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

UNITED STATES OF AMERICA, *ex rel.* PAUL FRASCELLA, Relator, v. ORACLE CORP., *et al.*, Defendants.	Case No. 1:07cv529 (LMB/TRJ)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT IN INTERVENTION

Respectfully submitted,

/s/

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Defendants Oracle Corp. and Oracle America, Inc. (collectively "Oracle"), by and through undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion to Dismiss the First Amended Complaint in Intervention.

PRELIMINARY STATEMENT AND SUMMARY

On November 2, 2010, the Court dismissed in part the Government's original Complaint in Intervention. The Court dismissed "(1) any claims based upon the 1997 disclosures, (2) any claims alleging common law fraud occurring before May 29, 2004, and (3) any claims alleging False Claims Act violations, breach of contract, or quasi contract violations occurring before May, 29, 2001…" (Order, Nov. 2, 2010.) The Court explained, "[T]o the extent that any of the government's non-disclosure, false statements, or non-compliance claims rest on factual allegations dealing with conduct before those dates, the allegations will be dismissed as time-barred under the relevant statutes of limitations." (Mem. Op. at 26.)

Finding that the Government had only alleged "a general pattern of fraud," the Court also required the Government to file an amended complaint providing more specificity about its fraud allegations:

> Given that many of the allegations in the United States's Complaint in Intervention do not provide specific dates, instead merely alleging a general pattern of fraud, the government will be required to file an Amended Complaint in Intervention stating only common law fraud claims based upon conduct occurring on or after May 29, 2004, along with any False Claims Act and breach of contract or quasi-contract claims based upon conduct occurring on or after May 29, 2001.

(*Id.* at 26 n.7.) Despite direction to avoid any claims "based upon the 1997 disclosures" and to provide details about Oracle's alleged fraudulent conduct, the First Amended Complaint in Intervention ("FACI") does neither. The FACI's principal False Claims Act ("FCA") allegations are barred by the statute of limitations ("SOL") because they are based on conduct prior to May

29, 2001, and the level of specificity regarding Oracle's alleged fraud remains woefully inadequate.

Through a legal sleight of hand, the Government attempts to resurrect its untimely 1997 Disclosure allegations.[1] First, the Government argues that Oracle represented after May 29, 2001 that its 1997 Disclosures, which it claims were false, were in fact accurate. Resolution of this allegation will necessarily require evaluation of the accuracy of the 1997 Disclosures as well as the post-May 29, 2001 representations. Thus, these claims impermissibly "rest on factual allegations dealing with conduct before those dates [May 29, 2001]" (Mem. Op. at 26), and are precluded for the reasons set forth in the Court's Opinion.

Second, the Government's argument about the alleged reaffirmations of the 1997 Disclosures ignores that Oracle's May 2, 2001 disclosures stated clearly that the company's fundamental business model for licensing software reflected in the 1997 Disclosures had been replaced by the e-Business model, thus rendering the 1997 Disclosures irrelevant. This superseding event cut off any relationship between the 1997 Disclosures and post-May 29, 2001 statements.

Third, the Government argues that the Price Reductions clause ("PRC") required updating any inaccurate disclosures and thus Oracle was in perpetual violation of the PRC because of its allegedly false 1997 Disclosures. But this argument ignores both that the PRC has no such update obligation and that another clause, the Price Adjustment clause ("PAC"), does

[1] Oracle's first Motion to Dismiss and this Court's Opinion identified "four categories of factual allegations" in the Government's original Complaint: 1997 Disclosures, PRC Reporting, PRC Compliance and e-Business Disclosures. (*See* Mem. Op. at 6-9.) The FACI is structured in substantially the same manner, and thus this Motion continues to refer to these four categories.

impose this obligation. The PAC, however, is not even in Oracle's contract. Thus, any claims based on continued conduct related to the 1997 Disclosures should be dismissed.

The FACI common law fraud counts also fail because the Government alleges no post-May 29, 2001 statement or conduct that remotely resembles fraud. The best the Government can do is to cite a letter dated June 22, 2005 related to a modification that states "All other discounts, terms and conditions remain the same." But this modification related to educational products, not software products, which are the subject of the case. Beyond this, the cited statement is not a price/discount disclosure at all, but boilerplate language reflecting that all other terms of the underlying GSA Contract remain the same.

The only other support for this allegation is an assertion "on information and belief" that a January 24, 2005 disclosure was inaccurate. This naked allegation is devoid of any other supporting detail and should be dismissed under Federal Rule of Civil Procedure ("FRCP") 9(b).

The Government tries to resurrect its e-Business Disclosure allegations, but they occurred before May 29, 2001. The Government's attempt to apply the same PRC update obligation to these disclosures as it did to the 1997 Disclosures fails for the reasons discussed in connection with the 1997 Disclosures.

Finally, the Government has ignored altogether the Court's direction to provide more specificity about its allegations. The FACI contains the same vague allegations regarding a general pattern of fraud that plagued the original Complaint. Such general averments of fraud are inconsistent with both the Court's specific direction and FRCP 9(b).

Nowhere is this more apparent than in the Government's PRC Compliance claims. The Government's allegation that Oracle manipulated its commercial transactions to avoid triggering the PRC relies on a few stray emails, at least one of which was sent prior to May 29, 2001, and

nothing more. The Government fails to identify the Oracle personnel involved, the identity of the customer, whether and how the transaction was completed, or the false claims for payment.

For all these reasons, the FACI should be dismissed with prejudice.

ARGUMENT

I. The FACI Disregards the Court's Statute of Limitations Rulings

The Court made two rulings when partially granting Oracle's first Motion to Dismiss. It dismissed as untimely "any claims based upon the 1997 disclosures." (Mem. Op. at 31.) In addition, the Court ruled untimely any alleged FCA violation, breach of contract or quasi-contract violation occurring before May 29, 2001, and any alleged act of common law fraud occurring before May 29, 2004. (*Id*. at 26, 31-32.) Despite these rulings, a substantial portion of the FACI's allegations concern the 1997 Disclosures. The FACI continues to assert common law fraud (Counts 4 and 5) without identifying a single misrepresentation or transaction occurring after May 29, 2004. In accordance with this Court's prior rulings, all claims based upon the 1997 Disclosures, as well as Counts 4 and 5 of the FACI must be dismissed.

