UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 03cv11965-NG**
	)	
DYNAMICS RESEARCH CORP.,	)	
Defendant.	)	

GERTNER, D.J.

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March 31, 2008

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I. INTRODUCTION

In 2001, Victor Garber ("Garber") and Paul Arguin ("Arguin"), two former employees of defense contractor Dynamics Research Corp. ("DRC"), pled guilty to multiple counts of conspiracy to defraud the United States. The charges stemmed from a series of fraudulent schemes whereby both men, Arguin in particular, used their positions at DRC as computer technology consultants to the Air Force to steer vast sums of government procurement funds into their own pockets. The facts underlying their convictions form the basis of the government's claims in this case.

In its complaint, the government seeks civil penalties and damages from DRC for Arguin and Garber's conduct, alleging various violations of the False Claims Act ("FCA") and the Anti-Kickback Act ("AKA"), unjust enrichment, breach of contract, and payment by mistake. In the motion currently before the Court, (document # 112), the government seeks summary judgment on a limited subset of its FCA, AKA, and breach of contract claims.

The motion addresses allegations that Arguin and/or Garber fraudulently caused the government to pay 1) $500 overcharges for installation services related to the Air Force's purchase of "Raven" computer systems from third parties; 2) inflated prices for the sale of "clone" computer memory substituted for name-brand "Sun memory"; and 3) charges for computer-based training modules that were never actually provided. The government asserts that DRC is liable for this conduct as a matter of law and, under the FCA, DRC owes the government treble damages and civil penalties amounting to between $24,296,121.73 and $24,800,121.73.[1] The government also asserts that DRC is liable under the AKA for civil penalties and double damages totaling $19,791,547.82, and for $10,035,373.91 for breach of contract.

It is not seriously disputed that Arguin and Garber received government funds through subcontracts with third parties in violation of contractual and regulatory conflict-of-interest rules and in breach of their duties to provide honest service to the government. For the three schemes at issue here, it is clear that Arguin, either alone or with Garber, orchestrated and participated in arrangements whereby Arguin would advise the Air Force to purchase goods and services from third-party contractors and then, in turn, receive payment from these contractors in

[1] $30,106,121.73 (treble damages), plus penalties of $5,000.00-$11,000.00 for each of at least 84 false claims, minus $6,230,000.00 in recoveries already made from other parties.

exchange for providing some or all of the goods and services himself. There are, however, material factual disputes as to the value of the goods and services actually received by the government -- and, indeed, whether the government received anything of value at all -- with regard to all three schemes. While these disputed facts affect the proper calculation of damages, they are irrelevant to the liability determination. Thus, for the reasons set forth below, I **GRANT** the government's Motion for Summary Judgment (document # 112) as to DRC's liability under the FCA, AKA, and for breach of contract, but **DENY** the motion as to an award of damages.

II. BACKGROUND

In January 1996, DRC, a defense contractor located in Andover, Massachusetts, entered into the Technical Management Support contract ("TEMS IV") with the Air Force.[2] Under TEMS IV, DRC would ultimately receive millions of dollars in exchange for technical support and advice concerning the acquisition, procurement, development, and deployment of computer systems for the Air Force's Theater Battle Management Core Systems ("TBMCS"). That contract expired in March of 1999. DRC also entered into the Information Technology Services Program ("ITSP") contract with the Air Force, which was in effect from 1997 to 2000. Both

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[2] This is the second time the Court has addressed these facts. See United States v. Dynamics Research Corp., 441 F. Supp. 2d 259, 261-62 (D. Mass. 2006).

the TEMS IV and ITSP contracts contained the following express conflict of interest prohibition:

> [T]he contractor shall not assign, nor allow any employee for whom it receives payment under this contract to perform any task under this contract concerning any program, contractor, contract, or other matter in which that employee, or that employee's spouse, minor child or household member has a financial interest."

(TEMS IV 36 (Exh. 1 to document # 18); ITSP 39 (Exh. 2 to document # 18)) The contracts also provided:

> The contractor shall obtain and maintain as part of its personnel records a financial disclosure statement from each employee assigned to perform support tasks to the Government under this contract. The financial disclosure statement shall: (1) list any financial interests described in subparagraph (b) hereof, (2) be obtained not later than upon each employee's initial assignment to a support task under this contract, (3) be updated at least annually, and (4) be reviewed by the contractor with each employee on an annual basis during the term of this contract.

(TEMS IV 37; ITSP 39.) They also incorporated the Federal Acquisition Regulations ("FAR") prohibitions on conflicts of interest and the statutory prohibition contained in the Anti-Kickback Act ("AKA"). 48 C.F.R. 52.203-7 (incorporated into government contracts by 48 C.F.R. 3.502-3).

DRC's Vice President, Victor Garber, oversaw the financial aspects of the TEMS IV and ITSP contracts as well as DRC's related work at Hansom Air Force Base. Garber had become a Vice

President in 1997 after having previously been a senior director with the company. In February 1999, he was made Vice President and General Manager of DRC's Technical Services Division and reported only to DRC's CEO. From at least 1996 until he was fired in 2000, Garber worked directly over Paul Arguin, a Senior Staff Engineer who later became a Program Manager. In 1997, Arguin was made the single interface between DRC and the Air Force on Combat Air Force ("CAF") programs at Hanscom Air Force Base, which included the TEMS IV and ITSP contracts, and was the highest ranking DRC employee working on location at Hanscom. In 1999, Arguin was promoted to Vice President.[3]

As part of DRC's work under the contracts, one of Arguin's primary duties was to provide technical advice to the Air Force and supervise others providing such advice. The work included preparing procurement documents and identifying suppliers of computer equipment that provided the best value to the government. According to DRC, a number of factors were to be taken into consideration in making recommendations to the Air Force, one of which was price.[4] The FAR, however, forbids DRC employees from making actual procurement decisions on behalf of

[3] According to DRC, however, he was never actually elected to the position.

[4] DRC asserts, and for our purposes here we accept as true, that price was not the only criterion on which it was supposed to base its recommendations to the Air Force. Other considerations included: 1) the Air Force's socio-economic purchasing requirements; 2) time constraints; 3) warranties; 4) past-performance of contractors; 5) maturity and reliability of the technology. (Wellspring Aff. 3 (Exh. 24 to document # 125).)

the Air Force, and it was part of Arguin's job to train DRC employees working at Hanscom on ethical standards under FAR and DRC's own ethics guidelines.

Garber and Arguin were fired by DRC in February 2000 after allegations of fraud surfaced. They were indicted later that year, and in 2001 Garber and Arguin pled guilty to, among other things, multiple counts of conspiracy to defraud the United States.[5] The convictions stemmed from a series of schemes undertaken by Garber and Arguin to divert government procurement funds into their own pockets and involved breaches of their duties of honest service to the government. The facts underlying the convictions form the basis of the government's allegations here.

A. Computer-Based Training

Arguin's first scheme began in 1996 when the Air Force needed a computer-based training program for TBMCS computer systems. Arguin, through his position at DRC, arranged for the Air Force to purchase the training module for $138,600 from a

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[5] Arguin pled guilty to Conspiracy to Defraud the United States (18 U.S.C. § 371); several counts of Wire Fraud (18 U.S.C. §§ 1343, 1346) and Aiding and Abetting (18 U.S.C. § 2); Theft and Conversion of Public Property (18 U.S.C. § 641); Conspiracy to Obstruct Justice and Tamper with Witnesses (18 U.S.C. § 371); and several counts of Witness Tampering (18 U.S.C. §§ 1512(b)(1), 1512(b)(2)(B)) and Aiding and Abetting (18 U.S.C. § 2). (Arguin Plea (Exh. 13 to document # 18).) Garber pled guilty to Conspiracy to Defraud the United States (18 U.S.C. § 371); Wire Fraud (18 U.S.C. §§ 1343, 1346) and Aiding and Abetting (18 U.S.C. § 2); Conspiracy to Obstruct Justice and Tamper with Witnesses (18 U.S.C. § 371); and Witness Tampering (18 U.S.C. §§ 1512(b)(1), 1512(b)(2)(B)) and Aiding and Abetting (18 U.S.C. § 2). (Garber Plea (Exh. 12 to document # 18).)

