's approach, and implicates constitutionally based concerns over extraterritorial application of U.S. law. And this extraterritorial application will require international shippers to revisit their activities *all over the world*, especially because broad venue rules will make it difficult if not impossible for them to shield their activities from the Fourth Circuit's jurisdiction.

II. In addition to treble damages, the FCA imposes a minimum civil penalty of $5,500. But when, as here, multiple invoices are deemed "false" only by operation of law (*e.g.*, only the initial, underlying contract was actually tainted), does the FCA require a penalty *for each invoice*, or must the court instead consider the defendant's culpability and impose penalties corresponding to each distinct falsity or act of fraud?

The Fourth Circuit in *Harrsion* had interpreted the FCA to *require* imposition of one penalty for each claim submitted by the defendant—even if the claims were only "false" by virtue of a single falsity in the initial contract. Even the panel below called this mechanical rule a "monster of our own creation," because it invites penalties inherently at odds with the Excessive Fines Clause. Here, that "monster" produced an arbitrary penalty in the *tens of millions*, simply because of the happenstance of how many DPM invoices were submitted and despite a lack of any economic harm. As the panel saw, this construction of the FCA thus walked right into the Excessive Fines Clause. The panel responded by warping the constitutional inquiry—ignoring powerful uncontested mitigating evidence regarding Gosselin's conduct under the DPM contract and instead upholding a huge penalty based only on categorical generalities that will equally apply in every FCA case.

Other courts, by contrast, have ensured that FCA penalties remain linked to the defendant's culpability. Some, following this Court's lead, have interpreted the FCA itself to account for culpability, basing civil penalties on the defendant's number of fraudulent contracts, false statements, or otherwise "fraudulent acts," rather than on the arbitrary number of invoices. They thereby have avoided Eighth Amendment questions—not invited them, as the Fourth Circuit did here. A smaller set of courts has used the Excessive Fines Clause to avoid per-invoice penalties under the FCA that would be out-of-step with the gravity of the defendant's offense.

The decision below stands in conflict with *both* camps. Indeed, as the author of the leading FCA treatise—John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTONS (4th ed. 2011)—has recognized, the panel's "Alice in Wonderland" decision is "squarely at odds with a number of constitutional protections," and the panel's "sole reliance on intangible and non-economic factors such as 'deterrent effects' and public policy considerations to override the traditional excessive fines analysis lacks precedent and should result in en banc and, if necessary, Supreme Court review." *FraudMail Alert* (Dec. 20, 2013), http://goo.gl/epbZoG.

With the Government collecting increasing *billions* in FCA litigation every year, the recurring importance of how to calculate civil penalties consistent with the statute and the Constitution is self-evident. As Mr. Boese further noted, the panel's decision will only trigger even *more* FCA litigation, as relators discover the value of targeting high-invoicing industries even where damages are negligible or absent—and particularly in the Fourth Circuit, where a large volume of federal contracting occurs. Indeed, relators and the Government have extorted massive settlements in analogous cases—stunting the law's development—because companies cannot afford to risk incurring hundreds of millions of dollars in penalties. It is time for this Court to clarify the operation of FCA civil-penalty liability, and this case presents an ideal vehicle for doing so.

ARGUMENT

I. THE PANEL MAJORITY, BY EVISCERATING THE SHIPPING ACT'S IMMUNITY, CREATED A CIRCUIT SPLIT ON AN IMPORTANT ISSUE OF ANTITRUST LAW FOR INTERNATIONAL SHIPPING.

The Shipping Act expressly exempts from the antitrust laws any collusive agreement or activity relating to the "foreign inland segment" of "through transportation." 46 U.S.C. § 40307(a)(5).[3] Congress enacted that immunity in 1984 to restrict the extraterritorial application of U.S. law and so reduce "jurisdictional friction." Until now it has been clear that entities engaged in foreign shipping who act collusively in their own countries—*e.g.*, set collective prices—are immune from U.S. antitrust law even if their services are used in "through transportation" shipping to or from the United States. The Ninth Circuit unanimously affirmed that rule in 1999, and the District Court here appropriately followed it.

In the decision below, however, a divided Fourth Circuit panel has thrown this area of law into disarray, holding that the immunity did not apply because Gosselin's agreement to set prices for the German component of international shipping had the *effect* of increasing *overall* shipping costs. That reasoning conflicts with the Ninth Circuit and eliminates the immunity: The immunity only applies to agreements concerning a "*segment*" of "*through* transportation," and collusion on a component affects the price of the whole. This Court's review is needed

[3] Before 2006, the immunity was codified at 46 U.S.C. app. § 1706(a)(4). *See* Pet.App.42a n.15.

to resolve this conflict and thereby to reinstate the clear rules of liability on which international shippers depend.

A. The Decision Below, In Effectively Repealing the Immunity, Conflicts with the Ninth Circuit's Construction.

The decision below squarely conflicts with the Ninth Circuit's decision in *United States v. Tucor International, Inc.*, 189 F.3d 834 (9th Cir. 1999), which granted "foreign inland segment" immunity in a case involving materially identical facts.

1. *Tucor* involved Philippines-based companies that transported U.S. military household goods "from United States military bases in the Philippines to other points within the Philippines." *Id.* at 835. Other companies then shipped the goods to the United States. *See id.* at 836. The defendants were accused of fixing prices for their shipping services in the Philippines, allegedly impacting the overall costs paid by the U.S. military because those prices were incorporated into the through-rate bid. Affirming the district court, the Ninth Circuit found the statute "clear and unambiguous," and held without dissent that the Shipping Act "unambiguously exempts the activities of [defendants] from antitrust liability"—indeed, that it exempts "precisely" that conduct. *Id.* at 835-36, 838.

2. This case arises out of the same shipping program (ITGBL) as *Tucor*. As in that case, the Government here alleged that Gosselin's pricing agreement on foreign shipping services (here, within Germany) "had the effect of increasing the price that the United States paid" for through transportation, because the U.S.-based carriers submitted higher

bids so that they could pay higher "landed rates" for German services. Pet.App.56a. Citing *Tucor*, the District Court held that the pricing agreement "concern[ed] exclusively the German inland segment" and "falls squarely within the scope of the Shipping Act immunity." Pet.App.64a.

But the Fourth Circuit panel, over Judge Shedd's dissent, reversed. It reasoned that "Gosselin's price-fixing scheme did not inflate in isolation merely the landed rate quoted the [carriers]; it inflated the all-inclusive through rates that the [carriers] were induced to bid (and [the government] was compelled to pay)." Pet.App.43a. Thus, the majority concluded, Gosselin's conduct "concerned more than just the foreign inland segment" and so did not come within the protection of the immunity. *Id.*

The majority baldly asserted in a footnote that the "circumstances surrounding Gosselin's case are dissimilar to those in *Tucor*." Pet.App.42a n.16. But the panel did not even purport to identify any dissimilarity, and no material one exists. Both this case and *Tucor* involved pricing agreements as to the "foreign inland segment" of "through transportation" under the *same* ITGBL program. And any indirect effect Gosselin's agreement had on the overall cost of through transportation was equally present in *Tucor*: The military's contract in the latter was also for "transportation provided under one bill of lading that includes all of the interrelated segments from the point of origin in the Philippines to the service person's new home in the U.S.," and thus necessarily incorporated the costs of each segment. *Tucor*, 189 F.3d at 836.

In the absence of any actual or even alleged "dissimilar[ity]" between this case and *Tucor*, the panel majority also simply declared that *Tucor* "is not the law of this Circuit." Pet.App.42a n.16. It thereby confirmed the circuit conflict.

3. The effect of the Fourth Circuit's rule highlights the starkness of that conflict. Whereas the Ninth Circuit applied the immunity (and did not even find the question close), the panel here refused to apply it, and on grounds that will govern in *every* case where the immunity matters, thus effectively repealing it. The immunity protects only collusion as to foreign inland segments of "through transportation," meaning transportation "between a United States port or point and a foreign port or point." 46 U.S.C. § 40102(25). That link to transportation to or from the United States is necessary for U.S. antitrust law to potentially apply in the first place. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). And because the overall rate assessed for "through transportation" will necessarily be a function of the various "foreign inland segments" of the shipping (among other things), it will *always* be true that collusive agreements as to the foreign inland segment will implicate the overall price for "through transportation." Thus, the panel majority's limitation of the immunity reads it out of existence—in plain conflict with *Tucor*, which straightforwardly applied the law's "clear" text.

B. The Question Presented Is of Great Practical Importance for International Shipping and Implicates U.S. Foreign Affairs Interests.

This Court's immediate resolution of the circuit conflict regarding the scope of the "foreign inland segment" immunity is warranted for two principal reasons. *First*, the conflict is of great practical significance for international shipping, creating damaging uncertainty that reaches well beyond the Fourth Circuit. *Second*, by effectuating a broad extraterritorial expansion of U.S. antitrust law, the decision below implicates foreign-policy interests, trampling on powers constitutionally allocated to the political branches.

1. The circuit conflict over the "foreign inland segment" exemption implicates a massive volume of international shipping activity. In 2012, over *1 billion tons* of goods were shipped through U.S. ports, to or from foreign destinations. *See* Am. Ass'n of Port Authorities, *U.S. Ports Ranked by Cargo Volume - 2012*, available at http://goo.gl/jrKwvu. The two circuits in conflict accounted for roughly one-third of this traffic, as they embrace numerous important ports such as Charleston, Norfolk, and Baltimore in the Fourth Circuit, and Long Beach, Los Angeles, Oakland, Richmond, Portland, Tacoma, and Seattle in the Ninth Circuit. *See id.*

Any shipper with a hand in this vast amount of shipping may be ensnared by the conflict, notwithstanding that, like Gosselin, its conduct is all outside of the United States, and regardless of whether the laws in the foreign country where the relevant segment occurs allow the conduct that U.S. antitrust law condemns. The venue provisions of the

Sherman Act and FCA—both of which allow jurisdiction in any district where a corporation can be found or transacts business, *see* 15 U.S.C. § 22; 31 U.S.C. § 3732—give plaintiffs, including the Government, a wide net for hauling shippers into the Fourth Circuit's district courts. Beyond that, any entity, anywhere in the world, that participates in foreign transportation of goods as part of "through transportation" to or from the United States (at least if outside the Ninth Circuit) now must take account of possible exposure to U.S. antitrust law.

The effects of the circuit conflict are thus both *global* and *immediate*, as the decision below compels industry members around the world to conform their conduct to U.S. standards or risk treble damages, civil penalties—and even criminal prosecution. Yet, as a leading antitrust scholar has noted, "the world's competition systems do not conform to a single model," and "[t]he multiplication of antitrust laws raises concerns that enforcement by jurisdictions with dissimilar substantive standards, procedures, and capabilities will discourage legitimate business transactions and needlessly increase the cost of controlling anticompetitive conduct." William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 311 n.9 (2003).

All of these concerns are particularly problematic in an industry that depends on stable, predictable rules. Indeed, courts have recognized a special need for predictability in the contexts of international transactions and maritime law, and this case involves *both*. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985)

(displaying "sensitivity to the need of the international commercial system for predictability in the resolution of disputes"); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1137 (5th Cir. 1995) (en banc) (recognizing that "need for predictability in the commercial maritime arena is arguably greater than in other areas").

2. Beyond its profound impact on international business, the circuit conflict also implicates serious foreign-affairs considerations, impinging on powers that this Court has held properly belong to the other branches of government.

Although U.S. laws presumptively do *not* apply extraterritorially, courts have long held that the antitrust laws *do*. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2886 n.11 (2010) (noting that Court in 1962 "overruled the holding … that the antitrust laws do not apply extraterritorially"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.). That rule, however, "discourag[ed] international trading involvement with the United States" and caused "general damage to its foreign relations," because other nations object to having their industries subjected to U.S. antitrust rules. P. Pettit & C. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAWYER 697, 698 (1982). Indeed, it is "axiomatic that in antitrust matters it may be the policy of one state to defend what it is the policy of another to attack." *Id.* Thus, other nations have "resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts." *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*,

549 F.2d 597, 609 (9th Cir. 1976), *superseded by statute,* Pub. L. No. 97-290, 96 Stat. 1233, *as recognized in McGlinchey v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988).

Against this backdrop, Congress enacted the Shipping Act of 1984. Its "foreign inland segment" immunity exempted foreign shipping activity from the antitrust laws to "reduce jurisdictional friction and confrontations" with trade partners. *1981 Shipping Act: Hearing Before Subcomm. on Merchant Marine of the S. Comm. on Commerce, Science & Transp.*, 97th Cong. 208 (1981).

The Fourth Circuit's decision below revives that very "jurisdictional friction." Yet, as this Court has explained, "the danger of unwarranted judicial interference in the conduct of foreign policy" is why courts must *not* apply U.S. laws extraterritorially absent a clear expression of intent from Congress. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). All the more must courts respect that limitation when, as here, Congress has *expressly* provided that its laws should *not* apply extraterritorially.

C. The Decision Below Is Wrong.

On the merits, the panel majority's construction of the "foreign inland segment" immunity is plainly erroneous, and the Ninth Circuit's plainly correct.

1. The Shipping Act provides that the U.S. antitrust laws "do not apply to … an agreement or

activity *relating to* the *foreign inland segment* of *through transportation* that is part of transportation provided in a United States import or export trade." 46 U.S.C. § 40307(a) (emphases added). This plain text clearly embraces the type of agreement at issue here and in *Tucor*—*i.e.*, an agreement as to pricing for services exclusively within a foreign country.

The panel majority thought it relevant that the *effects* of such agreements are not limited to the "foreign inland segment," in that they indirectly affect pricing for through transportation as a whole. But even with such an indirect effect, the conduct still "relat[es] to" the foreign inland segment. And, as explained above, a contrary reading would nullify the immunity: Whenever the immunity could apply, the conduct, even though limited to the foreign inland segment, will always be "part" of overall through transportation. *Id.* Accordingly, it will be equally true that collusion as to the foreign "part" will indirectly affect the overall price of through transportation, leaving the immunity with no effect.

2. In justifying its rationale, the panel below relied on the Fourth Circuit's earlier decision in the criminal case, *Gosselin I*. That case actually illustrates the panel's error here.

In *Gosselin I*, the court held that misconduct "*aimed at* the entire through transportation market, rather than just the foreign inland segment," was not immune. *Gosselin I*, 411 F.3d at 510 (emphasis added). It thus ruled that Gosselin could be indicted for having convinced U.S. carrier Cartwright to withdraw its low *through-rate bid* on 12 particular channels, and for pressuring other U.S. bidders not to match that bid. *See id.* at 506-07, 510-11.

Gosselin I acknowledged that, consistent with *Tucor*, the landed rate agreement itself "may have had the relationship to a 'foreign inland segment' that the statute requires." *Id.* at 510. As to the specific channels and conduct there, however, Gosselin had gone further, taking "additional steps" that exceeded the immunity by targeting through rates. *Id.*

The Fourth Circuit in its prior decision thus adopted a workable reading of the immunity that left room for it to operate—conduct limited to the "foreign inland segment" is exempt from antitrust scrutiny, but efforts to directly influence the overall through-rate bids are not exempt. Its reading of the immunity also was, as the court acknowledged, reconcilable with *Tucor*. *Id.* And the District Court below readily saw and applied the line that *Gosselin I* drew, dismissing claims of collusion on the foreign inland segment while refusing to direct a verdict as to the Covan channel conduct, which was alleged to be nearly identical to Gosselin's conduct on the Cartwright channels. Pet.App.63a-65a, 47a n.1.

Here, however, the panel majority held that even when Gosselin did *not* take any action to interfere with or otherwise aimed at the bidding on "through transportation," the *indirect* effect of its landed rate agreement on those bids rendered the immunity inapplicable. Pet.App.43a. It thus called the conduct at issue here "materially similar" to the Cartwright channel conduct, merely less "drastic." Pet.App.43a-44a. But that misconstrues the line drawn by *Gosselin I*, under which direct bid-rigging efforts aimed at U.S. carriers—absent here—were *dispositive* in rendering the immunity inapplicable.

Gosselin I rejected a broad construction of the immunity that "threaten[ed] to excise antitrust liability from the through transportation market completely." 411 F.3d at 511. But the decision below, through its narrow construction, excised the immunity itself from the U.S. Code.

II. THE FOURTH CIRCUIT'S RIGID IMPOSITION OF PENALTIES "PER-INVOICE," WITHOUT REGARD TO A DEFENDANT'S CULPABILITY, CONFLICTS WITH OTHER COURTS AND EXACERBATES FCA LITIGATION.

Under the FCA, a defendant who presents or causes to be presented to the Government a false claim for payment is liable not only for trebled damages but also for a civil penalty. *See* 31 U.S.C. § 3729(a)(1). The question here is whether that penalty must be imposed mechanically for every submitted invoice, even if the invoices were only "false" by operation of law (such as under a fraudulently induced contract), or whether penalties instead must be based on the defendant's specific culpable conduct.

While other courts (including this one) have imposed separate civil penalties only for distinct, culpable acts, the Fourth Circuit has interpreted the FCA to strictly require a separate penalty for each and every *invoice*. The panel below described that rule as a "monster of our own creation," because by delinking penalties from the defendant's individual culpability, the FCA as so construed runs into the Excessive Fines Clause. Pet.App.35a. Indeed, here the Fourth Circuit's rule required a penalty in the *tens of millions of dollars* even though the Relator proved *no* monetary damage. The District Court

held that penalty unconstitutionally excessive. The panel below, however, neutered the one remaining check on its extreme construction of the FCA by misconstruing the Excessive Fines analysis, upholding the penalty here by invoking generalities applicable to *every* FCA case.

This Court's review is needed to resolve the split in authority over how to calculate FCA penalties. The FCA in general is an area of increasing importance, and this question in particular is critical to that area. The FCA already has been producing a rising tide of abusive litigation (usually leading to massive settlements, which prevent development of the law). And the decision below—allowing relators to threaten massive, unchecked penalties without bearing any need to prove damages—will let loose an even greater deluge. As the author of the leading FCA treatise, John Boese, predicts, the decision below will trigger a "new groundswell of *qui tam* cases," as relators are "incentivized" to use the FCA as a "bludgeon" against defendants who did not cause any "actual loss to the government." *FraudMail Alert*, *supra*.

A. Other Courts Assess FCA Penalties Based on the Defendant's Culpability, but the Fourth Circuit Has Imposed a Strict Per-Invoice Rule, Unchecked by the Eighth Amendment.

If a company makes a single false statement to win a government contract, and then files one thousand truthful invoices over the course of the contract, is the company liable for *one* penalty (for the one actual falsity) or *one thousand* (for the thousand truthful claims that are deemed "false")? Courts at every level of the federal judicial system

have required penalties to be tied to the defendant's specific culpability—whether as a matter of interpretation of the FCA or under the Eighth Amendment's Excessive Fines Clause, which bars civil penalties that are "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

In its earlier *Harrison* decision, however, the Fourth Circuit "eschewed" this approach in the FCA context. Pet.App.36a. And now, the Fourth Circuit has exacerbated the harsh effects of its mechanical FCA construction by reducing the Excessive Fines Clause inquiry to a meaningless formality that likewise fails to account for the defendant's specific culpability.

1. The FCA does not say that a civil penalty must be imposed "per" false claim, and many courts have accordingly construed the Act to impose a penalty only for a defendant's *culpable* acts.

This Court has done just that on the two occasions it has construed the civil-penalty provision. In *United States ex rel. Marcus v. Hess*, the Court considered the case of electrical subcontractors who collusively fixed their bids on 56 separate municipal projects. 317 U.S. at 539-40. Because the fraud was in the collusive bidding, not in any of the claims for payment, there was a question whether the conduct even came within the prohibition of the statute. *Id.* at 540-42. This Court held that it did, by imputing the "taint" of the "initial fraudulent action" in the bidding to the ultimate claims for payment. *See id.* at 543-44; *see also In re Baycol Prods. Litig.*, 732 F.3d 869, 876 (8th Cir. 2013) (noting that this Court "first recognized fraud-in-the-inducement as a viable

theory of FCA liability" in *Hess*). That did not, however, answer the question of how to calculate the civil penalty, as the Court recognized. The relator had argued below that a separate civil penalty "should be exacted for every form submitted … in the course of [defendants'] enterprise," while defendants countered that "there should be merely one" penalty "for all the acts done." 317 U.S. at 552; *id.* at 543. Rejecting both extremes, the district court imposed a penalty "for each separate … project," *i.e.*, for each distinct commission of bid-rigging. *Id.* This Court affirmed, reasoning that "the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office." *Id.*

Decades later, in *United States v. Bornstein*, 423 U.S. 303 (1976), the defendant subcontractor sent three shipments of mislabeled parts to a contractor, who in turn sent 35 invoices to the Government for products incorporating the improper parts. *Id.* at 307. The court of appeals had imposed one penalty, because one contract was involved. *See id.* at 310. While rejecting such "automatic measurement," this Court equally rejected the Government's argument for 35 penalties, one for each invoice that the contractor had submitted to it. *Id.* at 311-12. The latter, the Court explained, would base penalties on "wholly irrelevant," "fortuitous" matters. *Id.* at 312. Instead, the Court looked to the "fraudulent acts" committed: Because the defendant engaged in three separate "causative acts" (three shipments), it was liable for three penalties. *Id.* at 311-12. "[T]he focus in each case [must] be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Id.* at 313.

Together, *Hess* and *Bornstein* hold that, when imposing FCA penalties, courts should look to the number of "fraudulent acts," *Bornstein*, 423 U.S. at 312, and "individualized" culpable acts, *Hess*, 317 U.S. at 552, in view of the "specific conduct" at issue, *Bornstein*, 423 U.S. at 313. They reject any rigid, "automatic" measurement, particularly a mechanical per-invoice rule. *Id.* at 311; *Hess*, 317 U.S. at 552.[4]

Lower courts have followed this Court's lead in construing the FCA as imposing penalties only for culpable acts. For example, in *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), the Eighth Circuit cited *Bornstein* to hold that the defendants could face only eight penalties—corresponding to eight false requests for Medicaid reimbursement—even though those requests affected the defendants' Medicaid "payment rates" and thus also tainted hundreds of subsequent reimbursement requests. *See id.* at 982, 993-94. The court saw a "fundamental problem" with penalizing each reimbursement request, because the requests "bea[r] no rational relationship to the false claim misconduct" at issue. *Id.* at 993. Instead, the court construed the FCA to impose

[4] While both decisions involved subcontractors rather than prime contractors, that distinction matters only where a prime contractor submits many "individual false payment demands," each independently false. *Bornstein*, 423 U.S. at 309 n.4. In such a case, the prime contractor would be liable for each separately false claim, *see id.*, while the subcontractor would be liable only for his own "causative acts," *id.* at 312—with each party's liability thus tracking its individual culpability. But when (as here) only the initial contract is tainted but the invoices submitted thereunder are not "individual[ly] false," *id.* at 309 n.4, the culpability considerations of *Hess* and *Bornstein* apply equally to prime and subcontractors.

penalties only for the culpable acts, thereby also avoiding the "Excessive Fines Clause implications" of a $1.68 million penalty where the jury found "these false claims caused *no* measurable damages to the United States." *See id.* at 986. *Cf. United States v. Krizek*, 111 F.3d 934, 940 (D.C. Cir. 1997) (rejecting "government's definition of claim" that resulted in "astronomical $81 million" award despite low actual damages).

Likewise, in *United States ex rel. Longhi v. Lithium Power Technologies*, 530 F. Supp. 2d 888 (S.D. Tex. 2008), the defendant submitted 54 vouchers for payment in connection with four fraudulently induced contracts. *See id.* at 900. Citing *Hess* and *Bornstein*, the court held that, since "the false statements were the Four Contracts and that falseness was imputed to the invoices," the relevant "causative acts" were the four contracts, not the 54 individual invoices. *Id.* at 901. It thus imposed four penalties, not 54. *Id. Accord United States ex rel. Dyer v. Raytheon Co.*, No. 08-cv-10341, 2013 WL 5348571, at *31-32 (D. Mass. Sept. 23, 2013) (rejecting claim that thousands of invoices triggered penalties, because a "fine of this magnitude simply cannot have any rational relationship to the alleged misconduct in this case"; looking instead to proposals that included false certifications), *appeal dismissed*, No. 13-2315 (1st Cir. Jan. 31, 2014).

2. Other courts, while assuming that the FCA authorized a separate penalty for each claim or invoice, have similarly considered a defendant's particularized culpability, by instead applying the Eighth Amendment.

For example, in *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993), a landlord charged an unlawfully high rent for low-income units. He endorsed 51 rent checks, and made seven false certifications to the housing authority that the checks complied with the law. *Id.* at 74-75. The court held it would violate the Eighth Amendment to impose 58 penalties (for 51 checks plus seven certifications) amounting to $290,000, with only $1,630 in damages. *Id.* The rent checks were false "only as a result of the [defendant's] contract with the housing authority," and the landlord could not be expected to consider rental agreement terms each time he cashed a check. *Id.* The court thus imposed only seven penalties—one for each of the false certifications, which "were false claims in every sense of the word." *Id.* at 75.

Likewise, in *United States v. Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995), the court held that 686 penalties—one for each of the 686 invoices the defendant submitted for deficient tools that he sold to the government—would be unconstitutionally excessive. *See id.* at 1018. Instead, the court imposed a penalty for each of the 73 *types* of tools that the defendant had improperly sold, since the defendant had engaged in distinct culpable conduct as to each. *See id.* at 1014, 1018-19. *Cf. United States ex rel. Lamberts v. Stokes*, 640 F. Supp. 2d 927, 933 (W.D. Mich. 2009) (awarding only 17 penalties, not 8,481, where even the government conceded that the latter "would be excessive").

3. In conflict with both camps above, the Fourth Circuit construes the FCA to rigidly demand a separate civil penalty for each technically "false"

invoice, disregarding specific culpability under both the statute and the Constitution.

As explained above, the Fourth Circuit set out its statutory rule in *Harrison*, under which a separate penalty must be assessed for every invoice, even if the invoices contained no false information and thus involved no specific culpability. *See* 176 F.3d at 793-94; *see also Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 920 & n.13 (4th Cir. 2003) (after remand, affirming imposition of 26 penalties, one for fraudulent contract and 25 for invoices thereunder). The panel below reaffirmed and applied that mechanical rule, calculating a minimum civil penalty of $50,248,000, which is simply $5,500 (the statutory minimum) multiplied by the 9,136 invoices that Gosselin submitted over the DPM contract's three-year life. Pet.App.22a.[5]

By thus lashing FCA penalties to the number of invoices submitted under a tainted contract—often an arbitrary figure that even the panel admitted was "hardly a perfect indicator of the relative liability that ought to attach," Pet.App.37a—the *Harrison* rule conflicts with *Hess* and *Bornstein*, with court of appeals decisions like *Hays* and *Krizek*, and with district court decisions like *Lithium Power* and *Raytheon*, all of which construe the FCA to impose penalties on the basis of a defendant's culpable acts.

[5] The panel ultimately imposed $24 million on the novel theory that the relator has "virtually unbounded" discretion to accept a "lesser judgment," and had offered to accept that lower amount. Pet.App.34a. Either way, the Fourth Circuit's per-invoice rule produced the penalties' large order of magnitude, and the conflicting approach taken by the other courts discussed above would not have done so.

Nor, unlike the courts in *Gilbert Realty* and *Advance Tool*, does the Fourth Circuit correct for its rigid statutory construction through an Eighth Amendment analysis focused on the defendant's culpability. Rather, the panel below blessed a massive penalty through generalities about the FCA—the need for "deterrence," an undefined "profit motive," and the tendency of FCA violations to "shak[e] the public's faith in the government's competence." Pet.App.40a-41a. Such considerations exist in *every* FCA case that gets to the civil-penalty stage, and so add nothing to the Eighth Amendment inquiry beyond the fact of liability. Limiting itself to generalities, the panel ignored the substantial and uncontested mitigation evidence regarding the DPM contract (including Gosselin's minimal profit and the Government's renewal of the contract, twice), which had caused the District Court to hold that the *appropriate* fine in this case, based on Gosselin's culpability, would be $500,000, and the *maximum* constitutional fine, $1.5 million. Pet.App.108a, 110a.

B. Whether FCA Civil Penalties Must Be Based On the Defendant's Culpability Is of Exceptional Importance.

Two factors in addition to the conflict in authority particularly counsel in favor of review. *First*, the sums at stake are enormous, which is why defendants settle rather than risk huge penalties. *Second*, the issue of how to determine FCA civil penalties is growing in importance, with leading commentators predicting a "groundswell" of new litigation arising from the decision below.

1. The magnitude of potential liability that turns on the question presented is a strong reason

for review. *See Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari) (petitioner's potential liability of $1.4 billion, which was "$2,500 per violation" of Driver's Privacy Protection Act, as well as $40 billion value of "other class actions" raising same issue, was "strong factor" in favor of granting certiorari). And the sums recovered through FCA litigation are immense and growing. For example, in the 2013 fiscal year, the Government netted $3.8 billion in settlements and judgments in FCA cases, the second largest annual recovery ever. *See* DOJ Press Release (Dec. 20, 2013), http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html. And since 2009, the Government has recovered $17 billion, "nearly half the total recoveries since the Act was amended 27 years ago in 1986." *Id.*

These enormous sums point to an additional, related reason for certiorari: The issue presented, even while arising frequently, will often evade review. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.) (granting mandamus relief where decision below threatened to create "intense pressure to settle," leaving legal issue effectively unreviewable); *Ex parte Young*, 209 U.S. 123, 144-47 (1908) ("enormous penalties" prevented company "from resorting to the courts," inhibiting "judicial construction of laws"). Relators and the Government can coerce huge FCA settlements, because companies cannot risk losing where penalties would be so devastating.

To take a recent example, in February 2014 a defendant paid $171.9 million to settle *United States ex rel. Ryan*, No. 2:05-cv-3450 (E.D. Pa.), in which it

had allegedly caused "thousands of claims to be submitted to Medicaid" that were "fraudulent"—not because any of the claims contained any false information, but rather only because the defendant "promot[ed] the off-label use" of its drug contrary to FDA regulations. *Cf. United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (invalidating conviction for violation of FDA off-label regulations under First Amendment).

Where contractors face such intense economic pressure to settle, pressure that the Fourth Circuit's rule compounds, it may be difficult for this recurring issue to stay alive through appellate review. That is a reason *for* review, not *against* it.

2. Review also is warranted because the decision below is likely to release a flood of FCA litigation in marginal cases. The decision creates a new incentive simply to target high-invoicing industries—pharmaceutical manufacturers, for example, or defense contractors—even where damages likely are low, or where a relator wants to avoid investing the time and money into developing proof of damages. Especially without the check of a meaningful Excessive Fines Clause, nothing would stop plaintiffs who sue in the Fourth Circuit from obtaining (through either the increased settlement value or judgment) huge awards completely disproportionate to both damages and culpability.

That the decision below is from the Fourth Circuit promises a particularly large groundswell, given that court's importance in the development and exposition of FCA law. The Fourth Circuit embraces many important government agencies (like DOD) that initiate a large volume of federal

contracting. And any claims submitted to those agencies give rise to FCA jurisdiction in the Fourth Circuit. 31 U.S.C. § 3732(a) (jurisdiction in any district "in which any act proscribed by [FCA] occurred"). The Eastern District of Virginia and the District of Maryland are thus among the most popular venues for FCA cases. *See* Gov't Accountability Office, *Qui Tam Cases Filed in U.S. District Courts* 27 (2006), http://www.gao.gov/new.items/d06320r.pdf.