A. The FACI Asserts Untimely Claims Based Upon the 1997 Disclosures

The FACI attempts to revive the untimely 1997 Disclosure allegations in two ways. First, the Government asserts that Oracle reaffirmed the 1997 Disclosures after May 29, 2001 in connection with various contract modifications by stating that its discounting practices had not changed. (FACI ¶¶ 49-73.) Second, the FACI alleges that Oracle's failure to correct the 1997 Disclosures resulted in continuous PRC violations. (FACI ¶¶ 76-78.) Both ignore the Court's prior SOL ruling. Regardless of any theory that the Government may conjure up to cloak the

1997 Disclosures, they all suffer the same infirmity: the Government was on notice about any alleged defect in the 1997 disclosures through the 1998 GSA OIG audit report.[2]

The truth of any allegation arising out of the 1997 Disclosures -- whether based upon charts submitted in 1997, statements made after May 29, 2001 that Oracle's business practices had not changed, or an alleged PRC obligation to correct any past mistakes -- turns on whether the 1997 Disclosures were correct. This is the issue that the Court ruled untimely. "With regard to the 1997 disclosures, all of the pitfalls that statutes of limitations are designed to avoid would almost certainly be present, including immense difficulties presented by requiring whatever witnesses who are still available to recall what was said, intended, and understood during complex contract negotiations from over a decade ago." (Mem. Op. at 23.) The existence of the PRC, or a later non-specific statement of affirmation does not make memories more clear, or documents more available, nor does it raise witnesses from the dead. If the SOL's underlying policies are honored, then *all* claims arising out of the 1997 Disclosures must be dismissed.

Similarly, even if the alleged reaffirmations of pre-2001 statements or the PRC somehow revived the 1997 Disclosures, it is undisputed that the Government knew of these claims from the 1998 Audit, but decided to ignore them and move forward with the 1998 Contract. As the Court noted at oral argument, this knowledge and acceptance implicates more than just timeliness issues. Accepting as true the Government's allegation that the 1997 Disclosures were false, any "corrected" Oracle disclosures during contract performance would have merely repeated conclusions that the Government reached in the 1998 Audit, but chose to ignore. The FACI continues to rely on the 1997 Disclosures, as it still asserts that "the information that

[2] Notably, the Government, in its "Statement of Facts" related to the 1997 Disclosures once again omits any reference to the GSA OIG audit report, which the Court addressed in its opinion. (Mem. Op. at 20-23.)

Oracle provided GSA regarding its commercial sales practices was not accurate, complete, or current, and its actual commercial discounting and pricing policies were not consistent with Oracle's disclosures to the Government." (FACI ¶ 57.) Whether described in terms of waiver, or the lack of materiality required for fraud, the Government's knowledge and acceptance of any alleged improprieties eliminates all current claims arising out of the 1997 Disclosures. Not only are they stale, but as discussed below, Oracle did not reaffirm the 1997 Disclosures after May 29, 2001, and the PRC did not require Oracle to take any action.

1. Oracle did not reaffirm the 1997 Disclosures within the SOL

On May 2, 2001, Oracle made an updated disclosure in connection with a contract modification to add e-Business products. (FACI ¶¶ 44-45.) The FACI misrepresents this disclosure as one that provided discounting practices for new "upgraded versions" of Oracle software (the e-Business products) while leaving the allegedly false 1997 Disclosures unchanged. (FACI ¶¶ 44, 50.) Contrary to the FACI's characterization, Oracle did not reaffirm the allegedly false 1997 Disclosures during the applicable SOL because before May 29, 2001, Oracle amended those disclosures.

The May 2, 2001 disclosure shows that e-Business was far more than updated software, it was an entirely new way of licensing software. (*See* Ex. 1 at Attach. 2.)[3] Oracle explained that it fundamentally changed the way in which it licensed software, terminating the "Concurrent Device" licensing metric used at the time of the 1997 Disclosures. (*Id.*) In December 1999, Oracle stopped selling under the "Concurrent Device" model (which charged license fees based

[3] This Court "may consider documents attached to the complaint, *see* Fed. R. Civ. P. 10(c), as well as those attached to [a] motion to dismiss, so long as they are integral to the complaint and authentic." *See Sec. of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007). The Exhibits attached to this Motion qualify on both counts. Each are quoted or otherwise relied upon in the FACI, and there is no question regarding their authenticity.

upon the maximum number of people or devices accessing the software at one time) and replaced it with the e-Business model (which charged license fees based upon either the number of named users or the number and speed of processors accessing the software). (*Id.*) The technical support pricing method also changed in the e-Business model. The May 2, 2001 disclosure then describes Oracle's new e-Business sales model, which included different discounting practices and policies. (*See id.*; FACI ¶¶ 44-45.) Thus, the e-Business sales practices disclosures were not made in addition to and separate from the allegedly false 1997 Disclosures -- they *replaced* those disclosures.

The FACI identifies three allegedly false portions of the 1997 Disclosures that Oracle reaffirmed after May 29, 2001:

> 1) Oracle's discounts were based on distinctions between classes of customers;
>
> 2) Oracle offered "standard discounts" that fell within specified ranges to its non-GSA customers, and the "standard discount" for commercial end users was 15 to 20 percent off of list prices; and
>
> 3) "non-standard discounts are used in less than five percent (5%) of the total number of commercial transactions" and that "Oracle uses non-standard discounts [only] in unique situations where an individual transaction/contract size warrants additional considerations."

(FACI ¶ 50.) The May 2, 2001 disclosure, however, rendered all of these concepts meaningless.

The e-Business discounting disclosures confirm that Oracle changed all of the allegedly false 1997 Disclosures. Oracle described new standard discounting policies, with new discount ranges that were based primarily upon order size, without any reference to customer category. (*See* Ex. 1 at Attach. 2, 4.) This change expressly amends not only the 1997 Disclosures about customer classifications and specific disclosed discount ranges, but also the frequency of "non-standard" discounts, which is nothing more than a statistical representation of the relationship

between certain "standard" and "non-standard" discounts that had ceased to exist. Thus, far from reaffirming the 1997 Disclosures within the applicable SOL, Oracle unequivocally amended those disclosures before May 29, 2001. As such, contrary to what the FACI would portray, the impact of the allegedly false 1997 Disclosures began and ended outside of the limitations period.

In this context, Oracle's statements after May 29, 2001 do not revive the allegedly false 1997 Disclosures. Oracle included the following condition in its post May 29, 2001 statements: "[e]xcept as previously discussed and identified in previous modification submissions. . ." (FACI ¶ 49.) As set out above, the changes referenced in this caveat would include the replacement of the 1997 Disclosures with e-Business disclosures.

All other documents cited in the FACI as reaffirming the 1997 Disclosures have nothing to do with the 1997 Disclosures. The FACI identifies two letters (dated July 27, 2001 and August 5, 2002) which certify that certain information submitted *in connection with requests for modifications* was current accurate and complete. (FACI ¶¶ 52-53.) These letters make no mention of the 1997 Disclosures. (*See* Exs. 2-3.) The FACI also quotes language from a June 22, 2005 letter stating that "[a]ll other discounts, terms and conditions remain the same." (FACI ¶ 54.) This letter does not mention the 1997 Disclosures, but more importantly, it does not even discuss software licenses. (Ex. 4.)[4] The June 22, 2005 letter concerns changes to certain education products, which are not at issue in this case. (*Id.*) Finally, the FACI cites an October 31, 2003 certification that the PRC relationship established in 1997 would not change. (FACI ¶ 56.) As set out more fully below, this certification is unrelated to the 1997 Disclosures and merely confirms that Oracle would report to GSA if it gave its BOA customers better discounts

[4] There are two letters to GSA dated June 22, 2005 containing the quoted language. Both transmitted modifications to Oracle's training products, and the arguments presented apply with equal force regardless of which letter the Government seeks to rely on.

than those provided under its MAS Contract. Accordingly, nothing that Oracle stated to GSA after May 29, 2001 reaffirms to the 1997 Disclosures.

2. The 1997 Disclosures did not violate the PRC

The second tactic that the Government uses to revive the 1997 Disclosures seems to be predicated on the PAC and the PRC, and asserts that the 1997 Disclosures violated the PRC throughout contract performance and required Oracle to reduce its prices. (FACI ¶ 57-77.) Again, the FACI uses deceptive language in attempting to create a timely claim. The accuracy of disclosures made during negotiations is governed *exclusively* by the PAC, which was not included in Oracle's 1998 Contract. The plain language of the PRC and practical realities confirm that the PRC does not operate as the FACI alleges.

a. The FACI improperly conflates the PRC and PAC

The FACI asserts that the 1997 Disclosures regarding Oracle's discounting practices were not current, accurate and complete, and seems to suggest that as a result, the Government was entitled to a price reduction under the PRC, reflecting Oracle's actual discounting practices. (FACI ¶ 57-77.) The GSA Acquisition Manual ("GSAM") includes a contract clause that grants such price reduction rights to the Government, but it is the PAC, not the PRC. *Compare* GSAM 552.238-75(c) *with* GSAM 552.215-72 (attached as Ex. 5). The PAC permits the Government to reduce negotiated MAS contract prices if those prices were significantly increased because the Contractor failed to "[p]rovide information required by th[e] solicitation," or "[s]ubmit information that was current, accurate, and complete." GSAM 552.215-72(a). The Government

acknowledges this, and cites the PAC. (FACI ¶ 25.) Once again telling only half the story, the Government neglects to mention that the PAC was *not* in Oracle's contract.[5]

The PAC is the *only* contractual provision entitling the Government to a price reduction based upon inaccurate or incomplete disclosures made during negotiations. GSA admitted this when responding to industry comments on the PAC:

> The final rule retains the Price Adjustment clause. Even though GSA has limited post-award audits of information submitted in support of price negotiations, there are other circumstances that may result in the Government discovering that the offeror/contractor submitted inaccurate, not current or incomplete information. For example, the IG may perform an audit based on its authority under the Inspector General Act. The IG may not find fraud but may find that incomplete, not current or inaccurate information was provided GSA and that the lack of information impacted the price the contracting officer negotiated. Without a clause, GSA has no recourse other than to try and convince the contractor to negotiate an equitable settlement. *The contractor would be under no contractual or legal obligation to do so*.

See 62 Fed. Reg. 44,517, 44,520 (Aug. 21, 1997) (emphasis added). If the PRC did what the Government now argues, the PAC would be superfluous. Given the absence of a PAC in the 1998 Contract, the Government may not conflate the PAC and the PRC in an effort to assert a right that simply does not exist.

[5] The original solicitation resulting in Oracle's 1998 Contract was issued before the PAC was included in the GSAM in August 1997. *See* 62 Fed. Reg. 44,517, 44,518 (Aug. 21, 1997). Inclusion of the PAC in solicitations issued before August 21, 1997 was completely optional. (*Id.*) Although GSA continued to negotiate with Oracle until December 1998, it chose not to add the PAC to Oracle's Solicitation, and as a result, that clause was not included in the 1998 Contract.

b. The PRC does not require price reductions to correct inaccurate disclosures

To the extent that the FACI asserts that the PRC polices the accuracy of disclosures made during negotiations, it is incorrect. Instead, the PRC focuses exclusively on *an agreed upon relationship* between the BOA and GSA price and *changes to that relationship*:

> Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained throughout the contract period. Any change in the Contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.