Missouri company called World Wide Technology ("WWT"). WWT was a small company and helped the government satisfy various regulations requiring that a certain amount of government business go to disadvantaged businesses (known as "8(a) companies"). Per Arguin's instruction, WWT, in turn, issued an invoice to Greenleaf Associates ("Greenleaf"), a company owned by Arguin's wife, Lisa Arguin, and named for the street on which the Arguins lived in Amesbury, Massachusetts. Arguin gave the name "Lisa Thompson," his wife's maiden name, as the contact person at Greenleaf.[6] Arguin ultimately received approximately $138,600 for the services;[7] the check was cashed by Lisa Arguin. WWT never received the training module, but was advised that it had been sent directly to the Air Force.

Whether or not the Air Force actually received any such training module is a contested fact in this case. The government now claims that no computer-based training was ever provided to the Air Force. However, Arguin disputed this when he pled guilty to the charges against him in the underlying criminal case, and, moreover, there is evidence in the record, including a statement by Arguin himself detailing his actions, to suggest that he did in fact provide the requested training program to Hurlburt Air

[6] Originally, Greenleaf had been set up by Lisa Arguin as a biotechnology consultancy, but had never conducted any business.

[7] There is evidence in the record suggesting that the figure was actually $132,000.

Force Base in Florida, including a shipment of Dataram memory worth approximately $46,000 paid for out of the $138,600 fee. (Arguin Stmt. 2 (Exh. 8 to document # 18).) An Air Force officer also signed a document confirming receipt. (Exh. 14 to document # 125.)

B. Raven Installation Charges

In late 1996, DRC recommended that the Air Force purchase a number of computers manufactured by ECCS, Inc. (later known as Storage Engine, Inc.) known as "Ravens." The Raven had been developed to fill a void left after Sun Microsystems had discontinued a line of computers needed by the Air Force to run various programs. Beginning in late 1996 and early 1997, Arguin and/or employees working under his direction executed and provided to the General Services Administration ("GSA") "sole source justifications" recommending that the Ravens be purchased outside of the normal competitive bidding process though WWT in order to satisfy the Air Force's obligation to give a certain amount of business to 8(a) companies. (Exh. 32 to document # 18.) Arguin had a prior relationship with ECCS (according to Arguin, he had consulted with ECCS to develop the Raven), and for each of the Ravens purchased from ECCS through WWT, ECCS made a payment of $500 to Arguin through Greenleaf for "design, installation, and integration services." (Arguin Stmt. 3; Arguin Plea; Garber Plea.) In early 1997, ECCS issued a check for

$92,500 to Greenleaf, which was deposited in the Greenleaf bank account by Lisa Arguin. (Garber Plea.) DRC has filed documents suggesting that the $500 installation fees were not in fact passed onto the Air Force, but instead were "eaten" by ECCS to make the Air Force "happy." (Azcuy Dep 113 (Exh. 12 to document # 125).)

When WWT later "graduated" from its 8(a) status, the Air Force began to purchase the Ravens through a company called KKP Corp. ("KKP"). (Arguin Stmt. 4; Garber Plea; Arguin Plea.) In the early 1990s, Arguin and Garber had helped a former DRC employee named Chutchai Gary Khanijao start and organize KKP so that it could gain 8(a) certification and receive labor and services contracts from the Air Force outside of the usual competitive channels.[8] Arguin vouched for KKP within the Air Force and, again, DRC employees prepared "sole source justifications" for KKP. Between early 1997 and 1999, two DRC employees, Gillian Ferguson and Judy Ryan, submitted numerous "sole source justification" for WWT and KKP at the behest of Arguin. (Exh. 32 to document # 125.) Soon thereafter, KKP began sending invoices for $500 per Raven for "installation" services

[8] The government alleges that as part of this effort, Arguin directed DRC employees and Air Force personnel to travel to KKP headquarters in Nashua, NH, during a visit from the Small Business Administration to make it appear as if KKP were more of a real company than it really was. Lieutenant Colonel Edward Cangelosi stated that he did attend a briefing in Nashua, but could not remember anything particular about the meeting. (Cangelosi Dep. 155-57 (Exh. 7 to document # 125).) It is unclear whether the event occurred before or after KKP had been given 8(a) status. Either way, it is not material to the analysis here.

to ECCS. These payments were shared by Khanijao, Garber, and Arguin. Initially, KKP made payments to Garber and Greenleaf. Later, however, Garber and Arguin formed their own company called Merrimac Systems Corp. ("Merrimac"), which served as a conduit for the payments. Khanijao testified before the grand jury that he "felt he had no choice but to [make the payments] because [Garber and Arguin] had control over the contracts." (Khanijao Gr. Jury Test. (Exh. 17 to document # 18).) In all, the government alleges that it paid approximately $531,500 for these installation fees between 1997 and 1999.

It is unclear from the record what, if any, services were actually rendered for these payments. The government has presented strong evidence that no services were ever provided.[9] At the same time, there is some evidence, vague to be sure, that Arguin provided some services in exchange for these payments, be it through consultation, design, or other functions. (Arguin Stmt. 4.) Moreover, there is evidence suggesting that the Air Force had deemed the installation services necessary and

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[9] In Khanijao's grand jury testimony, the following exchange took place:

> Q: The description that's provided on each one [of the invoices KKP sent for the $500 payments by ECCS]: Installation, support, engineering, were those real services?
> A: No.
> Q: They weren't?
> A: No.
> Q: Were any services provided by KKP for these payments?
> A: No.

(Khanijao Gr. Jury Test. 21.)

specifically requested that a third-party be identified to perform the hardware installation services for the Ravens.[10]

C. **Sun Memory**

During the same time period, Arguin arranged for the Air Force to purchase computer memory for the Ravens through KKP. When KKP bid on the contract, Arguin recommended to Khanijao that he quote the same price that Sun Microsystems had charged in a previous fixed-price contract. Based at least in part on representations made by Arguin to the Air Force that KKP's quote was "fair and reasonable," the government awarded KKP a fixed-price contract worth millions of dollars. By the time the contract was awarded, however, Arguin and Garber became aware that the price of the Sun-compatible memory had fallen drastically on the "spot" market. In order to take advantage of the price discrepancy, Garber, Arguin, and Khanijao agreed among themselves that whenever the government ordered memory from KKP, Garber and Arguin, acting first through Greenleaf and then through Merrimac, would supply KKP with the memory and the three would split the profit.[11]

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[10] According to one document, Lieutenant Colonel Edward Cangelosi, the Air Force Officer in charge of equipment procurement for the TBMCS program, noted that installation tasks that had been performed by DRC were shifted over to KKP in order to satisfy requirements that a certain percentage of business go to disadvantaged business. (Exh. B to document # 131-2.) There is also evidence that ECCS regularly charged between $500 and $700 for installation.

[11] Graber and Arguin received the lion's share.

It is clear from the record that Garber, Arguin, and Khanijao made extremely large profits through this scheme. As government orders would come in, Garber and Arguin would supply KKP with Sun-compatible memory manufactured by Dataram at a significant mark-up, which KKP would then provide to the government. The government claims that it paid a total of $12,111,543.10 for the memory, while Garber and Arguin paid only $2,748,269.19, for a difference of $9,365,273.91.

D. <u>Conflict of Interest Disclosure</u>

The undisputed evidence in the record also reveals that during the time period encompassing these schemes, Garber and Arguin never signed required annual conflict of interest disclosure affidavits per the terms of the TEMS IV and ITSP contracts. There is also evidence that DRC employee Sean Finley knew that in 1996 Arguin had refused to sign the requisite financial affidavit and that DRC took no action to remedy Arguin's refusal. (Finley Gr. Jury Test. 18-22 (document # 112-4).)