C. The Decision Below Is Wrong as Both a Statutory and Constitutional Matter.

Finally, the decision below is wrong on the merits. A "cardinal principle" of statutory interpretation is that when one reading of a statute would produce "serious doubt of constitutionality," a court should "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). Here, the panel below (i) conceded that the FCA might be "construed as authorizing" a single civil penalty on facts like those presented here, Pet.App.35a; and (ii) "reluctantly acknowledge[d]" that the contrary construction, requiring one penalty per invoice, was in "tension" (*id.*) with the principle of the Excessive Fines Clause that fines cannot be "grossly disproportional to the gravity of a defendant's offense," *Bajakajian*, 524 U.S. at 334. Nonetheless, the court adopted the latter construction—inviting not only a flood of litigation (as discussed above) but also serious constitutional challenges in any case that does not settle. Indeed, as the panel admitted, such challenges are now all but "inevitable," "in view

of the vast number of government contracts—many of prodigious size and sophistication"—that involve "thousands of invoices" and thus (under the Fourth Circuit's FCA interpretation) "millions of dollars of liability for civil penalties." Pet.App.37a.

Rather than construing the *statute* to avoid constitutional problems, the panel instead warped the constitutional inquiry. Under *Bajakajian*, the penalty must be compared to the *particular* gravity of the *particular* defendant's *particular* offense. *See* 524 U.S. at 337-39 (looking to specific facts, including that harm was "minimal" and crime was "solely a reporting offense," "unrelated to any other illegal activities"); *United States v. 3814 NW Thurman St., Portland, Or.*, 164 F.3d 1191, 1197 (9th Cir. 1999) ("The culpability of the offender should be examined specifically, rather than examining the gravity of the crime in the abstract."). Here, those defendant-specific facts, as found by the District Court, were mitigating, substantial, and uncontested, leading the District Court to find the *maximum* constitutional fine to be $1.5 million. Yet the panel ignored all of them in imposing a fine 16 times that.

And the panel was "comfortable" in doing so. Pet.App.37a. It reasoned that, "[w]hen an enormous public undertaking spawns a fraud of comparable breadth," the Government must be made "completely whole." *Id.* The panel did not explain, however, how the *Harrison* rule satisfies that purpose at all. Indeed, it does not. The FCA's treble-damages provision already ensures the Government is *more than* made whole; the civil-penalty provision is a *punishment* on top of that (which is why the Excessive Fines Clause applies). Moreover, as here,

the number of invoices is generally a function of how a particular agency chooses to reimburse contractors, and so does not represent the size of the contract, the materiality of the falsity, the "breadth" of the scheme or public undertaking—or anything else of relevance to making the Government whole. Pet.App.93a. The Fourth Circuit's approach is thus indefensible not only under the statute and Constitution, but also as a matter of common sense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 2014

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1369

UNITED STATES ex rel. KURT BUNK; UNITED STATES ex rel. RAY AMMONS,

Plaintiffs – Appellants,

and

UNITED STATES OF AMERICA,

Intervenor/Plaintiff – Intervenor,

and

UNITED STATES ex rel. DANIEL HEUSER,

Plaintiff,

v.

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; MARC SMET,

Defendants – Appellees,

and

BIRKART GLOBISTICS GMBH & CO. LOGISTIK UND SERVICE KG; THE PASHA GROUP; ITO MOBEL TRANSPORT GMBH; ANDREAS CHRIST SPEDITION & MOBELTRANSPORT GMBH; JOHN

DOES 1-100; AMERICAN MOPAC INTERNATIONAL; DOE DEFENDANTS; GATEWAYS INTERNATIONAL; ALLIED FREIGHT FORWARDERS; NORTH AMERICAN VAN LINES, INCORPORATED; GLOBAL WORLDWIDE INCORPORATED; AIR LAND FORWARDERS SUDDATH; COVAN INTERNATIONAL; JET FORWARDING INCORPORATED; ARPIN INTERNATIONAL; BIRKART GLOBISTICS AG; THIEL LOGISTIK AG, a/k/a Logwin AG; VIKTORIA SCHAFER INTERNATIONALE SPEDITION GMBH; VIKTORIA SCHAFER INTERNATIONAL SPEDITION GMBH; VIKTORIA-SKS KURT SCHAFER INTERNATIONALE GMBH & CO., KG; GILLEN & GARCON GMBH & CO. INTERNATIONALE SPEDITION KG; GILLEN & GARCON GMBH & CO. KG; M.T.S. HOLDING & VERWALTUNGS GMBH, d/b/a M.T.S. Gruppe; ANDREAS CHRIST GMBH; MICHAEL VILLINGER; ERWIN WEYAND; NICODEMUS GOSSELIN; DIETER SCHMEKEL; HORST BAUR; KURT SCHAFER; MARTINA SCHAFER; JOHN DOE DEFENDANTS; BIRKART VERMOGENSVERWALTUNG GMBH; LOGWIN AIR + OCEAN DEUTSCHLAND GMBH; LOGWIN HOLDING DEUTSCHLAND GMBH; JURGEN GRAF; MISSY DONNELLY; GEORGE PASHA; AMERICAN MOPAC INTERNATIONAL, INCORPORATED; AMERICAN SHIPPING INCORPORATED; CARTWRIGHT INTERNATIONAL VAN LINES INCORPORATED; JIM HAHN; INTERNATIONAL SHIPPERS ASSOCIATION INCORPORATED; GOSSELIN WORLD WIDE MOVING GMBH; VIKTORIA INTERNATIONAL SPEDITION; GOVERNMENT

LOGISTICS N.V.; GATEWAYS INTERNATIONAL INCORPORATED,

Defendants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,

Amici Supporting Appellees,

TAXPAYERS AGAINST FRAUD EDUCATION FUND,

Amicus Supporting Appellants.

No. 12-1417

UNITED STATES ex rel. KURT BUNK; UNITED STATES ex rel. RAY AMMONS,

Plaintiffs – Appellees,

and

UNITED STATES OF AMERICA,

Intervenor/Plaintiff – Appellee,

and

UNITED STATES ex rel. DANIEL HEUSER,

Plaintiff,

v.

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; MARC SMET,

Defendants – Appellants,

and

VIKTORIA INTERNATIONAL SPEDITION; GOVERNMENT LOGISTICS N.V.; BIRKART GLOBISTICS GMBH & CO. LOGISTIK UND SERVICE KG; THE PASHA GROUP; ITO MOBEL TRANSPORT GMBH; ANDREAS CHRIST SPEDITION & MOBELTRANSPORT GMBH; JOHN DOES 1-100; AMERICAN MOPAC INTERNATIONAL; DOE DEFENDANTS; GATEWAYS INTERNATIONAL; ALLIED FREIGHT FORWARDERS; NORTH AMERICAN VAN LINES, INCORPORATED; GLOBAL WORLDWIDE INCORPORATED; AIR LAND FORWARDERS SUDDATH; COVAN INTERNATIONAL; JET FORWARDING INCORPORATED; ARPIN INTERNATIONAL; BIRKART GLOBISTICS AG; THIEL LOGISTIK AG, a/k/a Logwin AG; VIKTORIA SCHAFER INTERNATIONALE SPEDITION GMBH; VIKTORIA-SKS KURT SCHAFER INTERNATIONALE GMBH & CO., KG; GILLEN & GARCON GMBH & CO. INTERNATIONALE SPEDITION KG; M.T.S. HOLDING & VERWALTUNGS GMBH, d/b/a M.T.S. Gruppe; ANDREAS CHRIST GMBH; MICHAEL VILLINGER; ERWIN WEYAND; NICODEMUS GOSSELIN; DIETER SCHMEKEL; JURGEN GRAF; HORST BAUR; KURT SCHAFER; MARTINA SCHAFER; JOHN DOE DEFENDANTS; BIRKART VERMOGENSVERWALTUNG GMBH; LOGWIN AIR + OCEAN DEUTSCHLAND GMBH; LOGWIN HOLDING DEUTSCHLAND GMBH; MISSY DONNELLY; GEORGE PASHA; AMERICAN MOPAC INTERNATIONAL, INCORPORATED;

AMERICAN SHIPPING INCORPORATED; CARTWRIGHT INTERNATIONAL VAN LINES INCORPORATED; JIM HAHN; INTERNATIONAL SHIPPERS ASSOCIATION INCORPORATED; GATEWAYS INTERNATIONAL INCORPORATED; GOSSELIN WORLD WIDE MOVING GMBH,

Defendants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,

Amici Supporting Appellants,

TAXPAYERS AGAINST FRAUD EDUCATION FUND,

Amicus Supporting Appellees.

No. 12-1494

UNITED STATES OF AMERICA,

Intervenor/Plaintiff – Appellant,

and

UNITED STATES ex rel. DANIEL HEUSER; UNITED STATES ex rel. KURT BUNK; UNITED STATES ex rel. RAY AMMONS,

Plaintiffs,

v.

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; MARC SMET,

Defendants – Appellees,

and

BIRKART GLOBISTICS GMBH & CO. LOGISTIK UND SERVICE KG; THE PASHA GROUP; ITO MOBEL TRANSPORT GMBH; ANDREAS CHRIST SPEDITION & MOBELTRANSPORT GMBH; JOHN DOES 1-100; AMERICAN MOPAC INTERNATIONAL; DOE DEFENDANTS; GATEWAYS INTERNATIONAL; ALLIED FREIGHT FORWARDERS; NORTH AMERICAN VAN LINES, INCORPORATED; GLOBAL WORLDWIDE INCORPORATED; AIR LAND FORWARDERS SUDDATH; COVAN INTERNATIONAL; JET FORWARDING INCORPORATED; ARPIN INTERNATIONAL; BIRKART GLOBISTICS AG; THIEL LOGISTIK AG, a/k/a Logwin AG; VIKTORIA SCHAFER INTERNATIONALE SPEDITION GMBH; VIKTORIA-SKS KURT SCHAFER INTERNATIONALE GMBH & CO., KG; GILLEN & GARCON GMBH & CO. INTERNATIONALE SPEDITION KG; M.T.S. HOLDING & VERWALTUNGS GMBH, d/b/a M.T.S. Gruppe; ANDREAS CHRIST GMBH; MICHAEL VILLINGER; ERWIN WEYAND; NICODEMUS GOSSELIN; DIETER SCHMEKEL; JURGEN GRAF; HORST BAUR; KURT SCHAFER; MARTINA SCHAFER; JOHN DOE DEFENDANTS; BIRKART VERMOGENSVERWALTUNG GMBH; LOGWIN AIR + OCEAN DEUTSCHLAND GMBH; LOGWIN HOLDING DEUTSCHLAND GMBH; MISSY DONNELLY; GEORGE PASHA; AMERICAN MOPAC INTERNATIONAL, INCORPORATED; AMERICAN SHIPPING INCORPORATED; CARTWRIGHT INTERNATIONAL VAN LINES

INCORPORATED; JIM HAHN; INTERNATIONAL SHIPPERS ASSOCIATION INCORPORATED; GATEWAYS INTERNATIONAL INCORPORATED; GOSSELIN WORLD WIDE MOVING GMBH; GOVERNMENT LOGISTICS N.V.; VIKTORIA INTERNATIONAL SPEDITION,

Defendants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA,

Amici Supporting Appellees,

TAXPAYERS AGAINST FRAUD EDUCATION FUND,

Amicus Supporting Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:02-cv-01168-AJT-TRJ)

Argued: May 14, 2013 Decided: December 19, 2013

Before KING, SHEDD, and THACKER, Circuit Judges.

No. 12-1417 affirmed; No. 12-1369 affirmed in part, reversed in part, and remanded with instructions; and No. 12-1494 vacated and remanded by published opinion. Judge King wrote the opinion, in which Judge Thacker joined. Judge Shedd wrote a separate opinion concerring in part and dissenting in part.

ARGUED: Michael T. Anderson, MURPHY ANDERSON PLLC, for United States ex rel. Kurt Bunk, United States ex rel. Ray Ammons, and United States ex rel. Daniel Heuser. Kerri L. Ruttenberg, JONES DAY, Washington, D.C., for Gosselin World Wide Moving, N.V., Gosselin Group N.V., and Marc Smet. Jeffrey Clair, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor.

ON BRIEF: Richard E. Greenberg, John E. Petite, GREENSFELDER, HEMKER & GALE, P.C., St. Louis, Missouri; Ann Lugbill, Mark Hanna, Michael L. Woolley, MURPHY ANDERSON PLLC, Washington, D.C., for United States ex rel. Kurt Bunk, United States ex rel. Ray Ammons, and United States ex rel. Daniel Heuser. Shay Dvoretzky, JONES DAY, Washington, D.C., for Gosselin World Wide Moving, N.V., Gosselin Group N.V., and Marc Smet. James M. Spears, Melissa B. Kimmel, PHRMA, Washington, D.C.; David W. Ogden, Jonathan G. Cedarbaum, Nicole Ries Fox, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Pharmaceutical Research and Manufacturers of America. Robin S. Conrad, Rachel Brand, NATIONAL CHAMBER LITIGATION CENTER, INC., Washington, D.C.; M. Miller Baker, McDERMOTT WILL & EMERY LLP, Washington, D.C.; Joshua Buchman, Peter Schutzel, McDERMOTT WILL & EMERY LLP, Chicago, Illinois, for Chamber of Commerce of the United States of America. Kristin L. Amerling, Cleveland Lawrence III, TAXPAYERS AGAINST FRAUD EDUCATION FUND, Washington, D.C.; Colette G. Matzzie, Claire M. Sylvia, PHILLIPS & COHEN, LLP, Washington, D.C., for Taxpayers Against Fraud

Education Fund. Neil H. MacBride, United States Attorney, Alexandria, Virginia, Stuart F. Delery, Acting Assistant Attorney General, Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor.

KING, Circuit Judge:

These appeals and cross-appeal are taken from final judgments, entered in accordance with Federal Rule of Civil Procedure 54(b), in a pair of qui tam actions consolidated for litigation in the Eastern District of Virginia. By its Order of February 14, 2012, the district court: (1) assessed a single civil penalty in the sum of $5,500 in favor of the United States, intervening in substitution of relator Ray Ammons, as to a single portion of its claim pursuant to the False Claims Act (the "FCA"), which it alleged against defendants Gosselin Worldwide Moving, N.V., Gosselin Group N.V., and the latter's CEO, Marc Smet (collectively, "Gosselin" or the "company"); (2) decreed judgment for Gosselin on the remainder of the FCA claim, as well as common law claims asserted by the government in the same action; (3) granted judgment as to liability with respect to a single FCA claim alleged by relator Kurt Bunk and against Gosselin in the second action; but (4) denied Bunk recovery of civil penalties on that claim.

The primary issue before us is whether the district court erred in determining that, concerning 9,136 false invoices at the heart of Bunk's claim, any award under the FCA must necessarily exceed more than $50 million. The court ruled that such an assessment would contravene the Excessive Fines Clause of the Eighth Amendment, and it thus awarded nothing.

We must also decide whether, as to the larger portion of the government's FCA claim on which Gosselin prevailed, the court properly declared the company immune under the Shipping Act. Gosselin, for its part, urges on cross-appeal that Bunk's election to seek civil penalties to the exclusion of actual damages deprives him of standing to maintain any recovery—even one consistent with the Eighth Amendment.

We conclude that Bunk possessed standing to sue for civil penalties while bypassing the prospect of a damages award, and we thus affirm the district court's judgment in his favor. To the extent, however, that the court denied Bunk recovery of any penalties, we reverse and remand for entry of his requested award of $24 million, an amount that we deem to be consistent with the Constitution. Finally, we are of the opinion that the Shipping Act confers no immunity upon Gosselin for any part of the government's FCA claim; we therefore vacate the contrary ruling in favor of Gosselin and remand the misadjudicated portion of the claim for further proceedings.

I.

A.

1.

An army may march on its stomach, but when a fighting force is deployed to a foreign front, familiar furnishings also serve to fuel the foray. The Department of Defense (the "DOD") seeks to provide its armed military forces and civilian personnel with the orderly and efficient transport of their goods and effects across the Atlantic, point to point within Europe, and back home again. The DOD thus instituted the International Through Government

Bill of Lading program (the "ITGBL program") to govern transoceanic moves, while relying on the Direct Procurement Method (the "DPM") to contract for transport strictly on the European continent. Both methodologies were administered by the DOD's Military Traffic Management Command (the "MTMC").[1]

In the ITGBL program, the MTMC solicited domestic vendors—often referred to as "freight forwarders"—to bid on one or more "through rates," i.e., unitary prices for moving household goods along shipping channels established between the several states and the particular European countries in which American personnel were encamped. Channels were further distinguished based on which of the respective termini was the origin of the goods. For example, the Virginia-to-Germany channel was bid apart from the Germany-to-Virginia channel.

The successful bidders contracted with the MTMC to supply door-to-door service, typically consisting of discrete segments: packing the goods at the origin; land carriage to the ocean port; origin port services; ocean transport; destination port services; and carriage overland to the destination, where the goods were unpacked. Subcontractors, including Gosselin, provided services in connection with the European segments, and the prices quoted by those subcontractors were taken into account by the freight forwarders. The MTMC dealt on an individual basis with some of these same subcontractors when it availed itself of the DPM to obtain packing, loading,

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[1] The MTMC is now called the Surface Deployment and Distribution Command, or the SDDC.

and transportation services exclusively within Europe.

On November 14, 2000, Gosselin met in Sonthofen, Germany, with a number of its industry peers, some that provided services in multiple European segments and others that were more locally focused. Together, these entities controlled the lion's share of packing and transportation services within Germany. The meeting participants agreed to charge a non-negotiable minimum price for these local services, which would also be incorporated into the fixed "landed rate" quoted to the freight forwarders for servicing multiple segments. Apart from its intended effect upon the ITGBL program, the Sonthofen meeting and resultant agreement arguably served as a catalyst with respect to an ongoing DPM scheme. Pursuant to that scheme, Gosselin was awarded a contract, effective May 1, 2001, after colluding with its fellow bidders to artificially inflate the packing and loading component of the submitted bids. Thereafter, Gosselin subcontracted much of the work, in predetermined allocations, to its supposed competitors.

Despite the efforts of Gosselin and its Sonthofen cohorts, freight forwarder Covan International, Inc., was able to submit, at initial filing for the ITGBL International Summer 2001 ("IS01") rate cycle, the low bid on fourteen channels between Germany and the United States (the "Covan Channels"). In order to increase the likelihood of obtaining business in those channels, other freight forwarders such as the Pasha Group, with which Gosselin had a continuing relationship, would have been compelled to match Covan's prime through rate. Instead, Gosselin

threatened to withdraw financing from Covan for the latter's purchase of thousands of lift vans required to fulfill its contractual obligations with the MTMC. Consequently, Covan cancelled its bid, and Gosselin spread the word among the freight forwarders that each should, during the second ("me-too") phase of the bidding, match only the second-lowest bid on the Covan Channels.

2.

The foregoing scenario was virtually duplicated one year later, during bidding for the IS02 cycle. On that occasion, Cartwright International Van Lines, Inc., successfully bypassed the established landed rates to submit the low bid on twelve Germany-U.S. channels (the "Cartwright Channels"). Gosselin and Pasha, however, convinced Cartwright to withdraw its bid, and, after ensuring that local agents would refuse services to anyone who failed to cooperate, they secured agreements from Pasha's fellow freight forwarders to echo the second-lowest bid. For their actions in connection with the Cartwright Channels, the Gosselin and Pasha corporate entities were each convicted of federal criminal offenses in the Eastern District of Virginia. *See United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502 (4th Cir. 2005).

B.

The above-described acts gave rise to the underlying civil actions premised on the FCA, 31 U.S.C. §§ 3729-3733, which, during the events in question, provided in pertinent part:

(a) Any person who—

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claims paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid[,]
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person[.]

Id. § 3729(a).[2] The FCA confers on private persons, such as Bunk and Ammons, the authority to "bring a civil action for a violation of section 3729 for the person and for the United States Government" in the government's name. *Id.* § 3730(b)(1).[3]

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[2] The FCA was revised in 2009 to clarify and flesh out many of its provisions. The bases relied on in § 3729(a) to establish Gosselin's potential liability, however, remained substantially the same.

[3] The heading of § 3730(c) refers to a proceeding initiated under the FCA as a "qui tam" action, which has been defined as one "under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive. They are usually reported as being in the name of the government *ex rel.* ([i.e.,] on the relation of) the private citizen." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 728-29 (2d ed. 1995).

Bunk sued in the Eastern District of Virginia on August 2, 2002, asserting claims arising from the DPM scheme. Ammons's lawsuit, stemming from the machinations relating to the ITGBL program, was initiated on September 17, 2002, in the Eastern District of Missouri. The two actions were commenced under seal against Gosselin and a long list of other defendants, all but one of which have since been dismissed via settlement and otherwise. Advancement of both lawsuits was deferred pending the final outcome of the criminal investigation and resultant proceedings. *See* § 3730(b)(2), (3) (prescribing that relator's complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders"). On November 9, 2007, the Ammons matter was transferred to the Eastern District of Virginia, where it was consolidated with the Bunk proceeding.

Bunk accused Gosselin of participating in an unlawful conspiracy to defraud the MTMC. His operative Third Amended Complaint (the "Bunk Complaint"), filed December 8, 2009, alleged that the conspirators saw their illicit plans bear fruit when they "falsely represented, directly or indirectly, in submitting claims for payments that they had not engaged in common discussions or agreements regarding prices to be offered and terms and conditions of service," such terms and conditions including "allocation of territories or market share . . . for work performed under . . . [DPM] Government

contracts . . . for transportation of military personal property." Bunk Complaint ¶ 136.[4]

In a similar fashion, the Complaint filed by Ammons (the "Ammons Complaint") asserted, inter alia, that Gosselin facilitated "a bid rigging scheme," in furtherance of which it and Pasha illegally "control[led] the access to German freight agents for [ITGBL] origin and destination services[.]" Ammons Complaint ¶¶ 50, 61.[5] This monopoly of access, according to Ammons, enabled the conspirators to "raise and control the prices for a critical feature of the services necessary to service the traffic channel between Germany and the United States." *Id.* ¶ 61.

The Ammons Complaint was superseded on July 18, 2008, by the United States' Complaint in Intervention (the "Government Complaint"). *See* 31 U.S.C. § 3730(b)(2) ("The Government may elect to intervene and proceed with the action.").[6] The material allegations of the Government Complaint echoed those of its Ammons predecessor, in particular the asserted purpose of the conspiracy, which "was to obtain collusive, artificially inflated, and noncompetitive prices for transportation services performed in connection with [ITGBL] international household goods shipments." Government Complaint ¶ 6. To advance the illicit aims of the conspiracy, according to the government, Gosselin knowingly "submitted or caused to be submitted false and

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[4] The Bunk Complaint is found at J.A. 294-340. (Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties to this appeal.)

[5] The Ammons Complaint is found at J.A. 243-58.

[6] The Government Complaint is found at J.A. 263-93.

inflated claims for payment to the United States . . . and made, used or caused to be made or used false records or statements to get those claims paid or approved." *Id.*[7]

The government thus maintained that Gosselin was liable under the FCA for treble damages and civil penalties, *see* Government Complaint ¶¶ 87-93 (First Cause of Action), or, in the alternative, for common law fraud, for conspiracy to defraud the United States, and for unjust enrichment, *see id.* ¶¶ 94-108 (Second through Fourth Causes of Action). Bunk, for his part, pleaded various FCA theories of liability against Gosselin and others. *See* Bunk Complaint ¶¶ 145-59 (Counts I through V). Suing in his individual capacity, Bunk joined several additional claims, including a 42 U.S.C. § 1985 claim for conspiracy to interfere with his civil rights, *see id.*

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[7] Though subordinated as a result of the government's intervention, Ammons remained in the suit, maintaining his status as a party-plaintiff. *See* 31 U.S.C. § 3730(c)(1) ("[T]he person bringing the action . . . shall have the right to continue as a party to the action."). Bunk's role was unchanged, as the government declined to intervene in his proceeding. *See id.* § 3730(c)(3) ("If the government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."). The government's decisions as to intervention bear not only on who conducts the litigation in the respective matters, but also the eventual award, if any, to the relator. *Compare id.* § 3730(d)(1) (providing that where "the Government proceeds with an action brought by a person under subsection (b), such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim"), *with id.* § 3730(d)(2) ("If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount . . . not less than 25 percent and not more than 30 percent of the proceeds.").

¶¶ 160-62 (Count VI), and state law claims for tortious interference with contractual relations, for antitrust and related violations, and for defamation, *see id.* ¶¶ 163-75 (Counts VII through IX).[8]

C.

On the basis of the prior criminal proceedings against Gosselin, the district court granted partial summary judgment on liability to the government on its FCA claim insofar as it pertained to the Cartwright Channels. The remaining issues in the consolidated matters were tried in Alexandria before a jury, beginning on July 18, 2011. The government explained in its opening statement that Gosselin, pursuant to the conspiracy engendered by the Sonthofen Agreement, engaged in two general types of wrongful conduct: (1) unlawfully colluding with its industry cohorts to inflate the landed rate component of ITGBL bids involving all German channels, which caused those bids as a whole—and the resultant DOD payments—to be higher than they would have been absent such collusion (the "price-fixing" conduct); and (2) in concert with Pasha and others, improperly influencing Covan and Cartwright to withdraw their initial low bids in the IS01 and IS02 cycles, respectively, and dissuading its competitors from matching the Covan and Cartwright bids in the affected channels (the "bid-rigging" conduct). *See*

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[8] Although the government did not intervene in the Bunk proceeding, the district court determined that all of Bunk's claims had nonetheless been effectively superseded by the Government Complaint, except for Count II of the Bunk Complaint, which sought recovery under the FCA for Gosselin's actions in connection with the DPM scheme. The court's ruling in that regard has not been appealed.

Transcript of Trial, July 18, 2011, at 54-58. For these asserted misdeeds, the government sought both categories of redress permitted by § 3729(a), that is, a fixed civil penalty for each false claim, plus three times the amount of actual damages it had sustained. Bunk, by contrast, chose to forgo proof of damages, suing only for civil penalties.

At the close of the government's case-in-chief, on July 28, 2011, the district court granted in part Gosselin's motion for judgment as a matter of law, concluding that the company was entitled to immunity under the Shipping Act, and it therefore could not be held accountable under the FCA for its price-fixing conduct. *See* Fed. R. Civ. P. 50(a). That conduct, the court explained, was the only basis for imposing liability on Gosselin for the inflated landed rate affecting all ITGBL channels starting and ending in Germany, and not merely the Covan and Cartwright Channels that were the sole bid-rigging targets. The court likewise awarded judgment to Gosselin on the alternative, common law claims, with the result that the only portion of the government's case permitted to proceed was its FCA claim, and that only insofar as it related to Gosselin's bid-rigging conduct directed at Covan and Cartwright.

Conversely, the district court denied Gosselin's motion for judgment as a matter of law with respect to Bunk's claim premised on the DPM scheme. The court explained that the conduct engendering FCA liability as to that claim was not grounded in immunized price-fixing, but instead manifested in the subsequent Certificate of Independent Price Determination (the "CIPD") filed by Gosselin. The CIPD was designed to affirmatively assure the

MTMC that the successful DPM contractor had not discussed pricing or soliciting strategy with other potential suppliers. Bunk had adduced evidence at trial, the court recalled, that Gosselin had met with its competitors "and agreed on prices that would be charged and who would service territories regardless of who was awarded the contract." Transcript of Trial, July 28, 2011, at 1059. That evidence created "a triable issue for the jury" as to whether Gosselin "acted in a way inconsistent with its certification," and, assuming that the CIPD was false, "whether it was a material misstatement and whether [it was made] knowingly." *Id.* at 1059-60.

Gosselin proceeded with its defense, followed by rebuttal from Bunk and from the government. At the conclusion of all the evidence, the jury was instructed by the district court, heard the parties' closing arguments, and retired to consider its verdict. On August 4, 2011, after about nine hours of deliberations over two days, the jury returned a verdict in favor of Gosselin as to that portion of the government's FCA claim stemming from the Covan Channels. In regard to the Cartwright portion of the FCA claim, for which the district court had previously ruled Gosselin liable as a matter of law, the jury found that the government had proved 4,351 instances of false or fraudulent claims. Finally, the jury found Gosselin culpable under the FCA for its role in the DPM scheme, as set forth in Count II of the Bunk Complaint.

D.

1.

Through its memorandum opinion of October 19, 2011, the district court disposed of various post-trial

motions filed by the parties. First, the court deemed the evidence insufficient to support the jury's finding of 4,351 false claims in connection with the Cartwright Channels; it thus granted Gosselin partial judgment as a matter of law, or, alternatively, a new trial on the civil penalties remedy pertaining to the government's First Cause of Action. *See* Fed. R. Civ. P. 50(c)(1). We characterize the judgment as "partial" because the district court declined to decree that the government recover nothing. To the contrary, in line with its prior ruling regarding the Cartwright Channels, the court entered judgment for the United States in the sum of $5,500. The amount of the judgment reflects the court's conclusion that the whole of Gosselin's bid-rigging misconduct established nothing more than a baseline false claim, for which the government—in the absence of more sophisticated proof—was entitled to receive only a single civil penalty.[9]

Moving on to consider the damages remedy, the district court observed that the government had collected approximately $14 million from settling codefendants. That amount was far in excess of the presumptive damages, i.e., the $865,000 that Gosselin paid as restitution in the criminal proceedings, such liability under the FCA being increased to $2,595,000 upon application of the trebling modifier. The court thus decided that

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[9] *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 920 (4th Cir. 2003) (ascertaining defendant liable for twenty-six false claims, consisting of initial fraudulent certification plus twenty-five resultant invoices). The government has not appealed the district court's Rule 50(c) determination as to the number of Cartwright Channel claims.

Gosselin was entitled to a full offset, with no damages remaining payable. Lastly, the court denied Gosselin's motion for judgment as a matter of law with respect to Count II of the Bunk Complaint and held Gosselin liable for 9,136 false claims, corresponding to the number of invoices stipulated by the parties to have been submitted under the DPM contract.

2.

It remained for the district court to calculate the appropriate civil penalties for the Bunk false claims. Treating each of the 9,136 claims as a discrete basis for liability under § 3729(a), imposition of no more than the statutory minimum of $5,500 would have resulted in a cumulative penalty just in excess of $50 million ($50,248,000).[10] Gosselin contended that a multi-million-dollar award would be grossly out of proportion to its misconduct, and thus in contravention of the constitutional proscription against excessive fines. *See* U.S. Const. amend. XIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

The district court agreed, and by memorandum opinion of February 14, 2012, expressed its view that the relatively isolated harm caused by the DPM

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[10] Pursuant to 28 C.F.R. § 85.3(a)(9), persons adjudged liable under the FCA are, as of September 29, 1999, subject to increased civil penalties amounting to a minimum of $5,500 and a maximum of $11,000. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 535, 104 Stat. 890 (1990), *as amended by* Pub. L. 104-134, 110 Stat. 131 (1996) (directing that agency heads adjust and publish via regulation certain civil penalties).

scheme, under which the government paid a total of approximately $3.3 million for the packing and loading line item, could not justify a $50 million penalty. Concluding that it was unauthorized by the FCA to award less than the $5,500 minimum per claim, and, further, that each of the 9,136 claims required an award, the court rejected Bunk's proposal, in consultation with the government, to accept $24 million in settlement of the judgment. Indeed, the court concluded in the alternative that, under the circumstances, any penalty in excess of $1.5 million would be constitutionally excessive, and in the event the statute permitted an assessment of less than $50,248,000, it would award $500,000.

The district court directed the entry of final judgment as to the claims set forth in the operative complaints against Gosselin.[11] Encapsulating the various jury findings and legal rulings set forth above, the court ordered:

(1) judgment in favor of the Plaintiff the United States of America and against Defendants

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[11] *See* Fed. R. Civ. P. 54(b) (instructing that "[w]hen an action presents more than one claim . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties . . . if the court expressly determines that there is no just reason for delay"). The court deferred decision on the relators' claims for a percentage of the government's recovery, together with their requests for FCA attorney fees from Gosselin, pending final disposition of this appeal. Also left pending is the fate of the lone remaining defendant in the case, Government Logistics, N.V., which was alleged liable as a successor to Gosselin. The court denied the parties' cross-motions for summary judgment as to the successor liability question, holding it over for eventual determination by trial.