GSAM 552.238-75(a); *see also* 63 Fed. Reg. 64,717, 64,717 (Nov. 23, 1998) ("The only monitoring required by the [PRC] is for sales to the designated customer or class of customer.").

The Government is fully aware of the PRC's focus on the BOA/GSA relationship, and accurately describes this focus when it serves the Government's purposes. For example, in its original Complaint, the Government described Oracle's PRC obligations in terms of a pre-established GSA/BOA relationship, asserting that the PRC prohibited Oracle from offering better discounts to the BOA customer than it offered to GSA. (Compl. ¶ 44.) The FACI provides a similar description of the PRC when discussing Oracle's alleged "manipulation." (*See* FACI ¶ 80.)[6]

When attempting to revive the untimely 1997 Disclosures, however, the Government asserts a different position regarding Oracle's PRC obligations, stating that "any sale at or under

[6] The PRC descriptions in the Complaint ¶ 44 and FACI ¶ 80 are not completely accurate, and Oracle is not accepting or endorsing them in their totality. Oracle merely cites these descriptions for the proposition that the PRC is concerned with a pre-established GSA/BOA relationship, not discount disclosures.

the amount of $200,000 net price made to 'commercial end-user customers' that was discounted at a greater percentage *than had been disclosed to the Government* . . . would have the effect of automatically increasing the discount provided to the Government." (FACI ¶ 42.) The Government's new interpretation is not supported by the PRC's plain text or common sense.[7]

Adding to the confusion, the Government misconstrues PRC subsection "C," which lists three events that could trigger price reductions. (*See e.g.*, FACI ¶ 76.) Although the triggering events include (i) revisions to the commercial pricelists or other documents upon which contract award was predicated, and (ii) the grant of more favorable discounts than those contained in the commercial pricelists or other documents upon which contract award was predicated, such statements do not alter the definition of a price reduction, or create some new enforcement mechanism. *See* GSAM 552.238-75(c).

A price reduction is limited to a disruption in the established GSA/BOA relationship, and the Government's remedy under the PRC is limited to re-establishing that relationship. *See* GSAM 552.238-75(a). The PRC contains no mechanism to change the discounts offered to GSA based upon corrected disclosures. Thus, even if PRC subsection "C" is read to impose a general duty, unrelated to the BOA/GSA relationship, to update disclosures, a contractor's compliance

[7] The Government's new reading of the PRC creates a host of practical problems. As reflected in the Government's 1997 Disclosure claim, Oracle disclosed that it deviated from its "standard" discounts a certain percentage of the time. It thus would be entirely consistent with its disclosures for Oracle to grant its BOA customer larger discounts than the disclosed "standard" discounts, or discounts larger than the discounts offered to GSA. If disclosed discounts are the key benchmark, then the Government's enforcement of the critical GSA/BOA price relationship would be undermined.

Rather than policing adherence with a range of disclosed discounting practices, the PRC was designed and intended to police an established GSA/BOA relationship. Read in this manner, administration of the PRC is possible. Each transaction during contract performance that is subject to the PRC is compared to the BOA/GSA relationship. If the transaction is inconsistent with that relationship, then it must be reported to GSA.

with that reporting duty would have no impact on the appropriate GSA price. In the absence of a mechanism to change the GSA price based upon allegedly incorrect disclosures, the PRC cannot revive the 1997 Disclosures or recast them as some ongoing contract performance issue.

B. The FACI Fails to Allege an Act of Common Law Fraud Occurring Within the SOL

The Court specifically directed the Government to identify conduct occurring after May 29, 2004, that would support its common law fraud counts. (Mem. Op. at 26 n.7.) The original Complaint alleged no acts occurring on or after May 29, 2004. The FACI adds only two allegations, and neither is sufficient to state a fraud claim.

The first allegation concerns a June 22, 2005 letter that accompanied a contract modification and states, "All other discounts, terms and conditions remain the same." (FACI ¶ 54.) The quoted letter concerns educational products and makes no reference to the Oracle software licenses at issue in this case. Moreover, the quoted language makes no representation about the accuracy of any disclosures or statements. It simply expresses Oracle's intention that the modification would alter only specified contract terms, and all other terms would continue to apply. The statement is neither false nor related in any way to this case.

The second allegation concerns a purported January 24, 2005 disclosure that includes a commercial discount schedule.[8] (FACI ¶ 74.) The FACI baldly asserts that "[u]pon information and belief" the disclosure was false. (FACI ¶ 75.) The elements required to establish a claim for either form of common law fraud asserted in the FACI include a false statement or omission, reliance, and damages. *Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.* 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998) (stating elements of constructive fraud); *White v. Potocska* 589

[8] Oracle has no record of any communication with the Government on January 24, 2005, and the FACI contains no allegation about the source or recipient of the purported disclosure.

F.Supp.2d 631, 642 (E.D. Va. 2008) (stating elements of fraud by omission). The Government has not sufficiently pled any of these elements with regard to the January 24, 2005 disclosure.

Even if the Court accepted the bald assertion of falsity, the FACI fails to allege reliance or damages. What impact, if any, did the commercial discount schedule have on the 1998 Contract? In what way, if any, did the discount schedule result in inflated invoices? The FACI does not even allege why Oracle submitted the chart, or how GSA used it. Moreover, the FACI does not identify a single order that occurred after Oracle submitted the schedule, much less link the schedule to a specific and allegedly fraudulent transaction. The most recent order identified in FACI occurred on April 29, 2004, a month before the applicable common law limitations period, and eight months before the allegedly false January 24, 2005 commercial discount schedule. (*See* FACI ¶ 99.)

The Government has responded to the Court's direction for greater specificity about the timeliness of its fraud claims by merely adding two random and unexplained events occurring after May 29, 2004. These allegations fail to assert a plausible common law fraud claim, and FACI Counts Four and Five therefore should be dismissed. If the Court concludes that the Government's allegations suffice to state a claim under FRCP 12(b)(6), then as set out in Section III, below, those allegations fail to state fraud claims with sufficient particularity under Rule 9(b). *See Harrison v. Westinghouse Savannah River*, 176 F.3d 776, 784-85 (4th Cir. 1999).

