

seal to allow the Government time to conduct its investigation to determine whether to join the action. *Id.* at 3. After filing several Motions for Extension of Time to Consider Election to Intervene, on October 7, 2014, the Government filed its Notice of Election to Decline to Intervene. (ECF No. 25). On October 20, 2014, the Complaint, the Government's Notice of Election to Decline to Intervene, and ECF No. 26 were unsealed. (ECF No. 26). On March 30, 2015, KBR filed its Motion to Dismiss for Failure to State a Claim. (ECF No. 38). On May 14, 2015, the Relators filed their Memorandum in Opposition to the Motion to Dismiss. (ECF No. 42). On May 29, 2015, KBR filed its Reply to the Relators' Opposition to the Motion to Dismiss. (ECF No. 44). On June 15, 2015, Relators filed their Sur-Reply in Opposition to

at 678. However, the Court need not accept true the complaint's legal conclusions; "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (Citing *Bell Atlantic Corp.*, 550 U.S. at 555). The Court may consider "documents that are central to the claim and are referred to in it, and information that is properly subject to judicial notice," in addition to documents that are cited to and attached by plaintiffs. *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

Statements in the complaint must be sufficient to provide the defendant with "fair notice" of the claim and its basis. *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012). This means that (1) "the complaint must describe the claim in sufficient detail to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests'" and (2) its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a "s

FACTUAL BACKGROUND

A. Parties

The United States of America, the real party in interest in this case, entered into the Logistics Civil Augmentation Program (“LOGCAP III contract and various task orders thereunder with KBR. (ECF No. 1 at 4) The United States Army Field Support Command, located in Rock Island, Illinois, awarded and issued the LOGCAP III prime contract. The United States Army Field Support Command’s successor, the United States Army Sustainment Command, also located in Rock Island, also bore responsibility for administering LOGCAP III, defined the United States’ needs under LOGCAP III, and issued task orders pursuant to LOGCAP III *Id.*

Relator Geoffrey Howard (“Relator Howard”) is a former employee of Service Employees International Union (“SEIU”), which is entirely owned by KBR through two subsidiaries. *Id.* at 4. Relator Howard joined the LOGCAP project on July 19, 2007, as a data and system analyst. *Id.* Relator Howard’s first assignment was to work as a Desktop Analyst for KBR’s IT Department at the Al-Asad Airbase in Iraq, known as B-1 within KBR. *Id.* Relator Howard then relocated to KBR site B-9, at Habimah Airbase, where he remained until March 2008. *Id.* at 4-5. Relator Howard’s job was to work as an IT technician and to help implement KBR’s new property management system. *Id.* at 5. Relator Howard was later transferred to a position with KBR’s Support Office in Kuwait (“KSO”) on March 16, 2008, where he prepared reports on KBR’s materials usage. *Id.* During this assignment, the Relators allege Relator Howard discovered hundreds of millions of dollars in idle Government property. *Id.* Due to pressure from KBR, resulting from his complaints about excessive ordering and underutilization of Government property under the LOGCAP III contract, the Relators allege Relator Howard

resigned on August 2, 2009. Relator Howard currently resides in Langenberg, Germany.

Relator Zella Hemphill (“Relator Hemphill”) is an employee of SEI. Relator Hemphill joined KBR as a LOGCAP III recruiter in its Human Resources Department in 2004. On July 27, 2005, Relator Hemphill was deployed to the LOGCAP III project to work as an Administrative Specialist in Baghdad, Iraq. Relator Hemphill was subsequently transferred to Tikrit, Iraq, and Kirkuk, Iraq, to manage KBR’s Government property. During this assignment, the Relators allege Relator Hemphill discovered large problems in how KBR was ordering, using, and accounting for Government property. In May 2008, Relator Hemphill was transferred to KBR’s newly-created Distribution Management Center (“DMC”) in KBR’s KSO and promoted there to Senior Material Control Specialist one month later. Relator Hemphill’s job at the DMC was to facilitate usage of KBR’s excess Government property by matching internal demand for materials with available supplies in KBR storerooms, a process known as cross-leveling. Relator Hemphill worked closely with Relator Howard to increase KBR’s cross-leveling and correspondingly decrease duplicative purchasing. Relator Hemphill is a resident of Houston, Texas.

Defendant KBR, Inc. is a global engineering and construction company incorporated in Delaware with its corporate headquarters in Houston, Texas. Defendant Kellogg Brown & Root Services, Inc. is a Delaware corporation with its principal place of business located in Houston, Texas. Defendant Kellogg Brown & Root Services, Inc. is a wholly owned subsidiary of KBR, Inc. and assumed responsibilities for the LOGCAP III contract. Prior to 2005, KBR, Inc. was known as Kellogg Brown & Root, Inc., a wholly owned subsidiary of Halliburton Company. In April 2007, KBR became an independent company.

B. Background

In 1985, the Government initiated LOGCAP, a United States Army initiative for the use of civilian contractors to provide combat support and combat service support to armed forces in wartime and other contingencies. *Id.* at 7. Since its initiation, LOGCAP has grown exponentially as the Government has relied increasingly on private contractors to support the military missions in Iraq and elsewhere. *Id.* From 1992 to 2007 the LOGCAP prime contract increased from \$2 billion to \$23 billion. *Id.* The first LOGCAP prime contract, LOGCAP I, was awarded to KBR in 1992; LOGCAP II, to DynCorp in 1997; and LOGCAP III, to KBR in 2001. *Id.* at 8.