> [Gosselin], jointly and severally, in the amount of Five Thousand, Five Hundred Dollars ($5,500), on the First Cause of Action in the [Government] Complaint . . . ; (2) judgment in favor of Defendants [Gosselin] and against the Plaintiff the United States of America on the Second, Third, and Fourth Causes of Action in the [Government] Complaint . . . ; (3) judgment in favor of [Bunk] and against the Defendants [Gosselin] as to liability on Count II of the [Bunk] Complaint; and (4) judgment in favor of Defendants [Gosselin] and against the United States of America and [Bunk] as to civil penalties on Count II of the [Bunk] Complaint.

J.A. 1621.

By notice timely filed on March 13, 2012, Bunk and Ammons jointly appealed the district court's Rule 54(b) judgment (No. 12-1369). Thereafter, on March 27, 2012, Gosselin cross-appealed (No. 12-1417). The government noticed its appeal (No. 12-1494) on April 13, 2012.[12] We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Intricate issues of law underlie the judgment below and permeate these several appeals. Most of the issues concern the construction and application of federal statutes in a fashion consistent with the

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[12] In the typical civil case, a party seeking to appeal must file notice thereof in the district court "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). If, however, "one of the parties is . . . the United States," or an agency or official representative thereof, "any party" to the litigation may appeal within 60 days following the entry of the judgment or order at issue. *Id.* 4(a)(1)(B).

Constitution. These legal issues were, with certain exceptions identified below, considered and decided in the first instance by the district court, whose rulings thereon we review de novo. *See United States v. Under Seal*, 709 F.3d 257, 261 (4th Cir. 2013) (deeming questions of statutory interpretation and constitutional challenges subject to de novo review).

III.

A.

1.

Gosselin suggests that Bunk lacks standing to sue, thereby challenging the jurisdiction of the federal courts as to that portion of the consolidated litigation in which the government has not intervened. *See* U.S. Const. art. III, § 2 (limiting judicial power of United States solely to adjudication of cases and controversies). We thus turn our attention at the outset to Gosselin's cross-appeal. *See United States v. Day*, 700 F.3d 713, 721 (4th Cir. 2012) ("[C]ourts must resolve jurisdictional Article III standing issues before proceeding to consider the merits of a claim."). According to Gosselin, Bunk's decision to bypass proof of actual damages and instead seek only civil penalties demonstrates that he suffered no injury in fact caused by Gosselin, such being an essential component of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (observing that "irreducible constitutional minimum of standing contains three elements," i.e., injury in fact, traceability of injury to defendant's conduct, and redressability); *accord Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

The Supreme Court's decision in *Vermont Agency* is dispositive of the question. Therein, Justice Scalia, writing for the Court, reiterated that "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing." 529 U.S. at 772. The Court nevertheless instructed "that adequate basis for the relator's suit . . . is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773. The relator provisions of the FCA suffice in that regard, the Court reasoned, insofar as they occasion a "partial assignment of the Government's damages claim." *Id.* This assignment in part, especially when viewed in the context of the long tradition of qui tam actions—originating in England about 500 years before the ratification of the Constitution—*see id.* at 774-75, "leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing." *Id.* at 778.[13]

Gosselin, however, seizes upon the Supreme Court's characterization of an FCA action as alleging both an "injury to [the government's] sovereignty arising from violation of its laws" and a "proprietary injury resulting from the alleged fraud," 529 U.S. at 771, asserting that the civil penalties provision redresses strictly the former, with damages payable dollar for dollar to remedy the latter. Gosselin suggests that only the proprietary injury is an injury

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[13] The Supreme Court's invocation of the principle of assignment to establish relators' standing under the FCA is sufficient to distinguish *Lujan* and analogous authorities relied on by Gosselin, in which plaintiffs suing to vindicate exclusively their own rights were required to have themselves sustained a palpable injury in fact.

in fact for standing purposes, and it relies for support on the *Vermont Agency* language quoted in the preceding paragraph, pointing out that Justice Scalia spoke only of the FCA assigning the "damages claim" on behalf of the government. Thus, the argument goes, Bunk's election to forgo proof of damages and pursue penalties solely for the government's sovereignty injury—purportedly non-assignable—strips him of standing to maintain suit and thereby moots his portion of the case. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must commence at the outset of the litigation . . . must continue throughout its existence." (citations and internal quotation marks omitted)).

We are scarcely convinced that the Supreme Court in *Vermont Agency* would have embarked by mere implication on the novel dissection urged by Gosselin, without so much as a nod that it was breaking new ground. The judgment entered below, unchallenged on its merits, confirms that the government sustained injury by virtue of Gosselin's conduct, and it is "the United States' injury in fact," without reference to the source of that injury, that the Court has said "suffices to confer standing" on FCA relators like Bunk, who is not otherwise alleged unqualified. *See Vermont Agency*, 529 U.S. at 774. That Bunk made a tactical decision during the course of litigation to pursue only civil penalties altered in no material way the fundamental legal relationship among him as plaintiff and assignee, Gosselin as defendant and tortfeasor, and the government as victim and assignor.

Moreover, in documenting the use of qui tam actions over the centuries to buttress the concept of relator standing, the *Vermont Agency* Court discussed so-called “informer” statutes that had been enacted in England and, later, in the American colonies. These statutes, designed to redress a host of wrongs such as piracy, privateering, and horse thievery, “allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves.” *See* 529 U.S. at 775-77 & nn. 6-7. We think it highly unlikely that the Court would have relied on the informer statutes to reach the result it did in *Vermont Agency* had it intended future relators, such as Bunk, seeking precisely the same sorts of penalty bounties, to be without standing to sue.

Successful FCA relators can and do recover both damages and civil penalties. *See* 31 U.S.C. § 3729(a) (specifying defendant’s liability “for a civil penalty . . . *plus* 3 times the amount of damages” sustained by the government (emphasis added)). The two remedies were thus designed to be unitary, or at least complementary. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) (ascertaining that dual remedy provisions facilitate the “chief purpose” of the FCA to ensure “that the government would be made completely whole,” and acknowledging the problem Congress confronted in “choosing a proper specific sum which would give full restitution”). Exemplifying the intended synergy, the penalty provision fulfills a function similar to that of the damages multiplier. *Cf. United States v. Bornstein*, 423 U.S. 303, 315 (1976) (touting usefulness of multiplier “to compensate the Government completely for the costs, delays, and inconvenience

occasioned by fraudulent claims"). As the court of appeals emphasized in *United States ex rel. Main v. Oakland City University*, 426 F.3d 914, 917 (7th Cir. 2005), the FCA "provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify."

The practical integration of the remedial provisions strongly suggests that they should not be evaluated in isolation for standing purposes. This seems all the more so when one also considers the similar integration between FCA relators and the government; the statute provides that both share in the ultimate recovery regardless of which directs the litigation. To deny a relator its bounty on the ground that it cannot pursue penalties alone would be to deny the United States due recompense, or, in the alternative, to deprive the government of its choice to forgo intervention. We decline Gosselin's invitation to interpret the FCA in a manner that disrupts the statute's careful design. In holding that relators seeking solely civil penalties enjoy standing to sue, we find ourselves in agreement with the two other circuits that have decided the issue. *See United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 804 (10th Cir. 2002), *rev'd on other grounds*, 549 U.S. 457, 479 (2007); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 752 n.3 (5th Cir. 2001) (en banc).

2.

Gosselin presses on, insisting that if Bunk's standing depends on Congress having assigned him the right under the FCA to seek redress for the government's sovereign injury, such an action by the legislative branch contravenes Article II of the Constitution, specifically the Appointments Clause

and the Take Care Clause. The former confers on the President the exclusive authority to appoint all "Officers of the United States," except those who require "the Advice and Consent of the Senate" or whose appointment Congress otherwise vests "in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The latter mandates that the President "take Care that the Laws be faithfully executed." *Id.* art. II, § 3. Gosselin contends that Congress, through the FCA, has effectively appointed Bunk an officer of the United States. This alleged usurpation of the President's constitutional role, the argument goes, has further resulted in Bunk impermissibly wielding the power reserved to the executive to penalize Gosselin's violation of federal law.

Being derivative of the failed threshold assault on relator standing pursuant to Article III of the Constitution, the more nuanced Article II attacks on the FCA were purposely and pointedly left unresolved by the Supreme Court in *Vermont Agency*. Justice Scalia was careful to note that the Court "express[ed] no view" on the constitutionality of the FCA under the Appointments and Take Care Clauses, because the statute was not contested on either of those bases. *See* 529 U.S. at 778 n.8. Importantly for our purposes, however, the Court recognized that "the validity of *qui tam* suits under those provisions," in contrast to the standing afforded the relator to bring suit, was not "a jurisdictional issue" requiring analysis and decision. *Id.*

The same is true here. Gosselin's constitutional challenges to the FCA are newly raised in its cross-appeal, having never been presented to the district

court for consideration in the first instance. Although the question of Bunk's standing strikes at the heart of federal jurisdiction limited under Article III to cases and controversies, whether the FCA contravenes Article II does not.

As one of our esteemed colleagues has aptly observed, "it remains the law of this circuit that when a party to a civil action fails to raise a point at trial, that party waives review of the issue unless there are exceptional or extraordinary circumstances justifying review." *Corti v. Storage Tech. Corp.*, 304 F.3d 336, 343 (4th Cir. 2002) (Niemeyer, J., concurring) (collecting cases). We discern no compelling reason to depart from the usual rule in this case. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals."). The *Vermont Agency* Court exercised its discretion to withhold ruling on the Article II challenges not properly before it, and, under similar circumstances, we do the same.

B.

1.

We move on to address Bunk's appeal of the district court's ruling that it lacked authorization to enter judgment against Gosselin on the 9,136 false claims for civil penalties amounting to less than $50 million and change (insofar as $248,000 can be considered "change"), notwithstanding that Bunk was willing to accept a remittitur to $24 million. Bunk suggests that, to the extent the district court correctly concluded that the Eighth Amendment is contravened if the full force of the FCA is brought to bear on Gosselin, the statute can nonetheless be

reformed within constitutional tolerances by imposing a civil penalty on fewer claims than proved or stipulated; the same result could be obtained by disregarding the $5,500 floor per claim. In support of the reformation approach, Bunk points to *Ayotte v. Planned Parenthood of Northern New England*, in which the Supreme Court explained that "when confronting a flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force." 546 U.S. 320, 328-29 (2006). We are content to leave the FCA as it is, however, by reaching the same result another way.

We begin with the proposition that litigation usually commences to redress a perceived wrong against one or more private persons or entities, or the public at large. As a society, we seek to encourage this structured, civilized form of dispute resolution, so it makes sense that parties availing themselves of the courts to sue possess considerable latitude—so far as may be fair to the defendant—over how the suit progresses and ultimately culminates. In the normal course, the plaintiff or prosecutor determines the claims or charges to bring, how much discovery or investigation is reasonable to undertake, the evidence and testimony introduced to sustain the burden of proof, and whether to initiate or accept an offer of compromise.

The primacy of the complaining party is reflected in the legal vernacular. We often speak of the civil plaintiff being the "master of his complaint." *See, e.g., Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) ("In general, the plaintiff is the master of the

complaint and has the option of naming only those parties the plaintiff chooses to sue." (citation and internal quotation marks omitted)); *Johnson v. Advance Am.*, 549 F.3d 932, 937 (4th Cir. 2008) (acknowledging that "plaintiffs, as masters of their complaint, can choose to circumscribe their class definition" to escape federal jurisdiction under Class Action Fairness Act); *Pueschel v. United States*, 369 F.3d 345, 356 (4th Cir. 2004) (explaining that claim raised in prior proceedings but not adjudicated was subsequently precluded because plaintiff was responsible "as the master of her complaint, to make sure that the district court identified all of her claims"). Similarly, in the criminal context, it is taken for granted that prosecutors enjoy substantial discretion with regard to the persons and offenses they elect to charge. *See Bordenkircher v. Hayes* 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

It is hardly surprising, then, that the FCA was crafted in acknowledgment of the flexibility typically afforded the government to right a public wrong. At the threshold, the United States is vested with the discretion to file or forgo suit. *See* 31 U.S.C. § 3730(a) (providing that, after diligent investigation, "[i]f the Attorney General finds that a person has violated or is violating section 3729, the Attorney General *may* bring a civil action under this section against the person (emphasis added)). If a relator initiates suit, then the government "*may* elect to intervene and proceed with the action." *Id.*

§ 3730(b)(2) (emphasis added). Upon intervention and notwithstanding the objection of the relator, the government may, after a hearing before the court, dismiss or settle the suit, *see id.* § 3730(c)(2)(A)-(B), prerogatives that, absent intervention, inhere in either the government or a relator suing as the government's assignee.

By requesting the district court to enter judgment for a reduced amount of $24 million on the claims he brought, Bunk, as the government's assignee, was merely exercising his discretion to attempt to bring the case to a suitable conclusion following the jury's verdict in his favor. A dispute can be settled, of course, at any time before litigation has commenced, during its pendency, or after it has finished. And settlements often take the form of a consent judgment. Bunk's proposal, being unilateral, was not a settlement. It was, however, doubtlessly intended to make the prospect of settlement more palatable for Gosselin, or—failing that immediate resolution—to smooth Bunk's path before the district court and on appeal against the looming Eighth Amendment challenge.

In short, Bunk's effort at a voluntary remittitur was just the sort of arrow that a plaintiff is presumed to possess within his quiver. It must be the rare case indeed where the plaintiff prevails before a jury, then, under no overt influence from the court or the defendant, elects to take a lesser judgment before the ink has dried on the verdict form. Nevertheless, we imagine that the plaintiff's discretion to willingly do so is virtually unbounded. In *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003), the district court entered judgment against the defendant under

the FCA for treble damages in excess of $174,000 stemming from 1459 false claims. Although the defendant was also liable for civil penalties on each claim, the court, at the government's request, assessed the $5,000 minimum on only 111 of the claims to add $555,000 to the judgment. Neither the court nor the defendant questioned the government's discretion to proceed in such a manner. *Accord Peterson v. Weinberger*, 508 F.2d 45, 55 (5th Cir. 1975) (approving entry of judgment on civil penalties for only 50 of 120 false claims "where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government").

By our observations, we do not mean to imply that a district court is at the mercy of either the government or a relator in an FCA proceeding. Quite the opposite is true: the court remains in firm control of those aspects of the litigation over which it has always had domain, including without limitation scheduling and discovery, the admission and exclusion of evidence, and the conduct of trial. But the court must permit the government or its assignee the freedom to navigate its FCA claims through the uncertain waters of the Eighth Amendment.

We reluctantly acknowledge that the perceived tension between the FCA and the Excessive Fines Clause of the Eighth Amendment, which so understandably concerned the district court, is a monster of our own creation. The FCA as enacted could arguably have been construed as authorizing a total civil penalty not to exceed $11,000 (in addition to treble damages) against anyone planning or executing a scheme to defraud the government. *See*

31 U.S.C. § 3729(a) (providing that any person presenting, facilitating through certain means, or conspiring to present government with a false or fraudulent claim "is liable to the United States Government for *a* civil penalty" now ranging from $5,500 to $11,000 (emphasis added)).

We eschewed such a narrow interpretation, however, in *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) ("*Harrison I*"), a relator's appeal from the district court's dismissal order, wherein the defendant was alleged to have misrepresented costs and withheld disclosures to obtain subcontracting approval from the government. With respect to the defendant's requests for reimbursement of its payments to the subcontractor, we concluded that the FCA "attaches liability, not to the underlying fraudulent activity . . . but to the claim for payment." *Harrison I*, 176 F.3d at 785 (citation and internal quotation marks omitted). Moreover, "each [invoice] constitutes a claim under the False Claims Act," *id.* at 792, on the ground that these invoiced "claim[s] for payment . . . [were] . . . submitted under a contract which was fraudulently approved," *id.* at 793-94. In so ruling, we took note of substantial amendments to the FCA thirteen years earlier, reflecting the determination of Congress to "'enhance the Government's ability to recover losses sustained as a result of fraud.'" *Id.* at 784 (quoting S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266)).

That approach proved just the tonic in the *Harrison* cases, where, it would turn out, the defendant was penalized nearly $200,000 for submitting twenty-five false invoices. *See United*

States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 913, 920 (4th Cir. 2003) *("Harrison II")*. It was inevitable, we suppose, in view of the vast number of government contracts—many of prodigious size and sophistication—that we would confront FCA actions involving thousands of invoices, thus exposing culpable defendants to millions of dollars of liability for civil penalties. We are entirely comfortable with that proposition. When an enormous public undertaking spawns a fraud of comparable breadth, the rule set forth in *Harrison I* helps to ensure what we reiterate is the primary purpose of the FCA: making the government completely whole. *See Harrison II*, 352 F.3d at 923 (citing *Hess*, 317 U.S at 551-52).

The district court's methodology cannot be said to have furthered that statutory purpose. Indeed, an award of nothing at all because the claims were so voluminous provides a perverse incentive for dishonest contractors to generate as many false claims as possible, siphoning ever more resources from the government. Though we agree that the number of false invoices presented is hardly a perfect indicator of the relative liability that ought to attach to an FCA defendant, injustice is avoided in the particular case by the discretion accorded the government and a relator to accept reduced penalties within constitutional limits, as ultimately adjudged by the courts.

2.

An important question remains as to whether $24 million is an excessive fine as applied to Gosselin's misconduct in connection with the DPM scheme. According to the Supreme Court, "[t]he touchstone of

the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The test is by no means onerous. A cumulative monetary penalty such as that imposed under the FCA will violate the Eighth Amendment proscription against excessive fines in the infrequent instance that it is "grossly disproportional to the gravity of a defendant's offense." *Id.*

The defendant in *Bajakajian*, travelling with his family from the United States to Cyprus, was detained by customs officials in Los Angeles upon being discovered with cash in his possession totalling $357,144. The defendant pleaded guilty to attempting to leave the United States with more than $10,000 without reporting it, *see* 31 U.S.C. § 5316(a)(1)(A), and the government sought forfeiture of the entire amount. In reviewing the judgment of the Ninth Circuit that the government was entitled to only $15,000, the Supreme Court assessed the gravity of the defendant's offense by its nature and the harm it caused.

In that regard, the Court explained that the defendant's "crime was solely a reporting offense. It was permissible to transport the currency out of the country so long as he reported it." *Bajakajian*, 524 U.S. at 337. Moreover, the "violation was unrelated to any other illegal activities. The money was the proceeds of legal activity and was to be used to repay a lawful debt." *Id.* at 338. Further, the Court observed, the defendant did "not fit into the class of persons for whom the statute was principally

designed: He is not a money launderer, a drug trafficker, or a tax evader." *Id.* Conviction of the failure-to-report offense carried a term of imprisonment of no longer than six months and a maximum fine of $5,000, "confirm[ing] a minimal level of culpability." *See id.* at 338-39. Finally, the resultant harm from the defendant's failure to report the cash he was carrying was described as "minimal," with "no fraud on the United States, and . . . no loss to the public fisc." *Id.* at 339. The Court thus affirmed the judgment of the court of appeals, recognizing that the amount sought was "larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government." *Id.* at 340.

The circumstances of this appeal could not be more readily distinguishable from those evaluated by the Supreme Court in *Bajakajian*. Signed into law by President Lincoln in the midst of the Civil War, the FCA was enacted specifically "in response to overcharges and other abuses by defense contractors." *Harrison I*, 176 F.3d at 784. As a defense contractor, Gosselin is precisely within the class of wrongdoers contemplated by the FCA. Gosselin did not commit some sort of technical offense; its misdeeds were of substance. For analogous misconduct in connection with the ITGBL program as it pertained to the Cartwright Channels, Gosselin was convicted of conspiring to defraud the United States, as proscribed by 18 U.S.C. § 371, and of conspiring to restrain trade, in contravention of 15 U.S.C. § 1. Those offenses carry maximum prison terms under the pertinent statutes of, respectively, five and ten years.

Though Bunk sought no damages, the question of economic harm to the government arising from the DPM false statements was fiercely contested before the district court. The court ultimately concluded that there was insufficient evidence of any harm, a notion seemingly inconsistent with Gosselin's apparent profit motive in making the statements at issue. The undisputed evidence revealed a substantial short-term price increase under the DPM contract for similar services previously provided, perhaps in excess of $2 million, and there is no doubt that the government has suffered significant opportunity costs from being deprived of the use of those funds for more than a decade.

For purposes of our Eighth Amendment analysis, however, the concept of harm need not be confined strictly to the economic realm. The prevalence of defense contractor scams, as often portrayed in the media, shakes the public's faith in the government's competence and may encourage others similarly situated to act in a like fashion. We made the proper point more than fifty years ago in *Toepleman v. United States*:

> [N]o proof is required to convince one that to the Government a false claim, successful or not, is always costly. Just as surely, against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable. The [FCA] seeks to reimburse the Government for just such losses. For a single false claim[, the civil penalty] would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced

> against the expense of the constant Treasury vigil they necessitate.

263 F.2d 697, 699 (4th Cir. 1959). Thus, to analyze whether a particular award of civil penalties under the FCA is "grossly" disproportionate such as to offend the Excessive Fines Clause, we must consider the award's deterrent effect on the defendant and on others perhaps contemplating a related course of fraudulent conduct.

Under the circumstances before us, we are satisfied that the entry of judgment on behalf of Bunk for $24 million on the DPM claim would not constitute an excessive fine under the Eighth Amendment. That amount, we think, appropriately reflects the gravity of Gosselin's offenses and provides the necessary and appropriate deterrent effect going forward. To the extent that the district court was of the view that the constitutional threshold could not exceed $1.5 million, we have reviewed its decision de novo, *see Bajakajian*, 524 U.S. at 336 & n.10, and have come to the different conclusion set forth above.[14]

C.

The government appeals the district court's Rule 50(a) determination as to the larger portion of its FCA claim, that is, those aspects of the claim seeking to hold Gosselin liable for its price-fixing conduct

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[14] Gosselin interposes a number of arguments to the effect that, for myriad reasons, Bunk and the government are estopped from advocating for a substantial penalty. *See* Br. for Defendants-Appellees/Cross Appellants at 36-39, 59-65. We have carefully considered each of these arguments, and we reject them.

affecting all channels with a German terminus. For purposes of this discussion, we exclude the smaller portion of the FCA claim relating to the Cartwright Channels, for which the government has received judgment and has not appealed. *See supra* note 9. The linchpin of the court's decision was a provision of the Shipping Act of 1984, 46 U.S.C. App. §§ 1701-1719, barring application of the antitrust laws to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." *Id.* § 1706(a)(4).[15] The court concluded that the provision accurately described Gosselin's agreements and activity to inflate the landed rate, reasoning further "that a false claim under the FCA cannot be predicated on price fixing conduct that enjoys a statutory immunity from the antitrust laws." J.A. 1137.[16]

In the criminal proceedings pertaining to the Cartwright Channels, during which Gosselin admitted to similar price fixing, we rejected the same

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[15] The Shipping Act was amended and recodified in 2006, with the result that substantially the same provision now appears at 46 U.S.C. § 40307(a)(5). The referenced exemption applies by its literal terms merely to liability under the antitrust laws, but, strictly for purposes of this decision, we assume that it may also apply to exempt persons from FCA liability.

[16] In deciding the immunity issue, the district court relied in part on the Ninth Circuit's opinion in *United States v. Tucor International, Inc.*, 189 F.3d 834, 836-38 (9th Cir. 1999), wherein the court of appeals declared the defendants immune from antitrust liability pursuant to § 1706(a)(4). The facts and circumstances surrounding Gosselin's case are dissimilar to those in *Tucor*, which, in any event, is not the law of this Circuit.

immunity argument. *See United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 509-11 (4th Cir. 2005). Mindful of the canon that exemptions from antitrust liability are to be narrowly construed, our friend Judge Wilkinson reasoned that because Gosselin's "collusive effort was aimed at the entire through transportation market, rather than just the foreign inland segment, we do not think that they can claim exemption." *Id.* at 510.

Put another way, Gosselin's price-fixing scheme did not inflate in isolation merely the landed rate quoted the freight forwarders; it inflated the all-inclusive through rates that the freight forwarders were induced to bid (and MTMC was compelled to pay) on each of the channels between the United States and Germany. The scheme thus concerned more than just the foreign inland segments from which the landed rate was derived. That the effect may have been more drastic in the Covan and Cartwright Channels—burdened with the additional encumbrance of Gosselin's bid-rigging efforts—is insufficient reason to segregate the other channels for purposes of the immunity analysis.

Adhering to our decision in the criminal proceedings, the district court correctly granted summary judgment against Gosselin as to liability on that portion of the FCA claim regarding the Cartwright Channels. The court, however, incorrectly ruled as a matter of law in Gosselin's favor on the company's price-fixing conduct affecting the remaining German channels, including the Covan Channels. Gosselin could not have successfully asserted Shipping Act immunity anew to defeat the preclusive effect of our prior judgment, and it should

not have been suffered to prevail on the same argument with respect to the nearly identical circumstances presented by the Covan Channels, or to the materially similar circumstances common to all the German channels. The jury should have been allowed to consider the government's entire case, but, inasmuch as it was not so permitted, the verdict in favor of Gosselin must be vacated as infirm. On remand, the district court shall conduct further proceedings, not inconsistent with this opinion, as to the remainder of the government's FCA claim.

IV.

Pursuant to the foregoing, the judgment of the district court is affirmed as to Gosselin's cross appeal. We also affirm the entry of judgment in favor of Bunk, but we reverse and remand the court's entry of no monetary award, instructing it to amend the judgment to award $24 million. Lastly, we vacate the court's judgment in favor of the United States so that it may conduct further proceedings on what remains of the government's FCA claim and reenter judgment as appropriate.

No. 12-1417 *AFFIRMED*

No. 12-1369 *AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS*

No. 12-1494 *VACATED AND REMANDED*

SHEDD, Circuit Judge, concurring in part and dissenting in part:

I concur in all but Part III-C of the majority opinion. In my view, the district court correctly determined that Gosselin's activity was immunized by the Shipping Act, 46 U.S.C. App. § 1706(a)(4), and I would affirm substantially for the reasons given by the district court. *See United States v. Birkart Globistics GMBH & Co.*, No. 1:02cv1168 (E.D. Va. Aug. 26, 2011).

APPENDIX B

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

UNITED STATES OF AMERICA *ex rel.* Kurt Bunk and Daniel Heuser, Plaintiffs/Relators, v. BIRKART GLOBISTICS GmbH & CO., *et al.*, Defendants.	No. 1:02cv1168 (AJT/TRJ)
UNITED STATES OF AMERICA *ex rel.* Ray Ammons, Plaintiff/Relator, v. THE PASHA GROUP, *et al.*, Defendants.	No. 1:07cv1198 (AJT/TRJ)

MEMORANDUM OPINION

The trial of this case began on July 18, 2011 with a jury. On July 27, 2001, the government rested its case in chief and the defendants moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), which on July 28, 2011, the Court orally granted in

part, denied in part, and reserved on several issues.[1] On August 1, 2011, the government moved for reconsideration with respect to the Court's ruling, which the Court orally denied the same day; and the Court issues this written memorandum opinion in further support of its rulings of July 28, 2011 that

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[1] Following the plaintiffs' case in chief, the Court granted defendants' Rule 50 motion as to both liability and damages as to all ITGBL claims pertaining to all channels other than those related to the 14 channels for which the carrier Covan International set the prime rate for IS01 (referred to as the "Covan Channels") and the 12 channels for which the carrier Cartwright International set the prime rate for IS02 (referred to as the "Cartwright Channels"). The Court also granted defendants' motion as to the plaintiffs' common law claims. The Court reserved with respect to whether the plaintiffs presented sufficient evidence for a jury to determine the number of false claims that defendants caused to be filed as to both the Covan Channels and the Cartwright Channels. The Court denied defendants' Rule 50 motion as to the Direct Procurement Method ("DPM") claim. Following the close of all of the evidence, the Court again denied defendants' Rule 50 motion as to the DPM claims but again reserved as to the sufficiency of the evidence for a jury to determine the number of false claims that defendants caused to be filed, expressing substantial doubt as to the sufficiency of the evidence in that regard, including the sufficiency of the evidence with respect to certain summary charts and related exhibits, and the exclusion of those exhibits under Fed. R. Civ. P. 37 and otherwise. On August 4, 2011, the jury returned a verdict in the defendants' favor as to the Covan Channels and in the plaintiffs' favor as to the Cartwright Channels and the DPM claim. The jury further found that defendants caused to be filed 4,351 false claims as to the Cartwright Channels and the parties stipulated that in the event of liability as to the DPM claim, the defendants filed 9,136 invoices under the DPM contract. Re. Ex. 296. The Court ordered that any post-trial motions, including those pertaining to the issues on which the Court reserved, be filed on or before August 29, 2011.

certain of defendants' conduct is exempt from antitrust challenges under the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1719 (2000), currently codified at 46 U.S.C. §§ 40301-40307 (2006),[2] and therefore cannot form the basis of a False Claims Act ("FCA") violation under 31 U.S.C. § 3729.

BACKGROUND

This action is brought by the United States, Relator Kurt Bunk, and Relator Ray Ammons (collectively "plaintiffs"). On July 18, 2008, the United States intervened as to all claims relating to the International Through Government Bill of Lading ("ITGBL") program. Those claims allege that the defendants Gosselin Worldwide Moving N.V., Gosselin Group N.V. (together "Gosselin"), and Marc Smet (collectively with Gosselin "defendants"), among others, formed a single, overarching bid-rigging and price-fixing conspiracy on November 14, 2000 that successfully raised the rates charged for packing and unpacking U.S. military household goods within Germany by German moving companies, known as German local agents. Based on these allegations, plaintiffs assert causes of actions for violations of the FCA, 31 U.S.C. § 3729, common law fraud, common law conspiracy to defraud the United States, and unjust enrichment.

Although the United States intervened as to the ITGBL claims, the United States did not intervene as to the claim referred to as the Direct Procurement Method contract, or DPM claim, brought by Relator

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[2] The Shipping Act of 1984 was amended effective October 6, 2006. The Court applies the version of the statute in effect during defendants' conduct, 46 U.S.C. app. §§ 1701-1719(2000).

Bunk. Relator Bunk alleges that the defendants violated the FCA by filing a false Certificate of Independent Price Determination in connection with their bid for the DPM contract, under which defendants certified that the prices in their offer had been arrived at independently, when in fact, they and other potential bidders had entered into a price fixing agreement and territory allocations.

STATEMENT OF FACTS[3]

A.

The United States selects American freight forwarding companies, also known as carriers, to transport the household goods of military personnel who are posted to a foreign country through the ITGBL program. The ITGBL program is administered through the Surface Deployment and Distribution Command ("SDDC"), formerly known as the Military Traffic Management Command ("MTMN"), of the Department of Defense ("DOD"). The SDDC solicits bids for "through rates" from these American freight forwarding companies. A through rate is composed of all of the costs involved in a door-to-door move of household goods. Carriers submit through rates biannually that cover a six-month period for a particular year, and are referred to as International Summer or International Winter cycle followed by the year; thus IS01 refers to the International Summer 2001 cycle and IW01 refers to the International Winter 2001 cycle. For each seasonal cycle, there are separate transportation routes, called channels, that correspond roughly with

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[3] The Statement of Facts is based on the evidence presented during plaintiffs' case in chief at trial.

a transportation route to and from each state, with some states having more than one channel, so that between Germany and the United States in 2001 and 2002, the years at issue, there was a total of 52 channels in each direction for each of the two seasons in each year.

The bidding takes place according to a two-step process. In the first step, also known as the initial filing, freight forwarders who wish to participate file a bid for a particular channel based on a through rate per hundred pounds of weight transported. For this reason, a freight forwarder could file as many as 104 separate through rates, one for each of the 104 channels in the IS cycle and then again for the IW cycle. During the years relevant in this case, 2001 and 2002, the freight forwarder would file its initial bids in November for the IS cycle and in May for the IW cycle. The low bid that emerges from this process is referred to as the "prime through rate" or simply the "prime rate." Under this bidding system, the freight forwarder who filed the prime rate for a particular channel was guaranteed at least 10% of the volume for that channel.