II. The e-Business Allegations Fail To State A Plausible Claim for Relief

Claims based upon the e-Business allegations suffer from many of the same flaws as the 1997 Disclosure claims. The original Complaint alleged that Oracle fraudulently induced GSA to modify the 1998 Contract by misrepresenting its e-Business discounting practices. The alleged misrepresentations and the modification, however, both occurred before May 29, 2001, and thus are outside of the applicable limitations period. Although the FACI attempts to make

the e-Business claims timely by adding new allegations after May 29, 2001 or focusing on alleged reaffirmations of the e-Business disclosures, the claims as recast lack any coherent legal basis. Moreover, the e-Business claims are based entirely upon incomplete and distorted facts.

A. The e-Business Allegations Lack a Coherent Legal Theory

The e-Business allegations in the original Complaint were based upon disclosures that Oracle made in a May 2, 2001 letter, and asserted that those disclosures fraudulently induced GSA to modify the 1998 Contract. Tacitly recognizing that the Court dismissed such claims as untimely, the FACI removed the common law fraud in the inducement count, as well as all references to fraud in the inducement from its FCA counts. The FACI now focuses on certain e-Business disclosure reaffirmations that Oracle made after May 29, 2001, and includes new allegations about a different e-Business disclosure in July 27, 2001. (FACI ¶¶ 46, 49-56.) The FACI, however, does not assert how the acts occurring within the SOL resulted in false claims or a breach of a contractual or quasi-contractual duty.

Instead, much as it did with the 1997 Disclosures, the FACI seems to erroneously assert that the untimely May 2, 2001 e-Business disclosures resulted in an ongoing breach of the PRC. (*See* FACI ¶¶ 76-77.) As set out above, the PRC does not regulate the accuracy of disclosures, nor would it entitle the Government to a price reduction.

In the absence of the PRC or fraud in the inducement arguments, the e-Business allegations lack any coherent legal theory. The FACI identifies certain allegedly false statements made after May 29, 2001, but never attempts to link them to any of its seven counts. (FACI ¶¶ 69-73.) How did the July 27, 2001 e-Business disclosure or the e-Business reaffirmations occurring after May 29, 2001 result in a false claim? In what way, if any, did those statements relate to the price that the Government agreed to pay prior to the statements? How were those acts material? What contractual or quasi-contractual duty did those acts violate? The FACI

answers none of these questions. Accordingly, the FACI's e-Business claims fail to meet the Court's directive for specific allegations regarding timely FCA, contract or quasi-contract violations and should be dismissed. (*See* Mem. Op. at 26 n.7.)

B. The e-Business Allegations are Based upon Distorted and Incomplete Facts

Even if a valid legal theory supported the e-Business allegations, the alleged falsity of Oracle's e-Business disclosure is a house of cards. In essence, the FACI alleges that Oracle falsely represented the frequency of "non-standard" e-Business discounts, without alleging what, if anything, Oracle in fact disclosed about the frequency of such discounts. The e-Business allegations focus on certain volume discount disclosures that Oracle made on May 2, 2001[9] and July 27, 2001 in connection with the e-Business modification. Based entirely upon a "preliminary analysis" that is never described, the FACI asserts that the e-Business disclosures "were false because Oracle engaged in numerous E-Business transactions with non-GSA customers in which Oracle granted discounts that were inconsistent with the 'Commercial Discounts' that [were] represented on the charts presented to GSA." (FACI ¶ 47.) The Government alleges that the volume discount charts misleadingly "suggested that GSA would be receiving better discounts than commercial customers for each of the price tiers set forth in the charts, when, in fact, Oracle repeatedly granted discounts to commercial customers that were greater than those represented on these charts and greater than the discounts that were offered to GSA." (*Id.*)

The unstated logic of the "preliminary analysis" is that deviation from the disclosed volume discount charts inherently makes those charts false. This misconstrues the nature and context of MAS contract negotiations. What GSA seeks from contractors during negotiations is

[9] As set out above, any allegation based upon the May 2, 2001 disclosure is barred by the SOL.

a statement of the contractor's *written sales policies*, a description of nonstandard sales practices, and a general statement regarding the frequency of each. (*See* Ex. 6 (Solicitation excerpts directing Oracle to "explain both standard discount and pricing policies, as well as any nonstandard business practices")); *see also* 62 Fed. Reg. 44,517, 44,519 (Aug. 21, 1997) (describing GSA's intent during MAS negotiations as seeking "to obtain information on the offeror's written pricing policies, or standard commercial sales practices if the offeror has no written policies, and a general explanation of the circumstances and frequency of deviations from those policies or standard practices").

The FACI only references what Oracle disclosed with regard to its standard or written e-Business discounting policies. It alleges, through selective quotation, that Oracle's "Discounting Policy" determined discounts based upon order size. (FACI ¶ 45.) The FACI then describes the volume discount chart that was the subject of the Government's "preliminary analysis" as Oracle's "Standard Discounts." (*Id.*) There is no allegation that these disclosures inaccurately described Oracle's written sales policies, nor could such an allegation be plausible. Oracle's May 2, 2001 e-Business disclosure attached website printouts showing the volume discounts that Oracle offered to commercial customers. (*See* Ex. 1 at Attach. 3 (May 2, 2001 Disclosure).)

Instead, the FACI essentially claims that Oracle falsely represented the *frequency* of its non-standard discounts, while (i) ignoring what Oracle disclosed about non-standard discounts and (ii) failing to allege what, if anything, Oracle represented regarding their frequency. Initially, Oracle's May 2, 2001 disclosures explained that factors other than order size could result in discounts greater than those reflected in the volume discount charts:

> Circumstances such as line item license credit from purchase of a successor product, prior contract IDIQ fixed price, product migration history, product quantity, required functionality, and

> license use restrictions can result in additional discount for specific line items within an overall order.