Arguin refused to sign again in 1999. An internal DRC memo from a senior DRC employee in October 2000 recognized this failure to fulfill the disclosure requirements: "[W]e . . . re-examined the ITSP Blanket Purchase Agreement (BPA) and determined that those employees working on ITSP Orders should complete a Financial Disclosure Statement (FDS). This disclosure has not

been accomplished since TEMS III (or IV) so now is the time to catch up." (Exh. 28 to document # 18.) And on February 2, 1999, DRC certified that it was "in full compliance with the strict conflict of interest clauses of the TEMS contract without exception."[12] (Exh. 6 to document # 18.)

E. Government Involvement

The Air Force's Operations Support Program Manager Lieutenant Colonel Edward Cangelosi oversaw most of the government's procurements at issue in this case. Cangelosi approved all of the claims. He also signed "sole source justifications" to allow KKP to recover Air Force Contracts outside of the normal competitive bidding process and certified that the prices being paid were "fair and reasonable."

DRC has presented evidence that the Air Force, and Cangelosi in particular, ceded tremendous authority to Arguin and allowed him to act as a de facto procurement manager in violation of the FAR.[13] Under the FAR, DRC employees were specifically prohibited

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[12] There is a dispute as to whether this certification referred only to institutional conflicts of interest (conflicting business relationships) or to the conflicts of individual DRC employees as well.

[13] DRC also claims that Cangelosi also knew that Greenleaf was owned by Arguin's wife and that it was acting as a government subcontractor. There is evidence that Cangelosi knew that Greenleaf was Lisa Arguin's company, but believed it to be related her biotechnology consulting business. The only evidence that he knew that Greenleaf acted as a subcontractor consists of the following statements made in a deposition by ECCS President Gregg Azcuy:

> Q: So it is your understanding that he [Cangelosi] knew that Greenleaf was a company in which Lisa Arguin was interested?
>
> A: I assumed he knew everything that Paul would disclose to him, just what he disclosed to us.

from engaging in "inherently governmental functions," including "determining what supplies or services are to be acquired by the government."

Viewing the evidence in the light most favorable to DRC, it seems likely that Arguin regularly operated outside the limits of the FAR and that third parties believed that the Air Force intended for Arguin to speak on its behalf. Arguin and DRC employees working for him prepared and submitted "sole source justifications" and made procurement decisions with Cangelosi's knowledge. There is also evidence that Cangelosi gave DRC employee Gillian Ferguson access to his signature stamp and would allow her to acknowledge receipt of products and equipment. There are no allegations, much less proof, that Cangelosi or anyone at the Air Force knew of or took part in Garber and Arguin's elaborate self-dealing scheme.

III. <u>SUMMARY JUDGMENT STANDARD</u>

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Once the moving party demonstrates the "'absence of evidence to support the nonmoving party's case,'

(Azcuy Dep. 124 (Exh. 1 to document # 125).) On this record, then, there is no direct evidence that Cangelosi knew of the schemes.

the burden of production shifts to the nonmovant." Dow v. United Brotherhood of Carpenters, 1 F.3d 56, 58 (1st Cir. 1993) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). The nonmovant must then "affirmatively point to specific facts that demonstrate the existence of an authentic dispute." McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995). The court must:

> view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor,' but paying no heed to 'conclusory allegations, improbable inferences, [or] unsupported speculation.' If no genuine issue of material fact emerges, then the motion for summary judgment may be granted.

Id. (citations omitted).

IV. DISCUSSION

Because of the potential for treble damages of over $20 million, the parties have expended the vast majority of their energy on the government's FCA claims. The discussion here follows suit, but for a different reason: the arguments and counter-arguments involved in the three counts on which the government seeks summary judgment -- FCA, AKA, and breach of contract -- are all functionally similar and share identical factual bases. Thus, the analysis for the AKA and breach of contract counts flows naturally from the discussion of the FCA.

A. The FCA Claims

To prevail on a claim under the FCA, the government must prove that the defendant 1) knowingly presented, or caused to be presented, 2) to an officer or employee of the United States Government or a member of the Armed Forces of the United States 3) a false or fraudulent claim for payment or approval. 31 U.S.C. § 3729(a)(1); Maturi v. McLaughlin Research Corp., 413 F.3d. 166, 171-72 (1st Cir. 2005). Section 3729 also imposes liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government," or "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." § 3729(a)(2)-(3).

Analytically, the first major question the Court must address is whether there are genuine issues of material fact with regard to the falsity of the claims presented to the government. If the Court finds that there are no such issues, the question then becomes whether DRC may be held directly liable for the false and/or fraudulent statements and acts of Arguin and Garber or, alternatively, vicariously liable under a theory of apparent authority.

1. Falsity of the Claims

The government has moved for summary judgment on only a limited set of claims: 1) claims for alleged overcharges of $500 per Raven computer for installation services; 2) claims for the

cost of Sun computer memory allegedly sold at fraudulently inflated prices; and 3) claims for computer-based training that was allegedly never provided to the Air Force. The government asserts that these claims violated the conflict of interest requirements of the TEMS IV and ITSP contracts and the purpose of those contracts -- to provide advice to the Air Force on obtaining the best value for its purchasing -- and carried with them explicit and/or implicit representations that the services had been provided in compliance with the terms of DRC's contracts with the Air Force.

Functionally, there are two sets of facts at issue in this case. One set of facts, having to do with the existence and structure of Garber and Arguin's schemes, is not meaningfully disputed. It is clear from the record that Garber and Arguin, both individually and together, knowingly received payment for goods and services provided to the government via various intermediaries in violation of rules prohibiting conflicts of interest. However, the second set of facts, pertaining to the goods and services actually provided to the government for these payments and their value is in dispute. The question before the Court is whether the second set of disputed facts is relevant to determining whether DRC should be held liable for Garber and Arguin's actions and the claims submitted to the government, i.e. does Garber and Arguin's self-dealing render the claims made on the government false or fraudulent even if the government

received exactly what it paid for? In light of the analysis below, I conclude that while the disputed facts preclude summary judgment on the question of damages, DRC's liability under the FCA is clear on the record as a matter of law.

Before moving on, one point deserves quick mention: DRC is correct to note that it is in no way procedurally precluded from disputing the facts underlying Arguin and Garber's guilty pleas, as DRC was not a party to the criminal proceedings.[14] See 31 U.S.C. § 3731(d) (only the defendant in a criminal case is estopped from contesting the facts of fraud in a later civil trial). Indeed, "guilty pleas do not establish historic facts." Thore v. Howe, 466 F.3d 173, 183 (1st Cir. 2006). Had DRC been a defendant in the criminal case, it would be estopped from denying in the civil case what it admitted in the criminal case. See United States v. DiBona, 614 F. Supp. 40, 41 (E.D. Pa. 1984). Since it was not, it is free to contest the factual underpinnings of the allegations.

The government does not urge the Court to collaterally estop DRC from contesting the factual admissions of Garber and Arguin. The government simply argues that the alleged facts underlying

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[14] In its recitation of the facts, the government asserts that DRC has conceded the facts underlying Garber and Arguin's fraud. It does so based on statements made by Richard Covel, DRC's General Counsel, in an affidavit in Storage Engine's (f/k/a ECCS) bankruptcy proceeding. DRC is correct in asserting that the admissions it is alleged to have made are not admissions at all, but recitations of the government's Complaint against DRC in order to make out its claims for indemnification and contribution against Storage Engine, Inc., and Gregg Azcuy, Storage Engine's President and CEO. The government's argument in this regard is overzealous.

Garber and Arguin's fraudulent schemes have not been meaningfully disputed by evidence in the record and that Garber and Arguin themselves are not able to dispute them in light of their guilty pleas. See United States v. Kates, 419 F. Supp. 846, 855 (E.D. Pa. 1976) (granting summary judgment against corporate defendant based on testimony given at prior criminal trials in which it had not been a party). I agree. The only question remaining is whether the facts to which Arguin and Garber admitted satisfy the elements of the FCA.

2. Competing Theories of Falsity

The first step in the analysis is determining what exactly constitutes a false or fraudulent claim under the FCA. Under the FCA, a false or fraudulent claim is "a false statement made with the purpose and effect of inducing the Government immediately to part with money."[15] United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995) (quoting United States v. Neifert-White, 390 U.S. 228, 230 (1968)). As to the falsity of the claims at issue, DRC's argument against summary judgment is twofold: First, DRC argues that there is evidence in the record suggesting that the claims submitted to the government were neither false nor fraudulent because the claims themselves reflected accurate information as to what the government paid and what it received in exchange. With respect to the payments for Sun memory, for

[15] That the demands for payment in this case constitute "claims" under the FCA is not contested by either party.

example, DRC argues that the Air Force's orders called for a certain quantity of Sun-compatible memory, which is exactly what it received. Second, DRC argues that it was under no obligation to advise the government to buy the least expensive goods or services, or to disclose to the government the wholesale cost of any such product.

The government rejects both positions, arguing that false claims are not limited to those claims that are facially inaccurate, but also comprise claims that are the direct product of fraudulent conduct. Arguin and Gaber's self-dealing, the government further argues, was clearly fraudulent as it ran counter to their obligations to provide sound procurement advice to the Air Force free of conflicts of interest.

While some courts seem to have interpreted the FCA in line with DRC's position, history and the weight of precedent is on the government's side. The quintessential example of a false claim under the FCA is a facially inaccurate claim – that is, a false invoice or bill for goods or services never actually provided. Id. However, the FCA's reach has not been so limited. Enacted in its original form during the Civil War in an effort to stem widespread abuse of the government procurement process, the FCA has as its core function the promotion of transparency and honesty among government contractors. See id.; Cook County v. United States ex rel. Chandler, 538 U.S.119, 128 (2003). Specifically, the "aim was to clamp down on widespread fraud by

government contractors who were submitting inflated invoices and shipping faulty goods to the government." Rivera, 55 F.3d at 55. To accomplish this goal, Congress cast its net wide: "The legislative history indicates that the False Claims Act was intended to cover each and every claim submitted . . . by means of false statements, or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation." United States v. Village of Island Park, 888 F. Supp. 419, 439 (E.D.N.Y. 1995) (quotation and citation omitted); Rivera, 55 F.3d at 55 ("a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss") (emphasis added). As such,"the statute is violated not only by a person who makes a false statement or a false record to get the government to pay a claim, but also by one who engages in a fraudulent course of conduct that causes the government to pay a claim for money." Id. (citing Scolnick v. United States, 331 F.2d 598, 599 (1st Cir. 1964)).

Since the Civil War, the FCA has been used to ferret out all types of fraud resulting in claims for government funds, not just for claims that are false on their face.[16] In light of the FCA's legislative history and overarching aims, courts have generally

[16] The provision of civil fines reinforces this view, as it allows for liability even in cases where the government has not suffered any actual damages. 31 U.S.C. § 3729(a).

embraced an expansive reading of the FCA and what constitutes a "wrongful" payment. See Island Park, 888 F. Supp. at 439 ("The provisions of the False Claims Act are to be read broadly and 'reach[] beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.'") (quoting United States v. McLeod, 721 F.2d 282, 284 (9th Cir. 1983) (quoting United States v. Neifert-White Co., 390 U.S. 228, 233 (1968))); see also Chandler, 538 U.S. at 129.

Not all fraudulent conduct gives rise to liability under the FCA. See United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir.), cert. denied, 543 U.S. 820 (2004); see also United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) (non-compliance with special education regulations did not render receipt of federal funds fraudulent under FCA). Indeed, "[t]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment." Karvelas, 360 F.3d at 225. For example, in United States v. President & Fellows of Harvard College, 323 F. Supp. 2d 151 (D. Mass. 2004), the Court held that a university employee, receiving funds under a Cooperative Agreement with the United States to consult on issues of economic development in Russia, was not liable under the FCA for investing in Russian companies in violation of contractual prohibitions since the employee did not take any actions to have claims submitted to the government. Id. at 188-

89. In the same vein, fraudulent activity is not converted into a violation of the FCA merely because the fraud also constitutes a breach of contract with the government. Id. at 179. If, however, the fraudulent conduct directly undermines the integrity of the claim itself, the claim may violate the FCA even if it is facially accurate.

The Supreme Court provided guidance as to how lower courts should draw this distinction in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). Hess involved a collusive bidding scheme in which members and officers of the Electrical Contractors Association in Pittsburgh, Pennsylvania, conspired to rig the bidding process for contracts with local governments, where substantial portions of the contracts were actually paid by the federal government.[17] Id. at 539 n.1. In finding that the collusive bidding constituted conduct proscribed by the FCA, the Court emphasized the statute's aim of guarantying the underlying reliability of information presented to the government, especially when taxpayer dollars are at stake:

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[17] The Court described the bid rigging scheme as follows:

> The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each applicant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market.

Id. at 539 n.1 (quotation omitted).

> The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. . . . The fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate paid. . . .

Id. at 543-45 (emphasis added). Crucially, the Hess Court reasoned that the false and fraudulent nature of the claims presented to the government did not stem from any inaccurate statements on the face of the contractors' bids, but rather on the fraudulent process that produced them.[18] Id.; see also United States v. Kates, 419 F. Supp. 846, 849 (E.D. Pa. 1976) (collusive bidding).

Ten years after Hess, the First Circuit decided Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953), a case presenting facts strikingly similar to the facts in the instant case. Murray & Sorenson involved a purchasing agent employed by two government contractors whose job was to solicit competitive bids for materials for the construction of a naval base and submit recommendations to a Navy officer; the contractors would then place only those orders with Navy approval. Id. at 121. After two rounds of purchases, the purchasing agent, who had a prior relationship with one of the suppliers, informed the supplier that the quoted price was "very

[18] The Court noted that "many, if not most of the respondents certified that their bids were 'genuine and not sham or collusive.'" Id. at 543. This certification, however, was not essential to the Court's holding.

low" and suggested that the supplier raise the price in order to take advantage of the government's willingness to pay more for the materials. Id. As a result, the government subsequently paid the higher inflated cost.[19] Id. In Murray & Sorenson, as in the instant case, the government received exactly what it paid for. Nonetheless, the First Circuit found that "it is not essential to recovery under [the FCA's predecessor statute] for the United States to prove that it paid an unreasonably high price" since such schemes have the "necessary effect of increasing the price which the government eventually has to pay" and held the defendant liable under the FCA. Id. at 123; see also id. at 124 ("there was an implied false representation that the bids were at a figure which the corporate defendant would have submitted in competition").

Similarly, in Island Park, the District Court for the Eastern District of New York found that a New York village's claims for mortgage subsidies violated the FCA where village officials failed to follow a prescribed scheme for awarding housing subsidies by preselecting applicants in order to prevent minority families from moving into the village. 888 F. Supp. at 439-40. The Court found that the existence of the underlying fraudulent scheme was enough, on its own, to render the

[19] The purchasing agent also received a kickback. Id.

subsequent claims for mortgage subsidies false and/or fraudulent under the FCA. Id. at 443.[20]

Thus, as the cases discussed above illustrate, the facial accuracy of a claim does not preclude liability under the FCA.[21] To the contrary, the legislative history of the statute and relevant case law support the proposition that where a claim for payment is the result of a fraudulent process -- bid rigging, self-dealing, etc. -- such that the reliability and trustworthiness of a claim is compromised, the claim may be considered false under the FCA despite its facial accuracy.[22]

DRC is correct in arguing that the fact that the government may have paid prices above the wholesale price for purchased

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[20] As in this case, the FCA violation in Island Park involved a breach of contract language, namely the Cooperation Agreement prohibiting racial discrimination. Id. at 440.

[21] These cases are also distinct from cases that rely on a theory of "false certification." Under the false certification theory, a claim is considered false where eligibility for payment from the government is expressly or implicitly contingent on a party's compliance with some contractual term, law, or regulation. See Harvard College, 323 F. Supp. 2d at 179; see also Lisa Michelle Phelps, Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions, 51 Vand. L. Rev. 1003, 1005 (1998). Compare United States ex rel. King v. F.E. Moran, Inc., No. 00 C 3877, 2002 WL 2003219, at *12 (N.D. Ill. Aug. 29, 2002) (granting summary judgment for defendant and rejecting implied certification theory where subcontractor failed to allocate 10% of contract price to qualified Minority Business Enterprise per the contract terms), with Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994) (government contractor violated the FCA because it had breached the "implied certification . . . of its continuing adherence to the requirements for participation in the 8(a) program"). In contrast to the circumstances in most false certification cases, the fraudulent conduct alleged here directly undermined the integrity of the price being charged to the government for various goods and service.