The contracting agency for LOGCAP is the United States Army Sustainment Command located in Rock Island, Illinois. *Id.* Once the prime LOGCAP contract has been awarded, all work to be performed under the contract is divided by individual task orders that specify a particular Statement of Work and period of performance. The services provided under the LOGCAP program include supply operations such as the delivery of food, water, fuel, spare parts, and other operations; field operations such as dining and laundry facilities, housing, sanitation, waste management, postal services, morale, welfare, and recreation activities. *Id.* Other operations under the LOGCAP program include engineering and construction, support to communication networks, transportation and cargo services, and facilities maintenance and repair. *Id.*

On December 14, 2001, LOGCAP III was awarded to Brown & Root Services, Inc., a subsidiary of Kellogg Brown & Root. *Id.* at 6, 8. Brown & Root Services later transferred its responsibilities under the LOGCAP III contract to Defendant Kellogg Brown & Root Services, Inc. *Id.* at 6. LOGCAP III was a performance based plus award fee contract that provided for KBR to be paid as profit 1% of its costs plus up to an additional 2% for good performance

based on a detailed set of performance criteria at 8. The Relators allege KBR's profit under LOGCAP III increased the more its cost increased with no specified cap 9.

LOGCAP III initially was designed to last up to 10 years; however KBR's performance under the contract was subject to intense criticism on multiple fronts. Beginning in 2004, the Special Inspector for Iraq Reconstruction and other audit agencies found multiple deficiencies by KBR across a wide spectrum of responsibilities under LOGCAP III. Various governmental audits, including a United States Government Accountability Office report issued in April 2005, turned up more than \$1 billion in questionable costs.

Among other regulatory provisions, the Relators allege LOGCAP III incorporated FAR § 45.5, which at the time specified KBR was responsible and accountable for the Government property² in its possession, and required it to establish and maintain a system to “control, protect, and maintain” all such property.*Id.* The Relators allege FAR § 45.5 also made KBR “responsible for the proper care, maintenance, use of Government property in its possession or control from the time of receipt until property relieved of responsibility, in accordance with sound industrial practice and the terms of the contract.”*Id.* at 10-11. (citing 48 C.F.R. § 45.509). In accordance with this responsibility, the Relators allege KBR was required to promulgate and follow written procedures adequate for assuring that Government property would “be used only for those purposes authorized in the contract.”*Id.* at 11.

D. KBR’s Control Procedure for Government Property

In accordance with LOGCAP III KBR developed LOGCAP Government Property Control Procedures (“PCP”)*Id.* at 11. Each revision of the PCP was submitted to the Defense Contract Management Agency (“DCMA”) by KBR for approval.*Id.* DCMA approved a KBR PCP on July 15, 2008, under 48 C.F.R. § 45.104(b), which allows the Government to revoke its assumption of risk for “loss, theft, damage or destruction” of Government property if the contractor’s property management procedures are inadequate.*Id.* The PCP covers “all facets of property control, from requisition through disposition of all [G]overnment property in the possession of KBR.” *Id.* The Relators allege that according to KBR, the PCP “ensure[s] [G]overnment property is protected, controlled, reserved, and maintained in accordance with the FAR and the terms of the contract.”*Id.*

The Relators allege PCP, Tab A, ¶ 5.1.0 provides KBR must order Government property

² Government property refers to property the Government furnishes to KBR and property KBR acquires under LOGCAP III. (ECF No. 1 at 10).

whether furnished by the Government or acquired by KBR “[r]easonable quantities, commensurate with the work to be accomplished.” The Relators allege the quantities of material that KBR uses or otherwise consumes must likewise be “reasonable when compared to the work/job at hand and Material Requisitions.”*Id.* The Relators allege KBR must use Government property only for performing the LOGCAP III contract and may dispose of Government property only by screening the items against current and anticipated needs. The Relators allege KBR is required to promptly report excess items and to dispose of such items only after receiving governmental approval.*Id.* at 11-12.

KBR supplements the PCP with Desktop Operating Procedures (“DOP”) and Technical Derivatives (“TD”) to promulgate property management policies and procedures not otherwise provided for in the PCP.*Id.* at 12. Unlike the PCP, KBR does not submit its DOP’s or TD’s to the Government. *Id.* The procedures provided by the PCP state KBR requisitions of Government property must be contractually authorized, necessary for performance of the LOGCAP III contract, and only be in the quantities that are needed for the specific performance. *Id.* The Relators allege that when requesting property, KBR employees are required to prepare a Material Requisition request form (“MR”) and forward it to KBR’s Material Control office.*Id.* The Material Control office is then responsible for attempting to fill the request internally before ordering additional property.*Id.* Filling an MR with material available in the local warehouse is known as “transfer,” and the process of filling MR’s for suitable property available elsewhere within KBR is known as “cross-utilization” or “cross-leveling.” *Id.* at 13.

The Relators allege cross-leveling is mandatory and necessary to prevent KBR from buying excess amounts of property.*Id.* The Relators allege KBR is required to use the property in its possession that the Government has already paid for, whether locally or theater-wide,

before it purchases more of the same property. KBR supplements the PCP's cross-leveling procedures with a DOP for the Distribution of Government Property ("DGP").*Id.* Under the DOP, the Relators allege KBR's DMC is responsible for screening all procurement requests for possible cross-leveling.*Id.* The Relators allege KBR's policy is that cross-level requests must be filled for all lines of inventory that are above a safety stock level.*Id.* The Relators allege inventory that does not have a safety stock level, such as excess materials, must be "entirely available" for cross-leveling.*Id.* The Relators allege sites are required to fill all valid cross-leveling requests from the DMC.*Id.*

In screening procurement requests "for availability within theater prior to purchase," the Relators allege the DMC must cross-level materials in the following order: (1) from redistributable storerooms, such as those holding excess materials; (2) from underutilized stock; and (3) from stock, provided the items are above the safety stock level.*Id.* at 13-14. The DOP further states cross-leveling "should not only be used when tasked by the DMC. If a site foresees a need for an item(s), it is contractually obligated to attempt to obtain the items through cross-utilization within its project (group of sites)."*Id.* at 14. Thus, the Relators allege through this provision and others, KBR codes its contract requires cross-leveling before buying or disposing of Government property.*Id.*

The PCP includes procedures for ensuring "proper consumption, maximum utilization, and required maintenance of Government property in accordance with contractual requirements."*Id.* KBR must use Government property for its authorized purpose.*Id.* KBR departments designate Property Custodians to control and protect the Governme