(Ex. 1.) In short, Oracle did not represent to the Government that its discounts would always be consistent with the written volume discount charts, and there is no indication that the Government's "preliminary analysis" ever assessed these additional discounting factors.

More importantly, the FACI never alleges what, if anything, Oracle represented about the frequency of "standard" or "non-standard" e-Business discounts – supposedly the focus of the preliminary analysis. To the extent that the Government is asserting that describing discounting policies as "standard" suggests a certain limited amount of deviation, that assertion is false. GSA fully understands that a contractor's written sales policies will not govern all, or, in some instances, even most of the contractor's commercial transactions. Indeed, GSA has identified frequent deviation from written sales policies as a reason to conduct pre-award audits. 62 Fed. Reg. 44,517, 44,519 (Aug. 21, 1997). In other words, GSA does not consider "written policy" to state anything regarding standard/non-standard discount frequency.

Thus, when Oracle's e-Business disclosures are read in context and in their entirety, they do not support any cause of action. Oracle did not misrepresent its written e-Business sales policies (nor does the FACI allege such a misrepresentation), and those policies do not support the Government's preliminary analysis findings, which focus only on deviations. Accordingly, the Court should dismiss all counts based upon the e-Business allegations for failure to state a plausible cause of action.

III. The FACI Fails to Meet the Requirements of FRCP 9(b)

In directing the Government to file an amended complaint, the Court noted that the Complaint in Intervention lacked specificity. (Mem. Op. at 26 n.7.) Rather than providing detailed factual allegations to overcome what the Court has already found to be "merely . . . a

general pattern of [alleged] fraud," the FACI rests on the same broad factual allegations as the original Complaint. The Government's failure to supplement the specificity of its claims require that the FACI be dismissed for failure to meet the heightened pleading standards set out in FRCP 9(b).

FRCP 9(b) provides that "[i]n all averments of fraud[10] or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The circumstances required to be pled with particularity under FRCP 9(b) are "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison*, 176 F.3d at 784; *United States ex rel. Elms v. Accenture*, 341 F. App'x 869 (4th Cir. 2009). These facts are often referred to as the "who, what, when, where and how" of the alleged fraud. *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008). The FACI allegations fail to meet this standard.

A. The PRC Manipulation Claims Fail to Meet FRCP 9(b)

The Court ruled that the Government's PRC Manipulation claims are plausible under FRCP 12(b)(6), and provided the following description of those claims:

> The United States contends that Oracle identified transactions with its commercial BOA customers that would have violated the PRC and then instructed its agents to "rework" those contracts so that they fell outside the PRC, thereby permitting Oracle to give those customers discounts significantly higher than those that GSA was receiving in essentially identical transactions.

[10] A false claim allegation under the FCA is an "averment of fraud" within the meaning of FRCP 9(b). *Harrison*, 176 F.3d at 783-84. Accordingly, FCA complaints must satisfy this heightened pleading standard.

(Mem. Op. at 30-31.) Although Oracle respectfully disagrees with the ruling, even if the PRC Manipulation claims are plausible, the FACI fails to state those claims with sufficient particularity to support any of the FACI fraud counts.

Under well-established Fourth Circuit precedent, in order to satisfy FRCP 9(b), a complaint alleging an FCA violation must specifically allege a false claim that was actually submitted to the Government. *Harrison*, 176 F.3d at 785; *United States ex rel. Brooks v. Lockheed Martin Corp.*, 423 F. Supp. 2d 522, 526 (D. Md. 2006); *United States ex rel. Conrad v. Grifols Biologicals Inc.*, No. 07-3176, 2010 WL 2733321, *5 (D. Md. July 9, 2010). In order to identify a false claim arising out of Oracle's alleged PRC Manipulation, the FACI would need to allege: (i) a proposed deal that would have triggered the PRC, (ii) that was later consummated after Oracle "manipulated" the terms, and (iii) a subsequent sale to the Government through the 1998 Contract at a greater price. The FACI does not identify a single transaction in that satisfies requirements (ii) and (iii).

First, the FACI does not identify a single transaction that was actually "manipulated." The FACI includes a number of allegations about *suggested tactics* to avoid triggering the PRC made by certain Oracle employees. (*See e.g.*, FACI ¶ 81, 89 (allegations regarding suggestions on working with discounting policy) The FACI then asserts that the suggested tactics were commonplace. (FACI ¶ 83.) The emails that the FACI quotes, however, only discuss one transaction that was actually *approved by Oracle*, and for that transaction, there is no allegation that Oracle's customer agreed to the altered deal proposed or that any "manipulated" transaction actually occurred. (*See* FACI ¶ 85.) In most instances, the quoted emails do not even show what Oracle *approved*, much less the terms of the final transaction. (*See* FACI ¶¶ 84; 86-88.)

Second, even if there was a "manipulated" transaction, the FACI has not identified a later MAS sale at a higher price. In the absence of such a sale, any alleged act of "manipulation" would not result in a false claim to the Government. The only specific orders that the FACI identifies are included in a chart that compares 18 GSA orders to various "Commercial" orders (the "Chart"). (FACI ¶ 99.) The Chart does not identify any completed transaction or false claim arising out of a "manipulated" transaction. There is no allegation that any of the Chart orders were "manipulated" or how. The FACI does not allege that the "Commercial" customers included in the Chart are BOA customers. Moreover the PRC works on a product by product basis. *See* 63 Fed. Reg. 64,717, 64,717 (Nov. 23, 1998). Accordingly, if Oracle "manipulated" a particular transaction, that could only impact the future price of the individual products involved in that transaction. Although the FACI alleges that the GSA and Commercial transactions in the Chart are "similar," it does not allege that the transactions being compared involved the same products. Finally, a number of the orders in the Chart do not implicate the PRC because they are above $200,000 or the GSA transactions occur before the "Commercial" transactions. (*See e.g.*, FACI ¶ 99 (Chart Orders 4, 5, 8, 13-18).)

The PRC Manipulation claims in this case are similar to claims dismissed under FRCP 9(b) in *Mason v. Medline Industries, Inc.*, No. 07-C-5615, 2009 WL 1438096, *3 (N.D. Ill. May 22, 2009). *Medline* was an FCA case involving a Department of Veterans Affairs ("VA") contract that included a price reductions clause which operates in the same manner as the PRC here. The defendant in that case was accused of "manipulating pricing to other customers in order to avoid the PRC." *Medline*, 2009 WL 1438096 at *6. The court, however, dismissed the manipulation claim under FRCP 9(b) because the complaint did not "provide any specific facts supporting th[e] allegation," such as the timing of or customers involved in the allegedly

manipulated transactions, or what effect those transactions had on claims submitted to the Government. *Id.* at *6. The FACI's PRC Manipulation allegations are similarly deficient. The FACI never identifies the participants, timing or impact of any "manipulated" transaction.

While the FACI alleges that certain Oracle employees suggested or promoted allegedly improper PRC practices, it never links those practices to a false claim. This does not meet FRCP 9(b):

> Underlying improper practices alone are insufficient to state a claim under the False Claims Act absent allegations that a specific fraudulent claim was in fact submitted to the government. In short, [the plaintiff] provided the "who," "what," "where," "when," and "how" of improper practices, but he failed to allege the "who," "what," "where," "when," and "how" of fraudulent submissions to the government.

Corsello v. Lincare, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005) (internal citations omitted).

B. The FACI's Other Fraud Claims Also Fail to Meet FRCP 9(b)

Although the lack of specificity is most acute regarding the PRC Manipulation allegations, the FACI's other fraud allegations are also deficient. None of the FACI allegations allege the "who, what, when, where and how" of the alleged fraud.

1. The FACI Fails to Allege That Oracle Submitted a False Claim

The Government has not identified any Oracle invoices that were rendered false by the alleged false statements. The FACI generally alleges that the Government incurred damages for "each claim" in which an agency received a smaller than appropriate discount (FACI ¶ 92), but does not identify any such claims. Generic allegations do not satisfy the *sine qua non* of a False Claims Act violation, pleading proof of an actual false claim. As the court explained in *Grifols*, "We cannot make assumptions about a False Claims Act defendant's submission of actual claims to the Government without stripping all meaning from FRCP 9(b)'s requirement of specificity."

Grifols, 2010 WL 273321 at *5 (quoting *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1357 (11th Cir. 2006)).

The FACI is replete with allegations of generalized schemes, but any link between those generalized allegations and a specific claim for payment is completely missing. The FACI must link the specific allegations of deceit to specific claims for payment (*id.*), but it fails to do so. Pleadings alleging fraudulent schemes, without linkage to actual false claims submitted to the Government, fail the FRCP 9(b) test. *Harrison*, 176 F.3d at 785; *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004).

2. The FACI Fails to Allege Oracle's Contractual Requirements

Though the FACI alleges generally that Oracle failed to meet its contractual requirements and is therefore liable under the FCA and common law, it fails to allege the particular terms and conditions of Oracle's contract. Instead, the FACI relies on generalized statements about the requirements of MAS solicitations (*see* FACI ¶¶ 25-28) without ever alleging which iteration of the solicitation applied to the contract in question, or which of the general requirements applied to Oracle and in what form.[11] The FACI goes on to recite the language of Oracle's BAFO, without ever alleging that the terms of the BAFO are the terms of the contract. Although Oracle does not dispute the existence of a contract, or that the contract contains the PRC, it is impossible to discern from the FACI what the Government alleges Oracle's obligations were. For instance, the PRC clause is critical to the Government's argument, but the FACI never alleges what Oracle's contractual PRC obligations were.

[11] While the general MAS solicitation contains multiple requirements, not all of these requirements become part of a resulting contract.

The FACI thus falls far short of the requirements for particularity. *Grifols*, 2010 WL 273321 at*4 (relator's citation to general information about contract requirements, not specific to defendant, fails to meet FRCP 9(b) particularity requirements). *See also United States ex rel. Godfrey v. KBR. Inc.*, 360 F. App'x 407, 411 (4th Cir. 2010) (affirming Judge Lee's order of dismissal explaining that where facts necessary to establish FCA liability are terms of contract, and complaint fails to allege the terms of the contract, then the complaint fails for lack of particularity).

3. The FACI Fails to Allege Contractual Violations With Particularity

Nor does the FACI specify how Oracle violated its contract with GSA. The FACI Chart lists transactions which supposedly illustrate that Oracle violated its contractual obligations. No detail is provided from which the Court could glean the substance of the alleged violations. The Chart relies instead on generalized allegations without ever tying those allegations to the actual requirements of the contract. As explained in *Medline*, "the number of examples does not compensate for their lack of particularity." 2009 WL 1438096 at *3.

The FACI also contains a number of other charts through which the Government purports to show that, based on a "preliminary analysis," Oracle provided false information to the Government. (*See* FACI ¶¶ 65, 70.) The Government's reliance on a "preliminary analysis" of data it has possessed since at least October 2008 is unsupportable. Critically, here again the FACI fails for lack of particularity. For instance, in ¶¶ 70 and 72, the FACI purports to show that Oracle provided discounts to non-GSA customers in excess of previously-disclosed discounts. The FACI fails to allege, however, what category of customers were involved in the transactions it cites and the type of transaction involved. Generalized allegations about Oracle's sales fail to satisfy the particularity requirement. *United States ex rel. Carter v. Halliburton*, No. 1:08cv1162, 2009 WL 90134, *4 (E.D. Va. Jan. 13, 2009) (Allegations of contractual failures,

coupled with formulaic recitation of the elements of an FCA claim, do not rise to the level of particularity required under FRCP 9(b).).

Finally, without providing any context or factual support, the FACI references a January 24, 2005 discount schedule and avers that "upon information and belief," the disclosure was false. (FACI ¶¶ 74-75.) Such a pleading is facially defective and cannot survive a motion to dismiss. *See United States ex rel. Lindsey v. Easter Seals UCP North Carolina, Inc.*, No. 1:06CV125, 2007 WL 3124664 (W.D.N.C. Oct. 25, 2007) (finding that FRCP 9(b) prevents plaintiffs from pleading fraud based upon "information and belief" rather than "hard facts"); *see also United States ex rel. Promega Corp. v. Hoffman-La Roche Inc.*, No. 03-1447-A, slip op. at 6 (E.D. Va. Sept. 29, 2004) (rejecting fraud allegations made on information and belief) (attached as Ex. 7). Conclusory allegations of fraud are insufficient to meet the requirement of particularity. *Harrison,* 176 F.3d at 783-84. Moreover, the bald assertion of falsity fails to meet the minimum pleading standard set by *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Under that standard, a claim must be "plausible on its face." *Id.* at 1950-51 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.3 (2007)). Here, "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.* at 1950. Because the Government does not allege facts to show the discount schedule is false, the FACI does not meet the *Iqbal* test.

The particularity requirements are especially important in the FCA context, where they serve in part to prevent the powerful FCA tool from being used inappropriately. "The clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed." *United States ex rel. Elms v. Accenture*, 341 F. App'x 869 (4th Cir. 2009) (quoting *Harrison*, 176 F.3d at 789); s*ee also, Karvelas*, 360 F.3d at 231

(citing *United States ex rel. Clausen v. Lab. Corp. of America*, 290 F.3d 1301,1313, n.24 (11th Cir. 2002) (allowing a qui tam plaintiff to proceed without meeting the FRCP 9(b) requirements may encourage a suit premised on "baseless allegations used to extract settlements")). While the caselaw shows that FRCP 9(b) is most commonly invoked to attack a relator's complaint, the case for 9(b) dismissal is even stronger in the context of a complaint in intervention.

Unlike a relator, the Department of Justice has access to data from across the Government. And in this case, the Government has also had the benefit of interviews with Oracle current and former employees, 64,000 pages of documents, detailed reports from Oracle's attorneys and accountants, and a CD containing nearly six years of transaction data, all provided in response to its July 16, 2008 subpoena. Subsequently, in eight months of settlement discussions in 2010, Oracle provided over 1,100 additional pages of documents, including underlying contracts and orders, and answered all of GSA's questions about the transaction data. This is all information that would otherwise be available only in discovery. Nevertheless, even with all the data at its disposal, and access to an Oracle insider (the Relator) who could help interpret that data, the Government is unable to plead with particularity the "who, what, when, where and how" of the alleged fraud.

4. The FACI Fails to Allege Intent with Particularity

To state a claim under the FCA, the Government must allege that Oracle knowingly presented for payment or approval a false or fraudulent claim. Although the particularity standard of FRCP 9(b) does not apply with respect to scienter, allegations of intent may not be pled as conclusions. Rather, they must include enough of a factual basis from which one may conclude that the defendant acted with the requisite intent. *See North Carolina Farmers' Assistance Fund v. Monsanto Co.*, No. 1:08cv409, 2010 WL 3817349, *10 (M.D.N.C. Sept. 27, 2010) (plaintiff must specify the information based on which it formed a plausible belief);

Tricontinental Indus., Ltd. v. PricewaterhouseCooopers, LLP, 475 F.3d 824, 841 (7th Cir. 2007) (issue is whether facts and reasonable inferences therefrom permit conclusion that false statements were made with requisite intent); *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) (complaint must afford basis for believing plaintiffs could prove scienter).

In this case, the FACI fails to allege any facts suggesting that Oracle knew that the allegedly false statements were actually false, or that Oracle acted in reckless disregard or with deliberate ignorance. The FACI alleges in ¶¶ 73 and 78 that Oracle knew that its affirmations of previous disclosures were false. This of course ignores that Oracle's affirmations all the "except as previously discussed" caveat. It also appears to be the only explicit reference to scienter, except for the very rote language in the counts. Essentially, the allegation is that because the Government has now decided that the disclosures are false, Oracle must have intended to make false statements. This kind of generalized intent allegation is insufficient.

5. The FACI Fails to Allege Materiality

Liability under each of the provisions of the FCA is subject to the judicially-imposed requirement that the false statement or claim be material. Materiality depends on whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action. *Harrison*, 176 F.3d at 785. To be viable, the FACI must also allege with particularity a link between the government's decision to pay and an alleged false statement. *Id*. The Government must show that Oracle's disclosures were material - had it known that the statements were false, it would have refused payment.

The FACI's allegations are patently insufficient in this regard. The Government has used rote language to allege that Oracle's statements were material to its payment decisions (*see* ¶¶ 58, 63, 73 and 92), but it has failed to allege any facts that would support a showing of materiality. And indeed, the 1998 Audit demonstrates just the opposite - the Government had

full knowledge of Oracle's pricing practices, yet it decided to enter in the Contract anyway. It is difficult to construct an argument for materiality in these circumstances, and the Government has not even made the attempt.

CONCLUSION

For the reasons set out above, the Court should dismiss the FACI in its entirety and with prejudice. All claims based upon the 1997 Disclosure and e-Business allegations are untimely or otherwise improper. In addition, despite two attempts, the Government has not sufficiently pled a timely FCA violation or act of common law fraud. Finally, in the absence of a valid fraud claim, if the Court concludes that the FACI states a valid common law contract or quasi-contract claim, then such claims are subject to the Contract Disputes Act, and this Court lacks jurisdiction to hear them. *See United States v. J & E Salvage Co.*, 55 F.3d 985, 987-88 (4th Cir. 1995). Accordingly, the FACI should be dismissed for failure to meet the requirements of FRCP 9(b) and 12(b)(6).

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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