[22] United States v. Shaw, 725 F. Supp. 896 (S.D. Miss. 1989), which seems to reject this proposition, finds little support in case law or in the underlying purpose of the FCA. See, e.g., Island Park, 888 F. Supp. at 439-40 (dismissing the restrictive reading of the FCA in Shaw as an "anomaly").

goods does not make the claims false, per se. See United States ex rel. Wilkins v. N. Am. Constr. Corp., 173 F. Supp. 2d 601, 632 (S.D. Tex. 2001) ("[T]he mere fact that an activity may be accomplished less expensively in a fixed-price contract falls measurably short of fraud under the False Claims Act."). However, a claim is false under the FCA where it is the direct product of secret self-dealing or collusion, as in the bid-rigging cases. See id. ("[A]lthough the work contracted for is actually performed to specification at the agreed price, liability may attach under the False Claims Act because of fraud surrounding representations made to obtain a contract or to obtain payment under a contract").

Here, it is undisputed 1) that DRC employees were under an obligation to provide advice regarding which products represented the best value to the Air Force;[23] and 2) that they were obligated to do so free of any conflicts of interest. Thus, if Arguin and Garber caused a claim to be presented to the government by making procurement recommendations in contravention of these obligations and reaping substantial hidden profits in their own pockets as a result, the claims are false under the terms of the FCA regardless of their facial accuracy. See Murray

[23] DRC argues that it was not under an obligation to recommend the lowest cost products or services to the Air Force, but instead that it considered a number of factors when formulating its recommendations as to what constituted the best value. Nonetheless, whichever factors DRC may have legitimately considered in making its recommendations, maximizing secret profits for DRC employees was certainly not among them.

& Sorenson, 207 F.2d at 123-124. That DRC did not have an absolute obligation to recommend the lowest priced products and services to the Air Force does not negate the fraudulent nature of Arguin and Garber's conduct. Any allegedly inflated price paid by the government, assuming there was one, is merely the proof and measure of damages.

3. The Three Schemes

This analysis applies equally to each of the three schemes alleged here, as all three shared essentially the same structure: Arguin used his position as an advisor to the Air Force to steer business to third parties who would then contract the work back to Arguin, and later to Garber as well, through Greenleaf and Merrimac. As to each of the schemes, DRC argues that despite the existence of the self-dealing, there is evidence suggesting that none of the claims were actually false because they reflected payment for goods and services actually provided at prices deemed "fair and reasonable" by the Air Force.

For example, with regard to the charges for computer memory, the parties' disagree about the meaning of "Sun memory." The government contends that Garber and Arguin essentially tricked the Air Force into believing that it was paying for and receiving name-brand memory manufactured by Sun Microsystems from KKP, while in reality KKP was supplying the Air Force with merely "Sun compatible" Dataram memory. DRC, on the other hand, has

presented evidence that "Sun memory" is commonly understood to mean any memory that is "Sun-compatible."[24] DRC has also presented evidence showing that 65 of the 84 claims made no reference to "Sun Memory" and that 38 of the claims were not for memory at all, but were for computer servers containing memory components for which the government was not separately charged.[25] Therefore, DRC argues, the invoices for memory were not false because there was no requirement that name brand "Sun memory" be provided.

While there may be disputed issues of material fact as to whether Dataram memory satisfied the Air Force's requests, these disputed facts do not negate the fraudulent nature of the resulting claims under the FCA in light of Garber and Arguin's concealed self-dealing. Even assuming arguendo that Dataram brand memory satisfied the government's requirements, the underlying claims were nonetheless fraudulent. It does not matter that DRC was not under an obligation to advise the government to buy the least expensive memory. It was under an obligation to advise the government as to the products with the

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[24] There is evidence that Dataram memory is fully compatible with name brand Sun memory and carries a better lifetime warranty. Also, at a grand jury hearing in the criminal case, a Dataram executive testified that the market value of Dataram memory differed significantly from what the government alleges in its filings.

[25] Moreover, the government consistently refers to 84 claims relating to the purchase of Sun memory, though the damage calculation spreadsheet it submitted in fact contains 90 government orders, six of which are labeled "Unidentified Air Force Projects."

best value, unencumbered by conflicts of interest; the conflicts of interest directly undermined the legitimacy of the claims made on the government.

The analysis for the other two schemes follows the same pattern. With respect to the payments made to Arguin and Garber for installation-related services for the Ravens, there is evidence in the record to suggest (though it is admittedly vague), that the installation services were specifically requested by the Air Force and were actually provided. Similarly, there is evidence that Arguin, acting through Greenleaf Associates, did in fact provide computer-based training to the Air Force. None of the facts put forward by DRC, however, cast doubt on the allegation that Arguin and Garber received payments in connection with these charges and in violation of their ethical obligations. This fraudulent conduct is enough, on its own, to render a claim actionable under the FCA. See Hess, 317 U.S. at 543-45; Murray & Sorenson, 207 F.2d at 123-24.

4. The Knowledge Requirement

In addition to falsity, the FCA requires that the claims be made knowingly. Under the FCA, "knowing" and "knowingly" mean that a person, with respect to information 1) has actual knowledge of the information; 2) acts in deliberate ignorance of the truth or falsity of the information; or 3) acts in reckless

disregard of the truth or falsity of the information. § 3729(b). No proof of specific intent to defraud is required. Id.

As a starting point, it is beyond question that Arguin and Garber had actual knowledge of the fraudulent conduct at issue here. It suffices to note that they created their own company, Merrimac, in order to receive government funds in direct violation of their duty to avoid conflicts of interest. The more pressing question is whether Garber and Arguin's knowledge may be imputed to DRC. For the reasons that follow, I find that DRC's direct liability for Arguin and Garber's acts is not clear on the record before the Court.

In order for the knowledge of an employee to be imputed to a corporation, the employee must have acted within the scope of her employment. Harvard College, 323 F. Supp. 2d at 192 n.33 (citing United States v. Bank of New England, 821 F.2d 844, 854-56 (1st Cir. 1987)). "An agent's acts are within the scope of his actual authority if 'it is the kind of work he is employed to perform, occurs within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master.'" Island Park, 888 F. Supp. at 437 (E.D.N.Y. 1995) (quoting W. Prosser, Torts § 70 at 461 (4th ed. 1971)).

In this case, the question of whether Arguin and Garber's acts were performed within the scope of their employment turns on whether the two were motivated, at least in part, by an intent to benefit DRC. See Restatement (Second) of Agency § 235, Comment a

("It is the state of the servant's mind which is material. . . . Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master."). While the intent to benefit standard is rather forgiving -- it requires only that the agent be motivated "at least in part" by an intent to serve the principal -- the disputed facts on the record make summary judgment on this point inappropriate. See Island Park, 888 F. Supp. at 437.

Viewed in the light most favorable to DRC, evidence in the record suggests that Arguin and Garber went to great lengths to conceal their behind-the-scenes activities from DRC and were wholly motivated by self-interest in carrying out their schemes. See Harvard College, 323 F. Supp. 2d at 192 n.33 (refusing to impute to Harvard the knowledge of two rogue employees because the employees "were not acting with an intent to benefit Harvard in engaging in the acts that gave rise to the false claims"). For example, the 84 allegedly false invoices for memory were not submitted to the government by DRC, but instead were submitted by KKP and ECCS (through WWT) in connection with their own prime contracts. DRC had no involvement in the preparation or submission of the invoices, which never came into DRC's possession. KKP and ECCS distributed the funds to Garber and Arguin via their shell companies; DRC never received any payments for the claims at issue here.

The government argues that Garber and Arguin's actions did in fact benefit DRC in that the Air Force's relationship with KKP helped satisfy certain contractual obligations relating to the minority-owned businesses. DRC has presented evidence, however, that Garber and Arguin actively concealed their schemes from DRC and ensured that the schemes took place entirely outside of DRC's internal processes. The link between DRC's need for a minority-owned business partner and Arguin and Garber's fraud is too tenuous and remote to constitute a sufficient causal connection. See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 714 (10th Cir. 2006) (there must be a "sufficient nexus between the conduct of the party and the ultimate presentation of the false claim to support liability under the FCA"). And while both Garber and Arguin held important positions at DRC, they did not constitute the "apex of power" such as to make their actions indistinguishable from those of the corporation. See United States v. DiBona, 614 F. Supp. 40, 44 (E.D. Pa. 1984) ("apex of power" vested in highest ranking officer and secretary-treasurer of the corporation, making question of scope of employment and benefits to the corporation irrelevant). As such, Garber and Arguin's knowledge should not be imputed to DRC.[26]

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[26] In the alternative, the government argues that DRC acted with reckless disregard or deliberate ignorance with regard to Arguin and Garber's fraudulent conduct. The basis for the government's argument is also one of the bases for its breach of contract claim: DRC's failure to gather the

5. Vicarious Liability

While summary judgment based on DRC's own knowledge of the fraud or recklessness would be premature at this juncture, DRC may nevertheless be held vicariously liable for Garber and Arguin's conduct under a theory of apparent authority.

One point should be made clear from the outset: The application of vicarious liability does not displace or alter the FCA's requirement that false and fraudulent claims be made knowingly in order to be actionable. Vicarious liability allows one party to be held liable for the conduct of another by virtue of some legally cognizable relationship. Thus, once it has been shown by undisputed evidence that Garber and Arguin knowingly caused false claims to be presented to the government, the doctrine of apparent authority requires the Court to determine whether DRC should be held accountable for that knowing conduct because it put its agents in the position to do harm. I conclude that it should.

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requisite conflict of interest certifications during the fraudulent schemes. See United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir. 1997) (FCA was "intended to reach the 'ostrich-with-his-head-in-the sand problem'").

To be certain, the conduct of Garber and Arguin should have raised "red flags" within DRC. See Harvard College, 323 F. Supp. 2d at 191-193. It is undisputed that DRC did not collect the required conflict of interest certification forms from all of its employees during the time Arguin and Garber's schemes were ongoing. More troubling, there is also evidence that other DRC employees knew that Arguin had refused to sign the requisite financial affidavit in 1996 and failed to take action. However, because I find that DRC may be held liable on an apparent authority theory, the Court declines to reach the issue of DRC's recklessness and/or deliberate ignorance.

The First Circuit has clearly and unambiguously held that the apparent authority theory of vicarious liability is recognized under the FCA. See United States v. O'Connell, 890 F.2d 563, 569 (1st Cir. 1989). Under the apparent authority doctrine, a corporation need not benefit from the conduct of its employee in order for vicarious liability to attach. Id. ("We hold that a corporation should be held liable under the False Claims Act for the fraud of an agent who acts with apparent authority even if the corporation received no benefit from the agent's fraud."). "Apparent authority is the authority which outsiders would normally assume the agent to have, judging from his position with the corporation and the circumstances of his conduct." United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984); see also Restatement (Second) of Agency § 49, Comment c ("Acts are interpreted in the light of ordinary human experience. If a principal puts an agent into, or knowingly permits him to occupy, a position in which according to the ordinary habits of persons in the locality . . . it is usual for such an agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such authority. . . . "); Island Park, 888 F. Supp. at 437-38.

It is undisputed that a significant part of Arguin's job at DRC was to be the company's interface with the Air Force and to provide technical advice. It also seems clear from the record that he used his position to help guide significant amounts of

government funds into his own pockets. DRC attempts to get around this conclusion by arguing that while O'Connell does not require the principal to receive a benefit from the agent's conduct for apparent authority to attach, it does require intent to benefit the principal on the part of the agent. See O'Connell, 890 F.2d at 569. Thus, DRC argues, because Garber and Arguin did not intend to benefit DRC in any way with their schemes, DRC cannot be held vicariously liable for their conduct.

While there is some support fo this argument in the case law, the cases DRC cites seem to muddle the distinction between direct liability, as to which there must be an intent to benefit, and vicarious liability, as to which there is not. For example, the district court in O'Connell suggested that the apparent authority doctrine requires that the agent be acting, at least in part, with the intent to benefit the principal. See United States v. O'Connell, No. 86-2133-MA, 1988 WL 103329, at *6 (D. Mass. Sept. 23, 1988). However, the First Circuit made no mention of such a requirement.[27] O'Connell, 890 F.2d at 569.

The weight of precedent, however, suggests that there is no requirement that the agent intend to benefit the principal in

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[27] Moreover, the intent requirement suggested in these cases is so relaxed so as to be virtually irrelevant. See O'Connell, 1988 WL 103329 at *6 ("All that is required for this test is 'a' purpose to benefit the corporation; in order for the employer to be liable an employee need not act solely for his own benefit.") (citing United States v. Ridglea State Bank, 357 F.2d 495, at 500 (5th Cir. 1966)).

order for apparent authority liability to obtain.[28] The leading case on this issue is American Society of Mechanical Engineers, Inc. (ASME) v. Hydrolevel Corp., 456 U.S. 556 (1982). In AMSE, which later served as the basis for the First Circuit's holding in O'Connell, the Supreme Court held that general common law rules of agency, and the doctrine of apparent authority in particular, were consistent with federal antitrust law. Id. at 570. In doing so, the Court looked to the Restatement (Second) of Agency (1957) to map out the contours of the apparent authority doctrine. Id. at 565-70. The Restatement (Second) makes abundantly clear that there is no intent requirement in the apparent authority doctrine:

> The principal is subject to liability under the rule stated in this Section although he is entirely innocent, has received no benefit from the transaction, and . . . although the agent acted solely for his own purposes. Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting

[28] DRC repeatedly cites Harvard College for the proposition that where an employee does not intend to benefit her employer, her knowledge should not be imputed to the employer. The Harvard College Court did so hold, but in the context of its analysis of Harvard's direct liability. 323 F. Supp. 2d at 192 n.33. DRC fails to note, however, that the Court then went on to make a separate determination as to vicarious liability in which it cited O'Connell for the proposition that a principal need not benefit for FCA liability to attach and made no mention of an intent requirement. Id. at 193-94 (holding that apparent authority did not apply because employees did not hold themselves out to third parties as agents of Harvard).

in the ordinary course of the business provided to him."[29]

Restatement (Second) of Agency § 261, Comment a; see also ASME, 456 U.S. at 566 ("a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority").

Furthermore, liability based on apparent authority is entirely consistent with the underlying purposes of the FCA.[30] The FCA is meant to encourage government contractors to "turn square corners when they deal with the government." Rock Island, Ark. & La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920)

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[29] One of the illustrations in § 262 is also informative: "P, whose business is that of advising persons concerning investments, represents to T that A is his manager. At P's office, T seeks advice of A concerning investments. A, acting solely to promote an enterprise of which he is the owner, makes deceitful statements in regard to it, on the strength of which T invests and loses. P is subject to liability to T." § 262, Illustration 1.

[30] In a footnote, DRC puts forward the interesting argument that the Supreme Court's decision in Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000), casts doubt on the First Circuit's holding in O'Connell. In Stevens, the Court held that states are not "persons" under the FCA, in part, because "the FCA imposes [treble] damages that are essentially punitive in nature." 529 U.S. at 785 (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981). Where damages are not purely remedial in nature, the Court argued, courts should be careful not to interpret liability too broadly. Id. Thus, DRC argues, the dicta in Stevens suggests that the holding in O'Connell, under which a corporation may be held liable for the misdeeds of its employees even if it receives no benefit, is too lax, as it allows for the punishment of a party who neither knew of the proscribed conduct nor benefitted therefrom.

This argument fails for a number of reasons. First, this Court is bound to follow the rule in O'Connell, which does not require an intent to benefit. Second, the Supreme Court has rejected this argument in a similar setting. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991) ("Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position to guard substantially against the evil to be prevented.") (quotation omitted). Third, as this section discusses, the apparent authority doctrine is wholly consistent with the underlying purposes of the FCA.

(Holmes, J.). Vicarious liability provides an important incentive for government contractors to self-police for the type of corruption that occurred here by placing liability on the actor in the best position to control the undesired conduct. O'Connell, 890 F.2d at 568 (citing the primary aim of deterrence); see also Daryl J. Levinson, Collective Sanctions, 56 Stan. L. Rev. 345, 362-67 (2003) (providing a comprehensive functional analysis of vicarious liability and other collective sanctions).

DRC's failure to self-police -- in particular to ensure that its employees did not have conflicts of interest -- is at least one reason this case is in litigation. Moreover, a requirement that the principal somehow benefit from the conduct of the agent -- or that the agent be motivated, at least in part, by a desire to benefit the principal -- runs counter to one of the primary rationales behind the apparent authority doctrine: that the law should protect the reliance interests of third parties who reasonably believe that the agent with whom they are dealing actually has the authority she appears to have.

In the instant case, the evidence is clear that Arguin took advantage of the Air Force's reliance on his technical advice as an agent of DRC for his personal advantage. That he may not have intended to benefit DRC with his fraudulent conduct in no way lessens the validity of the Air Force's reliance interest.

Therefore, it is appropriate to hold DRC vicariously responsible for Garber and Arguin's fraudulent conduct.

6. Reasonable Reliance

DRC makes one final attempt to avoid vicarious liability by arguing that the apparent authority doctrine does not apply in this case because the government's reliance on Arguin's authority was unreasonable. Under the traditional formulation of the apparent authority doctrine, a third party may be barred from holding a principal responsible for its agent's actions if the third party's reliance on the apparent authority of the agent was unreasonable. See Am. Title Ins. Co. v. E.W. Fin. Corp., 16 F.3d 449, 454 (1st Cir. 1994). While it is unclear if the same doctrine applies in the context of the FCA, it is clear that it should not apply here. Though there is evidence in the record suggesting that the Air Force may have ceded too much authority to Arguin, such evidence does not preclude the application of the apparent authority doctrine in this case.

DRC has presented evidence suggesting that the Air Force allowed Arguin to perform the functions of a procurement manager in violation of federal procurement regulations, including determining what supplies or services were to be acquired by the government and preparing "sole source justifications" for the purchase of the Ravens. There is even evidence that Arguin signed his name as the receiving agent and government

representative on numerous “inspection and receiving reports” and that Air Force officials advised suppliers to deal directly with Arguin. As such, DRC argues that any reliance on Arguin’s authority on the part of the Air Force was unreasonable since the Air Force should have known that Arguin was operating beyond his actual authority and in violation of federal procurement regulations.

While it is unsettling that the Air Force may have ceded such authority to Arguin, these facts, even if true, do not negate the falsity of the claims or DRC’s liability under a theory of apparent authority. To the extent that a defendant may avoid vicarious liability by asserting that the plaintiff’s reliance was unreasonable, the circumstances in which such an argument might succeed in the context of the FCA are severely limited by considerations specific to the statute. First, the public fisc, rather than a private party, is the object of the statute’s protections. Second, and relatedly, since under the FCA liability attaches to the making of a false claim, rather than any subsequent payment, the question of reliance assumes limited importance. See Rivera, 55 F.3d at 709 (“fraud by government contractors is best prevented by attacking the activity that presents the risk of wrongful payment, and not by waiting until the public fisc is actually damaged”).

In keeping with these considerations, the Second and Ninth Circuits have both held that the government’s knowledge of the

falsity of a claim does not bar FCA liability. See United States ex rel. Kreindler v. United Techs. Corp., 985 F.2d 1148, 1156 (2d Cir. 1993); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not itself a defense"). Some courts have suggested that there is a very narrow exception for cases in which "government knowledge of the relevant information may show that the defendant had made full disclosure and did not submit false claims knowingly or with reckless disregard for the truth."[31] Island Park, 888 F. Supp. at 442 (citing Kreindler, 985 F.2d at 1156; Hagood, 929 F.2d at 1421). But see United States ex rel. Mayman v. Martin Marietta Corp., 894 F. Supp. 218, 223 (D. Md. 1995) (rejecting an estoppel argument: "Even assuming that Martin Marietta did inform the government of its precise actions, a government officer cannot authorize a contractor to violate federal regulations."). Based on the record in this case, even if such an exception exists, it does not apply here.

There are no disputed facts regarding the essential elements of apparent authority here. While Arguin may have been acting far beyond the scope of what was permitted by the FAR and DRC's

[31] This, however, seems to be merely another way of saying that the intent requirement has not been met, rather that an argument based on the reasonableness of the reliance.

contracts with the government, acting as a de facto procurement manager, it is undisputed that part of Arguin's legitimate duties was to advise the Air Force on securing its computing needs and that he used this position to steer government funds into his own pocket. To the extent that an FCA defendant may invoke the absence of reasonable reliance to negate vicarious liability, there is no evidence to support the defense here, as there is no evidence in the record to suggest that Garber and Arguin fully disclosed all of the facts underlying the fraudulent schemes to the government thereby negating the falsity of the claims. The Air Force's reliance on Arguin's apparent authority to make recommendations about its technical needs was reasonable; that was the very reason the Air Force sought out DRC's services in the first place. As the First Circuit found in O'Connell, while "[t]here may, in certain circumstances, be questions of fact bearing on the question of apparent authority," there are none here. 890 F.2d at 567.

B. The AKA Claims

The government moves for summary judgment on only two of the schemes under the AKA: the Sun memory and the Raven installation charges. It is unnecessary to go much beyond the language of the AKA to determine whether summary judgment is appropriate here. Under the AKA, "[i]t is prohibited for any person (1) to provide, attempt to provide, or offer to provide any kickback; (2) to

solicit, accept, or attempt to accept any kickback; or (3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States." 41 U.S.C. § 53. The AKA defines a kickback as anything "which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract." 41 U.S.C. § 52(2). It is plain to the Court that Arguin and Garber's conduct fell within the scope of the AKA's prohibitions.

Indeed, the language of the AKA seems to apply very neatly to the situation in this case. KKP, ECCS/Storage Engine, and DRC indisputably were either subcontractors or prime contractors or both to the government at all relevant times; Garber and Arguin were DRC employees. According to DRC's own Rule 30(b)(6) witness, Arguin was in a position to help direct business to KKP. The record makes clear that KKP and ECCS made payments to Garber and Arguin, at least in part, for the purpose "improperly obtaining . . . favorable treatment in connection with" government contracts. 41 U.S.C. § 52(2). At a deposition in the Storage Engine bankruptcy, DRC's General Counsel, Richard Covel,

admitted as much: "It's our opinion that Storage Engine paid kickbacks to Arguin and Garber, in violation of the kickback act." (Covell Dep. 50 (Exh. 30 to document # 18).)

In an attempt to avoid the consequences of what seems to be a fairly straightforward application of the statutory language, DRC argues that "the AKA does not apply here, because it is only applicable where an illicit payment is made by a subcontractor to a person or entity further up the 'contractual chain.'" (Def.'s Opp. Memo 48 (document # 122).) The language of the AKA, however, does not support such a narrow reading.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (citation and quotation omitted). While, because of DRC's role as a consultant to the Air Force, the structure of Garber and Arguin's kickback scheme varies slightly from the "typical" kickback situation in which a prime contractor extracts payments from a subcontractor, there is nothing in the statutory language of the AKA to support DRC's argument.[32] None of the legislative history cited by DRC

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[32] To the extent that the holding in United States v. Kensington Hospital, 760 F. Supp. 1120 (E.D. Pa. 1991), is applicable to this case, the Court does not find its reasoning persuasive. In Kensington Hosp., the government charged various doctors with violating the AKA based on their

suggests that liability in the instant situation would be precluded by the AKA's language. To the contrary, as the Second Circuit noted in United States v. Purdy, 144 F.3d 241 (2d Cir. 1998):

> Congress substantially rewrote the [AKA] statute in 1986 with the express purpose of extending the scope of the statute to any commercial bribery occurring anywhere within the federal procurement system. . . . [T]he result is to impose liability on any person who makes a payment to any other person involved in the federal procurement process for the purpose of obtaining favorable treatment.

Id. at 243-45. Indeed, the statutory language seems to expressly contemplate arrangements in which a party seeking a prime contract with the government pays the employee of another prime contractor for some sort of advantage in the bidding process, defining a kickback as anything "which is provided, directly or indirectly, to any . . . prime contractor employee . . . for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract. . . ." 41 U.S.C. § 52(2).

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submission of claims to the Medicare program. Id. at 1138. The Court rejected the government's argument that the relationship between Medicare and the fiscal intermediaries who processed claims constituted the requisite "prime contract" for AKA purposes. Id. But see United States v. Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d 430, 449-50 (E.D. Pa.2004).

It is unclear whether Kensington Hosp. has any application at all outside of the context of Medicare and other similar governmental programs. However, to the extent that the result Kensington Hosp. turned on the lack of a strict prime subcontractor/prime contractor relationship between the doctors and the recipients of the payments, rather than the particular nature of the Medicare program, such an interpretation finds no support in the language of the statute or in other courts' interpretations.

DRC also argues that Arguin and Garber were not acting in their capacity as DRC employees when they engaged in the proscribed conduct. This mirrors the argument DRC makes in opposition to vicarious liability under the FCA, and it fails for similar reasons. Arguin and Garber's schemes were wholly dependent on their ability to influence government procurement as DRC employees. The distinction DRC invites the Court to draw is too fine and formalistic to affect the outcome of this case in light of the AKA's broad mandate. Allowing DRC to avoid liability simply because Garber and Arguin's kickback scheme was slightly more sophisticated and complex than the typical quid pro quo scenario would invite would-be defrauders to follow suit and undermine the central purpose of the AKA: to rid the federal procurement process of corruption.

C. Breach of Contract

DRC's liability for breach of contract is clear. Liability for breach of contract requires: 1) a valid contract; 2) an obligation or duty arising out of that contract; 3) a breach of that duty; and 4) damages caused by the breach. Harvard College, 323 F. Supp. 2d at 163. Both the TEMS IV and ITSP contracts contained prohibitions on conflicts of interest for DRC and its employees and required DRC to obtain annual financial disclosure certifications from employees working on the contracts. DRC's internal documents show that both Garber and Arguin refused to

sign the conflict of interest certification forms. (Exh. 1 to Pl.'s Motion of Apr. 4, 2007 (document # 120-2).) And DRC has admitted that it failed to take corrective action after Arguin and Garber's refusal. (Id.) It is also undisputed that DRC provided the Air Force with procurement advisors who had conflicts of interest in breach of the specific requirements of the contract.[33] Those advisors have admitted to using those relationships to defraud the government of vast sums of money.

DRC does not seriously contest that the elements for breach of contract have been satisfied, but instead puts forward an in pari delicto defense, arguing, in essence, that because the Air Force ceded too much authority to Arguin, which he then used to carry out his schemes, the government is barred from recovering damages. "Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing."[34]

[33] DRC's General Counsel, Richard Covel, made the following statements in a deposition in the Storage Engine bankruptcy:

> Q: Based on what you know today, isn't it a fact that Mr. Arguin in 1997 was in conflict of interest?
>
> . . .
>
> A: Based on what we know, and I say "know"; from reading the documents we've been provided, I would say that Mr. Arguin had a conflict.
> Q: While he was still an employee of DRC; correct?
> A: Yes.
> Q: And the same would be true of Mr. Garber; correct?
> A: Without regard to the specific year, yes.

(Covell Dep. 29-30.)

[34] "It does not make a difference that some of the . . . claims are premised on state law. Those claims invoke the law of Massachusetts -- and the Massachusetts courts, like the federal courts, have warmly embraced the in pari delicto defense." Nisselson, 469 F.3d at 151-52.

Nisselson v. Lernout, 469 F.3d 143, 151 (1st Cir. 2006). The "application of the in pari delicto doctrine [is restricted] to those situations in which 1) the plaintiff, as compared to the defendant, bears at least substantially equal responsibility for the wrong he seeks to redress and 2) preclusion of the suit would not interfere with the purposes of the underlying law or otherwise contravene the public interest." Nisselson, 469 F.3d at 152; see also Pinter v. Dahl, 486 U.S. 622, 634-38 (1988) (defense applies only where plaintiff "bears at least substantially equal responsibility for the underlying illegality"); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995) (unclean hands defense inappropriate where private suit serves public interests) (citation omitted). In this case, the defense fails on both counts.

First, as discussed above, while there is evidence that the Air Force ceded too much authority to Arguin and some vague evidence that Air Force officials had knowledge of at least some of the facts underlying the fraudulent scheme (e.g. that Greenleaf was associated with Arguin's wife), it is simply untenable to argue that the government bears "substantially equal responsibility for the wrong." The language of the TEMS IV and ITSP contract vehicles put the burden of vetting advisors for conflicts of interest directly on DRC. There is no evidence in the record to suggest that the Air Force interfered with this process or helped Garber and Arguin conceal their conflicts of

interest from DRC. DRC failed to obtain completed conflict of interest certifications from Garber and Arguin on its own.

DRC cites numerous cases involving federal securities law, including Moecker v. Honeywell International, Inc., 144 F. Supp. 2d (M.D. Fla. 2001), in support of its argument. In Moecker, the Court denied summary judgment on the plaintiff distributor's breach of contract and antitrust claims because of "significant disputes of material fact, and inferences from facts of record, concerning the issue of whether [the plaintiff] was at fault, and if so, the degree of its fault. Id. at 1315. Even viewing the facts in the light most favorable to DRC and assuming all of the logical inferences, the record simply does not support DRC's contention that the government's role in the contract breach was "substantially equal" to DRC's. There is nothing in the record to suggest that Air Force officials aided in the creation of Garber and Arguin's shell companies, profited from the schemes, or helped conceal them from DRC. And it is undisputed that DRC had not obtained the required conflict of interest certifications from Garber and Arguin during the time they were performing duties under the contract. Whatever disputed questions of fact there may be, they are immaterial to the breach of contract claim.

Second, public policy cautions against the application of the defense in this case. The underlying purpose of the conflict of interest provisions in the TEMS IV and ITSP contracts is to

protect the government and the federal treasury against corruption and fraud of the type at issue in the present case. Ensuring that those involved in the federal procurement process are free of financial conflicts of interest eliminates the temptations that undermine the integrity of the system. The in pari delicto defense should only be applicable, if at all, in cases where government involvement in the conduct underlying the breach is so complete as to negate the other party's wrongdoing entirely. When companies contract with the federal government, they take on the responsibility of policing themselves for conflicts of interest. Cf. ex rel. Mayman, 894 F. Supp. at 223 ("Even assuming that Martin Marietta did inform the government of its precise actions, a government officer cannot authorize a contractor to violate federal regulations."). This duty does not disappear merely because the government fails to call them on it.[35]

V. CONCLUSION

For the reasons set forth above, the government's Motion for Summary Judgment, (document # 112), is **GRANTED** as to DRC's liability under the FCA, AKA, and for breach of contract, but **DENIED** as to an award of damages.

[35] DRC has not cited, and the Court has been unable to find, any case in which the in pari delicto defense has been successfully asserted against the federal government in an action for breach of contract.

As noted above, disputed issues of fact prevent summary judgment on the question of damages. The Court also notes that there remain unanswered questions of law as to the proper measurement of damages under the FCA and the applicability of the liquidated damages clauses in the TEMS IV and ITSP contracts. A status conference will be held on **Wednesday, May 21, 2008,** in Courtroom 2, 3rd Floor, at which time the procedures to bring this case to judgment will be addressed.

SO ORDERED.

Date: March 31, 2008 /s/Nancy Gertner

NANCY GERTNER, U.S.D.C.