Whenever excess property is discovered, the ~~College~~ KBR is required to turn it in to Material Control, which then reports “all

Materials Stock Plan DOP. *Id.* In accordance with industry standards, KBR classifies the property in its possession as either stock ("STK"), special order items ("SP"), or non-stock ("NS"). *Id.* STK is material with recurring demand, and is re-ordered based on the number of those demands. *Id.* SP items are property with a non-re

disruptions. *Id.* When a line of STK inventory decreases to the reorder point KBR places a requisition order for the item, and the requisition order replenishes the STK line to the maximum allowed to be kept in inventory. *Id.* SP items, KBR's default classification for all items added to a storeroom, have no reorder point or safety stock level, and KBR will only change the classification of an item from SP to STK when it has been requested nine times or more. Even then, KBR's ASL Review Board must approve the reclassification by determining that the item has "legitimate ongoing requirements" that justify its presence on the ASL.

KBR must conduct physical inventories of the Government property in its possession, and this must be done at least once a year. After each inventory, the count on the inventory record is compared to the data on the corresponding property record, which is a record KBR keeps in Maxim³ for all Government property in its possession, accounting for the property from requisition to disposition. *Id.* KBR must record any unresolved discrepancies between the inventory count and its property records in an Inventory Adjustment Report⁴ ("IAR"). *Id.* at 17-18. KBR then reports the IAR and the overall inventory results to DCMA. *Id.*

The Relators allege KBR has procedures for requesting disposition instructions from the Government for Government property that identifies as “excess, obsolete, uneconomically

disposition. *Id.* In 2004 and afterwards, KBR made certifications on a form memorandum attached to the Form 1428's *id.* The memorandum was titled "Request for Disposition," and

acquisition to its delivery and usage.

warehouses, and whether KBR's utilization of those materials justified their classifications. *Id.* at 22-23. In preparing the ASL Report, Relator worked with KBR's DMC in Kuwait. *Id.* The DMC is responsible for cross-leveling purchase requests against KBR's current inventory to see whether the requests could be filled internally, and it had been largely unable to perform this task because of KBR's antiquated systems for managing materials. *Id.* at 23. The DMC expected the ASL Report to enable it to cross-level materials functionally for the first time. *Id.*

KBR did not address the problem ~~to~~ the Government about it *d.*

an item(s) that can fill a MR . . . and you ~~the~~ only place it can come from . . . and we don't cross-level it, we're going to ~~create~~ a PO (and expend \$\$) for ~~it~~ that [we] have on hand . . . To have something on hand and to not use ~~item~~ of purchasing more is a recipe for the DCAA to find fault with us and collect back what we paid for the item . . . *Id.*, *See* (ECF No. 1-10 at 1).

The Relators allege KBR and Mr. Kaye ~~had~~ long known the company was not cross-leveling before it bought materials. (ECF No. 25). The Relators allege ~~that~~ at every stage of the inventory process, KBR's processes for ma

information.” *Id.* at 26. This process must be conducted promptly, and in fact, the site has 24 hours to receive and process the property “and an additional 48 hours to input the receiving documentation into the automated stock record.” Any deviations from this schedule must be

The Relators allege because the warehouse property in its TREC, the property did not appear as part of KBR's active storerooms, project managers would not therefore see the property in Maximo as they prepared lists of materials for upcoming work orders. Nor would the DMC find the property in Maximo as cross-leveled MR's from other warehouses. *Id.* The Relators allege that for all practical purposes, the property did not exist to the people who needed it. *Id.* Thus, the Relators allege KBR LOGCAP Theater Procurement Supply Management Manager has acknowledged that "[u]tilizing TREC as a storage facility . . . is a misrepresentation of . . . inventory quantity which relates to funds. *Id.*; *See* (ECF No. 1-12 at 1).

The Relators allege KBR placed hundreds of millions of dollars' worth of Government property in TRECs, and knowingly left most of that property in the TRECs for far longer than 48 hours. (ECF No. 1 at 27) As early as May 20, 2009, KBR issued Technical Direction Bulletin that stated "Material Control personnel are using TRECs correctly, and warehouses were issuing property "directly from the TREC" instead of from an active storeroom. *Id.*; *See* (ECF No. 1-11 at 1). The Bulletin further ordered materials managers to cease using TREC's for transactions and to "[r]

Elias Faris, about the problems with the TREC's in late 2009 and early 2010. The Relators allege Relator Hemphill told Mr. Faris KBR was keeping incredible amounts of materials in its TREC's in near perpetuity. To prove her point, on January 14, 2010, Relator Hemphill ran a report showing the current status of KBR's TREC materials, and forwarded it to Mr. Faris. The report showed KBR had 74,542 inventory lines TREC's with a combined value of \$356,164,601.58. Out of this total, 67,381 inventory lines, 83.52%, had been in the TREC's for more than sixty days, and the total value of this stale inventory was \$342,381,068. By contrast, KBR only had \$9,471,332.03 worth of freight (material in transit to a warehouse) in its TREC's.

The worst of the KBR sites were the D and F, which were located in and around Baghdad, where 97% of the 28,956 TREC inventory was over sixty days old. The value of these idle materials was \$153,387,292.12, and the overwhelming majority of the items in the D and F sites had never been used.

Id.; See

2009 about a KBR site that was “placing everything on reserve so DMC won’t ask for it [to be] CL [cross-leveled] . . . they are ordering material and we have stock available. . . . We should build another warehouse to stock all the unnecessary material.” (ECF No. 1-17 at 4). This email was sent to KBR’s LOGCAP Chief of Staff Jeff Rock, in May 2010 by Frances Smith, an original recipient of Ms. Hays’ email. (ECF No. 1 at 32).

The Relators allege that in other cases warehouses were knowingly holding materials as reserved after the expiration of the work directive. In April 2009, KBR issued an Operations Directive titled “Return of Unused ACL Material and Property to Material Control.” *Id.*; *See* (ECF No. 1-18 at 1). The Directive ordered project managers to implement a process for returning excess reserved materials to general inventory at the completion of construction projects. *Id.* Pursuant to the Directive KBR managers were to hold a meeting within 48 hours of a project’s completion to account for and return the unused and unissued materials they had reserved under the ACL. *Id.* The Relators allege that in practice KBR has not implemented the Directive and does not remove the reserves on property after projects end. (ECF No. 1 at 32).

For example, the Relators allege that in January 2011, Relator Hemphill sought to cross-level materials from the D and F sites in Baghdad, where operations were being substantially downsized. *Id.* However, warehouse managers told Relator Hemphill that they were reserving the material for an ACL containing 4,000+ lines of inventory. *Id.* Because the sites were closing down at that time, the Relators allege it is unlikely that the warehouse managers actually had this many work orders open. *Id.* at 33. Nevertheless, soon after Relator Hemphill began to investigate, the D and F sites abruptly deleted 2,800 of the ACL’s 4,000 inventory lines.

In addition, the Relators allege KBR reserves Government property for contracts the Government has not yet awarded. *Id.* For example, the Relators allege that in January 2011,

Elias Faris and Tracy Townsend directed KBR materials managers to ship about \$2.7 million worth of materials to northern Iraq, claiming the materials were for a State Department project to build museums in Kirkuk and Mosul.^{Id.} However, at the time the State Department had not awarded KBR this contract or even indicated KBR would receive it.^{Id.} The Relators allege FAR and the LOGCAP contract expressly prohibit KBR from using Government property for unauthorized purposes, nevertheless Mr. Faris and Ms. Townsend instructed employees to simply “put the materials on the shelf” in Kirkuk and Mosul “until we get cleared.”^{Id.} The Relators allege when DCMA discovered this, it ordered the shipments to stop, but KBR had already shipped approximately \$700,000 worth of materials at that point.^{Id.} When this occurred, the Relators allege Mr. Faris and Ms. Townsend decided to achieve KBR’s goal of getting rid of incriminating excess stockpiles by reserving the materials in Maximo for the (nonexistent) museums contract.^{Id.} The Relators allege the value of the materials KBR reserved was approximately \$2 million, and the reservations were a flagrant violation of the DCMA order because KBR had no contract

been severely backlogged for years, which resulted in KBR failing to perform much of the maintenance it was scheduled to perform. The Relators allege that even as the managers called this backlog “hopeless,” KBR continued to order materials as if a maintenance session had never been missed.

For example, the Relators allege a June 2009 email exchange between Tina Hays and Frances Smith states a KBR maintenance officer in Taji, Iraq was ordering maintenance materials to “cover up the fact that he is ~~doing~~ the maintenance he says he is ~~doing~~.” See (ECF No. 1-21). The Relators allege such purchases were in excess to KBR’s requirements and KBR warehouses were filled with materials for maintenance work orders that were overdue or cancelled. (ECF No. 1 at 34). The Relators allege these materials were marked as reserved (or classified as STK) in Maximo, making them unavailable for use on other maintenance work orders. *Id.* The Relators allege as KBR continued to fail to keep to its maintenance schedules, the materials simply accumulated in its storerooms. The Relators allege that even when KBR did maintain property as expected much of the maintenance was for materials KBR had bought in excess of project requirements. *Id.* As excess, the Relators allege these materials should not have remained in KBR’s possession rendering KBR’s subsequent maintenance bills false. *Id.* at 35.

The Relators allege that even when materials were not reserved or otherwise unavailable, KBR sites prevented cross-leveling by ignoring DMC’s cross-leveling requests. *Id.* In early 2009, DMC manager Brandon Simmons complained to KBR’s senior leadership in Baghdad that sites were refusing to cross-level available materials. *Id.* Ultimately, on February 2, 2009, Mark Brennan, KBR’s Deputy Program Manager-Support, emailed KBR’s project managers, copying KBR’s senior leadership, stating sites were “ignoring DMC requests and

allowing the [cross-leveling] action to be cancelled through neglect, rather than through formal denials approved by the SLT [senior leadership team]. We are getting daily reports of denials from your sites now and none of those denials have been sent through SLT [senior leadership team] for approval.” *Id.*; *See* (ECF No. 1-22 at 1). The Relators allege Relator Hemphill witnessed a short lived uptick in cross-leveling following Mr. Brennan’s email, but sites soon reverted back, disregarding the DMC. (ECF No. 1-22 at 35). The Relators allege KBR took no concrete steps to force its sites to cross-level over a year later, 35% of KBR’s requisitions were bypassing the DMC entirely.*Id.*

In early 2009, the Relators allege Relator Howard created reports in Maximo that identified over \$628 million in excess Government property in KBR’s warehouses.*Id.* For example, in February 2009, KBR found that the sites in Iraq held \$20.5 million in inventory that had never been issued from a storeroom.*Id.* *See* (ECF No. 1-23 at 1). Likewise, in May 2009, KBR found \$24 million in underutilized materials at the D and F sites in Iraq, a number that did not include the property at sites KBR had previously identified as excess.*Id.* at 35-36; *See* (ECF No. 1-24 at 1). The Relators allege Relator Howard reported these totals to his supervisor, Charles Weaver; his manager, Ellen Sullivan; KBR’s LOGCAP Theater PSM Manager—Supply, Jim Haught; and Manager of KBR SMART team, Jim King who audited the Government property internally.*Id.* at 36. The Relators allege KBR’s senior management did not want to hear about the problem.*Id.*

For example, the Relators allege in April 2008, Relator Howard produced a report on excess materials in KBR’s T-1 site.*Id.* Responding to the report, the Relators allege his manager Ms. Sullivan thanked him, but stated, “the reports you are sending is [sic] causing consternation. . . .”*Id.*; *See* (ECF No. 1-25 at 1). The Relators allege as Mr. Weaver explained

to Relator Howard in August 2008, KBR's earnings depended on ordering materials, whether or not it had surplus stock on hand. (ECF No. 36) The Relators allege KBR never tried to control its inventory under LOGCAP because its revenue under the "cost-plus" contract required

May 2009, as part of its preparation to turn over LOGCAP III operations in Afghanistan to Fluor (which had won the LOGCAP IV task order for Afghanistan), KBR's project manager for Central Asia created a report for Floyd Shelton, KBR's LOGCAP III Business Planning Manager, on the number of employees and the amount of property at KBR's seven Afghan sites. *Id.* Among other things, the report contained a file titled "Inventory Adjustment Report" that listed KBR's inventory of materials in Afghanistan. *Id.*

The Report listed the value of inventory in KBR's warehouses, the number of inventory lines, and the number of inventory lines the warehouses had issued. *Id.* at 38; *See* (ECF No. 1-27). From these numbers the Report calculated the utilization percentage of non-stock inventory, the number of inventory lines that had not been consumed, and the total underutilization percentage. *Id.* The Relators allege the Report clearly and unambiguously, that KBR had not used 60% of the inventory lines in its Afghan warehouses (ECF No. 1 at 38). The total value of KBR's inventory in Afghanistan at that time was \$116,665,660. The Relators allege that were the Report to see the light of day every aspect of KBR's property management could be called into question. *Id.* For example, the Relators allege KBR had classified 71% of its inventory lines as stock, defined as having at least three demands in each stock year, even though 60% of its inventory lines had zero demands in the prior year. *Id.* The Relators allege Mr. Shelton forwarded the Report to David Stallard, KBR's Deputy Program Manager-Operations in Baghdad, and copied Jim Haught, KBR manager responsible for all LOGCAP III requisitions. *Id.* The Relators allege Mr. Haught forwarded Mr. Shelton's email to three KBR employees, including Tracy Townsend and John Vujic, and asked, "Tracy/John: Need you to validate the material numbers with our records. I don't think we should be showing underutilized on anything that can be seen by USG [United States Government]". *Id.*; *See* (ECF No. 1-28 at

2). In response, Ms. Townsend forwarded the report to Relator Howard (copying Mr. Vujic) and asked him to validate the material numbers; *See* (ECF No. 1-28 at 1).

The Relators allege Relator Howard understood the implication of removing the underutilization percentages and asked his manager, Ms. Sullivan, if she was comfortable hiding this information. *Id.* The Relators allege that after discussing Mr. Haught's directive at length, Ms. Sullivan emailed Mr. Howard and stated, "We don't own the data . . . we want to [give] Materials and PSM whatever they want . . . so good with it if it is what they want and need . . ." *Id.* However, the Relators allege Relator Howard refused to tamper with the report. (ECF No. 1 at 39). So the next day, after seeing no action from Relator Howard, the Relators allege Ms. Townsend forwarded the report to Ms. Sullivan, copying Mr. Haught, and asked her to validate the numbers by "prepar[ing] a report like the one listed in the attachment named 'Inventory Adjustment Report.'" *Id.* The Relators allege Mr. Haught noticed a mistake in Ms. Townsend's email and quickly clarified his directive to Ms. Sullivan by stating, "I don't need a report just like the attachment. The report should show total numbers and dollars, usage or underutilization." *Id.*; *See* (ECF No. 1-28 at 6) (Emphasis added).

Ms. Sullivan then turned to the head of the KSO, Mr. Weaver, and Relator Howard (again) to prepare Mr. Haught's report. *Id.* The Relators allege Relator Howard told Mr. Weaver he did not want to be associated with the report because it would be tantamount to providing false information to the Government (ECF No. 1 at 39). The Relators allege Mr. Weaver nonetheless directed Relator Howard to prepare the report. *Id.* The Relators allege that by removing its troubling utilization numbers from the report, KBR sought to keep the Government in the dark about its excess materials and wasteful ordering. *Id.* The Relators allege such episodes occur regularly at KBR, where employees are told to avoid using email when

talking about excess materials and underutilization. *Id.* The Relators allege in one instance Mr. Haught told KBR materials employees during a conference call to refer to excess materials as “redistributable” materials because the Government would be less likely to notice the euphemism. *Id.*

The Relators allege KBR’s top LOGCAP Management knows about the improper practices responsible for KBR’s buildup of excess materials, but has buried the information. The Relators allege after Relator Howard’s supervisors forced his resignation in August 2009 over his complaints about KBR’s wasteful practices, he resolved to tell KBR’s senior management about the conduct he witnessed. *Id.* at 39-40. The Relators allege that on or about February 25, 2010, Relator Howard phoned KBR’s Baghdad headquarters and spoke with Chief of Staff Jeff Rock and Deputy Program Manager Rich Kaye. *Id.* at 40. The Relators allege Mr. Rock and Mr. Kaye comprised two of the six members of KBR’s LOGCAP III Senior Leadership Team. *Id.* The Relators allege that during a meeting, Relator Howard informed Mr.

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129 at 4-9). The Relators allege that although Mr. Rock did not acknowledge receiving the forwarded email, KBR soon acted to prevent its employees from leaking any more information. *Id.* On March 11, 2010, Ms. Sullivan emailed KBR's Maximo staff saying, "Do not speak to anyone outside of KBR about any internal business," *See* (ECF No. 1-30). The Relators allege a KBR employee forwarded this email to Relator Howard. *Id.*

The Relators allege that despite its top management having specific information about excess materials, KBR did not act on Mr. Howard's warnings or disclose them to the Government. (ECF No. 1 at 40). Instead, the Relators allege KBR continued to conceal excess materials and underutilization from the Government, trusting it could reduce its inventory without the Government becoming aware of its problems. *Id.* at 41. The Relators allege that in this effort KBR decided to reduce its stockpiles of excess materials by returning millions of dollars' worth of property to the Government that some of its LOGCAP sites still needed and

operations in Iraq and would soon be cleared to hide the excess materials. *Id.* Because of this, the Relators allege KBR senior management told employees to funnel as much material as possible into PCARSS, without checking that the material was truly no longer needed.

In April 2009, KBR issued an Operational Directive for Non-Demand Supported Stock Removal. *Id.*; *See* (ECF No. 1-31). The purpose of the Directive was to eliminate material with less than two demands in the last year. (ECF No. 1 at 41-42, ECF No. 1-31 at 1). Managers were to review their storerooms, identify excess materials, and report them to the Plant Clearance Officer for disposition. (ECF No. 1 at 42, ECF No. 1-31 at 1-4). However, the managers were not to look in TREC, unserviceable or inactive storerooms when identifying excess materials. *Id.* Further, they were not to report any reserved property. The Directive required them and the DMC to cross-level the excess materials they found against existing requisitions before submitting the materials to the Government through PCARSS. This was to be completed by August 2009. *Id.*

The Relators allege KBR sent a signed memorandum to DCMA each time it entered property into PCARSS. (ECF No. 1 at 42). The memorandum stated:

KBR request disposition instructions for the attached listed property. It has been determined that this equipment is excess serviceable items to the contract and there is no further use for the property in support of the mission requirements. The attached list of item(s) have been screened for cross level requirements throughout the theater of operation. The items have been screened and verified there are no foreseeable requirements in support of the mission at this time.

Id.; *See* (ECF No. 1-32 at 1). The Relators allege a KBR property manager, project manager, material control manager, and the DMC signed the memorandum. (ECF No. 1 at 42). The Relators allege these memoranda were patterned because KBR did not try to cross-level the materials it entered into PCARSS.

Throughout 2009, the Relators allege Relator Hemphill and the DMC witnessed property being submitted to PCARSS without the DMC having screened it for internal demands. On June 18, 2009, KBR's Theater Materials Manager, Rochelle Knight acknowledged as much, saying KBR was not cross-leveling PCARSS submissions "with . . . due diligence"; See (ECF No. 1-33 at 2). The Relators allege that in April 2009, Mr. Haught ordered DMC manager Brandon Simmons to sign PCARSS memoranda where not the materials had been cross-leveled. (ECF No. 1 at 42). Rather than falsify certify materials had been screened for cross-level requirements, the Relators allege Mr. Simmons resigned. at 43.

The Relators allege KBR's response to Simmons' resignation was to cut the DMC out of the PCARSS process. On June 24, 2009, Ms. Knight announced via email, "[i]t is no longer a requirement to send [PCARSS requests] to th

PCARSS, under its existing process. For example, taking the first line of a June 7, 2009, PCARSS schedule (60 tube tires) the Relators allege Mr. O'Muirgheasa found there were two open MR's from other KBR sites for the same item. Mr. O'Muirgheasa concluded:

We are proposing to send [property] . . . to the PCARSS process because it is showing as a non-demand supported item in the storeroom of the site submitting the PCARSS schedule; [yet it is a (correctly-classified) STK item in several other storerooms in theater; [and it is being actively procured. Instead, we should be cross leveling/transferring this item where it is needed, then sending the remainder (if any) to PCARSS.

Id.; *See* (ECF No. 1-34 at 12).

The Relators allege that at the time of Mr. O'Muirgheasa's email, KBR had submitted dozens of PCARSS memoranda identical to the one Mr. O'Muirgheasa identified as false. The Relators allege KBR did not retract or amend these PCARSS submissions following Mr. O'Muirgheasa's email, and instead ignored his concerns. The Relators allege on July 1, 2009, Mr. Haught issued a Technical Directive adopting Ms. Knight's PCARSS revisions. *See* (ECF No. 1-7 at 1-2) In the Directive the Relators allege Mr. Haught stated excess materials should have been available for cross-leveling before being selected for PCARSS, and thus that DMC review of every PCARSS submission would be redundant. However, the Relators allege Mr. O'Muirgheasa's PowerPoint had shown Mr. Haught that KBR's processes were broken and would only get worse with Ms. Knight's changes. (ECF No. 1 at 44). The Relators allege KBR disregarded Mr. O'Muirgheasa's warnings because it was unwilling to delay its inventory drawdown, or sacrifice its current purchases, for the sake of eliminating its excess materials properly. *Id.*

The Relators allege Mr. Haught left LOSEP in August 2009 and was replaced by Elias Faris, a specialist on the PCARSS process. Under Mr. Faris, the Relators allege KBR continued to send materials to the Government through PCARSS. The Relators allege KBR

began packing excess materials into connexes, shipping containers, and once packed KBR stored the connexes in anticipation of shipping them to Afghanistan for use on LOGCAP IV. *Id.* As of the day the Complaint was written, the Plaintiffs allege many connexes that have neither gone to Afghanistan nor to the Governme

which DCMA had provided disposition instructions *Id.*; *See*

Soon after the call, Ms. Austin emailed Townsend to memorialize the conversation, and she also summarized statements Townsend made about cross-leveling. Specifically, Ms. Austin stated:

Just to reiterate our conversation today, KBR is currently re-leveling material stock at a 162.5 day level (50% below) previous 365 day (100%) established levels with base closures. When a material requisition is submitted, the request is screened to see if the item(s) are available within KBR and no longer needed at that located site. If the item is not in stock at any KBR

The Relators allege that even though DMUirgheasa alerted DCMA to Ms. Townsend and Mr. Hernandez's false statements on this occasion, on information and belief KBR has misled DCMA repeatedly about its material practices, both before and during the Iraw drawdown. *Id.* The Relators allege that attesting to this are the efforts by Ms. Hearn and Ms. Townsend, the two most senior KBR officials on the call, to hide information from the Government. *Id.* The Relators allege KBR's misstatements have enabled it to continue ordering far beyond its needs, at the expense of taxpayers.

DISCUSSION

"The FCA imposes liability where any party knowingly presents or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). To establish liability under this theory, a relator must prove the existence of: (1) a false or fraudulent claim; (2) which was presented for payment, caused to be presented for payment, by the defendant; (3) with knowledge the claim was false." *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 709 (7th Cir. 2015). According to the FCA, a "claim" is "any request or demand, whether under a contract or otherwise, for money or property . . . that is presented to an officer, employee, or agent of the United States; or is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest . . ." 31 U.S.C. § 3729(b)(2)(A). In satisfying the knowledge element, a relator must prove the defendant acted with "actual knowledge," "deliberate ignorance of the truth or falsity," or "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A). The FCA does not require a relator to prove a defendant's specific intent to defraud. 31 U.S.C. § 3729(a)(1)(B). Additionally, "a mere breach of contract does not give rise to liability under the [FCA] [However,] [i]f the breaching party falsely claims to be in

compliance with the contract to obtain payment [from the Government] there may an actionable false claim.” *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 824 (7th Cir. 2011).

After review of the voluminous record, it is evident that the premise of the Relators’ claim is that during the time they worked for KBR in Iraq and Kuwait they discovered KBR knowingly and routinely violated their cross-leveling requirements, and concealed those violations from the Government. (ECF No. 53) As a result, the Relators argue KBR sought substantial payments from the Government for costs that were not allowable, and if the Government had known the truth it would not have paid for these excess goods because KBR violated material terms of LOGCAP III. *Id.*

allegedly “unreasonable” costs is sufficient to constitute a violation of the FCA is an allegation that appears nowhere in the Complaint

Conversely, the Relators argue KBR's act of returning supplies to the Government for disposition and stating on PCARRCs that such items had been screened "for cross level requirements throughout the theater of operations" was a false representation because KBR routinely failed to follow its established practices that required it to cross-level before returning equipment to the Government. (ECF No. 42 at 25) The Relators argue a knowing request to the Government for the payment of money which is not owed is unquestionably a false claim. (ECF No. 46 at 5) (citing *United States v. Bornstein*

finds it appropriate to address in detail KBR's argument that both *Watkins* and *Sanford-Brown* are dispositive at this stage of litigation, in addition to the other relevant case law that has been cited and relied upon by both parties. With respect to *Watkins*, the Court notes *Watkins* consisted of an entirely different factual situation that led the court ultimately granting the defendant's motion to dismiss. Unlike the relator in *Watkins*, the Relators here have not alleged a false certification theory of false claims liability. On the contrary, the Relators theory of liability is based on KBR's alleged act of seeking millions of dollars' worth of payments from the Government for costs that were unallowable and unreasonable, and if the Government had known the truth it would not have paid for the excess goods because KBR violated material terms of LOGCAP III.

Focusing primarily on the issue of reasonable prices, and accepting as true all factual allegations in the Complaint, under LOGCAP III KBR was required to order Government property in "reasonable" quantities commensurate with the

“[w]hat is reasonable depends upon a variety of considerations and circumstances, including—

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor’s business or

Furthermore, with respect to the issue of falsity specifically, while the FCA does not expressly define the term “false,” the Seventh Circuit has held “[a] statement may be deemed ‘false’ for purposes of the [FCA] only if the statement represents ‘an objective falsehood.’” *ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 836 (7th Cir. 2011). The Complaint references a May 6, 2009, email from Mr. Ugalde, the KBR manager responsible for all LOGCAP III requisitions, that stated, “I don’t need a report just like the attachment. The report should show total numbers and dollars, not usage or utilization[.]” and directed Relator Howard to prepare a report that would amount to providing false information to the

premised upon the allegation that the invoices (i.e. requests or demands for payment) KBR submitted to the Government were themselves false because they contained unallowable and unreasonable costs.

The court in *Watkins* distinguished that case from *United States ex rel. Chilcott v. KBR, Inc.*, No. 09-4018, 2013 WL 5781660, (C.D. D.C. Oct. 25, 2013)) by stating in *Chilcott* “[it] explained that no certifications of compliance were necessary to plead the FCA claims at issue there and *indicta*, observed that the [c]ourt would be receptive to a claim that an invoice itself could be the false record or statement that influences the Government’s decision to pay.” *Id.* at *14. The court in *Watkins* acknowledged that in *Chilcott* it ultimately decided that issue did not need to be resolved because the relator in *Chilcott* “had adequately alleged that the filing of a standard invoice form carried with an express certification of compliance, and that disposition on a Rule 12(b)(6) motion to dismiss was not the proper stage at which to contest the veracity of a plaintiff’s allegations.” *Id.* Thus, the court in *Watkins* stated the allegations in *Chilcott* “were sufficient to convey to the [c]ourt that the plaintiff was pleading an affirmative statement/express certification was required by the defendant to obtain payment in that case.” *Id.* Similar to *Watkins*, that is not the situation in the instant case because the Relators have not plead an express certification theory of false claims liability.

Nevertheless, the instant case can further be distinguished from *Watkins* because in that case the court did not specifically address whether a reimbursement claim for unallowable costs is a false claim. Instead, *Watkins* focused on the relator’s allegation that statements of allowable costs submitted along with

Watkins, 2015 WL 2455533 at *14. Continuing in its analysis, the court rejected the relator's argument that the FCA does not require in its any certification requirement by highlighting 31 U.S.C. § 3729(a)(1)(B) and noting

Government's payment decision, and that had the Government known about such costs it would not have paid, therefore certification is not an issue (ECF No. 1 at 48, ECF No. 49 at 56-58).

Moreover, for purposes of clarity, this Court agrees with *Watkins* that the terms "record or statement" in § 3729(a)(1)(B) should not be interpreted to encompass the term "claim" because "claim" has been defined by § 3729(a)(2) to mean "any request or demand" for money or property.¹⁰ As such, the Court finds the alleged invoices submitted by KBR were "claims" under § 3729(a)(1)(A), the section of the FCA relied on by the Relator in this case. *See* (ECF No. 1 at 48 ¶136, ECF No. 50 at 7). *Not* the Court finds it appropriate to distinguish this case from *Sanford-Brown*, a case in which the relator alleged regulatory violations that had

In addressing the § 3729(a)(1)(A) theory of liability the Court stated, “[g]ood-faith entry into the PPA is the *condition of payment* necessary to be eligible for subsidies under the U.S.

regulation that contains, on its face, a direct nexus to the [G]overnment's payment decision is . . . actionable under the FCA." *United States v. Rogan*, 459 F. Supp. 2d 692, 717-18 (N.D. Ill. 2006) aff'd, 517 F.3d 449 (7th Cir. 2008). As such, at this stage of litigation, without the benefit of discovery this Court cannot dismiss the ~~Reid~~ Complaint because the allegations stated therein "relate to actual money that was or might

another KBR site in the theater simultaneously placed new orders for the same supplies. (ECF No. 1-34 at 3-12). The presentation states:

We are proposing to send [property] . . . to the PCARSS process because it is showing as a non-demand supported item in the storeroom of the site submitting

materials requisitions without screening them from sources currently available in KBR (ECF No. 1 at 24-25, ECF No. 1-9); a May 28, 2010, email in which Ms. Sullivan stated “[w]e created [the] LC-IRQ-DF-999 storeroom at [the] D and F [sites] to avoid making inventory adjustments in a TREC. We can do the same for every site. I really don’t want TREC audits [to] occur especially not right now” (ECF No. 1-15 at 2); and Mr. Faris’ response which stated KBR was developing processes “to get away from TREC which should have never been created in the first place but we are where we are and have to fix it” (ECF No. 1-15 at 2).

The Complaint alleges the scheme KBR participated in included: (1) a failure to cross-level before purchasing materials (ECF No. 1 at 24-25, 32, 35-36, 38); (2) failure to properly remove materials from TREC status (ECF No. 1 at 26-28, 30, ECF No. 1-11); (3) the improper reservation of goods (ECF No. 1 at 31-34, ECF No. 1-18); and (4) the act of returning supplies to the Government as excess while ordering more (ECF No. 1 at 41-44, ECF No. 1-28). As such, the Court finds the Complaint sufficiently alleges KBR acted with at minimum “deliberate ignorance of the truth or falsity or “reckless disregard of the truth or falsity of the information.” 31 U.S.C. § 3729(b)(1)(A).

II. Federal Rule of Civil Procedure 9(b)

As mentioned above, Federal Rule of Civil Procedure 9(b) requires relators in FCA cases to allege the “who, what, when, where, and how of the fraudulent conduct, although the exact level of particularity that is required will necessarily differ based on the facts of the case.” *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011). In a multiple-defendant case a relator must “plead sufficient facts to notify each defendant of his alleged participation in the scheme[,] . . . [and] absent a compelling reason the [relator] is normally not entitled to treat multiple corporate defendants as one entity.” *Sanford-Brown, Ltd.*, 788 F.3d at 705-06.

Furthermore, in regards to the invoices ~~that~~ the grounds upon which the Relators' false claim is premised, the Seventh Circuit has held ~~that~~ ~~dates~~ need not provide invoices and the accompanying representations at the outset of a ~~Suit~~ ~~by~~

Finally, with respect to whether Defendant KBR, Inc. should be dismissed from this action the Complaint alleges Defendant Kellogg Brown & Root Services, Inc. is a wholly-owned subsidiary of KBR, Inc, and on December 14, 2001, LOGCAP III was awarded to Brown & Root Services, Inc., who later transferred its responsibilities under the contract to Defendant Kellogg Brown & Root Services, Inc. While this fact on its face would seem to support KBR's argument that the Complaint unequivocally alleges Defendant Kellogg Brown & Root Services, Inc. is the sole entity that held the LOGCAP III contract and billed the Government for services provided therein at all relevant times of alleged fraudulent conduct in the Complaint, the Court also is required to take into consideration the attachment submitted with the Complaint.

When looking at such attachments, many of the high ranking individuals alleged to have knowledge of KBR's fraudulent activities list KBR, Inc. in the signature block of their emails. Such individuals consist of Mr. Kaye, Richard Abraham, Mr. Faris, Ms. Sullivan, Mr. Roy, Mr. O'Muirgheasa, Mr. Hernandez, Shon Shanley, Ms. Townsend, Mr. Vujic, Mr. Shelton, Thomas Sellars, Jim Luchsinger. (ECF No. 1-10, ECF No. 1-12, ECF No. 1-14, ECF No. 1-16, ECF No. 1-20, ECF No. 1-22, ECF No. 1-26, ECF No. 1-28) It is hard to imagine why such individuals would list Defendant KBR, Inc. in their email signature if they do not work for the company, and this suggests the aforementioned individuals were employed by Defendant KBR, Inc. even though Defendant Kellogg Brown & Root Services, Inc. is alleged to have held the LOGCAP III contract. Furthermore, when looking at *Watkins*, a case relied upon by KBR in support of their Motion to Dismiss, that case states "KBR, Inc. . . holds the LOGCAP III contract and has assigned responsibilities for the contract to KBR SI." *Watkins*, 2015 WL 2455533 at *2. The Complaint and the attachments thereto have provided KBR with enough information to notify Defendant KBR, Inc. of the circumstances of alleged participation in the scheme. As such,

the Court finds at this time, ~~De~~endant KBR, Inc. will remain in this case along with Defendant Kellogg Brown & Root Services, Inc and KBR's Motion to Dismiss is denied.

CONCLUSION

For the reasons stated above, KBR, ~~and~~ Kellogg Brown & Root Services, Inc.'s Motion to Dismiss (ECF No. 38) is DENIED ~~and~~ the Relators' Motion to Compel (ECF No. 47) is MOOT. This matter is referred to ~~a~~ Magistrate Judge for further handling.

ENTERED this 15th day of October, 2015.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge