UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES ex rel. JAHR et al., Plaintiffs, v. TETRA TECH EC, INC. et al., Defendants.	Case No. 13-cv-03835-JD **ORDER RE MOTIONS TO DISMISS RELATORS' COMPLAINTS**
UNITED STATES ex rel. SMITH, Plaintiff, v. TETRA TECH EC, INC. et al., Defendants.	Case No. 16-cv-01106-JD
UNITED STATES ex rel. WADSWORTH et al., Plaintiffs, v. TETRA TECH EC, INC. et al., Defendants.	Case No. 16-cv-01107-JD
UNITED STATES ex rel. MCLAUGHLIN, Plaintiff, v. SHAW ENVIRONMENTAL & INFRASTRUCTURE, INC. et al., Defendants.	Case No. 14-cv-01509-JD

INTRODUCTION

These *qui tam* cases under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, are part of the sweeping litigation before the Court that challenges work by government contractors to remediate radiation contamination in the soil at the former Hunters Point Naval Shipyard in San Francisco. The Hunters Point cases are the functional equivalent of an intra-district MDL proceeding, in that the Court has related multiple complex lawsuits within the District to be managed much as an MDL case would be handled.

This order resolves motions to dismiss the relators' complaints. Dkt. Nos. 171, 176, 178, 200.[1] The parties' familiarity with the record, including the Court's many prior orders on other aspects of the litigation, is assumed.

The rather convoluted procedural history of the FCA cases is our starting point. On August 19, 2013, relators Arthur R. Jahr, III, Elbert G. Bowers, Susan V. Andrews, and Archie R. Jackson (Jahr relators) filed the first FCA *qui tam* complaint under seal, naming as defendants Tetra Tech EC, Inc., Tetra Tech, Inc., New World Environmental, Inc. dba New World Technology, and Aleut World Solutions. Dkt. No. 1. On April 1, 2014, relator Kevin McLaughlin filed a complaint, naming Shaw Environmental & Infrastructure, Inc. and Chicago Bridge & Iron Company N.V. *McLaughlin* Dkt. No. 1. Relator Anthony Smith filed a complaint on March 4, 2016, against Tetra Tech EC, Inc., Radiological Survey & Remediation Services, LLC (RSRS), the Shaw Group, Shaw Environmental and Infrastructure, Inc., and Chicago Bridge & Iron, Inc. *Smith* Dkt. No. 1. Relators Donald K. Wadsworth and Robert McLean (Wadsworth relators) filed a complaint on the same day, naming Tetra Tech EC, Inc., RSRS, and IO Environmental & Infrastructure Incorporated (IO Environmental). *Wadsworth* Dkt. No. 1.

After several years of investigation, during which the complaints remained sealed and inactive, the United States filed on January 14, 2019, the same complaint-in-intervention in the three cases filed by the Jahr relators, Smith, and the Wadsworth relators. *See* Dkt. No. 28; *Smith*

[1] Unless otherwise noted, all docket number references are to the ECF docket in the *Jahr* action.

Dkt. No. 23; *Wadsworth* Dkt. No. 23. In *McLaughlin*, the government declined intervention, and the Court unsealed the case on July 1, 2019. *McLaughlin* Dkt. No. 30.

On July 15, 2019, the United States filed a first amended complaint alleging FCA claims against Tetra Tech EC, Inc. only. Dkt. No. 82. This is the operative complaint-in-intervention in *Jahr*, *Smith*, and *Wadsworth*. On February 27, 2020, the Jahr, Smith, and Wadsworth relators filed in *Jahr* a combined second amended complaint (CSAC), which is the operative complaint for these relators. Dkt. No. 148. The allegations and claims by the Jahr relators are the same as those made by the United States in the complaint-in-intervention. *See id.* ¶ 22. The Smith and Wadsworth relators made allegations that they say were not encompassed by the United States' complaint. *See id.* ¶¶ 23-97. On February 27, 2020, relator McLaughlin filed a third amended complaint (TAC), which is his operative complaint. *McLaughlin* Dkt. No. 61.

Defendants fired a cannonade of attacks on the relators' complaints. Defendants Tetra Tech EC, Inc., Tetra Tech, Inc., IO Environmental, RSRS, Daryl DeLong, and Brian Henderson jointly ask to dismiss all relators' complaints based on various statutory bars in the False Claims Act. Dkt. No. 171. The Shaw defendants (Shaw Environmental & Infrastructure, Chicago Bridge & Iron Co., Aptim Corp., Aptim Federal Services, and Aptim Environmental & Infrastructure) joined this motion. Dkt. No. 201. Defendants RSRS, DeLong, and Henderson ask to dismiss the *Jahr* CSAC and the TAC in *McLaughlin*. Dkt. No. 176. IO Environmental filed a motion to dismiss the *McLaughlin* TAC, and relator Wadsworth's allegations in the *Jahr* CSAC. Dkt. No. 178. The Shaw defendants also ask to dismiss *McLaughlin*'s TAC, and relator Smith's allegations in the *Jahr* CSAC. Dkt. No. 200.

DISCUSSION

I. STATUTORY BACKGROUND

The Court has extensively analyzed the False Claims Act and its *qui tam* provisions in other cases.[2] *See Silbersher v. Valeant Pharmaceuticals Int'l, Inc.*, 445 F. Supp. 3d 393, 400-02

[2] "Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 768

(N.D. Cal. 2020). "The FCA, which Congress originally enacted in 1863, is the government's 'primary litigative tool for combatting fraud' against the federal government." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745 (9th Cir. 1993). The statute imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" by the United States government. 31 U.S.C. § 3729(a)(1)(A). The *qui tam* provisions of the FCA permit a private individual, as a "relator," to bring an action alleging an FCA violation "in the name of the Government." *Kelly*, 9 F.3d at 745-46 (quoting 31 U.S.C. § 3730(b)(1)).

Since its enactment over 150 years ago, the FCA has gone through a number of significant amendments. The three statutory bars at issue here -- (1) the first-to-file bar (31 U.S.C. § 3730(b)(5)); (2) the government action bar (31 U.S.C. § 3730(e)(3)); and (3) the public disclosure bar (31 U.S.C. § 3730(e)(4)(A)) -- were added by the 1986 amendments, which sought "to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs." *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001); *see also Silbersher*, 445 F. Supp. 3d at 401 ("the 1986 amendments were intended to encourage more private enforcement lawsuits," and "[a]t the same time, Congress sought to '*bar* a subset of those suits that it deemed unmeritorious or downright harmful.'") (citations omitted; emphasis in original).[3] While there is no question that Congress added these bars "in an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits," courts have wrestled with the 1986 amendments because "Congress was never completely clear about what kind of 'parasitic' suits it was attempting to avoid." *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280, 295 & 296 n.15 (2010) (quotations and citation omitted).

II. INTERVENTION AND THE FCA

Before determining how the statutory bars might apply here, there is a question of whether

[3] The public disclosure bar was amended again in 2010. *See Silbersher*, 445 F. Supp. 3d at 401-02. These cases were filed after those amendments, and there is no suggestion by any party that

the relators in *Jahr*, *Smith*, and *Wadsworth* can proceed at all under the FCA. Defendants contend that "[o]nce the United States intervenes in an FCA case, nothing in the Act permits a relator to continue separately prosecuting an FCA claim in that same case." Dkt. No. 171 at 16. In effect, defendants say that once the government takes the field, all other players are excluded.

The point is not well taken. Defendants do not cite an express provision of the FCA for their position, but suggest that it emanates as an abstract but perceptible principle from two indirect sources: (1) Section 3730(b)(4)(A), which states that if the United States elects to intervene, it "shall proceed with the action, in which case the action shall be conducted by the Government"; and (2) Section 3730(c)(1), which states that "[i]f the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." *See* Dkt. No. 171 at 16.

These portions of the FCA do not carry the load that defendants posit. Leaving aside the question of whether divining emanations is a sound approach to statutory construction, which is doubtful, nothing in the text of the provisions necessarily excludes a relator from a case after government intervention. The government may have "primary" responsibility for the litigation, but that does not mean "exclusive" responsibility. Defendants also overlook the fact that another provision in the FCA expressly contemplates that relators may litigate FCA claims in intervened cases. Section 3730(c)(1) plainly states that in cases where the government has elected to "proceed[] with the action," the "person bringing the action . . . shall have the right to continue as a party to the action," subject to certain limitations, such as the government's right to seek an order "limiting the participation by the [relator] in the litigation" upon a "showing . . . that unrestricted participation . . . by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." 31 U.S.C. § 3730(c)(2)(C).

Overall, the plain language of the FCA closes the door to defendants' theory. For this reason, the Court concludes, as many other courts have concluded, that the FCA does not automatically bar relators from the litigation after the government intervenes. *See, e.g.*, *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 28 (D.D.C. 2014) ("Nothing in

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