Once the freight forwarders filed their initial rates, the DOD would publish the lowest five rates and give the other participating carriers who had not filed at the prime rate an opportunity to indicate whether they would agree to ship at one of the five published rates. This second step of the process is called the "me-too" round of bidding. As with the carrier that had filed the prime rate, the DOD guaranteed that any carrier that filed a "me-too" at the prime rate would receive a certain percentage of the volume for that channel; and it was generally believed that

most, if not all, of the volume for a particular channel would be assigned to the carriers that had agreed to ship at the prime rate, although there were instances where the government would use carriers who had agreed to ship only at one of the higher rates, primarily because the prime rate carriers had insufficient capacity to handle all the volume that needed to be transported in that channel.

With limited exceptions, the freight forwarders' filed rates cover all costs associated with a "door-to-door" delivery. The components of a move include: the local (either U.S. or foreign) origin agent services, which primarily include packing of household goods; the origin line haul, which is the motor transportation of the household goods from a person's home to the origin port of shipment; origin port services; ocean transport services; destination port services; the destination line haul, which is the motor transportation of the household goods from the port to the person's new home; and destination local agent services, which primarily include the unpacking of the household goods. Generally, freight forwarders subcontract components of the move to subcontractors like the defendants who perform the services overseas. Freight forwarders must consider each component when they file rates with the DOD for each channel. The freight forwarder obtains payment for the move based on a government bill of lading ("GBL") which is submitted through a public voucher or invoice. Only the freight forwarder submits invoices for payment and only the freight forwarder is paid directly by the government, specifically, by the Defense Finance and Accounting Service.

B.

On November 14, 2000, in Sonthofen, Germany, the defendants entered into an agreement that came to be known as the Sonthofen Agreement, under which the signatories agreed to adhere to the "landed rate" system for the transportation of military household goods in the ITGBL program.[4] The landed rate system adopted in the Sonthofen Agreement bundled into one price the packing and unpacking destination services of the German local agents and the German line haul services, charges which the German agents controlled and set, along with the port agents' services, together with the trans-Atlantic ocean transportation services, which the German agents did not control or set.[5] Among the signatories to that agreement, in addition to Marc Smet on behalf of Gosselin, was ITO Mobel Transport GmbH ("ITO"), Andreas Christ Spedition & Mobeltransport GmbH, Birkhart Globistics AG, Victoria Gruppe, and E.N. Duerling GmbH.

In addition to acting as local agents, Gosselin and ITO acted as general agents and sold the bundled landed rate to freight forwarders, collected payment from the freight forwarders and paid the German local agents for their services. The local agents'

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[4] The Sonthofen Agreement stated in its entirety: "We, the undersigned companies agree that as of 4/1/2001 we will be using 'landed rates' for the U.S. Military business." Gov. Ex. 14.

[5] Prior to the Sonthofen Agreement, Gosselin had used a "landed rate" system with the freight forwarders since the late 1990s, which the government does not challenge. The Sonthofen Agreement for the first time infused into the landed rate system the alleged collusion of the German local agents to act in concert.

central purpose for this agreement was to get paid higher rates for their packing and unpacking destination services by preventing the freight forwarders from negotiating directly with local German agents and thereby curb the ability of freight forwarders to negotiate directly for a reduced rate.

Following the Sonthofen Agreement, on November 17, 2000, Gosselin through Marc Smet advised the freight forwarders for whom Gosselin served as general agent, including Covan International ("Covan"), Airland, Sentinel, and Jet Forwarding, that the rates had increased, that the German local agents were not going to handle business at the lower rates and that the larger local agents had already agreed to work only under the landed rate system. Subsequent communications took place among the German local agents, including a follow-up meeting on November 29, 2000 in Limburgerhoff, Germany in which they confirmed their agreement to work only under the landed rate system and the actual rates that they would receive for their packing and unpacking services.

In April 2001, another round of similar communications took place among the German agents with respect to the IW01 rate cycle, again led by Marc Smet of Gosselin, followed again by similar communications for the IS02 cycle. By April of 2001, the Pasha Group, an American landed rate provider, joined in the agreement and on April 25, 2001, Smet e-mailed the Pasha Group the rates Smet proposed be paid to German local agents under the landed rate with respect to their request for fixed rates in IW02. Although not all the German agents signed or agreed to the Sonthofen Agreement, the evidence was that

approximately 70-80% of the German agents did agree to abide by the Sonthofen Agreement, although some, including some of the actual signatories, did work for and negotiate individual rates lower than the landed rate. The freight forwarders would use the landed rate in calculating what rates to bid for the entire door-to-door move, and it is a fair inference that to the extent the landed rate was higher than what could have been negotiated otherwise with the local German agents, that increase was reflected in higher bids to the DOD for the overall door-to-door move.

Following the Sonthofen Agreement, the defendants were involved in two separate efforts to influence the actual bids that were filed by freight forwarders, one in the IS01 cycle and the other, in the IS02 cycle. In that regard, after the prime rate was set by Covan International ("Covan"), an American freight forwarder, for certain channels for the IS01 rate cycles, the German local agents determined that those identified prime rates were too low to cover all their charges for the local destination and line haul services that they had set for themselves and that, as a result, Covan and any other carriers that filed a me-too rate to those prime rates might fail to pay the German local agents after they performed their services, as other prime rate carriers had done in the past.[6] They therefore

[6] In the years preceding the Sonthofen Agreement, several freight forwarders that had set the prime rates had filed for bankruptcy, with the result that many of the German local agents, including Gosselin and the other signatories to the Sonthofen Agreement, had not been paid millions of dollars for their services.

decided that they would not handle any business for carriers that filed a me-too rate in the fourteen channels in which Covan set the prime rate (the "Covan Channels"). In addition, the carriers were told that efforts were being made to have Covan cancel its prime rate and to have other carriers me-too only the second low rate. Similar events occurred with respect to the IS02 cycle, but this time, in connection with a prime rate that had been filed by another American freight forwarder, Cartwright International Van Lines, Inc ("Cartwright"). In that regard, by an agreement dated January 8, 2002, Smet and other local German agents agreed that they would not handle business for freight forwarders in the twelve westbound channels for which Cartwright had filed the prime rate (the "Cartwright Channels") unless the freight forwarders submitted a me-too bid at the second low rate or above.

STANDARD OF REVIEW

On a motion for judgment as a matter of law, the Court is to consider whether "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). In evaluating a motion for judgment as a matter of law, the Court must view the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 259 (4th Cir. 2001). In considering the evidence presented at trial, the district court does "not make credibility determination or weigh the evidence," as "[c]redibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

ANALYSIS

The United States alleges three separate claims under the FCA, 31 U.S.C. § 3729; (1) that the defendants knowingly presented or caused to be presented to the United States government a false or fraudulent claim for payment or approval under § 3729(a)(1); (2) that the defendants knowingly made, or caused to be made or used a false record or statement to get a false claim paid or approved by the government under § 3729(a)(2); and (3) that the defendants conspired to defraud the United States by getting a false or fraudulent claim allowed or paid under § 3729(a)(3).

Each of these separate and distinct claims has different elements, but common to all of them is the government's theory of why the claims presented and paid by the United States were false. On that point, the United States contends that the claims were false because they were filed in connection with contracts whose issuance by the United States was fraudulently induced when the defendants and other German local agents, who collectively provide a large portion of origin and destination services in Germany, entered into a price fixing or bid-rigging agreement by agreeing to adhere to the landed rate system. The government further contends that the agreement to use the landed rate system had the effect of increasing the price that the United States paid for the transportation of military household goods in Germany under the ITBGL program in all 104 channels (52 channels eastbound and 52 channels westbound) in each of the four rate cycles

that occurred in 2001 and 2002. The government claims that because bid-rigging or price fixing is a fraudulent course of conduct, all claims for payment resulting from that conduct are false as a matter of law. This theory of falsity derives from *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which the Supreme Court assumed, without deciding, that the FCA covered a fraudulent course of conduct in connection with a government contract, specifically, bid-rigging. Other lower court cases, including the Fourth Circuit have explicitly adopted that theory of falsity. *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003). This Court will, therefore, apply that theory of falsity to the facts of this case.

In this case, the defendants' conduct on which the government relies to prove that false claims were filed pursuant to a fraudulent course of conduct falls into two distinct categories:

(1) the defendants' various agreements, formal and informal, that began with the Sonthofen Agreement, to use the landed rate system. Included in this category is the agreement among the defendants and other local German agents that they would work for American freight forwarders only under the landed rate system and also certain activities that defendants used to implement the landed rate system, including an agreement not to work for carriers who do not use the landed rate, and communicating that position to various carriers; and

(2) the defendants' efforts, and the efforts of those with whom they acted in concert, to influence the actual rates that various freight forwarders or carriers bid in connection with the Covan Channels

and the Cartwright Channels. Included in this category are the communications between the defendants or their alleged coconspirators with freight forwarders in which they stated that the local German agents would not work for any freight forwarder in any channel that did not me-too at least the second low rate, as opposed to the prime rates set by Covan in the IS01 cycle and Cartwright in the IS02 cycle, coupled with efforts to have Covan and Cartwright, and those carriers that filed a me-too bid to their prime rates, cancel their rates.

The defendants argue that neither course of conduct can result in the filing of false claims because the underlying conduct was not illegal under antitrust laws, either because the conduct was immune under the Shipping Act's exemptions or because the conduct, even if not covered by that immunity, was not unlawful under the antitrust law or otherwise, particularly given the very specific market place and regulatory environment in which the defendants operated, including predatory pricing and other practices that plagued the local German agents. The United States, on the other hand, argues that the conduct is not immune or otherwise protected under the antitrust laws, but even if it were, it is irrelevant whether or not defendants' conduct violated the antitrust laws because the defendants still engaged in a collusive, fraudulent course of conduct for the purposes of the FCA.

In order to rule on defendants' Rule 50 motion, the Court must decide whether defendants' price fixing and other collusive conduct is exempt from the antitrust laws under the Shipping Act and if so, whether that conduct can still be deemed a

fraudulent course of conduct for the purposes of the FCA. This issue appears to be one of first impression; the Court has not found any case that has considered whether price fixing conduct that is not unlawful under the antitrust laws can still subject a person to liability under the FCA.

The Shipping Act of 1984, 46 U.S.C. app. § 1706(a)(4) (2000), provides that the antitrust laws do not apply to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade."[7] The statute defines "through transportation" as "continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point and a foreign point or port." *Id.* at § 1702(24).

The government first contends that the immunity does not apply because it does not apply to any "conspiratorial conduct." The government's position, if accepted, would read the immunity out of the Shipping Act because the immunity, by its terms, applies to "any agreement or activity" and every conspiracy is necessarily based on an agreement and concerted activity. Likewise, to say that the immunity does not apply to a conspiracy even where the only conduct that would make the agreement an actionable conspiracy is covered by the immunity

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[7] The amended version of the Shipping Act, 46 U.S.C. § 40307(5), states that the antitrust laws do not apply to "an agreement or activity relating to the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade."

provided under the statute, necessarily eliminates the immunity, contrary to the clear language of the statute.

The government next contends that the immunity does not apply where the foreign conduct "affects United States commerce." This position appears to be based on § 1706(a)(3) of the Shipping Act, which provides an immunity from antitrust law "unless the agreement or activity [pertaining to transportation within or between foreign countries] has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States." The government's position is without merit. While it is true that certain immunities under the Shipping Act are so qualified, such as the immunity provided by § 1706(a)(3), the immunity at issue here is set forth in § 1706(a)(4), which has no such limitation. Moreover, there is no evidence that would support the conclusion that the German agent rates charged in Germany affect United States commerce. While those rates may affect the amount of the bid submitted by American freight forwarders under the ITGBL program, there is no evidence to suggest that those rates affect in any way the cost of providing services within the American portion of the transportation route. The evidence is that the landed rate was only used as a component of an overall rate filed with the United States, not as the basis for the pricing of domestic activities involved in through transportation. There was no evidence that it had any effect, let alone a direct effect, on commerce within the United States.

The government also argues that the defendants cannot claim any benefit from the Shipping Act

exemption pertaining to "a foreign inland segment" because the exemption applies only to "ocean common carrier agreements" or "marine terminal operator agreements," and their Sonthofen Agreement was not such an agreement. Thus, the government contends, the defendants' conspiracy to increase rates for local German agent services using landed rates does not fall under the Shipping Act because it was not an agreement "between or among" any ocean common carriers[8] and/or marine terminal operators. The government bases this argument on § 1703(a) of the Shipping Act, which states that "[t]his chapter applies to agreements by or among ocean common carriers to … discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations and other conditions of service" and on §1703(b) which provides "[t]his chapter applies to agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to … discuss, fix, or regulate rates or other conditions of service."

Contrary to the government's argument, and as the Ninth Circuit concluded in *United States v. Tucor International Inc.*, the plain language of the Shipping Act "does not compel the conclusion that agreements among ocean common carriers or marine terminal operators are the only agreements within the scope of the Shipping Act's exemptions." *United States v.*

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[8] Pursuant to the act, "'ocean common carrier' means a vessel-operating common carrier" and "'common carrier' means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation . . ." 46 U.S.C. app. § 1702(6), (16).

Tucor Int'l Inc., 189 F.3d 834, 837 (9th Cir. 1999). The plain language of the exemption, § 1706(a)(4), is not limited to such agreements. Rather, the language of § 1706(a)(4) applies not just to "an agreement" by or among ocean common carriers or marine terminal operators, but to "any agreement or activity"—without limitation—concerning the foreign inland segment of through transportation. The scope of this exemption contrasts with the narrower scope of § 1706(a)(2), which is limited to "any activity or agreement within the scope of this chapter," evidencing that Congress knew how to limit an exemption when it intended to do so. Moreover, certain exemptions under the Shipping Act extend to conduct far broader than the ocean segment transportation activities typically engaged in by ocean common carriers. *See id.* at § 1703(a)(3) (exempting from antitrust law certain agreements that relate to transportation services "within . . . foreign countries").

The government also argues based on legislative history that the antitrust exemptions apply only to activities that are subject to Federal Maritime Commission regulation and filing requirements. However, again, nothing in the language of the exemption itself would support such a narrow reading. *See Van Alstyne v. Electronic Scriptorium, Ltd.*, 560 F.3d 199, 207 (4th Cir. 2009) ("When statutory language is plain and unambiguous, there is no need for recourse to legislative history"); *see also Tucor*, 189 F.3d at 837 (considering and rejecting a similar argument about legislative intent under the Shipping Act). In addition, such arguments based on legislative history are difficult to embrace in light of the congressional amendments to the Shipping Act in

2006, after the *Tucor* decision, which did not amend Section 1706(a)(4) to limit its application, as the government urges this Court to do. *Compare* 46 U.S.C.A. § 40307(a)(5)(formerly 46 U.S.C. app. § 1706(a)(4))(exemption not limited)) *with* § 40307(a)(3)(formerly 46 U.S.C. app. § 1706(a)(2) (exemption applies to "an agreement or activity within the scope of this part")).

In deciding whether defendants' conduct is immune, the Court has also considered, as the government urges, the Fourth Circuit's decision in *United States v. Gosselin World Wide Moving N.V.*, 411 F.3d 502 (4th Cir. 2005), the criminal proceeding against Gosselin World Wide Moving N.V. and The Pasha Group based on some of the same conduct at issue in this case, specifically, defendants' attempt to cancel or influence the prime rates for the twelve westbound channels set by Cartwright in the IS02 cycle. There, the defendants claimed that the Shipping Act immunity extended to the entire scheme to influence the Cartwright bids. *Id.* at 509. The Fourth Circuit ruled that the statutory exemption did not extend that far. *Id.* at 510. In reaching its decision, the Fourth Circuit clearly analyzed the conduct at issue, not as a unitary undifferentiated whole, but in terms of the purpose of the particular conduct, focusing on the statute's requirement that the agreement or activity must *concern* the foreign inland segment and the parties' intention that their behavior causes a consequence in the foreign inland segment. *Id.* In that regard, the Court observed that "[i]t is true that defendants' original agreement with the German local agents may had the relationship to a 'foreign inland segment' that the statute requires." *Id.* The Fourth

Circuit held, however, that defendants' conduct extended beyond the foreign inland segment and concerned the entire through transportation market because the defendants directed and influenced the actual bids that were submitted to the DOD. *Id.* at 510-11. Specifically, the Fourth Circuit concluded that defendants desire to have Cartwright cancel its prime rates and the agreements defendants secured from other U.S. freight forwarders to file bids at or above the second low rate had little to do with the foreign inland segment, but rather were aimed at the entire through transportation market. *Id.* at 511.

Given the appellate decision in *Gosselin*, the question for the Court is whether defendants' behavior had in mind some consequence for the foreign inland segment such that their conduct sufficiently concerned the foreign inland segment of through transportation. Here, the evidence was clear and undisputed that the Sonthofen Agreement pertained to the origin and destination services, which concern exclusively the German inland segment. The fact that the Sonthofen Agreement, as implemented, included a landed rate that included ocean freight costs does not change this fact. The price of moving ocean freight was not part of the Sonthofen Agreement itself and is nevertheless immune under the Shipping Act.

For the above reasons, the Court must conclude, when viewing the evidence most favorably to the government, that the defendants' Sonthofen Agreement and the landed rate falls squarely within the scope of the Shipping Act immunity under § 1706(a)(4). The Court also concludes that other related conduct within the first category described

above, such as communicating the rate, or refusing to work for a carrier that does not agree to pay that rate, is also an agreement or activity that concerns the inland segment and is therefore within the scope of the immunity.

With respect to the second category of conduct that serves as the basis for the government's claim of falsity, the conduct directed to the bidding in the Covan Channels, the Court must conclude under the Fourth Circuits' opinion in *Gosselin*, that such conduct is not within the scope of the immunity because it is directed not to the foreign inland segment but to rates that apply to the entire through transportation route. As with the Cartwright Channels in IS02, the defendants sought to have Covan cancel the fourteen westbound prime rates and have other freight forwarders me-too at the second lowest rate or higher—conduct that the Fourth Circuit found to concern the entire through transportation service, rather than the inland portion of the move. Thus, the Court concludes that this conduct is not immunized by the Shipping Act.

Having concluded that the conduct the government relies on with respect to the Sonthofen Agreement is immune, the Court must now consider whether it can still serve as the basis for liability under the FCA. Overall, the government contends that the theory of recovery under the FCA embraced in *Marcus v. Hess*, and the cases based on it, applies to all bid-rigging agreements, regardless of whether the conduct is independently actionable. Similarly, the government argues, based in part on the Court's prior rulings, that because the United States has not asserted causes of action based on the antitrust laws, it need

not prove a *per se* or other antitrust violation, or indeed any other legally enforceable actual claim against the defendants, in order to establish that the filed claims for payment were false or fraudulent by virtue of the defendants' conspiracy, citing as support *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 778 (4th Cir. 1999) (quoting *United States v. Neifert White Co.*, 390 U.S. 228, 233 (1968)) ("The False Claims Act 'reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.'"). Neither contention supports the government's position that conduct immune under the antitrust laws can serve as fraudulent conduct for the purposes of the FCA. In *Marcus v. Hess*, and those cases that followed, the courts either expressly or implicitly assumed that the underlying collusive conduct was not legally sanctioned or protected. Likewise, the government's position that it need not prove an antitrust claim or any other cognizable claim begs the question whether bid-rigging conduct that is statutorily lawful and specifically exempt from liability under the antitrust laws can nevertheless be the basis for liability under the FCA.

In a similar vein, the government argues that the claimed antitrust immunities are completely irrelevant to proving the elements of a FCA violation, based in large part on this Court's decision in *United States v. Gosselin World Wide Moving N.V.*, 333 F. Supp. 2d 497 (E.D. Va. 2004), the now completed criminal case against some of the defendants, as well as the Fourth Circuit's decision in the appeal of that case, 411 F.3d 502 (4th Cir. 2005). The conduct at issue in the criminal case pertained to the Cartwright Channels in the IS02 cycle; and the Court ruled that

this conduct did not support a criminal conviction under the Sherman Act because of the statutory antitrust exemption under the Shipping Act for agreements that concern the foreign inland segment of through transportation. *See Gosselin*, 333 F. Supp. 2d at 507. It also ruled, however, that this conduct was sufficient to support criminal liability for conspiracy to defraud the government under 18 U.S.C. § 371. *Id.* at 512. In making those rulings, the Court did not consider the specific issue in this case but merely held that under a *Blockburger* analysis, the two offenses, one under the Sherman Act and one under the federal conspiracy to defraud statute, had different elements. *Gosselin*, 333 F. Supp. 2d at 511-12. On appeal, the Fourth Circuit reversed in part, concluding that the antitrust immunity under the Shipping Act did not extend to defendants' conduct pertaining to the Cartwright Channels. Significant for the purposes of this case is that the Fourth Circuit specifically reserved on whether the immunity under the Shipping Act extends to anti-competitive behavior that is also actionable under a conspiracy to defraud theory. *Gosselin*, 411 F.3d at 515.

The United States' position that defendants' conduct can be the basis for a false claim, notwithstanding its immunity from antitrust liability, is also difficult to reconcile with its unwillingness to argue that FCA liability also results from the immunized price fixing involved in the predetermined rates for the ocean transport segment. Those fixed rates, which are negotiated between the International Shippers' Association ("ISA") and the Trans-Atlantic American Flag Liner Operators ("TAAFLO"), are also incorporated into the bids

submitted by freight forwarders as part of the ITGBL program. *See* 46 U.S.C. §§ 40303, 40307, formerly 46 U.S.C.A. app. §§ 1704, 1706. Under the government's theory, a claim for payment submitted under the ITGBL program based on bids that incorporate those TAAFLO-ISA fixed prices would also be a false claim, a position the government itself has not embraced or suggested.

The Court concludes that a false claim under the FCA cannot be predicated on price fixing conduct that enjoys a statutory immunity from the antitrust laws. The Court, therefore, concludes that the defendants' landed rate agreement, and other related conduct immune from antitrust liability under the Shipping Act cannot be the basis for a false claim under the FCA.

Based on the statement of facts and plea agreement from the criminal proceeding, the Court previously entered judgment as to liability with respect to defendants' conduct as it relates to the Cartwright Channels. With respect to the other channels in the 2001 and 2002 rate cycles, other than the Covan Channels and the Cartwright Channels, the only conduct relied on by the government to establish liability relates to the landed rate agreement. There is no evidence that the defendants engaged in or directed any of their activities to the actual amount of the bids that would be submitted for those channels or in any way directed activities to attempt to have a freight forwarder cancel its rates. As discussed above, the activities pertaining to the Sonthofen Agreement itself and the use of a landed rate do not alone establish falsity and therefore cannot establish liability under the FCA. The Court,

therefore, concludes that defendants' conduct as to these remaining channels concerns only the inland segment of the through transportation process and is therefore immune under the Shipping Act.

Because the defendants' conduct is immune with respect to all ITGBL channels other than the Covan Channels and the Cartwright Channels, the government's evidence is also insufficient to establish with respect to those channels an agreement to achieve an illegal purpose or an agreement to achieve a lawful objective through illegal means and therefore cannot serve as the basis for the government conspiracy to defraud claim under 31 U.S.C. § 3729(a)(3). Likewise, the use of the landed rate did not result in the filing of a false claim and, therefore, there is no evidence to establish that the defendants presented or caused to be presented a false claim with respect to those channels in violation of § 3729(a)(1) as to those channels. Nor did the landed rate agreements result in the making, using or causing to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government in violation of § 3729(a)(2).

CONCLUSION

For the above reasons and those stated in open court, the Court has granted defendants' motion pursuant to Fed. R. Civ. P. 50(a) as to all ITBGL channels other than the Covan Channels in the IS01 rate cycle and the Cartwright Channels in the IS02 rate cycle.

The Clerk is directed to forward copies of this Memorandum Opinion to all counsel of record.

/s/ Anthony J. Trenga

Anthony J. Trenga
United States District Judge

Alexandria, Virginia
August 26, 2011

APPENDIX C

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

UNITED STATES OF AMERICA ex rel. Kurt Bunk and Daniel Heuser, Plaintiffs/Relators, v. BIRKART GLOBISTICS GmbH & CO., et al., Defendants.	No. 1:02cv1168 (AJT/TRJ)
UNITED STATES OF AMERICA ex rel. Ray Ammons, Plaintiff/Relator, v. THE PASHA GROUP, et al., Defendants.	No. 1:07cv1198 (AJT/TRJ)

MEMORANDUM OPINION

These consolidated actions present claims asserted under the False Claims Act, 31 U.S.C. § 3729(a)(l)-(3) (2000) ("FCA"). Beginning on July 18, 2011, this case was tried before a jury, which on August 4, 2011,

returned a verdict against the Gosselin Defendants[1] and in favor of the United States with respect to what has been referred to in this litigation as the "DPM claim," filed and pursued by Relator Bunk, without the intervention of the United States.[2] Presently pending before the Court is the Plaintiffs' post-trial motion for an award of civil penalties under the False Claims Act with respect to the DPM claim. For the reasons stated herein, the Court concludes that the mandatory civil penalty of at least $50,248,000 constitutes an unconstitutionally excessive fine in violation of the Eighth Amendment and, having made that determination, further concludes that it does not have the discretion to fashion some other civil penalty that would be within constitutional limits; and therefore no civil penalty will be imposed.

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[1] Defendants Gosselin Worldwide Moving N.V. ("Gosselin"), its successor Gosselin Group N.V., and Marc Smet are collectively referred to as the "Gosselin Defendants" or "Defendants."

[2] The jury also found in favor of the Gosselin Defendants as to the "Covan Channels" and against the Gosselin Defendants as to the number of false claims that the Gosselin Defendants caused to be presented with respect to the "Cartwright Channels." In post-trial proceedings, by memorandum opinion and order dated October 19, 2011 (Doc. Nos. 1104 and 1105), the Court concluded that the evidence was insufficient to sustain the jury's funding as to the number of false claims with respect to the Cartwright Channels, vacated and set aside the jury's verdict in that regard, and awarded one civil penalty with respect to the Cartwright claim in an amount to be determined. In addition, the Court concluded that the amount of treble damages otherwise assessable against the Gosselin Defendants based on the Cartwright Channels, $2,595,000, was completely offset by the restitution and settlement payments that the government had already received.

BACKGROUND

The nature and procedural history of this case are set forth in the Court's previous orders and memorandum opinions.[3] Briefly stated for the purposes of the pending motions, these consolidated actions were originally filed in 2002 by Relator Kurt Bunk and Relator Ray Ammons (collectively "Relators"),[4] and remained under seal for several years while the United States pursued and resolved its criminal charges against the Gosselin Defendants, *see* Case No. 1:03-cr-551 (E.D. Va.), and evaluated whether to intervene in these actions. On July 18, 2008, the United States intervened as to all claims relating to the International Through Government Bill of Lading ("ITGBL") program (the "ITGBL claims"), but not as to any claims relating to the contract awarded to Gosselin in 2001 (the "2001 DPM contract") under the Direct Procurement Method ("DPM") program (the "DPM claims"). All ITGBL claims against the Defendants have been resolved; and with respect to the DPM claim, the only remaining issue to be decided is the amount of civil penalties to be assessed against the Gosselin Defendants.

In late summer and early fall of 2000, the Department of Defense Contracting Office in Grafenwoehr, Germany, also known as the CCPSO,

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[3] *See*, in particular, this Court's Memorandum Opinion dated August 26, 2011 (Doc. No. 1072) and Memorandum Opinion dated October 19, 2011 (Doc. No. 1104), and related orders.

[4] Relator Heuser voluntarily withdrew from this case by consent of all parties. *See* Order dated June 6, 2011 (Doc. No. 895).

announced that it would be soliciting bids under the DPM program for the transportation of military household goods owned by U.S. military personnel and their families between U.S. military installations in, to, and from Germany, Italy, Belgium, The Netherlands, and Luxemburg. Under this contemplated procurement, the government would contract directly with local agents in those countries, rather than indirectly through United States freight forwarders, as under the ITGBL program; and unlike in other DPM procurements, for the 2001 procurement, only one company would be selected for all the included countries, rather than, as in prior years, several regional providers. Bidders were therefore required to demonstrate the ability to service all of the countries covered by the contemplated DPM contract; and if arrangements with subcontractors or joint venture partners were necessary for that purpose, to identify those arrangements in its bid.

On February 15, 2001, before bids were due, the government held an information session at the United States military installation in Grafenwoehr for all prospective bidders, at which the government detailed the 2001 DPM contract requirements. Immediately following that presentation, representatives of Gosselin, ITO, Birkart, Viktoria, and others met in the cafeteria at Grafenwoehr to discuss the DPM contract. At this meeting, three companies—Gosselin, ITO and Viktoria—discussed and agreed among themselves as to the prices each would charge and the territories they would service as subcontractors to the winning bidder, regardless of who actually was awarded the 2001 DPM contract.

The agreed upon subcontractor prices were confirmed in a later memorandum from ITO to Gosselin regarding "the rates that were agreed by the participants in the February meeting for the services to be rendered under the DPM contract." Further, ITO wrote that "[w]e find this very important as we go ahead and stabilize this business. We talk a lot about TRUST and we feel it is outmost [*sic*] important that we all work together in a good system, as we will trust you that things will happen just as they are being said." Shortly thereafter, by email dated February 20, 2001, Gosselin confirmed with ITO, Birkart, Viktoria, and Andreas Christ—other bidders on the 2001 DPM contract—the rates to be paid agents or subcontractors for certain services under the 2001 DPM contract. In that same email, Gosselin also listed trucking rates and disclosed that "a 5 [percent] rate increase per year is buil[t] into these rates." Gosselin further instructed the other bidders to list certain agents as servicing agents for each country.

By solicitation dated February 28, 2001 (Solicitation DAJA 16-01-R-0003), the CCPSO formally solicited bids for the 2001 DPM contract. Although discussions with a bidder's prospective subcontractors were implicitly contemplated, nothing in the solicitation indicates that the competing bidders were permitted, prior to submitting bids, to confer and collusively agree among themselves on what would be charged for servicing as a subcontractor under the 2001 DPM contract or to agree to share the contract and divide territories.

On February 28, 2001, Gosselin submitted its bid on the 2001 DPM contract. Included within that bid

was a Certificate of Independent Pricing ("CIPD"), which affirmed that "[t]he prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods of factors used to calculate the prices offered[.]" *See* Defs.' Ex. 335 at 254. On April 11, 2001, the United States awarded to Defendant Gosselin the 2001 DPM contract, DAJA-0016-01-0018, and Gosselin's services under that contract commenced on or around May 1, 2001.

In this action, Relator Bunk (who was employed by Birkart) alleged that the Gosselin Defendants violated the FCA by filing a false CIPD in connection with their bid for the 2001 DPM contract, under which Defendants certified that the prices in their offer had been arrived at "independently," when in fact, they and other potential bidders had entered into a subcontract price-fixing agreement and territory allocations. For 11 days beginning on July 18, 2011, this case was tried before a jury which, on August 4, 2011, returned a verdict in favor of the Relators as to the DPM claim.

Although Relators alleged damages in their original and amended complaints, *see*, *e.g.*, Doc. No. 448, the Relators did not seek damages at trial.[5]

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[5] As explained in Relators' Trial Brief on DPM Claims, "Relator Bunk is not seeking actual damages on his DPM claim, in that he could not procure from the government evidence necessary to support a damages analysis and [expert] opinion . . . . Rather, Relator Bunk seeks only a civil penalty of $5,000 to $10,000 for each false claim submitted . . . ." *See* Doc. No. 951 at 20-21.

Relators also presented no evidence at trial relating to the number of false claims arising out of the 2001 DPM contract; and the jury considered only the Defendants' liability with respect to the DPM claim, not the number of false claims that Defendants submitted under the 2001 DPM contract. In order to establish the number of false claims under the 2001 DPM contract, the Relators have relied entirely on the parties' stipulation that Defendants filed 9,136 invoices under the 2001 DPM contract. As discussed above, the jury returned a verdict against the Defendants on liability under the FCA based on the 2001 DPM contract.

Following the trial, the Defendants challenged the sufficiency of the evidence as to the jury's finding of liability on the DPM claim. *See* Defs.' Renewed Mot. for J. as a Matter of Law and Alternative Mot. for Partial New Trial (Doc. No. 1075). Based on the jury's finding of liability, the Plaintiffs sought to have a civil penalty of between $5,500 and $11,000 assessed as to each of those 9,136 invoices that the parties stipulated had been filed under the DPM contract. *See* United States and Relators' Mot. for J. Against Gosselin Defendants for Damages and Civil Penalties (Doc. No. 1076); Relators' Mot. Regarding Further Proceedings (Doc. No. 1073). By Memorandum Opinion and Order dated October 19, 2011, the Court concluded that the evidence was sufficient to sustain the jury's verdict as to Defendants' liability on the DPM claim and that as a matter of law, each of the 9,136 invoices constituted a false claim. *See* Doc. Nos. 1104 and 1105. In order to determine the amount of civil penalties to be assessed with respect to the 2001 DPM contract, the

Court held an evidentiary hearing on October 26, 2011.[6]

Central to the imposition of civil penalties based on the DPM claim is whether the minimum mandated civil penalty is unconstitutionally excessive under the Eighth Amendment; and if so what, if any, alternative civil penalty should be awarded. The Court ordered the parties to file supplemental memoranda concerning those issues, including specifically the Court's authority to impose a penalty other than that mandated under the statute in the event it found that penalty unconstitutionally excessive.[7] The Court has now received and

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[6] Following the Court's Order dated October 19, 2011 (awarding one civil penalty with respect to Defendants' liability based on the Cartwright Channels), the United States did not to present any evidence as to the appropriate amount of that civil penalty and proposed that the Court assess the minimum amount of $5,500 for that one civil penalty. *See* Oct. 26, 2011 Hrg. Tr. at 6:19-21.

[7] *See* Order dated October 31, 2011 (Doc. No. 1114). Among other issues, the Order required the parties to address (1) the accuracy or inaccuracy of the data and the analysis submitted by the parties with respect to the harm suffered by the United States as a result of the Defendants' subcontract pricing conspiracy; (2) whether the amount of civil penalties calculated at $5,500 on 9,136 false claims ($50,248,000) is within or beyond constitutional limits under the Excessive Fines Clause of the Eighth Amendment; (3) what methodology should the Court use in determining whether the civil penalties required to be imposed under the FCA were "grossly disproportional" to the "harm" suffered by the United States; and (4) should the Court determine that the assessment of a civil penalty calculated at $5,500 on 9,136 false claims is unconstitutional, whether the Court should impose a civil penalty that would be within constitutional limits and if so, how should the Court determine

considered the parties' supplemental memoranda and responses thereto, and finds that additional hearings in this matter would not further aid the Court.[8]

STANDARD OF REVIEW

The standard for evaluating challenges under the Eighth Amendment's Excessive Fines Clause was announced by the Supreme Court in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998): "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens,* 529 U.S. 765, 784 (2000), the Supreme Court made clear that damages imposed under the FCA are "essentially punitive in nature." *See also id.* at 786 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."); *United States v. Mackby,* 261 F.3d 821, 830 (9th Cir. 2001) ("We conclude the civil sanctions provided by the False Claims Act are

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what that civil penalty would be, and what is the legal authority for the Court to engage in that exercise.

[8] In addition to the memoranda directed by the Court to be filed, the United States also filed (1) the United States' Motion to Strike Certain Testimony of Stephen Marshall (Doc. No. 1121), and (2) the United States and Relators' Motion for Leave to File Reply to Defendants' Response to United States and Relators' Memorandum Of Law in Support of Award of Civil Penalties (Doc. No. 1124), which the Defendants have opposed. By Order dated February 13, 2012 (Doc. No. 1130), the Court has denied the United States' Motion to Strike (Doc. No. 1121) and granted the United States and Relators' Motion for Leave to File Reply (Doc. No. 1124).

subject to analysis under the Excessive Fines Clause because the sanctions represent a payment to the government, at least in part, as punishment. Inquiry must be made, therefore, to determine whether the payment required by the district court is so grossly disproportionate to the gravity of [defendant's] violation as to violate the Eighth Amendment."). "In an Excessive Fines Clause inquiry, the burden rests on the defendant." *United States ex rel. Tyson v. Amerigroup Ill., Inc.,* 488 F. Supp. 2d 719, 744 (N.D. 111. 2007) (citing *Bajakajian*, 524 U.S. at 348 (Kennedy, J. dissenting)).

Courts have recognized a variety of factors to consider when evaluating whether a fine is excessive under the Eighth Amendment. Among those generally recognized are (1) the extent of the harm caused; (2) the gravity of the offense relative to the fine; (3) whether the violation was related to other illegal activity, and the nature and extent of that activity; and (4) the availability of other penalties and the maximum penalties which could have been imposed. *See, e.g., United States v. 3814 NW Thurman St., Portland, Or.,* 164 F.3d 1191, 1197-98 (9th Cir. 1999) (citing *Bajakajian,* 524 U.S. at 336-39).

ANALYSIS

A. Whether application of the FCA to the DPM claim results in an unconstitutional penalty.

The FCA provides that a person who violates the False Claims Act "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990." 31 U.S.C. § 3729 (citing 28 U.S.C. § 2461 note,

Public Law 101-410). The applicable civil penalty, as adjusted, with respect to Defendants' liability based on the 2001 DPM contract, is no less than $5,500 and no more than $11,000.

As the False Claims Act has been interpreted in decisions binding on this Court, a civil penalty must be assessed for each false claim; and each claim for payment made under a fraudulently induced contract constitutes a separate false claim. *See Harrison* v. *Westinghouse Savannah River Co.,* 176 F.3d 776, 785 (4th Cir. 1999) ("In order for a false statement to be actionable under the False Claims Act it must constitute a 'false or fraudulent claim.' '[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.''" (quoting *United States v. Rivera,* 55 F.3d 703, 709 (1st Cir. 1995) (alteration in original))); *id.* at 793-94 ("Each claim for payment under the contract was therefore submitted under a contract which was fraudulently approved. So, [the defendant] could face False Claims Act liability for each claim for payment under the [fraudulently approved contract]."). The parties stipulated at trial that the Defendants submitted 9,136 invoices under the 2001 DPM contract; and the Court has already determined that as a matter of law each of those invoices constitutes a false claim for the purposes of assessing a civil penalty under the FCA. *See* Memorandum Opinion (Doc. No. 1104) at 33. The Court is therefore obligated to assess a civil penalty of no less than $5,500 and no more than $11,000 for each of 9,136 false claims, which amounts to no less than $50,248,000 and no more than $100,496,000. For this reason, the Court must determine whether an assessment in this case of civil

penalties of at least approximately $50 million would exceed constitutional limits under the Eighth Amendment. In order to determine whether a civil penalty is "grossly disproportional to the gravity of a defendant's offense" for Eighth Amendment purposes, the Court must first determine the "harm" caused by Defendants' conduct. That analysis requires an assessment of both economic and non-economic harm. If the Court were to determine that the mandated civil penalty is grossly disproportional to that harm, resulting in an unconstitutional application of the False Claims Act, the Court must then consider whether it has the authority to proceed further and impose a lesser amount that would be within constitutional limits and if so, what is that amount, and how is it to be determined.

1. Whether the government suffered any economic harm as a result of Defendants' conduct.

The Court's task with respect to economic harm is particularly challenging in this case, raising unsettled procedural and substantive issues, since neither the government (which did not intervene with respect to the DPM claim) nor the Relators attempted to prove at trial any damages associated with the DPM claim; and there was in fact no evidence during the trial of any cognizable financial harm to the United States as a result of the 2001 DPM contract. Rather, the only attempt to quantify the harm caused by Defendants' conduct came at the post-trial evidentiary hearing held on October 26, 2011 for the purpose of determining the amount of civil penalties to be assessed.[9] At that hearing, Plaintiffs attempted

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[9] The Defendants have objected to any attempt in post-trial proceedings to claim that the Defendants' conduct caused the

to quantify the relevant harm, not based on any cognizable theory of damages under the FCA, but rather, based on a comparison of Defendants' pricing under the 2001 DPM contract with the pricing provided by a variety of contractors, including Gosselin, under government contracts for comparable services in prior years.

The government's solicitation for proposals with respect the 2001 DPM contract required a bidder to list separate pricing for 51 separate tasks, each disclosed in a separate line item. *See, e.g.*, Trial Tr. at 1687:13-19. The principal task that accounted for most of the expense to be incurred by the government was the basic packing and loading of household goods, listed as line item 1AA, and it was Defendants' pricing for this line item that at trial was effectively

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government to sustain quantifiable economic damage on both substantive and procedural grounds, including that (1) the Plaintiffs' decision not to claim damages at trial precluded them from claiming financial harm for the purposes of assessing civil penalties; (2) that the legal measure of harm for the purposes of assessing civil penalties is the same as the legal measure of damages under the FCA and that since the Plaintiffs did not prove any legally cognizable damages, either at trial or at the post-trial evidentiary hearing on civil penalties, they are precluded from claiming financial harm for the purpose of justifying or determining the appropriate amount of civil penalties; and (3) the Plaintiffs failed to disclose and substantiate their theory of harm for the purposes of civil penalties during pre-trial discovery, including their failure to identify expert witnesses that testified at the evidentiary hearing on civil penalties, and were therefore precluded from presenting that evidence. As substantial as these objections are, given the Court's determination that the Plaintiffs failed to substantiate any financial harm to the government as a result of Defendants' conduct with respect to the 2001 DPM contract, the Court declines to rule on these objections.

the sole basis for the Relators' claim that Defendants filed with their proposal a false CIPD. In its proposal, which the United States accepted, Gosselin submitted a bid for item 1AA services of €36 per hundredweight. This bid was in turn based on the unlawful agreement among certain bidders to charge €35 per hundredweight as a subcontractor for item 1AA services, regardless of who was awarded the contract.

Plaintiffs claim that Defendants' item 1AA pricing was inflated and the amount by which the government overpaid as a result of the subcontractor pricing conspiracy could be calculated by comparing the pricing under the 2001 DPM contract with what the government paid for comparable services in 1999 and 2000. Based on this approach, Plaintiffs claim that the Defendants' conduct caused the government to pay between approximately three and five million dollars more than it should have.[10] As discussed

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[10] Plaintiffs' primary claim is that Defendants' conduct caused approximately $5 million of economic harm. In support of this amount, Plaintiffs claim that "a simple average of the prices for the same service [covered by the 1AA complete packing service] indicates that the prior price for the 1AA complete packing services was, on average, 32.4 Deutsche Marks ("DM") under the 1999 DPM Contracts[, which] is less than half of the price charged under the 2001 DPM Contract . . . ." *Id.* at 8. (The parties have assumed that for the time period of the 2001 DPM Contract, 1 DM was roughly equivalent to €0.50, and €1 was roughly equivalent to $1.) Plaintiffs then argue that because the total cost of the item 1AA complete packing service under the 2001 DPM Contract, as estimated by Gosselin, was €1.113 million for Germany in each of the three years that the contract was in effect, for a total of €3.3 million, the harm to the government as a result of Defendants' conduct is "50% of €3.3 million which equates to $2.455 million [and w]hen interest is

below, the Court concludes that the Plaintiffs have failed to establish, based on reliable information, that the Defendants' conduct, in fact, caused the government any economic harm.

First, there was no evidence that any bidder on the 2001 DPM contract would have offered or the government would have accepted a lower overall bid or even a lower price for line item 1AA. In fact, one of the three bids on the 2001 DPM contract that was rejected by the United States was submitted by a company that was not a party to the subcontract

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included for the decade that the Gosselin Defendants have had the benefit of their ill gotten gains to the detriment of the United States, the damages double to $5 million." *See* Doc. No. 1086 at 7-8 (citing Re. Ex. 177 at 9, 26, 43).

Plaintiffs alternatively claimed that the harm can also be calculated by comparing "the cost of a 'standard' packing service of 10,000 pounds, with 10 percent consisting of oversize and overflow household goods with 10 crates." *See* United States and Relators' Mem. of Law in Supp. of Award of Civil Penalties, Doc. No. 1117 at 2 (citing Re. Ex. 300). Based on this approach, Plaintiffs claim that the average cost to the United States for this service under the 2001 DPM contract was 87% higher than under the six 1999 DPM contracts. *Id.* Plaintiffs therefore calculate that the United States paid €4 million for these services under the 2001 DPM contract, which, according to the 87 percent overcharge figure, "equates to an overcharge of €1.87 million," which Plaintiffs equate to an overcharge of "approximately $2 million," and Plaintiffs employ this rounded up $2 million figure in their subsequent calculations. *Id.* at 3. Plaintiffs then "[a]pply[] a 4 percent interest rate [to the overcharge amount, which] increases the principal debt by 50 percent over a ten-year period," *id.* at 3, resulting in damages to the United States of $3 million, "consisting of $2 million in overcharges and an additional $1 million for the carrying cost incurred by the United States due to the lost use of the $2 million over a decade." *id.* at 3-4.

pricing conspiracy. In short, there was no evidence that the United States could have or would have obtained item 1AA services under the 2001 DPM contract for a lower cost, absent the subcontract pricing conspiracy. *See* Hrg. Tr. (Oct. 26, 2011) at 48:20-49:4 (Plaintiffs conceding that they had no evidence that absent the conspiracy, anyone would have bid a lower amount for item 1AA services under the 2001 DPM contract). But this is precisely the type of evidence needed to establish and calculate damages under the FCA: the amount the government paid over and above what the government would have paid if not for the fraudulent activity. *See, e.g., United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551-52 (1943) ("We think the chief purpose of the statutes here was to provide for *restitution to the government of money taken from it by fraud*...."); *United States ex rel. Roby v. Boeing Co.,* 79 F. Supp. 2d 877, 884 (S.D. Ohio 1999) ("The *Marcus* Court used a 'but for' test in its analysis of FCA damages. In other words, a court should ask the question of, 'How much would the government have paid for the item at issue 'but for' the fraudulent actions of the defendant?'"). For these reasons, the Plaintiffs' analysis for economic harm does not conform to any recognized measure of economic harm or damages.

Second, the Court concludes, based on the evidence presented, that Gosselin's pricing for item 1AA services under the 2001 DPM contract was substantially the same as, and perhaps less than, its pricing for comparable services to the United States during 1999 and 2000, especially since certain costs had increased significantly by 2001, including the cost of fuel and labor, and the United States required Gosselin, as it did all bidders, to propose prices for

the 2001 DPM contract that would remain in effect without escalation for three years (the 2001 DPM contract's first year as well as its two option years). *See, e.g.*, Defs.' Supp'l Mem. at 19.

Third, the contracts that the Plaintiffs rely on for their pricing comparisons were structured differently than the 2001 DPM contract and invited pricing strategies that make overall cost comparisons with the 2001 DPM contract difficult. For example, the 2001 DPM contract awarded to one company, Gosselin, services that in 1999 were split across six different contracts with six different companies (one of which was Gosselin), and the 2001 DPM contract consolidated in item 1AA services that in prior years were split into multiple line items, each priced separately, in some instances with large differences, such that the overall cost of providing in prior years what were included in item 1AA services in the 2001 DPM contract depended on a number of shipping and packing decisions that could and did dramatically affect the government's overall cost for those services.[11] For example, in the Birkart contracts for 1999, which the Plaintiffs used in their calculation of "average pricing" and "comparable" pricing, Birkart charged either 1 DM or 10 DM per hundredweight for

[11] More specifically, under the 2001 DPM contract, a range of packing services were all covered by line item 1AA, for which Gosselin charged €36 (or approximately 72 DM) per hundredweight. However, in prior years, the packing services covered by this single line item were split into three different line items—basic or standard packing, packing that used "oversized" packing boxes, and packing that used "overflow" packing boxes—each priced separately, and the overall cost in those prior years for services depended on a company's packing decisions.

standard or basic packing services, while charging 425 DM and 625 DM per hundredweight respectively for "overflow" and "oversize" boxes. *See* Doc. 1086-3 at 30. Gosselin, on the other hand, charged 72 DM for basic packing services and 85 DM for oversized and overflow packing in one 1999 contract and in another contract, 40 DM for basic packing and 80 DM for oversized and overflow packing. Significant, however, is that whereas Gosselin and other packers used the costlier overflow and oversize packing services in 54% or fewer of their jobs, Birkart used the more expensive packing services in 89% of their jobs.[12] Indeed, based on this pricing scheme, and the incentives Birkart had to pack in a way that allowed it to bill at 425 DM to 625 DM per hundredweight rather than 1 DM or 10 DM per hundredweight, Birkart's overall cost to the government was much higher than Gosselin's under either Gosselin's 1999 DPM contracts or under the 2001 DPM contract itself. In fact, the Defendants introduced uncontradicted testimony that the government restructured the 2001 DPM contract in order to eliminate the abusive pricing and billing it perceived in rate structures such as those charged by Birkart. *See* Hrg. Tr. at 72-73, 80-81.

In summary, the Plaintiffs have argued that the cost for services under the 2001 DPM contract was higher than in prior years for comparable services, while the Defendants have argued the opposite. It

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[12] In terms of each company's overall tonnage moved, Gosselin moved 5.41% of its tonnage at the more expensive rates under one 1999 contract and 10.13% under another, compared with Birkart, which under two 1999 contracts moved 16.85% and 19.97% of its total tonnage at the more expensive rates.

does appear that while the cost for services that the government paid to Gosselin under the 2001 DPM contract was higher than it had paid to certain packers in prior years, such as Viktoria, the cost was less than what it had paid to others in prior years, such as Birkart, and about the same or less than what it had paid to Gosselin in prior years. There is also strong evidence that, overall, the 2001 DPM contract provided pricing more favorable to the government than in prior years; and that the government benefitted substantially from eliminating the opportunity for packers, such as Birkart, to offer extremely low, non-compensatory pricing for certain packing services that were relatively infrequently charged, with any benefit to the government from that pricing more than offset by utilizing a different packing method governed by a much higher charge. In any event, the Court concludes that the evidence presented is simply inadequate by any standard of proof to establish that the government paid more for services under the 2001 DPM contract than it otherwise would have as a result of the subcontract pricing conspiracy that formed the basis for Defendants' liability under the FCA as to the 2001 DPM contract. On this basis, the Court concludes that the evidence is insufficient to quantify in any meaningful way any economic harm sustained by the government under the 2001 DPM contract.

2. Whether and to what extent the government has sustained non-economic harm as a result of Defendants' conduct.

In evaluating the harm for Eighth Amendment purposes, the Court must also consider non-economic harm, including the adequacy of the services

performed and the impact of Defendants' conduct on the integrity of the government contracting process. *See United States* v. *Mackby,* 339 F.3d 1013, 1018 (9th Cir. 2003) ("[The defendant's] false claims also harmed the government, in the form of both monetary damages and harm to the administration and integrity of [a government program]."); *id.* at 1019 ("The government has a strong interest in preventing fraud, and the harm of such false claims extends beyond the money paid out of the treasury. Fraudulent claims make the administration of [government programs] more difficult, and widespread fraud would undermine public confidence in the system."). Here, there is no doubt that the kind of price-fixing conspiracy that the jury found existed in this case is fundamentally inimical to the integrity of the procurement process and the public interest. Nevertheless, and without minimizing Defendants' conduct, there exist a number of facts and considerations that bear on the extent to which Defendants' conduct compromised the integrity of the contracting process that resulted in the 2001 DPM contract.

First, Plaintiffs offered no evidence, nor have they claimed, that the services provided by the Defendants under the 2001 DPM contract were deficient in any way. As mentioned above, the government twice extended the 2001 DPM contract with Gosselin without any evidence of any performance deficiencies.

Second, the subcontract pricing conspiracy did not extend to the overall bids that Gosselin and the other bidders submitted for the 2001 DPM contract. There is no evidence, and the government does not contend, that Gosselin's actual overall bid price on the 2001

DPM contract was disclosed, discussed or the subject of any collusion with any other bidder. Rather, the subcontract pricing conspiracy was effectively limited to the subcontract price that certain packers would charge for item 1AA services, regardless of whom was awarded the DPM contract. There is also no evidence, as discussed above, that any packers were prepared, absent their subcontract pricing agreement, to provide item 1AA services for a price lower than Gosselin's bid for item 1AA.

Third, while Defendants failed to abide by the critical and important difference between negotiating subcontract pricing on an individual basis with only one company at a time, without collusive agreements, rather than on a collective, collusive basis, its level of culpability must be assessed within the overall context of the solicitation. In that regard, the 2001 DPM contract solicitation, and the government's explanation of those solicitation requirements in a group meeting of potential bidders, presented new, if not novel, contracting and performance requirements that at least encouraged, if not required, discussions with potential subcontractors. For example, the 2001 DPM contract required a successful bidder to have the capacity to handle, on short notice, any packing and shipping requirements in any of the five countries covered by the contract. The government recognized that no individual packer likely had that capacity and therefore required a bidder to disclose what subcontracting or joint venture arrangements a bidder had made in order to have the practical ability to satisfy the government's needs. While this requirement did not suggest or justify collusive subcontract pricing, it did require a certain amount of

communication and collaboration among otherwise competing companies.

Fourth, the degree of harm to the contracting process must be assessed within the context of the substantial transparency that existed in Defendants' bid for the 2001 DPM contract and also the government's own substantial knowledge and experience in contracting for the services covered by item 1AA. In their bid submission, Defendants broke out their services into 51 separate line items. The government, which had been contracting for comparable services for decades, had the regulatory obligation to determine, before accepting Gosselin's bid, whether the DPM pricing was the "overall 'Best Value' to the Government." The government in fact determined that Gosselin's bid for the 2001 DPM contract constituted a fair price for the contract and exercised both options to renew the contract for two additional years rather than soliciting new bids. This decision by the government to renew the contract came after the government had received Relators' allegations of subcontract price fixing. In fact, those allegations were submitted to the very government official who subsequently decided to twice exercise the 2001 DPM contract options. While this evidence does not constitute "government knowledge" sufficient to preclude or estop the government from pursing claims against the Defendants based on the false CIPD submitted in connection with its bid, it is probative of how the government viewed the merits of Gosselin's bid, the value of the 2001 DPM contract to the government, Gosselin's performance under that contract, and the propriety of the solicitation process that resulted in that bid and contract.

Defendants' specific conduct is also relevant in assessing the impact of that conduct on the integrity of the contracting process. As discussed above, the conspiracy did not extend to the actual bids that would be submitted or even the amount of mark-up above the agreed-upon subcontract price for 1AA services. Rather, Defendants' FCA liability with respect to the 2001 DPM contract was based on the one-time filing of a single CIPD that was false with respect to one line item of the 51 line item bid. The parties stipulated that in the event the jury found Defendants liable on the DPM claim, the number of invoices Defendants submitted under the 2001 DPM contract was 9,136. However, none of those invoices contained or referenced the false CIPD contained in the Defendants' bid for the 2001 DPM contract; and none of those 9,136 false invoices contained any factually false information. Rather, they are deemed false as a matter of law based on judicial constructions of the FCA. For this reason, the number of invoices, in and of themselves, is not reflective of Defendants' level of culpability, particularly since the number of invoices that Defendants ultimately filed was determined by the number of jobs the government assigned to Gosselin over the life of the contract; and how Gosselin decided to bill those jobs. In other words, Defendants' false CIPD did not necessarily cause or correspond to any particular number of invoices that Gosselin would ultimately file; and there could have been substantially more or fewer invoices than actually filed without any real difference in Defendants' overall level of culpability.

3. Whether the violation was related to other illegal activity, and the nature and extent of that illegal activity.

As mentioned *supra,* and described in detail in this Court's prior opinions, *see, e.g.,* Doc. Nos. 1072 and 1104, Defendants also engaged in other unlawful conduct in connection with the ITGBL program during approximately the same time period as their conduct related to the 2001 DPM contract. The evidence demonstrates, however, that Defendants' conduct with respect to the ITGBL program was distinct from and unrelated to Defendants' conduct with respect to the 2001 DPM contract, as evidenced by, *inter alia,* the government's decisions not to pursue any criminal charges or intervene in the litigation instituted by the Relators based on the 2001 DPM contract, as it had done with respect to the ITGBL program. Furthermore, the government knew about Relators' allegations pertaining to the ITGBL program, as well as the 2001 DPM contract, before exercising its options to extend the 2001 DPM contract, all of which suggests, at the very least, that the United States did not consider the two courses of conduct to be related or intertwined in any significant way. Accordingly, the Court concludes that Defendants' illegal conduct pertaining to the ITGBL claims, and the harm related thereto, are not relevant or material considerations in analyzing under the Eighth Amendment issues pertaining to a civil penalty based on the 2001 DPM contract.[13]

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[13] For presumably similar reasons, the government takes the position that for the purposes of the Eighth Amendment analysis of the mandated civil penalties for the DPM claim, the

4. Whether the civil penalties required to be assessed under the FCA are grossly disproportional to the harm caused by Defendants' conduct.

Having assessed the harm associated with Defendants' conduct, the Court must next determine whether the civil penalties to be assessed are grossly disproportional to that harm. There is surprisingly little jurisprudence concerning how to determine whether a civil penalty is disproportional to harm. Some courts have considered the amount of the civil penalties as a multiple of actual damages sustained as a result of a defendant's conduct, taking guidance from the Supreme Court's decisions concerning how to evaluate the constitutionality of punitive damages awards under the Due Process Clause of the Fifth and Fourteenth Amendments, even though the legislative judgment embodied in a civil penalty is not itself subject to a Due Process analysis. *See Morse Diesel Int'l, Inc. v. United States,* 79 Fed. Cl. 116, 126-28 (Fed. Cl. 2007). Others seem to make a less structured or discernible judgment based on all the facts and circumstances. *See* cases cited *infra* at 25.

In order to make a judgment as to "gross disproportionality," the Court has principally considered the following factors: (1) the relationship of the mandated civil penalties to the harm, as discussed above; (2) the benefits Defendants derived from the illegally procured 2001 DPM contract; (3) the deference to be afforded to legislative judgments as reflected in the statutory language; and

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substantial criminal fines assessed in connection with the ITGBL program should not be considered.

(4) the criminal penalties that pertain to the subject matter of Defendants' conduct, as well as certain other more explicit civil penalties.

First, as discussed above, the government did not sustain any demonstrable damages and therefore the mandated civil penalties of at least approximately $50 million cannot be expressed or justified as a multiple of those damages. Second, with respect to the benefits derived by the Defendants, the evidence is that the government paid approximately $3.3 million for the basic packing service covered by line item 1AA during the three years the 2001 DPM contract was in effect, and that the Defendants realized an overall profit of 4.4355% on the 2001 DPM contract over three years, which when applied to the revenue received for line item 1AA services, results in a presumed profit of approximately $150,000 for those services. There is nothing about this level of gain that would justify the minimum mandated civil penalty of over $50 million.

Third, there is nothing in the language Congress adopted in the FCA that suggests that Congress ever contemplated that civil penalties would be imposed at the level required here under facts similar to this case. Rather, Congress chose to say only that a person who violates the FCA is liable to the United States for a civil penalty of not less than $5,500 and not more than $11,000. Congress did not say, as it did in other federal statutes, that a civil penalty shall be assessed for each false claim or that a Court, in its discretion, may impose a civil penalty up to a certain amount. *See, e.g.,* 42 U.S.C. § 11045(d)(1) (trade secret claimant who asserts a frivolous claim "is liable for a penalty of $25,000 *per claim")* (emphasis

added); 7 U.S.C. § 9 (persons found to have engaged in certain unlawful conduct pertaining to the commodities markets would be assessed a civil penalty of "*not more than* the higher of $100,000 or triple the monetary gain to such person *for each such violation,"* or in certain cases, of *"not more than* the greater of $1,000,000 or triple the monetary gain to the person *for each such violation")* (emphasis added); 7 U.S.C. § 1361(a)(1) (establishing civil penalty of up to $5,000 for each offense of distribution or sale of unauthorized pesticides); 8 U.S.C. § 1253(c)(1) (establishing civil penalty of $2,000 for each violation of detention and removal requirements imposed upon owners or operators of vessels and aircraft arriving in United States with alien stowaways); 15 U.S.C. § 45(1) (establishing civil penalty of up to $10,00 for each violation of Federal Trade Commission order). Given the FCA's language pertaining to the imposition of a civil penalty, it is difficult to justify, in terms of deference to a legislative judgment, the civil penalty mandated in this case under judicial constructions of the statute.

Finally, the Court also has considered certain federal criminal fines pertaining to false claims and other statutory civil penalties in assessing whether the FCA civil penalties are within constitutional limits. While there is no reason to think that Congress enacted such criminal fines or civil penalties at what it thought was the outer reach of the Eighth Amendment, such statutory fines and penalties provide some guidance as far as what penalties Congress thought are proportional to the conduct that would justify them and therefore provide some measure of proportionality within the context of this case, which presumably would be no

greater than within a criminal or other civil penalty context. With respect to criminal fines, the United States Code contains at least two criminal statutes with fines that would often apply to the filing of false claims.[14] The parties differ substantially in their views of what maximum or likely fine Defendants would pay were their conduct subject to sanction under these statutes. It would nonetheless appear that however calculated, the maximum criminal fines that could be imposed for the Defendants' conduct pertaining to the 2001 DPM contract, were it a proper basis for a criminal sanction, would be a small fraction of the civil penalties mandated under the FCA on the facts of this case. Likewise, as to civil penalties under other statutes, the Court has found no instance in which an amount as high as $50 million was specifically stated or otherwise authorized other than as a specific multiple of a defendant's gain or some other objective measure. *See, e.g.*, 7 U.S.C. § 9, discussed *supra* at 23.

For all of the above reasons, the Court concludes that the minimum mandated civil penalty of

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[14] 18 U.S.C. § 287 makes it a crime to "make[] or present[] to any person or officer in the civil, military, or naval service of the United States . . . any claim . . . knowing such claim to be false, fictitious, or fraudulent," and prescribes a fine of either (1) not more than $250,000, or (2) if the "offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss . . . ." 18 U.S.C. § 3571(b)(3) and (d). A party convicted of conspiring to defraud the United States by obtaining the payment of a false claim in violation of 18 U.S.C. § 286, or of violating the general criminal conspiracy statute, 18 U.S.C. § 371, faces the same potential fines as provided for a conviction under 18 U.S.C. § 287. *See* 18 U.S.C. § 3571 (d).

$50,248,000 is grossly disproportional to the harm caused by the Defendants with respect to the 2001 DPM contract. The Court therefore concludes that the FCA, as applied to the Defendants based on the facts of this case, results in the imposition of an excessive fine in violation of the Eighth Amendment. For that reason, the Court refuses to impose that civil penalty.

B. Whether the Court can impose a civil penalty less than that mandated by the FCA in order to avoid an unconstitutional result.

Having determined that the civil penalty required to be assessed under the FCA results in an unconstitutional application of the FCA, the issue for the Court is whether no civil penalty should be imposed or whether the Court should determine and impose a civil penalty that would be within constitutional limits and, if so, how should the Court determine such a civil penalty. Upon consideration of this issue, and having determined that the mandatory, nondiscretionary penalty imposed under the FCA is unconstitutional as applied in this case, the Court concludes that it does not have the discretion to fashion some other civil penalty other than the one required by statute, as that statute has been construed by the Fourth Circuit.

Neither the Supreme Court nor the Fourth Circuit has dealt specifically with this issue. Certain courts, having found the FCA's civil penalty excessive when applied to the facts of those cases, have in fact fashioned a different, constitutional penalty. *See e.g.. United States ex rel. Koch v. Koch Indus., Inc.*, 57 F. Supp. 2d 1122, 1145 (N.D. Okla. 1999) (stating as *dicta,* without holding, that "[i]f the [FCA], as

interpreted and applied to a particular set of facts, produces an unconstitutionally excessive fine, the amount of the penalty can then be remitted to prevent an unconstitutional result"); *United States v. Advance Tool Co.,* 902 F. Supp. 1011, 1018-19 (W.D. Mo. 1995) (concluding that $3,430,000 in civil penalties would be unconstitutionally excessive under Eighth Amendment and entering a civil penalty of $365,000); *United States ex rel. Smith v. Gilbert Realty Co., Inc.,* 840 F. Supp. 71, 75 (E.D. Mich. 1993) (determining that a civil penalty totaling $290,000 was excessive relative to actual damages of $1,630, and reducing the penalty to $35,000 because "any civil penalty above $35,000 is excessive and violates the Eighth Amendment of the United States Constitution"). Nevertheless, the Court has not found any real discussion in any case, binding precedent or otherwise, concerning the legal basis on which a Court may fashion its own civil penalty when an otherwise binding, nondiscretionary statutory penalty or fine is deemed unconstitutional. *See Bajakajian*, 524 U.S. at 337, n.11 (refusing to consider "whether a court may disregard the terms of a statute that commands full forfeiture").

The Court is driven to its conclusion that it must simply refuse to enforce the mandated penalty after finding it unconstitutional under the facts of this case, and not substitute its own fashioned penalty, in large part due to the structure and language of the FCA itself. Here, Congress mandated a civil penalty that authorized the courts to exercise a certain scope of discretion but no more; that is, the FCA authorizes a court to set the amount of the penalty within a certain range, but does not grant the court authority to impose a total penalty below the amount derived

after the exercise of that discretion within the prescribed range. This precisely delineated and circumscribed discretion contrasts with other congressional enactments that establish a maximum penalty, with no minimum, and grants to the court complete discretion as to whether or to what extent that maximum penalty should be imposed. *See, e.g.*, 29 U.S.C. § 1132(c)(1)(B) (providing for a penalty for a violation of certain notification requirements under the Employee Retirement Income Security ("ERISA") program "in the court's discretion … in the amount of up to $100 a day"). Congress chose not to grant to the Court "up to" authority under the FCA when imposing civil penalties. Rather, it took a different approach and required the imposition of a mandatory minimum penalty, with a mandatory maximum, and gave the courts the limited discretion to determine the amount of that penalty only within that minimum-maximum range. Having determined that any amount that the Court is authorized by statute to award would result in an unconstitutionally excessive fine, the Court would need, in effect, to grant to itself the discretion that Congress chose not to give it. Basically, the Court would need to rewrite the FCA, as given to this Court, in order to fashion a constitutional civil penalty under the facts of this case. Such an undertaking is particularly ill-advised given that Congress has repeatedly revised and amended the FCA following the judicial constructions, binding on this Court, without amending the civil penalty provision. In similar circumstances, courts have presumed that Congress has approved the judicially construed statutory construction. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982)

("[T]he fact that a comprehensive reexamination and significant amendment of the [Commodities Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *id.* at 382 n.66 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change[.]") (citations omitted). Had the interpretation of the civil penalty provision not been the subject of judicial constructions binding on this Court, the Court would be inclined to consider, as it does below as an alternative ruling, a reasonable construction of the FCA that results in the imposition of a constitutionally valid civil penalty. However, to engage in that exercise would cause this Court to adopt a construction of the statute that would be inconsistent with both binding judicial constructions and the presumed intent of Congress, in effect an unauthorized exercise of statutory revision.[15]

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[15] Plaintiffs appear to share this view. *See* Pls.' Mem. of Law in Supp. of Award of Civil Penalties (Doc. No. 1117) at 8 (quoting S. Rep. No. 345, 99th Cong. 2d Sess. 8 (1986)) ("The Court has no discretion to reduce the number of civil penalties below the amount required under the statute ..." but, rather, "[t]he legislative history of the 1986 FCA amendments makes clear that civil penalties are 'automatic and mandatory for each claim which is false.'"); *id.* at 9 ("[*United States v.*] *Bornstein*[, 423 U.S. 303 (1976),] does not support an alternative construction that would permit the Court to deviate from issuing one mandatory civil penalty per false claim in this case."); *id.* at 10 (The "Court[] may not adopt 'alternative statutory constructions' on the question of statutory penalties."); *id* at 9 ("[T]he Court must assess one civil penalty of at least $5,500 for each of the false claims …."); *id.* at 8 ("The Court has no discretion to reduce

Based on all the applicable considerations, the Court concludes that having found that the mandatory civil penalty in this case constitutes a constitutionally excessive fine in violation of the Eighth Amendment, and that the FCA does not give the Court any discretion to award any other civil penalty, it is not authorized to impose a lesser civil penalty that would be within constitutional limits. The Court is therefore left with no option other than to refuse to enforce the civil penalty provision of the FCA, as applied to the facts of this case.

C. Alternative rulings as to the amount of the civil penalty to be imposed.

Given the lack of any binding precedent concerning the Court's authority to impose an alternative penalty, the Court has also considered alternative rulings, based on alternative approaches, in the event that upon review by the Court of Appeals, it is determined that this Court does have the authority to impose a civil penalty other than the mandatory, but constitutionally excessive, civil penalty prescribed by

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the number of civil penalties below the amount required under the statute.") (citing cases including *United States ex rel. DRC, Inc. v. Custer Battles, LLC,* No. 1:04cv199, 2009 WL 3756343, at *1 (E.D. Va. Oct. 14, 2009) ("District courts have no discretion to award less than the minimum civil monetary penalty for each violation")); *id.* at 11 ("[A] district court does not have the 'power to mitigate what appear[s] to him to be the acerbities of the statutes by single-handedly reducing the amount of penalties to which the United States is entitled.") (citing *United States v. Cato Bros., Inc.,* 273 F.2d 153, 156 (4th Cir. 1959)); *id.* at 10 ("The Supreme Court has made clear that it is primarily the duty of Congress—not the district court—to determine the appropriateness of a punishment prescribed for an offense.") (citing *Bajakajian,* 524 U.S. at 336).

statute. In this regard, the Court has considered (1) an alternative reasonable and principled construction of the FCA's civil penalty provision that avoids a constitutionally excessive fine; (2) an enforcement of the mandated civil penalty up to the constitutional limit, determining for that purpose the constitutional limit, and whether Plaintiffs' proposed $24 million civil penalty is within that constitutional limit; and (3) an assessment of a civil penalty that is appropriate under all the facts and circumstances of this case.

1. An alternative construction of the FCA.

Courts have long recognized that there are circumstances in which a statute should be construed, if possible, in a reasonable, principled way to avoid an unconstitutional result. Indeed, it has been described as a court's duty when faced with the application of law that results, or even may result, in a violation of the Constitution, to determine whether any other application or construction exists that is reasonable and within the limits of the Constitution so as to avoid creating a constitutional issue. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail...."); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will

save the act. Even to avoid a serious doubt the rule is the same.") (citing cases); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). The Court therefore looks to the statute to determine if there exists a reasonable construction of the statutory language that could avoid the constitutional problem. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 177 (4th Cir. 2010) ("[T]he doctrine of constitutional avoidance attempts to 'giv[e] effect to [legislative] intent, not [to] subvert [ ] it,' since it is premised on the 'reasonable' notion that legislatures 'd[o] not intend [an interpretation] which raises serious constitutional doubts.') (citing *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005)). Here, it would be particularly appropriate to consider whether an alternative construction of the FCA avoids the constitutional problem since the unconstitutional result does not necessarily flow from Congress's chosen statutory language on its face, but rather from a judicial construction of that language.

As discussed *supra,* the FCA does not explicitly state that a civil penalty is to be assessed per false claim. Rather, the FCA states only that someone who violates the statute by engaging in certain conduct is "liable for a civil penalty between $5,500 and $11,000." That language, on its face, permits an alternative reasonable interpretation, *viz.,* that a civil penalty should be applied for each act that violated the statutory prohibition, which, as applied in this case, is each factually false statement, not

each claim paid as a result of that false statement. Here, the Defendants actually made only one false statement contained in the one false CIPD filed as part of their bid on the 2001 DPM contract, and for that reason, the FCA can be reasonably read to require only one civil penalty of between $5,500 and $11,000, a penalty clearly within constitutional limits. For the above reasons, the Court concludes that were it appropriate to consider an alternative reading of the FCA in order to avoid an unconstitutional result, the Court would conclude that one civil penalty should be imposed and assess an award of $11,000.[16]

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[16] Plaintiffs have argued that this construction of the FCA is foreclosed by *Marcus v. Hess,* 317 U.S. 537 (1943) (which the Plaintiffs contend "impliedly rejected" a reading of the FCA that provides for imposing one civil penalty per fraudulent scheme or actor, rather than one civil penalty per false claim submitted), and also by *United States v. Bornstein,* 423 U.S. 303 (1976). The Court rejects this position. First, neither case considered the issue faced by this Court: having found the FCA unconstitutional as applied, should it adopt a construction not otherwise appropriate in order to avoid the constitutional infirmity. Moreover, it appears that in *Hess,* the Supreme Court (which noted that its conclusions were related to the "circumstances of th[at] case," 317 U.S. at 552) actually approved of a penalty, not on each invoice filed under fraudulently procured contracts, but only for each project that was fraudulently obtained. *See id.* Likewise, in *Bornstein,* the Court's decision strongly suggests that the number of civil penalties awarded need not be the same as the number of false invoices submitted, particularly where a defendant does not control the circumstances that require claims to be filed. As the Supreme Court stated, a court is to "distinguish between the acts committed by [the defendant] and the acts committed by [another party]." 423 U.S. at 312. As the Court continued in *Bornstein,* "[i]f, as a result of the same act by [the defendant], [the other party] had filed three false claims, [the defendant]

2. Enforcement of the mandated civil penalty up to the constitutional limit.

As a second alternative, and in the event that the Court were not authorized to adopt the above alternative construction of the FCA, the Court has considered what penalty could be imposed were this Court permitted simply to enforce the mandated civil penalty up to an amount that that would be within constitutional limits, although untethered to any specific textual reading of the statute. In that connection, the Court has considered whether there is any economic or other measure that could reasonably serve as a touchstone for a determination of proportionality that would establish the constitutional limit. Here, there are no demonstrable damages,[17] but there is demonstrable financial gain

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would still have committed only one act that caused the filing of false claims, and thus, under the language of the statue, would again be liable for only one forfeiture." *Id. Bornstein* thus holds that "[a] correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Id.* at 313. Here, while the Defendants filed the claims directly with the government, those claims were deemed false only because of one fraudulent act, the filing of a false CIPD. Applying the language of *Bornstein* to this case, a court could easily conclude that because the same one act caused the filing of all of the false claims, the false claims were the result of the same one act and that only one forfeiture (civil penalty) is therefore appropriate. Finally, if the government is correct that the Court's alternative construction of the FCA is foreclosed, then there is no alternative, principled construction that would avoid the unconstitutional application of the statute and allow the Court to enforce the civil penalty of the FCA.

[17] The Plaintiffs argue that its proposed $24 million civil penalty is within constitutional limits principally on the grounds that it constitutes an acceptably low multiple of the

to the Defendants associated with the tainted line item 1AA services of approximately $150,000.[18] Using that figure, and the multiples identified by the Supreme Court as representing the outer limits of propriety under the Due Process clause for assessing punitive damages, the Court concludes that a total penalty of $1.5 million would reflect, based on the facts of this case, the outer limit of a constitutionally permissible fine under the Eighth Amendment, and the Court would award a civil penalty in that amount, were the Court directed to do so on this basis. For this reason, and those set forth in Part A.4, *supra*, the Court concludes that the amount of $24 million proposed by the Plaintiffs would not be within constitutional limits since it would be grossly disproportional to any harm caused by the Defendants.[19]

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government's claimed economic harm. Given the Court's rejection of the Plaintiffs' claim that the pricing contained in the 2001 DPM contract was inflated as a result of the subcontracting pricing conspiracy, *see* Part A.1 *supra,* the Plaintiffs' principal justification for the proposed $24 million civil penalty fails completely for Eighth Amendment purposes.

[18] *See supra* at 22. *See also* Commentary, ¶3(B), to Section 2B1.1 of the United States Sentencing Commission Guidelines manual (when the actual or intended loss to the victim cannot reasonably be determined, the court may use gain to the defendant for the purpose of calculating an enhancement to the offense level based on loss).

[19] The Court also fails to understand the government's position with respect to the Court's legal authority to impose a $24 million civil penalty. On the one hand, it takes the position that the Court has no discretion to impose less than the mandated civil penalty, which in this case is $50,248,000. *See* Pls.' Mem. at 8 (quoting S. Rep. No. 345, 99th Cong. 2d Sess. 8 (1986)) ("The Court has no discretion to reduce the number of civil

3. Assessment of a civil penalty that is appropriate under all the facts and circumstances.

The Court cannot conclude that the congressional purpose behind the civil penalty provision of the FCA is to impose a penalty that reaches the constitutional limits of the Eighth Amendment, but rather that it is to allow a Court to impose a civil penalty that is appropriate under the circumstances of a particular case. For this reason, the Court has considered what such a civil penalty would be, were it authorized to impose a civil penalty on that basis.[20] Based on all

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penalties below the amount required under the statute..." but, rather, "[t]he legislative history of the 1986 FCA amendments makes clear that civil penalties are 'automatic and mandatory for each claim which is false.'"). *See also id.* at 9 ("*Bornstein* does not support an alternative construction that would permit the Court to deviate from issuing one mandatory civil penalty per false claim in this case."). On the other hand, the government takes the position that the Court can, and should, impose a civil penalty of $24 million, because the government, in the exercise of its "prosecutorial discretion," only seeks a civil penalty in that amount. *See id.* at 7. Left unexplained is how the government, through the exercise of "prosecutorial discretion," can require the Court to impose a civil penalty it is not authorized by statute to impose, since the $24 million civil penalty does not result from any principled application of the FCA, as it is not a multiple of 9,136 and any number within the statutory range of $5,500 and $11,000. Rather, the proposed penalty appears to be based on nothing more than what the Plaintiffs think is an appropriate number under the circumstances of the case. *Compare United States v. Mackby,* 221 F. Supp. 2d 1106, 1110 (N.D. Cal. 2002) (government justified its requested civil penalty upon a reasonable construction of FCA as applied to facts of that case).

[20] Without explicitly stating so, some courts appear to have effectively made a civil penalty award on this basis. *See, e.g.*, *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.,* 46 F. Supp. 2d 546, 565 (E.D. La. 1999) (reducing civil penalty award

the facts and considerations set forth above pertaining to the specifics of Defendants' conduct, the gain obtained, the need to deter others as well as sanction the Defendants, and the public interest in protecting the integrity of the public procurement process, the Court would award, were it directed to do so on this basis, a civil penalty of $500,000.[21]

CONCLUSION

For the above reasons, the Court finds and concludes that the FCA's mandated civil penalty of at least $50,248,000 is unconstitutionally excessive under the Eighth Amendment and therefore may not be enforced. The Court also concludes that it does not have the discretion to award some other civil penalty within constitutional limits. Accordingly, the Court will award no civil penalty with respect to Defendants' liability based on the 2001 DPM contract.[22]

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amount from $7,850,000 to $100,000); *Peterson* v. *Weinberger,* 508 F.2d 45, 55 (5th Cir. 1975) (reducing civil penalties from $240,000 to $100,000, holding that "the court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government").

[21] This amount corresponds to approximately three times Defendants' presumed profit on the services provided under line item 1AA of the 2001 DPM contract and also to Defendant's approximate profit on the entire 2001 DPM contract over three years.

[22] With this ruling, the Court has now disposed of all remaining issues in this case with the exception of (1) whether or not Defendant Government Logistics, N.V., has successor liability with respect to any liability on the part of the Gosselin Defendants, an issue presented in pending cross-motions for summary judgment (Doc. Nos. 775 and 1074); (2) Relators' claim

The Clerk is directed to forward copies of this Memorandum Opinion to all counsel of record.

The Court will issue an Order.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
February 14, 2012

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for a percentage award of certain recoveries by the United States in this case; and (3) Relators' claim for attorney's fees. As set forth in the Order entered together with this Memorandum Opinion, the Court denies the parties' motions for summary judgment with respect to the imposition of successor liability on Defendant Government Logistics, and also defers ruling on any attorney's fee and other awards to Relators, pending the final disposition of any appeals in this case. The Court has also directed the entry of a final judgment under Federal Rules of Civil Procedure 54(b) and 58 as to all parties except Defendant Government Logistics.

APPENDIX D

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

UNITED STATES OF AMERICA *ex rel.* Kurt Bunk and Daniel Heuser,	)	
Plaintiffs/Relators,	)	No. 1:02cv1168
v.	)	(AJT/TRJ)
BIRKART GLOBISTICS GmbH & CO., *et al.*,	)	
Defendants.	)	
UNITED STATES OF AMERICA *ex rel.* Ray Ammons,	)	
Plaintiff/Relator,	)	No. 1:07cv1198
	)	(AJT/TRJ)
v.	)	
THE PASHA GROUP, *et al.*,	)	
Defendants.	)	

ORDER

Upon consideration of (1) the United States/Relators' Motion for Judgment Against Gosselin Defendants for Damages and Civil Penalties (Doc. No. 1076), (2) Relators' Motion Regarding

Further Proceedings (Doc. No. 1073), (3) the Motion for Summary Judgment by Defendant Government Logistics, N.V. (Doc. No. 719), and (4) the United States' Motion for Summary Judgment as to Defendant Government Logistics N.V. (Doc. No. 775), and the United States' Renewed Motion for Summary Judgment as to Defendant Government Logistics N.V. (Doc. No. 1074), the memoranda and exhibits filed in support thereof and opposition thereto, including the supplemental memoranda filed by the parties pursuant to the Court's October 31, 2011 Order (Doc. No. 1114); the arguments of counsel at the hearings held on October 29, 2010 and May 6, 2011 (as to the motions for summary judgment pertaining to the claim of successor liability against defendant Government Logistics); the Court's Memorandum Opinion and Order dated October 19, 2011 (Doc. Nos. 1104 and 1105) granting in part and denying in part Plaintiffs United States/Relators' Motion for Judgment Against Gosselin Defendants for Damages and Civil Penalties and Relators' Motion Regarding Further Proceedings (Doc. No. 1076); the evidence presented and the arguments of counsel at the hearing held on October 26, 2011 (pertaining to civil penalties based on the DPM claim); and for the reasons stated in the Memorandum Opinion pertaining to Plaintiffs' claim for civil penalties as to the DPM claim, filed herewith, it is hereby

ORDERED that Plaintiffs United States/Relators' Motion for Judgment Against Gosselin Defendants for Damages and Civil Penalties (Doc. No. 1076), and Relators' Motion Regarding Further Proceedings (Doc. No. 1073) be, and the same hereby are, (1) DENIED with respect to an award of civil penalties as to the DPM claim asserted in Count II of the Third

Amended Complaint on the grounds that the civil penalty mandated under the False Claims Act, 31 U.S.C. § 3729, as applied to the DPM claim, in an amount of at least $50,248,000, constitutes an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment of the United States Constitution; and the Court is without discretion to fashion an alternative civil penalty within constitutional limits; (2) GRANTED to the extent of a civil penalty in the amount of $5,500 wilh respect to the First Cause of Action of the United States Complaint in Intervention (Doc. No. 110), judgment for which be, and the same hereby is, entered in favor of the United States of America and against Defendants Gosselin Worldwide Moving, N.V., Gosselin Group N.V., and Marc Smet (the "Gosselin Defendants"), jointly and severally; and (3) otherwise DENIED as to any requested relief not addressed by this or any other order of the Court; and it is further

ORDERED that the Motion for Summary Judgment by Defendant Government Logistics, N.V. (Doc. No. 719), the United States' Motion for Summary Judgment as to Defendant Government Logistics N.V. (Doc. No. 775), and the United States' Renewed Motion for Summary Judgment as to Defendant Government Logistics N.V. (Doc. No. 1074) be, and the same hereby are, DENIED on the grounds that there exist genuine issues of material fact and neither the United States nor Defendant Government Logistics is entitled to judgment as a matter of law with respect to the imposition of successor liability on Defendant Government Logistics; and it is further

ORDERED that these consolidated actions be, and the same hereby are, STAYED with respect to the claims against Defendant Government Logistics, pending the disposition of any appeals taken from final judgments entered pursuant to this Order; and it is further.

ORDERED pursuant to Fed. R. Civ. P. 54(d)(2), that the time for filing any applications for attorneys' fees and costs be, and the same hereby is, EXTENDED until 30 days after the final disposition of any appeals filed with respect to the rulings in these consolidated actions; and it is further

ORDERED that the time for Relators to file any applications for a statutory share of the recovery of the United States pursuant to 31 U.S.C. § 3730(d) be, and the same hereby is, EXTENDED until 30 days after the final disposition of any appeals filed with respect to the rulings in these consolidated actions; and it is further

ORDERED that final judgments be entered pursuant to Fed. R. Civ. P. 54(b) as to the United States of America, Relators, and Defendants Gosselin Worldwide Moving, N.V., Gosselin Group N.V., and Marc Smet with respect to this Order and all other rulings and orders pertaining to them and the claims asserted against the Gosselin Defendants in these consolidated actions, the Court having expressly determined that there is no just reason for delay.

The Clerk is directed to enter final judgments pursuant to Fed. Rule Civ. P. 54(b) and 58 as follows: (1) judgment in favor of the Plaintiff the United States of America and against the Defendants Gosselin Worldwide Moving, N.V., Gosselin Group N.V., and Marc Smet, jointly and severally, in the

amount of Five Thousand, Five Hundred Dollars ($5,500), on the First Cause of Action in the United States' Complaint in Intervention (Doc. No. 110); (2) judgment in favor of Defendants Gosselin Worldwide Moving, N.V., Gosselin Group N.V., and Marc Smet and against the Plaintiff the United States of America on the Second, Third, and Fourth Causes of Action in the United States' Complaint in Intervention (Doc. No. 110); (3) judgment in favor of the Relators and against the Defendants Gosselin Worldwide Moving, N.V., Gosselin Group N.V., and Marc Smet as to liability on Count II of the Third Amended Complaint; and (4) judgment in favor of Defendants Gosselin Worldwide Moving, N.V., Gosselin Group N.V., and Marc Smet and against the United States of America and Relators as to civil penalties on Count II of the Third Amended Complaint.[1]

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia

February 14, 2012

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[1] By Order dated January 25, 2010 (Doc. No. 558), the Court ruled that the United States' Complaint in Intervention (Doc. No. 110) supersedes any corresponding claims in the Relators' complaints. Accordingly, the Relators' complaints have been entirely superseded by the United States' Complaint in Intervention, with the exception of Count II of Relator Bunk's Third Amended Complaint as it pertains to the non-intervened DPM claim.

APPENDIX E

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

UNITED STATES OF AMERICA ex rel. Kurt Bunk and Daniel Heuser, Plaintiffs/Relators, v. BIRKART GLOBISTICS GmbH & CO., et al., Defendants.	No. 1:02cv1168 (AJT/TRJ)
UNITED STATES OF AMERICA ex rel. Ray Ammons, Plaintiff/Relator, v. THE PASHA GROUP, et al., Defendants.	No. 1:07cv1198 (AJT/TRJ)

MEMORANDUM OPINION

This False Claims Act case was tried before a jury, which on August 4, 2011, returned a verdict (1) in favor of the Gosselin defendants[1] and against the

[1] Defendants Gosselin Worldwide Moving N.V. ("Gosselin"), its successor Gosselin Group N.V., and Marc Smet are collectively referred to as the "Gosselin defendants" or defendants.

United States as to what has been referred to in this litigation as the "Covan Channels"; (2) against the Gosselin defendants and in favor of the United States with respect to the number of false claims that the Gosselin defendants caused to be presented to the United States with respect to what has been referred to in this litigation as the "Cartwright Channels"; and (3) against the Gosselin defendants and in favor of the United States with respect to what has been referred to in this litigation as the "DPM claim," filed and pursued by the Relator Bunk, without the intervention of the United States.

Presently before the Court are post-trial motions consisting of: (1) Defendants' Renewed Motion for Judgment as a Matter of Law and Alternative Motion for Partial New Trial (Doc. No. 1075), which challenges the jury verdict against the Gosselin defendants as to the Cartwright Channels and the DPM claim, and also seeks a set-off against damages otherwise assessable based on the restitution and settlement payments already collected by the government; (2) United States/Relators' Motion for Judgment Against Gosselin Defendants for Damages and Civil Penalties (Doc. No. 1076), which seeks without further proceedings judgment against the Gosselin defendants for treble damages and civil penalties with respect to the Cartwright Channels based on the Court's previous determination of liability and damages and the number of false claims that the jury determined were caused to be presented by the Gosselin defendants, and also as to the DPM claim, based on the jury's finding of liability as to the DPM claim and the parties' stipulation as to the number of invoices that the Gosselin defendants submitted with respect to the DPM claim; and (3)

Relators' Motion Regarding Further Proceedings (Doc. No. 1073), which also seeks a determination of civil penalties as to the DPM claim based on the jury's finding of liability as to the DPM claim and the parties' stipulation.[2]

As discussed in this Memorandum Opinion, the Court concludes that the United States failed to present evidence sufficient to allow the jury to determine without speculation the number of false claims that the Gosselin defendants caused to be submitted to the government and for that reason, the Court will grant defendants' motion for judgment as a matter of law with respect to the Cartwright Channels. In addition, the Court conditionally rules pursuant to Federal Rule of Civil Procedure 50(c)(1) that a new trial should be granted as to the number of false claims that the Gosselin defendants caused to be submitted with respect to the Cartwright Channels if this judgment is reversed or vacated on appeal.

Second, the Court concludes that the government is entitled to treble damages in the amount of $2,595,000, or three times the amount of $865,000, which the Court had determined as a matter of law constituted the government's actual, total loss with respect to the Cartwright Channels, subject to any set-offs as a result of the criminal restitution payment of $865,000 made by defendant Gosselin Worldwide Moving N.V. and the approximately $14

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[2] Also pending is United States' Renewed Motion for Summary Judgment as to Defendant Government Logistics N.V. (Doc. No. 1074), which the Court, following the hearing held on September 23, 2011, deferred pending the resolution of all remaining issues as to the Gosselin defendants.

million the United States obtained in settlements from those alleged to be jointly and severally liable with the Gosselin defendants. In that regard, the Court concludes that after such restitution and settlement payments are appropriately credited and set-off against the trebled damage amount of $2,595,000, the United States has recovered fully with respect to the Gosselin defendants and no amount remains due and owing from them based on their liability for the claims set forth in the United States' Complaint in Intervention.

Third, the Court concludes that the evidence was sufficient for a reasonable jury to find in favor of the United States on the DPM claim and that as a matter of law, 9,136 false claims were submitted with respect to those claims.[3] The Court also concludes that the Gosselin defendants are not entitled to a new trial with respect to the DPM claims. The Court will therefore enter judgment against the Gosselin defendants for civil penalties in an amount to be determined following the evidentiary hearing scheduled for October 26, 2011 and also award attorney's fees and a share of the government's recovery to Relator Bunk following a determination of civil penalties.

For the reasons previously stated in open Court and in this Memorandum Opinion, the Court therefore: (1) grants defendants' motion for judgment as a matter of law, and conditionally grants a new trial, as to the number of false claims submitted by

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[3] The parties stipulated that in the event of liability as to the DPM claim, the defendants filed 9,136 invoices under the DPM contract. *See* Re. Ex. 296.

the defendants as to the Cartwright Channels; (2) denies defendants' motion for judgment as a matter of law as to the DPM claim and also their request for a new trial as to the DPM claims; (3) grants the United States and Relators' motion for judgment as to damages in the amount of $2,595,000 as to the Cartwright Channels but reduces the amount owed by the Gosselin defendants for those damages to zero after crediting restitution and settlement payments already collected by the government; (4) grants the United States and Relators' motion for judgment for civil penalties against the Gosselin defendants as to the Cartwright Channels to the extent of one civil penalty on one false claim, in an amount to be determined; (5) grants the United States and Relators' motion for judgment of liability against the Gosselin defendants as to the DPM claim for civil penalties on 9,136 false claims, in an amount to be determined; and (6) otherwise denies the United States and Relators' motion for judgment against the Gosselin defendants as to the DPM claim, without prejudice to the assessment of civil penalties, attorney's fees and a share of the government's recovery to Relator Bunk.

BACKGROUND

The nature and procedural history of this case are set forth in the Court's previous orders and memorandum opinions, including, in particular this Court's Memorandum Opinion dated August 26, 2011 pertaining to aspects of the Court's ruling at trial on Defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, made following the close of the government's case in chief. *See* Doc. No. 1072. Briefly stated for the purposes of the current

motions, this consolidated action was originally filed by Relator Kurt Bunk and Relator Ray Ammons (collectively "Relators"). On July 18, 2008, the United States intervened as to all claims relating to the International Through Government Bill of Lading ("ITGBL") program. Those ITGBL claims allege that the Gosselin defendants, among others, formed a single, overarching bid-rigging and price-fixing conspiracy on November 14, 2000 that successfully raised the rates charged for packing and unpacking U.S. military household goods within Germany by German moving companies, known as German local agents. Based on these allegations, the United States and Relators assert causes of actions for violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1)-(3) (2000), common law fraud, common law conspiracy to defraud the United States, and unjust enrichment.

Although the United States intervened as to the ITGBL claims, the United States did not intervene as to the claim referred to as the Direct Procurement Method contract claim, or DPM claim, brought by Relator Bunk. Unlike the ITGBL program, the DPM claim against the Gosselin defendants arises out of the government's contracting directly with the Gosselin defendants for packing and moving services within Europe. Relator Bunk alleges that the Gosselin defendants violated the FCA by filing a false Certificate of Independent Price Determination ("CIPD") in connection with their bid for the DPM contract, under which defendants certified that the prices in their offer had been arrived at independently, when in fact, they and other potential bidders had entered into a price fixing agreement and territory allocations.

Related to the current motions are the Court's pre-trial rulings with respect to the government's motions for summary judgment as to liability, damages and civil penalties based on the criminal convictions against Gosselin arising out of its conduct with respect to the Cartwright Channels.[4] Based on those criminal proceedings, by Order dated January 25, 2010 (Doc. No. 557), the Court entered summary judgment against the defendants as to liability on the government's claims for conspiracy to defraud under the False Claims Act (Count I of the Complaint in Intervention) and for common law conspiracy (Count II of the Complaint in Intervention). By Memorandum Decision and Order dated November 10, 2010 (Doc. Nos. 737 and 738), the Court entered summary judgment as to damages, finding that as a matter of law based on the restitution order entered in the criminal case in the amount of $865,000, the government had been damaged in the amount of $865,000. In that regard, the Court held that the restitution order entered against Gosselin in the criminal proceedings constituted a determination of the total actual loss that the government incurred as a result of the alleged conspiracies based on the Cartwright Channels and, under the doctrine of judicial estoppel, constituted the amount of the government's loss as a result of the conspiracies alleged in the United States' Complaint in

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[4] *See United States v. Gosselin World Wide Moving N.V.*, No. 1:03-cr-551 (E.D. Va., April 26, 2006). *See generally United States v. Gosselin World Wide Moving N.V.*, 333 F. Supp. 2d 497 (E.D. Va. 2004), *aff'd in part, rev'd in part and remanded, United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502 (4th Cir. 2005).

Intervention, as to which liability had been entered based on Gosselin's criminal convictions. *See* Memorandum Opinion and Order dated November 10, 2010, at 10-11 (Doc. Nos. 737 and 738). The Court denied, however, the government's summary judgment motion as to the number of false claims and civil penalties.

In support of its summary judgment motion for the assessment of civil penalties as a matter of law, the government submitted what it claimed were the 577 actual vouchers, also referred to as invoices, that requested payment for moves in the Cartwright Channels at rates, known as the "second low" rates, that the government claimed were the result of the defendants' fraud and conspiracy. *See* Gov. Mot. for Partial Summ. J. (Doc. No. 701) at 5; *see also id.* at Ex. D. In other words, the government claimed as a matter of law based on undisputed facts that defendants submitted or caused to be submitted 577 false claims with respect to Cartwright Channels.[5]

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[5] In support of its motion for summary judgment as to the number of false claims and civil penalties, the government represented as follows with respect to the vouchers claimed to be false claims with respect to the Cartwright Channels:

> . . . the United States has expended considerable resources physically locating the thousands of payment invoices for moves of household goods under the ITGBL program and has specifically identified those that are related to the twelve IS02 traffic channels. The United States has now completed that task and provided those invoices to the Gosselin Defendants. It has also appropriately moved for summary judgment now because there are no issues of material fact remaining regarding those claims.

The Court rejected the government's contention that as a matter of law the Court could determine that the Gosselin defendants caused to be submitted 577 false claims with respect to the Cartwright Channels, or that the Gosselin defendants must necessarily be assessed a civil penalty for every false claim filed, or that the amount of any such civil penalty should necessarily be assessed at the maximum amount of $11,000 per false claim. As the Court ruled in its Order denying this part of the government's motion for summary judgment, "[w]hether these particular [577] invoices, in fact, substantiate [577] 'false claims' remains subject to proof and adjudication." *See* Order dated November 10, 2010 (Doc. No. 737), at 16.

On March 8, 2011, the government moved for reconsideration of the Court's denial of its motion for summary judgment with respect to the number of false claims that the Gosselin defendants caused to be submitted with respect to the Cartwright Channels, specifically claiming that the Court's holding was based on an incorrect reading of *United States* v. *Bornstein*, 423 U.S. 303 (1976). On April 20, 2011, the Court denied the government's motion, and, in its order, identified issues that presaged fundamental evidentiary problems for the government at trial. The Court stated:

United States' Br. in Opp'n to Defs.' Mot. To Strike United States' Mot. for Partial Summ. J. on Damages and Civil Penalties (Doc. No. 714), at 2-3; *id.* (The 583—later reduced to 577—invoices identified were submitted to the Court with the United States' motion.). *See also* Reply Br. in Further Supp. of the Gov't's Mot. for Partial Summ. J. (Doc. No. 723) at 10, n.2 (reducing the originally claimed false claims from 583 to 577).

> Among other inadequacies, the summary judgment record does not establish that all of the relied upon invoices were, in fact, submitted by members of the alleged conspiracy pursuant to the conspiracy or contained pricing that was part of the alleged conspiracy. Rather, the record simply contains the relied upon invoices, which reflect the names of a large number of freight forwarders about whom there is little or no other information, including what contact, if any, they had with Gosselin, Smet or any other alleged coconspirators or whether they submitted each relied upon invoice as part of the alleged conspiracy.

Order dated April 20, 2011, at 3-4.

Against the backdrop of these rulings, the parties proceeded to trial;[6] and for 11 days beginning on July 18, 2011, this case was tried before a jury. At trial, the government did not limit its damages claim or its claim for civil penalties to the 12 Cartwright Channels, on the basis of which it had obtained summary judgment. Rather, it claimed that the Gosselin defendants, through their conspiracy, caused to be inflated all the rates filed with respect to all 416 channels for the movement of goods between the United States and Germany in the 2001 and 2002 rate cycles. As discussed below, the government likewise dramatically increased the number of false claims it claimed the Gosselin defendants had caused to be filed with respect to the Cartwright Channels

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[6] The government and Relators had settled or otherwise resolved their claims against all other defendants and alleged co-conspirators.

from 577 to as many as 4,351. *See* Trial Tr. at 1672:19 (Doc. No. 1065).

Following presentation of the government's case in chief, the defendants moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), which, on July 28, 2011, the Court orally granted in part, denied in part, and reserved on several issues.[7] Briefly summarized, the Court ruled that the Gosselin defendants' agreement to set prices for the European inland segment of the ITGBL program, the so-called Landed Rate Agreement or Sonthofen Agreement, was immune from the antitrust laws under the Shipping Act of 1984, 46 U.S.C. app. § 1706(a)(4) (2000), and because that conduct enjoyed that immunity, it could not constitute an unlawful conspiracy under the False Claims Act. The Court also ruled that because the government's claim as to all channels other than the Covan Channels in the IS-01 rate cycle and the Cartwright Channels in the IS-02 rate cycle was based entirely on conduct found to be immune, there was neither liability nor damages as to those channels as a matter of law; accordingly, the Court dismissed those aspects of the government's Complaint in Intervention.[8]

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[7] The Court further denied the government's August 1, 2011 motion for reconsideration of the Court's July 28, 2011 ruling. For a description of the Court's July 28, 2011 ruling, as well as the Court's ruling on defendants' Rule 50 motion as to the DPM claims, submitted following the close of all of the evidence, see the Court's Memorandum Opinion dated August 26, 2011 (Doc. No. 1072), at n.1.

[8] The Court also dismissed the government's claim for unjust enrichment in Count IV of the Complaint in Intervention.

On the other hand, the Court found that the defendants' conduct directed to the bids that the freight forwarders filed with respect to the Covan and Cartwright Channels was not immune and therefore denied the defendants' motion as to liability as to the Covan and Cartwright Channels. The Court held, however, that the government failed to prove causation with respect to damages for the Covan Channels, leaving, with respect to the Covan Channels, only the issue of liability for the purposes of civil penalties, as well as the number of false claims, to be decided by the jury. *See* Trial Tr. 1052:7-1058:7.

The Court also reserved on the issue whether there was sufficient evidence for the jury to determine the number of false claims that the Gosselin defendants caused to be submitted with respect to the Covan and Cartwright Channels. The Court reaffirmed its rulings (including its reservation as to whether there was sufficient evidence to determine the number of false claims as to the Covan and Cartwright Channels) following the close of all the evidence and the case was submitted to the jury on the issues of (1) liability as to the Covan Channels, and in the event of liability, the number of false claims the Gosselin defendants caused to be submitted as to those channels; (2) the number of false claims the Gosselin defendants caused to be submitted with respect to the Cartwright Channels (the issues of liability and damages as to those channels having already been decided in the government's favor on summary judgment); and (3) liability as to the DPM claim (Relator Bunk having decided not to attempt any proof of damages and the parties having stipulated

that the Gosselin defendants had submitted 9,136 invoices with respect to the DPM contract).

On August 4, 2011, the jury returned a verdict in the defendants' favor as to liability with respect to the Covan Channels and in favor of the United States and the Relators as to the Cartwright Channels and the DPM claim. The jury further found that defendants caused to be filed 4,351 false claims as to the Cartwright Channels, rather than the 577 that the government asserted in its summary judgment motion.

On August 29, 2011, the parties filed the post-trial motions referenced above and the Court held a hearing on these post-trial motions on Friday, September 23, 2011, following which the Court took the matters under advisement.

STANDARD OF REVIEW

On a renewed motion for judgment as a matter of law notwithstanding a jury verdict, the Court is to consider whether "there is substantial evidence in the record to support the jury's findings." *Wilhelm v. Blue Bell*, 773 F.2d 1429, 1433 (4th Cir. 1985). In determining whether the evidence supports the jury's verdict, the Court is to "review the evidence, and all reasonable inferences to be drawn therefrom, in favor of [the nonmoving party]." *Price v. City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996). In considering the evidence presented at trial, the district court does "not make credibility determination or weigh the evidence," as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

While the Court is "compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them," the Court is "not a rubber stamp convened merely to endorse the conclusions of the jury, but rather ha[s] a duty to reverse the jury verdicts if the evidence cannot support [them]." *Price*, 93 F.3d at 1250.

Pursuant to Federal Rule of Civil Procedure 50(c), should the Court grant a renewed motion for judgment as a matter of law, the Court is required to conditionally rule on any motion for a new trial and, in so doing, state the grounds for conditionally granting or denying the motion for a new trial if the Court's judgment should be vacated or reversed. In considering a motion for a new trial under Federal Rule of Civil Procedure 59(a), the Court must set aside the verdict and grant a new trial if it finds that the verdict: (1) is "against the clear weight of the evidence"; (2) is based on false evidence; or (3) will result in a "miscarriage of justice." *See Knussman v. Maryland*, 272 F.3d 625, 639 (4th Cir. 2001).

ANALYSIS

A. The sufficiency of the evidence with respect to the number of false claims that defendants caused to be submitted with respect to Cartwright Channels

The Gosselin defendants challenge the sufficiency of the evidence to support the jury verdict as to the number of false claims that the defendants caused to be presented with respect to the Cartwright Channels on the grounds that (1) the government failed to satisfy the requirements of Federal Rule of Evidence 1006 for the admission of certain summary exhibits, in the absence of which there was no evidence concerning the number of claims, false or

otherwise, that the government paid; (2) the government was estopped from claiming that more than 577 false claims generated the government's loss as result of the False Claims Act conspiracy, which the Court had determined to be, and limited to, $865,000; (3) even with the admitted exhibits, the jury necessarily had to speculate as to the number of claims filed since there was insufficient evidence to establish the actual number of vouchers, as opposed to government bills of lading, or GBLs, that the carriers submitted with respect to the Cartwright Channels; and (4) the evidence was insufficient to establish which vouchers submitted were "false," because the evidence was insufficient for a jury to determine, as required, which carriers obtained ITGBL contracts, and filed which vouchers under those contracts, based on bids higher than they otherwise would have filed in the absence of defendants' fraudulent conduct.

In response to defendants' Rule 50 motion, the government concedes that it did not produce or make available to the defendants the actual database from which the challenged summary exhibits were generated but argues that such production was not necessary because it had produced or made available the thousands of vouchers whose information was entered into the database. For this reason, the government contends that the summary exhibits were properly admitted because even though the database that generated the exhibits had not been produced or made available to the defendants, the "underlying documents" whose information had been entered into the database had been made available to the defendants. The government also argues that it had not represented that the number of false claims

was limited to 577 but that in any event, once the Court denied its motion for summary judgment as to the number of false claims and the amount of civil penalties to be assessed, it was not bound by the position it had taken in its summary judgment motion as to the number of false claims. As to the adequacy of the evidence itself, the government contends that the evidence supported the jury's finding in two ways. First, the government contends that "[t]he Gosselin Defendants are responsible for the full extent of the 4,351 false claims found by the jury because their fraudulent conduct and that of their coconspirator agents was a substantial factor in those claims and the claims were known and foreseeable consequences of that conduct." *See* Gov't Reply Brief, at 11. Second, the government contends that "there was evidence to support the jury's finding that all of the carriers filing at the second low were coconspirators, even without the carrier-by-carrier enumeration . . . ." *See id.* at 11.

As discussed below, the evidence was insufficient for the jury to determine (1) the number of claims that the carriers filed with respect to the Cartwright Channels that caused the government to pay out money, (2) the number of such claims that were "false" for the purposes of the False Claims Act, and (3) the number of such false claims that the defendants caused to be presented.

1. The applicable law as set forth in the jury instructions[9]

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[9] For the purposes of the post-trial motions, the parties do not challenge the correctness of the given jury instructions, insofar as they pertain to the Cartwright Channels.

"The test for False Claims Act liability . . . is (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a 'Claim')." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999). Briefly summarized, and as reflected in the given jury instructions,[10] the

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[10] *See* Jury Instruction Nos. 41 ("Fraudulent Conduct for the Purposes of Determining False or Fraudulent Claims") (Fraudulent conduct is non-immune conduct "engaged in for the purpose of restricting or removing competition from the bidding process . . . , including practices known as price rigging and boycotts."); 43 ("What is a Claim") ("A Claim . . . is a demand for payment on the United States government for government money or the transfer of government property. . . . [I]t is the public voucher that a carrier files with the United States in order to obtain payment for a shipment of goods. It is not a Government Bill of Lading (GLB) or other charge listed on or submitted for payment through the filing of a public voucher."); 44 ("What is a False or Fraudulent Claim") ("A claim is false or fraudulent if it is filed . . . based on a shipping contract that the government was fraudulently induced into awarding to a carrier; The United States was fraudulently induced . . . if the carrier's bid for that shipping contract was the result of a fraudulent course of conduct; A carrier's bid for a shipping contract was the result of fraudulent conduct if that fraudulent conduct was a substantial factor in causing him to file a did he would not have otherwise filed."); 45 ("Causing False Claim to be Filed) ("[A] defendant causes a false claim to be submitted if his fraudulent conduct was a substantial factor in causing the claim to be filed and it was reasonably foreseeable that the defendant's actions would result in false claims; . . . you must determine whether the conduct was a substantial factor in producing the harm and the outcome was foreseeable. . . . In order for a false claim to be made, it is not necessary for the defendant to actually receive money directly from the government; causing the payment of Government money to

government needed to prove the number of vouchers that the defendants caused the freight forwarders to file and get paid based on bids that were higher than they otherwise would have filed because of defendants' fraudulent scheme. In response to a special interrogatory, the jury determined that the defendants caused to be filed 4,351 false claims with respect to the Cartwright Channels.

2. The summary exhibits pertaining to the number of false claims that defendants caused to be submitted.

Although there is no dispute that it is the standard form voucher filed by a carrier that constitutes a "claim," the government did not introduce any of the actual vouchers that were submitted by the carriers for payment with respect to the Cartwright Channels. Nor did it present direct evidence of the actual number of vouchers filed or paid by the government. Rather, the government offered certain evidence from which it contended the jury could infer a certain number of false claims that the defendants caused to be filed and paid.[11] The government

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some individual will suffice."). *See also* Jury Instructions 30 ("False Claims Act—Definition of Knowingly"); 31 ("False Claims Act—Actual Knowledge"), 32 ("False Claims Act—Reckless Disregard"); 33 ("False Claims Act—Deliberate Ignorance"), and 37 ("Materiality").

[11] Based on its rulings, there is no need for the Court to consider whether the government was required to prove the actual number of false claims that were, in fact, filed, rather than a number that could reasonably be estimated based on inferences from the evidence. *See, e.g., Hays v. Hoffman*, 325 F.3d 982, 993 (8th Cir. 2003) (cited by both parties) (discussing how to determine the number of claims, concluding that the number must be supported by documentary records); *United States v.*

attempted this indirect method of proving the number of claims with respect to the Cartwright Channels by utilizing what it offered as summary exhibits under Fed. R. Evid. 1006, principally Government Exhibits 169, and 173.[12]

Exhibit 169 came from what was referred to as the DFAS DTRS database. It is hundreds of pages long and listed separately, not the vouchers filed, but each of the thousands of GBLs that had been issued to carriers with respect to all of the 208 channels over which goods were moved during the 2002 rate cycle between the United States and Germany and Germany and the United States (the "Code 4" channels). Importantly, Exhibit 169 in its last three columns contained as to each GBL the date, identifying code, and amount of payment on each listed GBL (but not any vouchers). As it turned out, these three columns constituted the only evidence of

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Krizek, 192 F.3d 1024, 1026-31 (D.C. Cir. 1999) (discussing procedural history of case concerning the need to repeatedly recalculate the number of claims by parties, court, and special master, and remanding with prescription for calculating precise number of claims).

[12] Over defendants' objections, the Court conditionally admitted when initially offered Exhibits 169 and 173 and reserved as to their admissibility as part of its ruling on defendants' Rule 50 motion for judgment as a matter of law following the close of the government's case in chief. Following the close of all the evidence, and in response to defendants' renewed Rule 50 motion as to the number of false claims that the defendants caused to be presented, the Court submitted Exhibits 169 and 173 to the jury but continued to reserve as to their admissibility as part of its more general reservation as to the sufficiency of the evidence with respect to the number of false claims that defendants caused to be submitted.

any government funds paid in connection with the 2002 ITGBL rate cycle.

Exhibit 173 listed in summary fashion as to each of the Cartwright Channels the number of "moves" and "paid moves," with an overall total of 4,543 "moves" and 4,351 "paid moves." Exhibit 173, like Exhibit 169, was supposedly generated from the DFAS DTRS database, but in reality, and as best as the Court can determine based on the foundation testimony offered at trial, the government calculated from the DFAS DTRS database, together with a Microsoft Office program, the number of paid GBLs in the 12 Cartwright Channels and then, based on this information, listed these totals of paid GBLs in Exhibit 173 as the "paid moves," which the government then claimed was equal in number to the number of false claims that the defendants caused the carriers to submit. Based on this approach, the government claimed that the defendants had caused to be filed, not 577 false claims, as it had claimed in its summary judgment motion based on actual vouchers, but 4,351 false claims based on 4,351 "paid moves" listed in Exhibit 173. *See* Tr. Trans. at 652:8-653:6, 654:7-22 (Haynie testimony). As mentioned above, the jury returned a verdict finding that defendants had caused to be submitted 4,351 false claims, the same number listed in Exhibit 173 for "paid moves."

The DFAS database was not produced or made available to the defendants during discovery or in connection with Exhibits 169 or 173. The government also never produced or identified in connection with Exhibits 169 and 173 either the specific vouchers, or the specific GBLs associated

with any specific vouchers, that were summarized as "paid moves," constituted the alleged false claims, or generated the government's actual loss of $865,000. Rather, the government relied on its having made available during discovery, before it tendered Exhibits 169 and 173, the undifferentiated tens of thousands of documents, stored on microfilm, that were submitted to the government in connection with the 2001 and 2002 rate cycles.

The admissibility of summary exhibits is governed by Rule 1006, which provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Fed. R. Evid. 1006 represents a method to present voluminous amounts of information in a format not otherwise admissible, in order to facilitate the fact-finding process. When a summary exhibit is admitted under Fed. R. Evid. 1006, it becomes the evidence of the facts presented and displaces the underlying documents or information as that evidence. *See United States v. Janati,* 374 F.3d 263, 272-73 (4th Cir. 2004). For this reason, the rule requires that the opposing party be given a fair opportunity to evaluate the accuracy and reliability of the summary exhibit against the source documents supposedly summarized in the summary exhibit. Normally, to satisfy that requirement, the party offering a summary exhibit must have affirmatively

and timely identified and made available the specific documents being summarized in the summary exhibit. *Id.* ("The obvious import of these provisions [of Fed. R. Evid. 1006] is to afford a process to test the accuracy of the chart's summarization.").

Here, the defendants were entitled to inspect the database that produced Exhibits 169 and 173 and also have produced contemporaneously with Exhibit 173 the specific documents that Exhibit 173 purported to summarize as 4,351 "paid moves." Because the government never produced the database or the underlying documents that supported the exhibits, identified as such, the defendants had no real opportunity to test their accuracy or reliability. In short, the government failed to satisfy the core requirement of Rule 1006.[13]

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[13] The Court also finds that the government failed to establish that the DFAS DTRS database itself was admissible, as Fed. R. Evid. 1006 requires. The evidence was that DFAS maintained the DTRS database as part of its ordinary operations and that it was part of DFAS's regular business to maintain the database. However, the DFAS representative whose testimony was used to qualify the database also testified that at least some of the relevant information that was entered into the database was entered not by DFAS, but by an independent, private contractor, to whom the carriers initially submitted their vouchers for payment and that this contractor, after performing a "prepayment audit," entered information into the database. *See* Trial Tr. at 660:4-662:10 (Haynie testimony). There was no evidence from anyone with knowledge about the reliability or accuracy of the process used by the contractor to enter information into the database (as opposed to the reliability and accuracy of the information subsequently entered by DFAS based on its actual payments and other activities). *See generally id.* at 642:6-648:25, 657:1-662:10.

The government's position reduces to the claim that because the documents that it made available during discovery contained the documents that would support the summaries it tendered at trial, it satisfied its obligations under Rule 1006 and there was no obligation or need for it to more specifically identify or actually produce the documents supposedly summarized, once it tendered the exhibits. This position essentially eliminates the mechanisms embedded in Rule 1006 to ensure that a summary is accurate and a party has a fair opportunity to test that accuracy, particularly in a case like this where the pre-trial productions went far beyond the scope of the documents supposedly being summarized and the parties have had fundamental disagreements over what documents evidence false or fraudulent claims. *See United States v. Strissel,* 920 F.2d 1162, 1164 (4th Cir. 1990) (Rule 1006 requires production of underlying documents that are supposedly accurately summarized "so that a proper cross-examination may be had.")

The government's discharge of its general discovery obligations did not satisfy its specific obligations under Fed. R. Evid. 1006 to tender the actual vouchers or GBLs that supposedly constituted and were summarized as the "paid moves" that, under the government's theory, equaled the number of false claims with respect to the Cartwright Channels. Whether intended or not, the government's decision to proceed as it did effectively prevented the defendants from challenging whether the 4,351 "paid moves" in fact corresponded to 4,351 separate false claims, which would necessarily

involve 4,351 separately filed vouchers for services based on allegedly inflated bids.[14]

For the above reasons, the Court concludes that at least the last three columns of Exhibit 169 (pertaining to payment information) should not have been admitted. Likewise, the Court concludes that Exhibit 173, which was generated from Exhibit 169, should not have been admitted. In the absence of these exhibits, there was no evidence from which a jury could determine the number of claims that were filed by the carriers and paid by the government with respect to the Cartwright Channels. There was therefore insufficient evidence from which a jury could determine the number of false claims that the defendants caused the carriers to submit with respect to the Cartwright Channels.

3. The government's failure to prove the number of claims that caused the government's harm.

Independent of this Court's determination that Exhibits 169 and 173 should have been excluded and

[14] In response to the 583 actual vouchers that the government identified and produced in its summary judgment motion as the false claims that caused the government's loss of $865,000, the Gosselin defendants, based on their review of those vouchers, claimed (with some agreement by the government) that some of the vouchers did not deal with the Cartwright Channels and others requested payment for service whose pricing was not based on the allegedly inflated bids or were filed by carriers that did not operate under a landed rate system. *See* Defendant's Motion Regarding Civil Penalties, Ex. E. The government's decision to attempt to prove the number of false claims at trial through summary exhibits, without producing or specifically identifying the specific vouchers that allegedly constitute the false claims, effectively foreclosed the same review and attack on the government's proof.

that the evidence was insufficient in the absence of those exhibits, the Court also concludes that the evidence was insufficient to prove the number of false claims that the defendants caused to be filed because there was no evidence to establish the number of vouchers that caused or in any way related to the $865,000 in damages that the Court had determined constituted the amount, and limit, of the United States' actual loss as a result of the alleged FCA and common law conspiracy. In fact, and as discussed above, the government did not introduce into evidence any vouchers, not even the 577 vouchers that it tendered in support of it request for summary judgment as to damages in the amount of $865,000 and the civil penalties related to those damages.

The government argues that it was not required to identify which vouchers or GBLs supported the $865,000 in damages because, as this Court recognized within the context of the DPM claim, damages need not be proven to establish liability for civil penalties under the FCA. However, what the government overlooks is that for the purposes of proving that a claim is false as to the Cartwright Channels, the government was required to prove that it paid more than it otherwise would have absent the defendants' fraudulent conduct. For this reason, within the context of the Cartwright Channels, unlike that of the DPM claim, only those vouchers that caused the government to pay more money as a result of the defendants' fraudulent conduct (that is, caused a monetary damage) could constitute a false claim; and since the government's loss was limited to $865,000, the government was required to identify how many vouchers caused that loss amount. As a result, unless it were shown that a particular voucher

filed with respect to the Cartwright Channels was associated with some inflated payment by the government—some fraction of the government's incurred damages—that voucher could not have been a false claim. But the government produced no evidence that would have allowed a reasonable jury to determine how vouchers accounted for some portion of the government's loss, an amount which the Court had already determined as a matter of law was $865,000. Indeed, there was no evidence from which the jury could even begin to determine whether the government's loss was caused by 577 vouchers, 4,351 vouchers, or some other number of vouchers.

4. The government failed to prove which carriers that filed claims did so as part of the alleged conspiracy.

The government claims that the evidence was sufficient for the jury to determine the number of false claims submitted because the jury could have reasonably determined that every carrier that filed at the second low rate during the me-too round for the Cartwright Channels were co-conspirators with the Gosselin defendants and acted as part of and in furtherance of the conspiracy. After review of the evidence, the Court concludes that there was no evidence from which the jury could determine that any carrier, other than Cartwright, was part of the conspiracy and submitted bids for the Cartwright Channels in furtherance of the conspiracy. More specifically, there was no evidence from which a jury could reasonably conclude that any carrier other than Cartwright—let alone *every* carrier that submitted bids for the Cartwright Channels—had entered into

an agreement of any kind with the defendants or any member of the alleged conspiracy, or acted as part of any agreement with any member of the conspiracy, with respect to bidding for the Cartwright Channels. In fact, the government never identified at trial any particular carrier, other than Cartwright, that it claimed acted as a co-conspirator.[15]

5. **The government failed to prove that the defendants' conduct caused the carriers to file bids higher than they otherwise would have in the absence of defendants' unlawful conduct.**

In order to prove that the defendants caused a carrier to file false claims, the government needed to produce evidence that would allow a reasonable jury to conclude that the defendants' fraudulent conduct was a substantial factor in causing a carrier to file a bid that resulted in a contract and that was higher than the bid it otherwise would have filed. Within the context of this case, the government was required to prove that the carriers who bid at the second low

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[15] Before trial, the Court had ordered the government to identify those individuals whose statements the government contended would be admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). In its submission as to this issue, the government did not identify a single carrier whose representative's statements would be admissible as co-conspirator statements. *See* United States' and Relators' Evidence of Co-Conspirator Statements (Doc. No. 971). Likewise at trial, there was no evidence that any member of the conspiracy, other than Cartwright, participated in the conspiracy at the direction of or with the knowledge of a carrier. At most, the evidence showed that co-conspirators passed on information to certain carriers concerning the position that the German agents had taken with respect to the Cartwright Channels.

rate for the Cartwright Channels in the me-too round would have me-too'ed the Cartwright prime rate had Cartwright not cancelled that rate as part of the defendants' conspiracy.

There was no direct evidence that any particular carrier would have me-too'ed the Cartwright prime rate absent the conspiracy or any of the Gosselin defendants' efforts to influence that carrier's bid. Representatives of six of the more than 100 carriers that submitted bids for the Cartwright Channels testified, but none stated that it would have me-too'ed the Cartwright prime rate had it not been cancelled.[16] In fact, the uncontradicted evidence was that a substantial number of carriers did not even operate under the Landed Rate system that, according to the government, allowed the Gosselin defendants to influence a carrier's bids through the threatened boycott.

The government heavily relies on the parties' Joint Stipulation, Ex. 179, at ¶¶ 23-29, but the Stipulation, which is based on the written statement of facts that Gosselin agreed to in the criminal proceedings, only describes the agreement among certain co-conspirators with respect to the Cartwright Channels and does not state that the defendants or their co-conspirators caused any carriers to file bids they would not have otherwise filed or that any carrier in fact filed a particular bid as a result of instructions from the defendants. Moreover, the only two carrier

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[16] Similarly, although there was evidence that three carriers did me-too the Cartwright prime rates, only to subsequently cancel those rates, no representatives from those carriers testified and there was no evidence as to why those carriers cancelled their bids at the prime rate.

representatives that spoke to whether they would have me-too'ed the Cartwright prime rate testified that they did not view the Cartwright prime as compensatory for their carriers, and that they would not in any event have me-too'ed the Cartwright prime rate because they could not perform profitably at that rate given the costs they knew they would incur. *See* Trial Tr. at 716:7-23 (testimony of Mario Rizzo); Bungert Dep. at 221:5-222:3 (testimony of Klaus Bungert, presented at trial through deposition, *see* Trial Tr. at 210:17); Trial Tr. at 756:22-757:2 (Mario Rizzo).[17] In short, the government failed to present sufficient evidence that would allow a reasonable jury to conclude that because of the defendants' conduct, any particular carrier filed a bid with respect to the Cartwright Channels higher than it otherwise would have.

In support of its position that there was "overwhelming evidence" to support the jury's finding of 4,351 false claims, the government claims that the jury could have inferred from general testimony pertaining to industry practice that the defendants' conspiracy caused carriers to file bids at rates higher than they otherwise would have filed. In that connection, the government presented testimony (not specifically directed to the Cartwright Channels) that carriers knew that "in ordinary circumstances" a

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[17] Although still falling short, the closest the government came to presenting the required evidence was through one carrier representative who testified that he "might have" bid at the Cartwright prime, had the defendants not refused to service his company if it did not me-too at the second low or higher. *See* Trial Tr. at 405:14-18 (testimony of Jack Kagan, of Great American Forwarders ("GAF")).

carrier had to me-too the prime rate in order to assure itself of some business (or "tonnage") in a given cycle. *See* Gov't Opp'n Br. at 9 (citing to portions of the testimony). Based on this testimony, the government argues that the jury reasonably could draw the inference that all the carriers that bid at the second low in the me-too round would have me-too'ed the Cartwright prime "absent the fraudulent [conduct] of [defendants]" and thus "all claims for payment at the second low level were false by virtue of the Defendants' fraudulent conspiracy." *Id.* at 10.

The Court concludes based on the evidence, or lack of evidence, that this testimony concerning "ordinary" industry practice, even when viewed in the light most favorable to the government, did not permit the jury to draw the inferences necessary to carry the government's burden with respect to causation. First, the evidence was undisputed that a carrier had an obligation under the applicable regulations to file only rates that were "compensatory," that is, rates that allowed a carrier to cover its costs and collect a reasonable profit. *See* Trial Tr. at 119:7-23 (testimony of D. Martinez). The government's position fails to account for that obligation and what carriers would have in fact done in response to the prime rate set for the Cartwright Channels, particularly because there was no evidence any carrier other than Cartwright viewed the Cartwright prime rate as compensatory. In fact, the government's position ignores a fundamental aspect of the causation analysis: whether any carrier would have wanted business at the prime rate set by Cartwright for the Cartwright Channels. On that question, and as mentioned above, the carriers that did speak to the Cartwright prime rate testified that

they considered it non-compensatory and would not have me-too'ed that prime rate even in the absence of the defendants' conduct. *See* Trial Tr. at 738:25-739:1 (Rizzo testimony); Bungert Tr. at 221:5-222:3.

Second, there was no evidence that any carrier was prepared to me-too a non-compensatory rate with respect to the Cartwright Channels out of economic or legal necessity, the regulatory obligation to file a compensatory rate and the non-compensatory nature of the Cartwright rate notwithstanding. None of the carriers that filed bids during the me-too round for the Cartwright Channels had any legal obligation to do so. And there was no evidence that even suggested an economic necessity on the part of any carrier to obtain business with respect to the Cartwright Channels, particularly if it would have been unprofitable: there were over ninety other channels within the IS-02 rate cycle for which the carriers could submit bids, and the carriers in fact did bid on these other channels.

Third, and just as significant, the jury heard uncontradicted evidence from three carriers that in every cycle, carriers secured business through bids above the prime rate, including bids above the second low, at the so-called "me-three" rate. *See* Labbus Tr. Testimony at 106:7-15 ("There are always some shipments moving on higher rates, they call it Me-3."); Coleman Tr. Testimony at 248:24-249:7; Hahn Tr. Testimony at 257:6-15 ("[T]here definitely was shipments moved during [the 1999 to 2002] cycles at

. . . the me-three or higher levels.") (all cited in Defs. Mot. at 6).[18]

For the above reasons, the Court also rejects the government's position that the jury could have inferred that carriers would have me-too'ed the Cartwright prime rate absent defendants' unlawful conduct, based on evidence that large numbers of carriers did me-too the prime rate in the non-Cartwright channels in the 2002 rate cycle. The Cartwright Channels were targeted by the German agents precisely because the Cartwright prime rate was viewed by them as non-compensatory to the carriers, unlike the prime rates filed in the non-Cartwright Channels during the IS02 rate cycle; and there was no evidence that would have allowed the jury to infer from the conduct of the carriers as to the non-Cartwright channels what the carriers would have done as to the Cartwright Channels in the absence of the defendants' conduct.

In essence, the government's position conflates liability and causation; and in the end, the government did no more than present evidence of the defendants' conspiratorial agreement to bid-rig without demonstrating any causation beyond Cartwright's cancellation of its prime rate.[19] That evidence, however, does not support the broader,

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[18] *See, e.g.*, Ex. 191 at 2 (projecting that for US24, one of the Cartwright Channels, only 50 percent of the tonnage would move at the prime rate).

[19] In its closing argument, the government essentially argued that the defendants' established liability as to the Cartwright Channels was sufficient for the jury to find that all the claims it found to be false were false claims that the defendants caused to be submitted. *See* Trial Tr. at 1672:19-1677:23; 1677:6-16.

necessary inference that defendants' conduct caused other carriers, not proven to be part of the alleged conspiracy, to file rates higher than the prime rate they otherwise would have me-too'ed. Given this uncontroverted testimony, and the absence of any testimony that any particular carrier in fact filed a rate higher than it otherwise would have absent the defendants' conduct, the jury could not reasonably infer from the fact of the defendants' conspiracy that the conspiracy caused carriers to file rates higher than they would have otherwise filed.

The government argues that by having established liability and damages under the FCA in the amount of $865,000, the defendants cannot now claim that no false claims were actually submitted to the United States. But as the Court already explained in connection with its order granting the government's motion for partial summary judgment as to damages, the fact that the government was damaged does not establish the number of false claims that were presented to cause those damages; and the government's position—just as its case at trial—ignores completely its own burden to show both (1) how many claims filed and paid were false (which required a showing that bids were filed at rates higher than they otherwise would have been because of fraudulent conduct), and (2) how many of those false claims incorporated bids that were inflated as a result of defendants' conduct. The government failed to carry its evidentiary burden as to both issues.

Based on all the evidence presented, when viewed most favorably to the government, there was insufficient evidence from which a jury could determine without speculating either the number of

false claims filed with respect to the Cartwright Channels or the number of false claims that the defendants caused to be presented with respect to the Cartwright Channels.[20] The Court does agree, however, that its finding of liability and damages for conspiracy under the FCA establishes that the defendants caused to be presented at least one false claim and will assess a civil penalty for one false claim, the amount to be determined following the Court's hearing on civil penalties scheduled on October 26, 2011.

B. Conditional Ruling on Defendants' Motion for New Trial as to the Cartwright Channels

Having granted defendants' renewed motion for judgment as a matter of law, the Court must also conditionally rule on defendants' alternative motion for a new trial by determining whether a new trial should be granted if the judgment is latter vacated or reversed, stating as well the grounds for conditionally granting or denying the motion for a new trial. Fed. R. Civ. P. 50(c)(1). Based on the evidence at trial, the Court concludes that should this Court's judgment under Rule 50(b) be vacated or reversed, a new trial

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[20] Based on the Court's rulings, there is no need for the Court to determine the appropriate number of civil penalties to be assessed based on the holding of *United States v. Bornstein*, 423 U.S. 303, 312-13 (1976) (holding that where the number of claims submitted by a prime contractor is a "fortuity," the number of false claims to be assessed against a defendant who does not actually submit a claim is to be determined by the number of causative acts in which the defendant engaged). Finally, there is no need to consider whether the government was precluded from claiming more than 577 false claims by virtue of its representations made in connection with its motion for summary judgment.

should be granted as to the United States' claims pertaining to the Cartwright Channels.

Even if legally sufficient, the jury's determination that it could determine the number of false claims that the defendants caused to be filed with respect to the Cartwright Channels without speculating was against the clear weight of the evidence. Neither Exhibit 169 nor 173 allowed the jury to engage in any real analysis or evaluation; and the foundation testimony for those exhibits was in material respects unclear, confusing and at times ostensibly inconsistent.[21] Even if Exhibits 169 and 173 contained all the information theoretically necessary to permit a calculation of the number of claims that were filed at the second low during the me-too round with respect to the Cartwright Channels, that evidence, as a practical matter, was so voluminous,

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[21] For example, the foundation testimony offered by the government for the admission of Exhibit 169 was, on the one hand, that only one GBL was issued for each move, and that with one exception, no GBL numbers were listed more than once in Exhibit 169, such that the total number of paid moves equaled the total number of paid GBLs listed in Exhibit 169. There was other testimony, however, that there was no way to know whether a GBL listed in Exhibit 169 contained pricing based on a bid that was alleged to be fraudulently inflated or whether it related to accessorial or other charges for services provided during a move whose pricing had nothing to do with any allegedly fraudulent scheme. That testimony also appears to accept that different services provided during the same move could be listed in separately listed GBLs in Exhibit 169, but in any event all services provided during the same move would be listed with the same GBL number, ostensibly raising the possibility that the same GBL number could appear multiple times in Exhibit 169. *See* Trial Tr. at 637:6-9; 644:18-24; 647:5-12; 647:22-648:11; 662:25-665:3; 667:8-670:11; 676:23-677:23; 679:15-680:16 (Haynie testimony).

over-inclusive, indirect and circumstantial that in the event the jury thought there were false claims, the jury was necessarily forced to speculate to an undesirable degree and simply to accept the government's conclusory tabulation of "paid moves" in Exhibit 173 as the number of fraudulent vouchers that constituted the false claims that the defendants caused to be submitted as to the Cartwright Channels, all without the benefit of even one voucher that actually constituted a false claim. The Court's concern over this practical inability of the jury to engage in any independent analysis of the evidence pertaining to the number of false claims is underscored by the government's decision to claim, through the summary and indirect methods of proof it utilized, nearly eight times as many false claims as the government had claimed before trial. Overall, these clearly tactical decisions, even if not precluded under Rule 1006, and the government's representations in pre-trial proceedings, so affected the overall fairness of the trial process that the interests of justice would not be served by permitting the judgment produced through that process to stand.

C. The Sufficiency of the Evidence with Respect to the DPM Claims

The defendants were required to sign and file a Certificate of Independent Price Determination ("CIPD") in connection with their successful bid on the DPM contract. The defendants' liability on the Relator's DPM claim depended entirely on whether defendants' CIPD was false. The Court concludes that the evidence was sufficient for a reasonable jury to find that it was false.

In their Rule 50 motion with respect to the DPM claim, defendants argue that the verdict should be set aside for two reasons: (1) "Plaintiffs failed to produce sufficient evidence to prove Defendants intended to restrict competition on the DPM contract to sustain the verdict"; and (2) "the jury was mischarged on all key knowledge issues and was not charged on antitrust issues that were relevant to 'restricting competition.'" *See* Defs.' Mot. at 1 (Doc. No. 1077). The Court rejects both grounds of defendants' argument.

In support of their first contention—that the evidence was insufficient for a jury to find that the defendants had filed a false CIPD because there was no evidence that they acted for the purpose of restricting competition—defendants argue that the evidence did not establish that the defendants had reached a price-fixing agreement with other bidders as to the prime contract bids that each would file with the government on the DPM contract. The defendants then contend that the evidence established only that the pricing and other agreements they did reach collectively with other bidders on the DPM contract were for their services as subcontractors to the successful prime contractor bidder, but not with respect to their bids as prime contractors. In this connection, the defendants claim that they did nothing other than what was expected of them under the terms of the DPM contract solicitation, which contemplated that the successful bidder would need to subcontract portions of the DPM contract, and in fact, required a prime contract bidder to identify the specific subcontractors that the bidder had lined up for that purpose. The Court has reviewed the evidence, including the terms of the

DPM solicitation, and concludes that the evidence was sufficient for a jury to find that the defendants' CIPD was false, even if the evidence of price-fixing related solely to subcontract pricing and not prime contract pricing. The issue at the heart of defendants' challenge—whether defendants possessed the requisite intent—is a classic jury issue; and the jury could have reasonably inferred such an intent to restrict competition from the existence of defendants' subcontract price fixing agreement itself. Accordingly, the Court rejects defendants' challenge to the jury's verdict on this ground.

The Court also rejects defendants' argument that the verdict should be set aside because the jury was "not charged on antitrust issues that were relevant to 'restricting competition.'" Defs.' Mot. at 1. Subsection (a)(1) of the CIPD submitted with the DPM contract requires the submitting party to certify that "[t]he prices in this offer have been arrived at independently, without, *for the purposes of restricting competition*, any consultation, communication, or agreement with any other offeror or competitor . . . ." *See* Re. Ex. 181 (emphasis added). The CIPD does not itself define "competition" or "restriction of competition."

Defendants' liability on the DPM contract claim was not based on anti-competitive conduct that would establish liability under the antitrust laws; and there is no reason that defendants' certified compliance with a straightforward obligation under the CIPD should have been infused with the complex concepts applicable to antitrust liability. Rather, the CIPD was phrased in terms of commonly used and commonly understood words. When such terms are

undefined in a contract-forming document such as the CIPD, the words are given their ordinary and customary meaning. "Competition" and "restricting competition" are commonly used and understood words for which the jury was capable of using its commonsense to supply a meaning. Moreover, as defendants concede, neither party asked the Court to define "competition" for the jury separate from the antitrust concepts they proposed. For the above reasons, the Court rejects defendants' challenge to the jury's verdict on this ground and denies defendants' Rule 50 motion with respect to the DPM claim.

As to the number of false claims that defendants presented in connection with the DPM contract, the Court concludes as a matter of law that each invoice filed with the government with respect to that contract was a false claim. The parties stipulated that the defendants filed 9,136 invoices. *See* Re. Ex. 296. The Court therefore concludes that defendants presented 9,136 false claims under the DPM contract. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("In order for a false statement to be actionable under the False Claims Act it must constitute a 'false or fraudulent claim.' '[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'") (quoting *United States v. Rivera,* 55 F.3d 703, 709 (1st Cir. 1995) (alteration in original).

D. The Defendants' Motion for a New Trial as to the DPM Claim.

For essentially the same reasons that the Court finds that the evidence was sufficient for the jury to

reach its verdict as to the DPM claim, the Court denies defendants' motion for a new trial as to the DPM claim. Simply put, given the admitted price-fixing among the potential subcontractors and the incorporation of that fixed subcontractor pricing into the Gosselin defendants' DPM contract bid, the jury's verdict was not "against the clear weight of the evidence" and the Court finds no other grounds that would justify a new trial as to the DPM claim. The Court will therefore enter judgment against the Gosselin defendants for liability as to the DPM claim and will determine the civil penalties associated with that liability following the evidentiary hearing scheduled on October 26, 2011. At that hearing, all parties will be permitted to present relevant evidence pertaining to the appropriate civil penalty to be assessed for each false claim and also the constitutional limits on such penalties under the Excessive Fines Clause of the Eighth Amendment, including, without limitation, evidence pertaining to any damage or injury suffered by the government as well as the benefits received by the government and the Gosselin defendants under the DPM contract.

E. Damages and Set-offs

The FCA authorizes treble damages. *See* 31 U.S.C. § 3729(a). Since the total loss incurred by the government in the Cartwright Channels has been established at $865,000, the Gosselin defendants are liable jointly and severally for treble damages in the amount of $2,595,000. The United States concedes that this trebled damages amount should be reduced by the restitution payments that Gosselin has already made, which total $865,000. The United States also concedes that the trebled damages

amount should be reduced by a portion of the $14,654,040.85 that the government has collected under settlement agreements with all alleged coconspirators other than the Gosselin defendants.

It is generally agreed that when a plaintiff settles with one of several joint tortfeasors, the non-settling defendants are entitled to a credit for that settlement. *See, e.g., Chisholm v. UHP Products, Inc.*, 205 F.3d 731, 735 (4th Cir. 2000) (adopting "the premise that 'when a plaintiff settles with one of several joint tortfeasors, the non-settling defendants are entitled to a credit for that settlement.'") (quoting *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 208 (1994). Within the context of this case, the United States agrees that "when a plaintiff receives a settlement from one defendant, a nonsettling defendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against the nonsettling defendant as long as both the settlement and judgment represent common damages." *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989). The United States contends, however, that only a small percentage of the settlement amounts it has collected constituted "common damages" that should be credited against the trebled damages, even though the settlements were obtained from joint tortfeasors with respect to claims identical to those asserted against the Gosselin defendants. This is so, the government contends, because the settling defendants settled all the claims asserted against them whereas the Gosselin defendants proceeded to trial on all of those same claims and the government recovered only as to portion of those claims, specifically the claims that related to the Cartwright Channels. For this reason,

in the government's view, the only "common damages" to be set-off against the trebled damages is that portion of the settlement amount that the settling defendants paid in settlement of the government's claims based on the Cartwright Channels. Since the settlements did not allocate or apportion the settlement amounts to any particular claims settled, "the Court must determine the relevant percentage [of the total settlement amounts collected] to be setoff against the judgment [for trebled damages]." Gov't Reply at 19. Based on the testimony of the government's damages expert (whose testimony the Court struck at trial), the government contends that its $865,000 recovery against the Gosselin defendants, before trebling, represents approximately 2% of the value of the claims that the government settled, and therefore only 2% of the settlement amounts should be offset against the trebled damages.[22]

In reviewing this issue, the Court starts with a number of undisputed propositions. First, the government has alleged a single, overarching conspiracy against the Gosselin defendants and the settling defendants. Second, the settling defendants are alleged to be co-conspirators with the Gosselin defendants with respect to that single overarching conspiracy and therefore were jointly and severally liable with the Gosselin defendants for any liability

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[22] The government also proposes an additional reduction of approximately $255,000 on the grounds "that the United States settled with defendant Cartwright in connection with the Cartwright cancellation scheme for $255,049.04. That amount thus is common damages with the judgment here." Gov't Mot. at 17.

resulting from that conspiracy. Third, based on their alleged joint and several liability, the settling defendants and the Gosselin defendants are considered joint tortfeasors. *See* Hrg. Tr. at 75:3-20; 77:25-78:4 (statement of counsel for government at motions hearing on September 23, 2011 conceding that the settling defendants and the Gosselin defendants are joint tortfeasors) (Doc. No. 1101). Fourth, before entering into the settlements with the settling defendants, the government had asserted against the settling defendants the same claims and causes of action as were asserted against the Gosselin defendants. For that reason, the government tried against the Gosselin defendants precisely the same claims it would have tried against the settling defendants had the settlements not been reached.

Here, the settling defendants shared joint and several liability with the Gosselin defendants as to all the claims the government settled and all claims the government tried against the Gosslin defendants. The amounts the government obtained from the settling defendants through settlements and the judgment the government obtained at trial with respect to those same settled claims were "common damages." The Gosselin defendants are therefore entitled to a credit against their liability for the amount the government has already collected with respect to those common claims and "common damages." After that credit, the Government has fully recovered with respect to the Gosselin defendants' liability for compensatory damages and is

not entitled to the entry of any judgment against them.[23]

The government relies heavily on two cases, *Miller v. Holzmann,* 563 F. Supp. 2d 54 (D.D.C. 2008), and *Grant Thornton*, *LLP v. FDIC*, Nos. 10-1306 & 10-1379, 2011 WL 2420264 (4th Cir. June 17, 2011). Neither supports its position. In *Miller,* the Court recognized that where the settling and non-settling defendants shared joint and several liability as to all the same claims, "the settlement payments and the judgment represented 'common damages'" and for that reason "a simple, *pro tanto* credit against their

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[23] The government appears to agree that the *pro tanto* credit is appropriate with respect to "common damages," under which the amounts already collected are applied dollar for dollar and the non-settling party is responsible for any amount of damages not already paid by another source. A second common approach is the "proportionate share" or *"pro rata"* approach, under which the non-settling defendant is only liable for his proportion of the total damages award. Thus, to calculate the liability of any one non-settling defendant under the *pro rata* approach, the liability of the non-settling defendant is reduced by the ratio of settling defendants to the total number of defendants so that if there were ten defendants and nine settled, the liability found against the one non-settling defendant would be reduced by nine-tenths. In this case, the Gosselin defendants have already paid $865,000 in criminal restitution payments, an amount equal to one-third of the total damages. As the number of settling and non-settling defendants far exceeds three, under the *pro rata* method, the Gosselin defendants would have already paid more than their share of the damages for which they are responsible. Additionally, as the payments by the settling defendants far exceeded the trebled damages amount against the Gosselin defendants, under the *pro tanto* method, the government would not be entitled to recover any additional amount from the Gosselin defendants. Therefore, the government is not entitled under either method to recover further against the Gosselin defendants based on their liability as determined at trial.

overall liability would have been appropriate." *Miller,* 563 F. Supp. 2d at 144. Only where the asserted claims differ as between settling and non-settling defendants, as they did in that case as between certain co-defendants, does an allocation of the settlement amounts to common claims need to be calculated before a credit based on common damages can be applied against a non-settling defendant's liability. In *Grant Thornton,* 2011 WL 2420264, at *12-13, the Fourth Circuit upheld the district court's determination that only a portion of a settlement with a codefendant should be setoff because the settled claims against the settling defendant were different in scope than those proved against the non-settling defendant and for that reason, the damages were divisible and the setoff credit was equal to only the percentage of the settlement amount that equated with the percentage of the damages for which the non-settling defendant was jointly liable. *See Grant Thornton, LLP v. FDIC,* 694 F. Supp. 2d 506, 532 (S.D.W. Va. 2010), *aff'd in relevant part by Grant Thornton*, 2011 WL 2420264, at *12-13.[24]

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[24] The government has also asked for prejudgment interest. The Court concludes that prejudgment interest is not appropriate because the trebled damages are intended to fully compensate the government. *See, e.g., Peterson v. Weinberger,* 508 F.2d 45, 55 (5th Cir. 1975); *United States v. McLeod,* 721 F.2d 282, 286 (9th Cir. 1983); *United States v. Foster Wheeler Corp.,* 447 F.2d 100, 102 (2d Cir. 1971); *United States v. Uzzell,* 648 F. Supp. 1362, 1368 n.6 (D.D.C. 1986); *accord United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551-52 (1943) (holding "the device of double damages [under the pre-1986 FCA] plus a specific sum was chosen to make sure that the government would be made completely whole"). Moreover, and in any event, any assessment of prejudgment interest would not result in any

Here, the settling defendants and the Gosselin defendants were alleged to be jointly liable for all the same claims.

CONCLUSION

For the above reasons, the Court (1) grants defendants' motion pursuant to Fed. R. Civ. P. 50(b), and conditionally grants a new trial pursuant to Fed. R. Civ. P. 50(c)(1), as to the Cartwright Channels in the IS-02 rate cycle; (2) denies the defendants' motion pursuant to Fed. R. Civ. P 50(b) and for a new trial as to the DPM claims; (3) grants the government's motion for damages in the amount of $2,595,000 as to the Cartwright Channels, but reduces that amount to zero after crediting against that amount the amounts already collected by the United States through restitution and settlement payments, and also awards a civil penalty for one false claim in an amount to be determined; and (4) grants the Relators' motion pursuant to Fed. R. Civ. P. 50(c) as to liability on the DPM claim; and otherwise denies that motion without prejudice to the assessment of penalties, attorney's fees, and a share of the recovery to Relator Bunk following the evidentiary hearing scheduled on October 26, 2011.

The Clerk is directed to forward copies of this Memorandum Opinion to all counsel of record.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
October 19, 2011

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residual amount owed to the government by the Gosselin defendants after setoffs.

APPENDIX F

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

UNITED STATES OF AMERICA *ex rel.* Kurt Bunk and Daniel Heuser, Plaintiffs/Relators, v. BIRKART GLOBISTICS GmbH & CO., *et al.*, Defendants.	No. 1:02cv1168 (AJT/TRJ)
UNITED STATES OF AMERICA *ex rel.* Ray Ammons, Plaintiff/Relator, v. THE PASHA GROUP, *et al.*, Defendants.	No. 1:07cv1198 (AJT/TRJ)

ORDER

Upon consideration of (1) Defendants' Renewed Motion for Judgment as a Matter of Law and Alternative Motion for Partial New Trial (Doc. No. 1075); (2) United States/Relators' Motion for

Judgment Against Gosselin Defendants for Damages and Civil Penalties (Doc. No. 1076); and (3) Relators' Motion Regarding Further Proceedings (Doc. No. 1073), the memoranda and exhibits in support thereof and the oppositions thereto, the arguments of counsel at the hearing held on September 23, 2011, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Gosselin Defendants' Renewed Motion for Judgment as a Matter of Law and Alternative Motion for Partial New Trial (Doc. No. 1075) be, and the same hereby is, GRANTED in part and DENIED in part. The Renewed Motion is GRANTED as to the number of false claims the Gosselin defendants caused to be submitted as to Cartwright Channels and the jury's verdict with respect to that issue be, and the same hereby is, VACATED and SET ASIDE and in its place the Court finds as a matter of law that the Gosselin defendants should be, and hereby are, assessed a civil penalty for one false claim, the amount to be determined following the evidentiary hearing scheduled on October 26, 2011. The Renewed Motion and the Alternative Motion for a New Trial are DENIED as to the DPM claim; and it is further

ORDERED, pursuant to Fed. R. Civ. P 50(c)(1), that for the reasons and on the grounds set forth in the attached Memorandum Opinion, in the event that this Order granting the Gosselin Defendants' Renewed Motion for Judgment as a Matter of Law as to the Cartwright Channels (Doc. No. 1075) is latter vacated or reversed, the Court conditionally orders a new trial as to the number of false claims that the

Gosselin defendants caused to be filed with respect to the Cartwright Channels; and it is further

ORDERED that the United States/Relators' Motion for Judgment Against Gosselin Defendants for Damages and Civil Penalties (Doc. No. 1076) be, and the same hereby is, GRANTED in part and DENIED in part. The Motion is GRANTED to the extent that damages be, and the same hereby are, awarded to the United States in the amount of $2,595,000, which amount is hereby reduced to zero after appropriately crediting against those damages the amounts already collected by the United States through restitution and settlement payments; and also GRANTED to the extent that a civil penalty for one false claim shall be awarded against the Gosselin defendants with respect to the Cartwright Channels, the amount to be determined following the hearing scheduled on October 26, 2011; and it is otherwise DENIED; and it is further

ORDERED that Relators' Motion Regarding Further Proceedings (Doc. No. 1073) be, and the same hereby is, GRANTED in part and DENIED in part. The Motion is GRANTED to the extent that judgment be, and the same hereby is, entered in favor of the United States and against the Gosselin defendants with respect to liability on the DPM claim; and it is otherwise DENIED without prejudice to the assessment of civil penalties for 9,136 false claims, attorney's fees and an a share of the government's recovery to Relator Bunk, in amounts to be determined following the hearing scheduled on October 26, 2011; and it is further

ORDERED that an evidentiary hearing shall take place on October 26, 2011, as previously scheduled, at

which time all parties may present relevant evidence not presented at trial pertaining to the appropriate amount of civil penalties to be assessed for each false claim awarded pursuant to this Order and also the constitutional limits on such penalties under the Excessive Fines Clause of the Eighth Amendment, including, without limitation, evidence pertaining to any damages or other injuries suffered by the government, as well as any benefits received by the government or the Gosselin defendants, under the DPM contract.

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
October 19, 2011

APPENDIX G

FILED: February 14, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1369 (L)
(1:02-cv-01168-AJT-TRJ

UNITED STATES EX REL KURT BUNK; UNITED STATES EX REL RAY AMMONS

Plaintiffs – Appellants

and

UNITED STATES OF AMERICA

Intervenor/Plaintiff – Intervenor

and

UNITED STATES EX REL DANIEL HEUSER

Plaintiff

v.

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; MARC SMET

Defendants – Appellees

and

BIRKART GLOBISTICS GMBH & CO. LOGISTIK UND SERVICE KG; THE PASHA GROUP; ITO MOBEL TRANSPORT GMBH; ANDREAS CHRIST SPEDITION & MOBELTRANSPORT GMBH; JOHN DOES 1-100; AMERICAN MOPAC

INTERNATIONAL; DOE DEFENDANTS; GATEWAYS INTERNATIONAL; ALLIED FREIGHT FORWARDERS; NORTH AMERICAN VAN LINES, INCORPORATED; GLOBAL WORLDWIDE INCORPORATED; AIR LAND FORWARDERS SUDDATH; COVAN INTERNATIONAL; JET FORWARDING INCORPORATED; ARPIN INTERNATIONAL; BIRKART GLOBISTICS AG; THIEL LOGISTIK AG, a/k/a Logwin AG; VIKTORIA SCHAFER INTERNATIONALE SPEDITION GMBH; VIKTORIA SCHAFER INTERNATIONAL SPEDITION GMBH; VIKTORIA-SKS KURT SCHAFER INTERNATIONALE GMBH & CO., KG; GILLEN & GARCON GMBH & CO. INTERNATIONALE SPEDITION KG; GILLEN & GARCON GMBH & CO. KG; M.T.S. HOLDING & VERWALTUNGS GMBH, d/b/a M.T.S. Gruppe; ANDREAS CHRIST GMBH; MICHAEL VILLINGER; ERWIN WEYAND; NICODEMUS GOSSELIN; DIETER SCHMEKEL; HORST BAUR; KURT SCHAFER; MARTINA SCHAFER; JOHN DOE DEFENDANTS; BIRKART VERMOGENSVERWALTUNG GMBH; LOGWIN AIR + OCEAN DEUTSCHLAND GMBH; LOGWIN HOLDING DEUTSCHLAND GMBH; JURGEN GRAF; MISSY DONNELLY; GEORGE PASHA; AMERICAN MOPAC INTERNATIONAL, INCORPORATED; AMERICAN SHIPPING INCORPORATED; CARTWRIGHT INTERNATIONAL VAN LINES INCORPORATED; JIM HAHN; INTERNATIONAL SHIPPERS ASSOCIATION INCORPORATED; GOSSELIN WORLD WIDE MOVING GMBH; VIKTORIA INTERNATIONAL SPEDITION; GOVERNMENT

LOGISTICS N.V.; GATEWAYS INTERNATIONAL INCORPORATED

Defendants

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

Amici Supporting Appellees

and

TAXPAYERS AGAINST FRAUD EDUCATION FUND

Amicus Supporting Appellants

No. 12-1417
(1:02-cv-01168-AJT-TRJ

UNITED STATES EX REL KURT BUNK; UNITED STATES EX REL RAY AMMONS

Plaintiffs – Appellees

and

UNITED STATES OF AMERICA

Intervenor/Plaintiff – Appellee

and

UNITED STATES EX REL DANIEL HEUSER

Plaintiff

v.

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; MARC SMET

Defendants – Appellants

and

VIKTORIA INTERNATIONAL SPEDITION; GOVERNMENT LOGISTICS N.V.; BIRKART GLOBISTICS GMBH & CO. LOGISTIK UND SERVICE KG; THE PASHA GROUP; ITO MOBEL TRANSPORT GMBH; ANDREAS CHRIST SPEDITION & MOBELTRANSPORT GMBH; JOHN DOES 1-100; AMERICAN MOPAC INTERNATIONAL; DOE DEFENDANTS; GATEWAYS INTERNATIONAL; ALLIED FREIGHT FORWARDERS; NORTH AMERICAN VAN LINES, INCORPORATED; GLOBAL WORLDWIDE INCORPORATED; AIR LAND FORWARDERS SUDDATH; COVAN INTERNATIONAL; JET FORWARDING INCORPORATED; ARPIN INTERNATIONAL; BIRKART GLOBISTICS AG; THIEL LOGISTIK AG, a/k/a Logwin AG; VIKTORIA SCHAFER INTERNATIONALE SPEDITION GMBH; VIKTORIA-SKS KURT SCHAFER INTERNATIONALE GMBH & CO., KG; GILLEN & GARCON GMBH & CO. INTERNATIONALE SPEDITION KG; M.T.S. HOLDING & VERWALTUNGS GMBH, d/b/a M.T.S. Gruppe; ANDREAS CHRIST GMBH; MICHAEL VILLINGER; ERWIN WEYAND; NICODEMUS GOSSELIN; DIETER SCHMEKEL; JURGEN GRAF; HORST BAUR; KURT SCHAFER; MARTINA SCHAFER; JOHN DOE DEFENDANTS; BIRKART VERMOGENSVERWALTUNG GMBH; LOGWIN AIR + OCEAN DEUTSCHLAND GMBH; LOGWIN HOLDING DEUTSCHLAND GMBH; MISSY DONNELLY; GEORGE PASHA; AMERICAN MOPAC INTERNATIONAL, INCORPORATED;

AMERICAN SHIPPING INCORPORATED; CARTWRIGHT INTERNATIONAL VAN LINES INCORPORATED; JIM HAHN; INTERNATIONAL SHIPPERS ASSOCIATION INCORPORATED; GATEWAYS INTERNATIONAL INCORPORATED; GOSSELIN WORLD WIDE MOVING GMBH

Defendants

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

Amici Supporting Appellants

and

TAXPAYERS AGAINST FRAUD EDUCATION FUND

Amicus Supporting Appellees

No. 12-1494
(1:02-cv-01168-AJT-TRJ

UNITED STATES OF AMERICA

Intervenor/Plaintiff – Appellant

and

UNITED STATES EX REL DANIEL HEUSER; UNITED STATES EX REL KURT BUNK; UNITED STATES EX REL RAY AMMONS

Plaintiffs

v.

GOSSELIN WORLD WIDE MOVING, N.V.; GOSSELIN GROUP N.V.; MARC SMET

Defendants – Appellees

and

BIRKART GLOBISTICS GMBH & CO. LOGISTIK UND SERVICE KG; THE PASHA GROUP; ITO MOBEL TRANSPORT GMBH; ANDREAS CHRIST SPEDITION & MOBELTRANSPORT GMBH; JOHN DOES 1-100; AMERICAN MOPAC INTERNATIONAL; DOE DEFENDANTS; GATEWAYS INTERNATIONAL; ALLIED FREIGHT FORWARDERS; NORTH AMERICAN VAN LINES, INCORPORATED; GLOBAL WORLDWIDE INCORPORATED; AIR LAND FORWARDERS SUDDATH; COVAN INTERNATIONAL; JET FORWARDING INCORPORATED; ARPIN INTERNATIONAL; BIRKART GLOBISTICS AG; THIEL LOGISTIK AG, a/k/a Logwin AG; VIKTORIA SCHAFER INTERNATIONALE SPEDITION GMBH; VIKTORIA-SKS KURT SCHAFER INTERNATIONALE GMBH & CO., KG; GILLEN & GARCON GMBH & CO. INTERNATIONALE SPEDITION KG; M.T.S. HOLDING & VERWALTUNGS GMBH, d/b/a M.T.S. Gruppe; ANDREAS CHRIST GMBH; MICHAEL VILLINGER; ERWIN WEYAND; NICODEMUS GOSSELIN; DIETER SCHMEKEL; JURGEN GRAF; HORST BAUR; KURT SCHAFER; MARTINA SCHAFER; JOHN DOE DEFENDANTS; BIRKART VERMOGENSVERWALTUNG GMBH; LOGWIN AIR + OCEAN DEUTSCHLAND GMBH; LOGWIN HOLDING DEUTSCHLAND GMBH; MISSY DONNELLY; GEORGE PASHA; AMERICAN MOPAC INTERNATIONAL, INCORPORATED; AMERICAN SHIPPING INCORPORATED; CARTWRIGHT INTERNATIONAL VAN LINES

INCORPORATED; JIM HAHN; INTERNATIONAL SHIPPERS ASSOCIATION INCORPORATED; GATEWAYS INTERNATIONAL INCORPORATED; GOSSELIN WORLD WIDE MOVING GMBH; GOVERNMENT LOGISTICS N.V.; VIKTORIA INTERNATIONAL SPEDITION

Defendants

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

Amici Supporting Appellees

and

TAXPAYERS AGAINST FRAUD EDUCATION FUND

Amicus Supporting Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk