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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA and STATE OF CALIFORNIA, *ex rel.* JAMES M. SWOBEN,

Plaintiffs,

v.

SCAN HEALTH PLAN, a California corporation, fka SENIOR CARE ACTION NETWORK; SENIOR CARE ACTION NETWORK, a business entity, form unknown; SCAN GROUP, a California corporation; *et al.*,

Defendants.

NO. CV 09-5013 JFW (JEMx)

UNITED STATES OF AMERICA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RELATOR'S MOTION FOR "PARTIAL SUMMARY JUDGMENT"

[FILED/LODGED CONCURRENTLY: (1) CALIFORNIA'S MEMORANDUM; (2) STATEMENT OF GENUINE DISPUTES, ETC.; (3) SUPPORTING DECLARATIONS AND EXHIBITS; (4) APPENDIX OF AUTHORITIES FOR THE COURT'S CONVENIENCE; (5) [PROPOSED] STATEMENT OF DECISION; (6) [PROPOSED] ORDER]

Date: March 30, 2015
Time: 1:30 p.m.
Place: Courtroom of the Hon. John F. Walter

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Under the federal and State of California False Claims Acts ("FCAs"), if there is a "public disclosure" as defined by 31 U.S.C. § 3730(e)(4)(A) and Cal. Gov't Code § 12652(d)(3)(A), respectively, the relator must then prove that he is an "original source" as defined by 31 U.S.C. § 3730(e)(4)(B) and Cal. Gov't Code § 12652(d)(3)(B), respectively. If the relator fails to so prove, then the Court lacks subject matter jurisdiction over the relator's action. The present relator James Swoben ("Swoben") brought a partial summary adjudication motion to try to establish that there was no applicable public disclosure. His attempt fails.

Under F.R.Civ.P. 56(a), summary adjudication may be granted only if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. There is a genuine dispute as to some of Swoben's alleged "undisputed facts." The United States of America ("United States") and the State of California ("California") (collectively, "the governments") have also presented additional material facts, at least some of which Swoben is almost certain to dispute, since these facts help defeat his arguments.[1] Thus Swoben cannot be granted summary adjudication. In addition, he is not entitled to it as a matter of law. The law is that:

> The public disclosure bar is triggered if three things are true: (1) the disclosure at issue occurred through one of the channels specified in the

[1] See United States of America and State of California's Statement of (1) Genuine Disputes of Material Fact and (2) Additional Facts Relating to the Issues Raised in the Relator's Motion for "Partial Summary Judgment," filed herewith ("GD"). These additional facts are material to the arguments and legal conclusions set forth in this memorandum, Part III, and in California's Memorandum of Points and Authorities in Opposition to Relator's Motion for Partial Summary Adjudication, filed concurrently herewith ("California's Opp. Brief"), Parts III.A, C-E, and F(3). The United States incorporates herein by reference the entirety of California's Opp. Brief. The governments suggest that the Court read the United States' Opp. Brief first.

statute; (2) the disclosure was "public"; and (3) the relator's action is "based upon" the allegations or transactions publicly disclosed. § 3730(e)(4)(A). [U.S. ex rel.] Malhotra v. Steinberg, 770 F.3d 853, 858 (9th Cir. 2014).[2] The State of California Controller's Office's June 30, 2008 report[3] was (1) an administrative report and a report in an administrative investigation (see Part III.A below), (2) publicly disclosed (see Part III.C below), (3) on which Swoben's first and second causes of action for Medi-Cal fraud are "based" (are substantially the same as) (see Part III.B below). Another way of putting no. (3) is that the SCO report disclosed the material transactions underlying Swoben's FCA claims alleged in the first two claims for relief ("causes of action") of his original Complaint, and thus contains the requisite "allegations or transactions" required by 31 U.S.C. § 3730(e)(4)(A). (See Part III.B below.)[4]

Finally, because the Court is faced with a question of subject matter jurisdiction, the Court is entitled to adjudicate the disputed facts and to decide the public disclosure matter on the papers presented pursuant to Swoben's present motion. (See California's Opp. Brief, Part III.G.) Because the evidence and the

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[2] The parties agree that federal FCA case law is persuasive authority regarding the meaning and application of the California FCA. Swoben's Opening Brief, 10:7-18; State v. Altus Finance, S.A., 36 Cal.4th 1284, 1299, 116 P.3d 1175, 32 Cal.Rptr.3d 498 (2005).

[3] What Swoben calls "the Brownfield memo" and what the United States of America ("United States") and California (collectively, "the governments") call "the SCO report" and "the SCO's report").

[4] All references to the "Complaint" herein are to the first and second causes of action thereof. Although the federal and California FCA statutes refer to an "action," a federal FCA public disclosure and original source analysis is conducted only on a claim-by-claim basis. Rockwell Intern. Corp. v. U.S., 549 U.S. 457, 476 (2007). The parties agree that the applicable public disclosure statutes are the 1986 federal statute and the 1987 California statute. (See Memorandum of Points and Authorities in Support of Relator's Motion for Partial Summary Judgment, filed on January 31, 2015 ("Swoben's Opening Brief"), 8:14-10:18; California's Opp. Brief, Part III.A.)

law show that the SCO report was a public disclosure as to Swoben and this action, the governments submit that the Court should so decide, now.

II. STATEMENT OF FACTS

The SCO report and the Complaint: In its July 30, 2013 minutes in the above-captioned action ("this action"), p. 3 (see Appendix of Authorities for the Court's Convenience, filed herewith ("Appendix")), the Court discusses Medicare's

> capitated, per-member-per-month payments …. Because MA Plans receive the same monthly payment regardless of the volume of services a beneficiary actually uses, the MA Plan assumes the risk a beneficiary's expenses may exceed the capitated payment for that month.

Medi-Cal's managed care payments work the same way.[5]

The Complaint alleges that the defendant SCAN Health Plan ("SCAN") received duplicative payments from Medicare and Medi-Cal for some of the same health care services that SCAN contracted to provide to its patient members. The SCO report alleges that SCAN appeared to be doing so. (GD Fact no. 20.) The Complaint's key allegations repeat and are supported by similar conclusions in the SCO report. (See California's Opp. Brief, endnote 1; GD Fact nos. 140-144.) Swoben blames SCAN for the alleged duplicative payments, charging SCAN with hiding, from the State of California, SCAN's Medicare revenue (GD Fact no. 21) and SCAN's true Medi-Cal costs.[6]

Examples of Swoben's Lack of Knowledge: As late as August 1, 2013, long after

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[5] California Welfare & Institutions Code, Division 9, Part 3, Chapter 8 (Pre-Paid Plans (§§14200-14499.77) (see especially, Article 8 (§§14499.7-14499.77), which covers risk-shifting); California Code of Regulations, Title 22, Division 3, Subdivision 1, Chapters 4, 4.1, and 4.5 (§§53000-53928) (see especially §§ 53320, 53222 (in the Appendix)).

[6] This "cost" allegation appears in the Second Amended Complaint, ¶ 16, 5:14-27, whose text Swoben now asserts is somehow already in his original Complaint. (GD Fact no. 22.)

this action had settled as to SCAN, Swoben demonstrably did not understand how the Medi-Cal program calculated the capitation rates for Medi-Cal's payments to SCAN. On August 1, 2013, Swoben testified that for the period at issue in his Complaint, 2001 through 2007, SCAN's prospective capitated Medi-Cal rate was negotiated with SCAN, and that SCAN's lobbyist was involved. (GD Fact no. 24.) All this was untrue for 2001 through 2007. In fact, in those years, the Medi-Cal rates for SCAN were never negotiated with SCAN or influenced by any SCAN lobbyist. California's Department of Health Care Services ("DHCS") and its predecessor agency simply set the rates and inserted them into SCAN's Medi-Cal contract. (GD Fact no. 25.) As Swoben finally admitted, "I had no way to know how they [Medi-Cal] were treating them [SCAN] …." (Swoben Depo., after his corrections to the transcript. Before his corrections, he testified: "I had no way to know that they [SCAN] were cheating them [Medi-Cal] …." Id.) (GD Fact no. 26.)

As of August 1, 2013, Swoben had never seen any of SCAN's Medicare and Medi-Cal contracts. (GD Fact no. 27.) In his position at SCAN, he also never had access to SCAN's financial accounting system, which included revenue and expenses -- the financial information that Swoben's Complaint alleges SCAN hid (in whole or in part) from DHCS. (GD Fact no. 28.)

As of August 1, 2013, Swoben did not know what Medi-Cal was paying SCAN for its dual-eligible ("Medi-Medi") members, despite alleging in his Complaint, ¶ 12, that it was approximately $3,300 per member per month. (GD Fact no. 29a.)

Nor had Swoben learned from his work at SCAN the key information in his Complaint. (GD Fact no. 29.) SCAN employed Swoben between March 1, 2004 and September 30, 2006 as its Encounter Data Manager.[7] The SCAN encounter data, which

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[7] (Uncontroverted Fact ("UF") 1.) In addition, SCAN never employed him thereafter, at least as of the date of his first deposition session in 2013. (GD Fact no. 30.) Finally, in his résumés provided on August 1, 2013, Swoben lists no State or federal government employment after 1997. (GD Fact No. 23.)

Swoben transmitted to DHCS (UF 5), did not contain any information regarding how much Medi-Cal (or Medicare) was paying SCAN, or even any SCAN requests for Medi-Cal (or Medicare) payment. (GD Fact no. 31.)

The encounter data also did not determine or influence what SCAN's capitated Medi-Cal rates would be. (GD Fact no. 32.) Swoben should have known this (GD Fact no. 33), because (1) he asserts that from approximately 1999 to March 1, 2004, SCAN had not given DHCS the encounter data (GD Fact no. 34), yet (2) he asserts that DHCS still paid SCAN capitated rates on SCAN's Medi-Cal contracts during those years. (GD Fact no. 35.)

Swoben testified that he learned about the alleged requirement that SCAN provide to the State of California SCAN's Medi-Cal costs (separate from its Medicare costs) (GD Fact no. 36) from his having to provide DHCS with the encounter data. (GD Fact no. 37.) Swoben believed that his own encounter data practice of not distinguishing Medicare and Medi-Cal services (and costs) had wrongfully "obfuscated" SCAN's Medi-Cal costs – given DHCS "too much data … instead of not enough." (GD Fact no. 38.) But this makes no sense, because Swoben admitted that the State of California approved the encounter datas' format, which did not distinguish between SCAN's Medicare and Medi-Cal costs. (GD Fact no. 39.)

Indeed, everything Swoben learned by the time he left SCAN – both from his own labor and otherwise – did not yet lead him to conclude that SCAN had defrauded the Medi-Cal program in the way he alleged in his Complaint: hiding financial information from the State of California. (GD Fact no. 40):

> Q So at the time you were at SCAN, you did not realize that SCAN was hiding any financial data from the State of California?
>
> A Not really.
>
> Q No?
>
> A No.

Id. Accordingly, while at SCAN, Swoben told no one there what he thought about the

SCAN Medi-Cal fraud that he now alleges in his Complaint – despite complaining to SCAN about the Medicare conduct that he alleged in his third cause of action, for which the United States has given him a relator's share in this action of $687,548.84. (GD Fact no. 41.)[8]

Then, in April 2007, Swoben had lunch with Rolando Chavez (GD Fact no. 44) , SCAN's former Director of Financial Planning and Analysis. (Swoben gives him an incorrect title and the name "Orlando.") (GD Fact no. 45). At the luncheon, Chavez told Swoben things about SCAN that were new to Swoben and that surprised him. (GD Fact no. 46.)[9] To wit, Chavez said that (1) "SCAN billed for and received capitated monthly payments of approximately $3,300 per beneficiary from Medi-Cal without reduction in payment for the care and services SCAN undertook and provided under the Medicare Social HMO contract." (2) SCAN realized a 65% profit margin on its Medi-Cal contract. (3) This amounted to more than $20 million per year of the Medi-Cal contract. (4) He (Chavez) had set up a special reserve account, into which went SCAN's Medi-Cal profits, because he was afraid that someday the State would ask for its money back. (5) SCAN had not yet repaid to the State of California the (supposed) "excess payments" and "overpayments" (as Swoben put it). (6) The State did not know SCAN's Medi-Cal profit. (7) SCAN's actuary was not willing to certify the actuarial statement that SCAN

[8] After leaving SCAN, Swoben worked for Medical Data Exchange and learned there, "for patients covered under both Medicare Advantage and Medi-Cal fee for service, that SCAN was able to separate costs allocable to Medicare services …." (GD Fact no. 42.) Swoben obviously considered this information unimportant, because he failed to list it in his August 4, 2009 statutorily required (31 U.S.C. § 3730(b)(2); Cal. Gov't Code § 12652(c)(3)) written disclosure of substantially all material evidence and information [he] possesses …." (GD Fact no. 43.)

[9] This is Swoben's testimony before contradictory deposition corrections. (See evidence in support of GD Fact no. 46.) Contradictory deposition revisions are not permitted. The Court may strike them, especially if (as here, see GD Fact no. 47) the witness and his counsel give no reason for them, in violation of F.R.Civ.P. 30(e)(1)(B). See, e.g., Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1224-1226 (Part II.A) (9th Cir. 2005) .

gave to the Medi-Cal program, so SCAN hired a new actuary who would certify it.[10]

This group of allegations did not explain, however, how it was that the State's not knowing SCAN's Medi-Cal profit could have caused (or would have naturally influenced) DHCS to pay SCAN the supposed "overpayments." In other words, what SCAN financial information, if any, did DHCS consider, ignore, or not have, when it set SCAN's capitated Medi-Cal rates?[11]

Nonetheless, in late April 2007, after his Chavez luncheon, Swoben met with State Senator Lowenthal and his staff, who then requested that the SCO make inquiries. (UF 6 and 7; GD Fact no. 52.) The SCO started its investigation thereafter. (GD Fact no. 53.) Meanwhile, Swoben waited approximately one year to speak with the SCO, without obtaining new information about SCAN and Medi-Cal. (GD Fact no. 54.) Finally, on April 9, 2008, the SCO Division of Audits interviewed Swoben. (UF 8; GD Fact no. 55.)

Swoben's sworn interrogatory answer gives a disputed account of what he said to Lowenthal, Lowenthal's staff, and the SCO.[12] Three things stand out about the SCO

---

[10] (GD Fact no. 48.) Swoben testified that after he and Chavez left SCAN, they spoke about SCAN and Medi-Cal only once, and only in that April 2007 luncheon. (GD Fact no. 49.) But Swoben advised federal and State investigators (on September 25, 2009) that in October 2006, he had spoken with Chavez by telephone regarding SCAN and Medi-Cal and that during that conversation, Chavez stated 1) that he believed that SCAN had a 60% profit margin on the California Medi-Cal SHMO contract, and 2) that SCAN's 2005 annual report showed $1 billion in revenue with a $100 million profit, resulting in an overall 10% profit margin. (GD Fact no. 50.) Swoben now asserts (in his 2013 deposition) that if he told the government investigators all that, it was not true ("not correct"). (GD Fact no. 51.)

[11] For FCA liability, "…the false statement or course of conduct must be material to the government's decision to pay out moneys to the claimant." U.S. ex rel. Hendow v. University of Phoenix, 461 F.3d 1166, 1172 (9th Cir. 2006), emphasis added.

[12] In deposition, Swoben testified to telling the Lowenthal office and the SCO certain limited things. (GD Fact no. 56.) Swoben even admitted that he might not have told the Lowenthal office everything he had learned from Chavez in the luncheon; he did

(footnote cont'd on next page)

interview, however: First, that Swoben orally reiterated two pages of "talking points" he had given to the SCO (according to the chief SCO investigator (GD Fact no. 73), that was all that Swoben did); produced no evidence or documents; and suggested that the SCO talk with a former SCAN employee who turned out to be Chavez. (GD Fact nos. 63, 64.) Second, that Swoben was not certain that SCAN was in fact being paid for overlapping Medicare and Medi-Cal services. (GD Fact no. 65.) He testified (GD Fact no. 66, emphasis added):

> … I wanted them [the SCO] to see if there was one of -- see if one of the reasons why this program was so profitable was that they [DHCS] were paying for services with overlapping benefits of being paid twice. [13]

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not remember. (GD Fact no. 57.) In his later interrogatory answer, however, Swoben now states, in boilerplate fashion, that he told Lowenthal, his staff, and the SCO auditors, in detail, every important factual allegation made in his first and second causes of action. (GD Fact no. 58.) Not only is this vastly more information than he testified to in deposition (GD Fact no. 59), but also, in his interrogatory answer, Swoben makes the boilerplate assertion that he later orally repeated all of these detailed allegations of his Complaint to federal and California investigators three separate times in three separate meetings. (GD Fact no. 60.) He did not. (GD Fact no. 61.) For most of these allegations, it also would be extremely odd for him to do so, since by then federal and State investigators already had Swoben's *qui tam* Complaint (GD Fact no. 62), making its oral repetition unnecessary.

[13] Pursuing this question, Swoben focused on SCAN's cost ratio:

> Q Now, in your statement [to the SCO], you -- you asked the question … at the end of the fifth paragraph, quote, "Was the benefit already paid by Medicare used in the medical cost ratio for the Medi-Cal -- for the Medicare rate." Were you asking the SCO that question?
> A I was wanting them -- that is what I wanted them to confirm which -- which was my deduction.
> … We wanted to know if these benefits were already paid -- the benefits paid by Medicare were in the cost ratio for the Medi-Cal rate.
> … [W]hat I wanted them to determine -- what I asked the auditors to determine [was] whether what was already paid for in Medicare, the services that were provided by Medicare, were included in the medical cost

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(GD Fact no. 66.) Third, that Swoben did not know whether DHCS had actually considered SCAN's Medicare revenues, in setting SCAN's Medi-Cal capitation rate. (GD Fact no. 69.) Swoben asked the SCO to find the answer. (GD Fact no. 70.) He testified (GD Fact no. 71, emphasis added):

> Q … [Y]ou were asking the auditors to find out whether the State looked at services that Medicare was already providing. Is that what you're saying?
>
> A Yes.

As the SCO report itself put it (GD Fact no. 72, emphasis added):

> We met with the former SCAN employee [Swoben] who made the original complaint with Senator Lowenthal's office. The issue raised by the former employee is whether the DHCS considered the amounts that Medicare was paying SCAN when determining its contract rates with SCAN.

The chief SCO investigator (GD Fact no. 73), who eventually spoke with Chavez as well as with Swoben (GD Fact nos. 107-109), realized that neither Swoben nor Chavez could know the answer to this question, or, indeed the general question of how DHCS was setting SCAN's capitated Medi-Cal rates and what information DHCS was considering in doing so. This is because they provided no basis and no evidentiary support (documents or otherwise) for any supposition about what information DHCS had considered in setting those rates, other than Chavez's showing that SCAN's Medi-Cal profit was large. Chavez and Swoben never provided to the SCO any documents

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> ratio for Medi-Cal which is the rate that was -- the losses were understated and the profit was too high ….

(GD Fact no. 67, emphasis added.) A health care company's medical "cost ratio" is the same as its medical "loss ratio," which is the cost to the company (here, SCAN) for providing a group of services, divided by premium that the government or other insurer pays the company for those services. (GD Fact no. 68.) Thus if SCAN were actually receiving payment from both Medicare and Medi-Cal for certain Medi-Cal services, then the Medicare revenue for the services should appear in the denominator of SCAN's cost ratio for Medi-Cal services.

showing what DHCS considered or did not consider in setting the rates, or how DHCS set the rates. Nor did either of them ever give the SCO any information obtained from DHCS that would answer these questions. As far as the lead investigator knew, neither of them had ever worked for DHCS or participated in the setting of SCAN's capitated Medi-Cal rates. Thus, he concluded, both men speculated that something was going on at DHCS, but they did not know what. (GD Fact no. 74; and see GD Fact nos. 75-82.) Accordingly, both Swoben and Chavez raised the "whether" issue quoted above. (GD Fact no. 83.) As the chief SCO investigator (GD Fact no. 73) recalled,

> [Swoben] did not know whether it [SCAN's Medicare revenue] was an offset already [from SCAN's Medi-Cal capitated rates]. He did not know the content of the contract that DHCS had with SCAN. He could not provide further details other than his allegations.

(GD Fact no. 84.) Therefore the SCO itself interviewed DHCS. (GD Fact no. 85.)

Meanwhile, from the time Swoben met with the SCO until he received its report, he obtained no new reliable information (either from people or documents) about his question.[14] When, finally, Swoben received the SCO report (UF 17), he could see that it answered his question unequivocally (and even provided additional information about DHCS's lack of consideration of SCAN's Medi-Cal costs) (GD Fact no. 90 (SCO report, p. 3), emphasis added):

> DHCS actuaries did not consider SCAN's costs of providing services when determining the contract rates. … DHCS did not take into account any

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[14] GD Fact no. 86. See also, GD Fact no. 87 (even thereafter, regarding William Dean, Swoben got no new information regarding SCAN; Swoben just provided information). The chief SCO investigator (GD Fact no. 73) also recalls that Swoben, in the process of referring the SCO to Chavez, reiterated information that appeared to come from Chavez. (GD Fact no. 88.) As to the third paragraph of Swoben's email ("The state rate did not consider what the federal government was already paying when it set the rate."), this information was not reliable. Neither Swoben nor Chavez ever provided the SCO investigators with any evidentiary support for it. (GD Fact no. 89.)

Medicare revenue in the development of the contract rates.

As Swoben put it (GD Fact no. 91):

> … [W]hat they [the SCO] found out is they [DHCS] didn't realize that SCAN was being paid for these [Medi-Cal] services.
>
> Q By?
>
> A Medicare. This is a coordination of benefits issue.

III. ARGUMENT

A. The SCO Report "Occurred Through [at Least] One of the Channels Specified in" the Federal Public Disclosure Statute.

The SCO report was "a[n] … administrative … report" (31 U.S.C. § 3730(e)(4)(A). See A-1 Ambulance Service, Inc. v. California, 202 F.3d 1238 at 1243 (9th Cir. 2000) ("it is axiomatic that agency actions are inherently 'administrative.'"); Schindler Elevator Corp. v. U.S. ex rel. Kirk, ___ U.S.___ , 131 S.Ct. 1885 (2011) ("something that gives information" is a "report" within the meaning of Section 3730(4)(e)(A)); Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280 (2010) (State and local agency reports qualify as "administrative reports" under Section 3730(4)(e)(A)); U.S. ex rel. Bly-Magee v. Premo, 470 F.3d 914, 919 (9th Cir. 2006) (a report by a California State auditor was a public disclosure under federal law). The SCO report also was a disclosure in the SCO's investigation (UF 12, GD Fact no. 92), and thus was a "disclosure … in a[n] …administrative … investigation" under 31 U.S.C. § 3730(4)(e)(A).[15]

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[15] Seal 1 v. Seal A, 255 F.3d 1154, 1161 (9th Cir. 2001) ("the term 'investigation,' as used in § 3730(e)(4)(A), must encompass any kind of government investigation -- civil, criminal, administrative, or any other kind."); Graham County, at 559 U.S. 302 ("the term 'administrative' … is not limited to federal sources.")

B. Swoben's Complaint is "Based Upon" the SCO Report, and the SCO Report Sufficiently Discloses "Allegations or Transactions" Under the Federal and State Public Disclosure Statutes.

1. Swoben's Complaint is "Based Upon" the SCO Report.

It is settled law in the Ninth Circuit that "based upon" in Section 3730(e)(4)(A) does not mean "derived from." Rather, "... 'based upon' means 'same as' or 'supported by.'... A claim [in an FCA *qui tam* complaint] is 'based upon' [a] public disclosure when the claim repeats allegations that have already been disclosed to the public ...." U.S. ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University, 161 F.3d 533, 537 (9th Cir. 1998).

It is also settled Ninth Circuit law that a *qui tam* complaint that, fairly characterized, repeats what the public already knows, but adds more allegations, is still "based upon" the public disclosure. See, e.g., A-1 Ambulance Service, Inc. v. California, 202 F.3d 1238, 1245 (9th Cir. 2000) (discussed below); Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1473 (9th Cir. 1996) ("The Wang court found there was public disclosure where the *qui tam* suit was 'supported by a few factual assertions never before publicly disclosed; but "fairly characterized" the allegation repeats what the public already knows.' Id. [Wang v. FMC Corp., 975 F.2d 1412 (9th Cir.1992)] at 1417."); U.S. ex rel. Mateski v. Raytheon Co., 2013 U.S. Dist. LEXIS 26398 (C.D. Cal. Feb. 26, 2013) ("'Based upon' does not mean 'solely based upon' -- a *qui tam* action partly based upon publicly disclosed information is deemed to fall within the jurisdictional bar of 31 U.S.C. § 3730(e)(4)(A). Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 920-21 (7th Cir. 2009).") (emphasis added). Other Circuits agree.[16]

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[16] See, e.g., U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) ("The phrase 'solely,' however, is not included in § 3730(e)(4)(A), which addresses actions 'based upon' public disclosure of the underlying allegations or transactions. Further, Precision Co., 971 F.2d at 552-53 [see citation below], explicitly repudiates the notion that § 3730(e)(4)(A) bars only actions based

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The plain language of Section 3730(e)(4)(A) generates this principle:

> [The relator] Precision would have us read this provision ["based upon" in § 3730(e)(4)(A)] to apply only to actions based "solely" upon publicly disclosed information. We cannot countenance Precision's interpretation. As a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." In this context, an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless "based upon" such allegations or transactions. Congress chose not to insert the adverb "solely", and we cannot, because to do so would dramatically alter the statute's plain meaning.
>
> Not only are we governed by the plain language of the statute, we must also be mindful that "statutes conferring jurisdiction on federal courts are to be

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'solely' upon publicly disclosed information, concluding that the statute applies to a '*qui tam* action ... based in any part upon publicly disclosed allegations or transactions.' 971 F.2d at 553."); U.S. ex rel. Fried v. West Independent School Dist., 527 F.3d 439, 442 (5th Cir. 2008) ("… we have held that if a *qui tam* action is 'even partly based upon public allegations or transactions' then the jurisdictional bar applies. United States ex rel. Fed. Recovery Servs., Inc. v. E.M.S., Inc., 72 F.3d 447, 451 (5th Cir.1995). Even if [the relator] Fried uncovered some nuggets of new, *i.e.*, non-public, information, his claims of fraud are based at least in part on allegations already publicly disclosed. Therefore, we hold that Fried's *qui tam* suit is based on publicly disclosed information. His claims thus are barred unless he can show that he is the original source of the information underlying his claim.") (emphasis added); U.S. ex rel. Poteet v. Medtronic, Inc., 552 F.3d 503, 514 (6th Cir. 2009) ("Any 'action based even partly upon public disclosures' will be jurisdictionally barred. McKenzie [v. BellSouth Telecommunications, Inc.,], 123 F.3d [935] at 940 [(6th Cir.1997 (emphasis added); accord Walburn [v. Lockheed Martin Corp.], 431 F.3d [966] at 975 [(6th Cir.2005)] ('[O]ur broad construction of the public disclosure bar ... precludes individuals who base any part of their allegations on publicly disclosed information from bringing a later *qui tam* action.'); Bledsoe I [U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.], 342 F.3d [634] at 646 [(6th Cir. 2003)] ('[A] person who bases any part of an FCA claim on publicly disclosed information is effectively precluded from asserting that claim in a *qui tam* suit.')."); U.S. ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548, 552-553 (10th Cir. 1992), discussed below.

> strictly construed, and doubts resolved against federal jurisdiction." F & S Construction Co. v. Jensen, 337 F.2d 160, 161 (10th Cir.1964. To insert the term "solely" into § 3730(e)(4)(A) would impermissibly expand federal jurisdiction …. [W]ith a little artful pleading, all *qui tam* plaintiffs could pass the jurisdictional threshold by fashioning complaints only "partly based" upon publicly disclosed allegations or transactions.
>
> … For all the foregoing reasons, we conclude that a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the "original source" jurisdictional requirement.

U.S. ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548, 552-553 (10th Cir. 1992) (emphasis added).

Applying the foregoing law, Swoben's first and second causes of action are clearly "based upon" the SCO report. See Part II (The SCO report and the Complaint) above. They both allege (the SCO report as a possibility, the Complaint as a certainty) the same duplicative Medicare and Medi-Cal payments to SCAN, and the Complaint's key allegations repeat and are supported by various conclusions of the SCO report. (See California's Opp. Brief, endnote 1, GD Fact nos. 140-144.)

Swoben argues that his Complaint adds something not in the SCO report: an allegation of fraud, which blames SCAN for what the SCO report noted was DHCS's lack of consideration of certain cost and Medicare revenue data, in setting SCAN's capitated Medi-Cal rates. But this added allegation does not rescue the first and second causes of action. They are still "based," at least in part, "upon" the SCO report, because they reiterate various conclusions of the SCO report.

2. The SCO Report Sufficiently Discloses "Allegations or Transactions" Under the Public Disclosure Statutes, Even if the Report Does Not Allege Fraud, FCA Liability, or Facts Showing the Same.

As the Ninth Circuit put it in U.S. [ex rel. Harshman] v. Alcan Elec. and

Engineering, Inc., 197 F.3d 1014, 1019-1020 (9th Cir. 1999), in affirming dismissal due to a prior public disclosure (the "Brooks complaint"):

> [The relator] Harshman's argument that the allegations in the Brooks complaint did not constitute public disclosure because they did not plead facts alleging FCA liability also fails. Specifically, Harshman contends that the allegations did not mention any overcharging, false-invoicing, false certification, or any other specific fraud on the government. As noted above, however, fraud need not be explicitly alleged to constitute public disclosure. See Hagood, 81 F.3d at 1473, 1474 n. 14.[17]

Indeed, in Seal 1 v. Seal A, 255 F.3d 1154 (9th Cir. 2001), the sole public disclosures were (1) "documents that … contained information raising the possibility that Zenith had committed fraud on the government similar to that committed by PBNEC" and (2) government attorneys' statements to the relator "that there was a possibility that some Zenith computers sold to the government had contained used PBNEC parts." (Id., at 255 F.3d 1157, emphasis added.) Pursuant to these disclosures of mere "possibility," the court affirmed dismissal due to lack of subject matter jurisdiction.

Thus, even if a complaint's additional, new allegations charge the defendant with fraud or an FCA violation, and the public disclosure did not (as Swoben contends here), the disclosure will still be deemed to satisfy Section 3730(e)(4)(A)'s "allegations or

[17] "… [T]he jurisdictional bar may be raised by public disclosure unaccompanied by an explicit allegation of fraud." Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1473 (9th Cir. 1996). See also, U.S. v. University of San Francisco, 2006 WL 335316 , *4 (N.D.Cal. Feb. 14, 2006) (Held: the relator's State law complaint constituted a prior public disclosure; "… [The relator] argued that her state law complaint was not a public disclosure under the FCA because it did not plead fraud. However, the substance of the prior disclosures need not explicitly mention the FCA nor explicitly allege the fraud to constitute a public disclosure. See Alcan Electrical and Engineering, 197 F.3d at 1019-20 (holding that [a] previous complaint that did not mention the FCA or any overcharging, false certification or any other specific fraud on the government still constituted [a] public disclosure) …").

transactions" (and "based upon") requirements -- so long as "the information publicly disclosed … contained the material facts underlying … [the relator's] allegation of fraud …." A-1 Ambulance Service, Inc. v. California, 202 F.3d 1238, 1245 (9th Cir. 2000).

In A-1, a (would-be) relator sued two California counties and their respective emergency ambulance service providers ("ambulance companies") for violating the FCA, because the counties' emergency ambulance service contracts offered little or no subsidy to cover the costs of ambulance services for the counties' indigent populations. The relator alleged that (1) in order to offset the losses incurred in serving indigent patients, the ambulance companies then were forced to charge artificially inflated rates to Medicare-covered patients, and (2) the counties thereby unlawfully shifted the cost of emergency ambulance services for their indigent populations to the federal government's Medicare program. The court found the following (Id.):

> In the course of the local agency proceedings [preceding the relator's complaint], there was public disclosure of the following material facts: (1) the amount, if any, of county subsidies under the exclusive operating area contracts, (2) the fact that the Counties would not otherwise be billed for services rendered to indigent patients, (3) the maximum allowable rates that the … [emergency ambulance service] providers could charge Medicare and other third-party payors, and (4) the issue of whether Medicare reimbursement would be sufficient at the maximum allowable rates specified by the contracts. In short, all the material transactions giving rise to the Counties' allegedly unlawful cost-shifting schemes were publicly disclosed.

Crucially, no fraud or false claims appeared in these disclosures. Absent from these disclosures was any allegation that the ambulance companies did in fact charge artificially inflated rates to Medicare-covered patients. (This was the allegation of fraud, and of the presentation of false claims to Medicare, that the relator's complaint alleged.) Indeed, the very fact that the defendant counties held public hearings revealing the

foregoing, "and actually invited, as well as received, public comment" (Id., at 202 F.3d 1244), would tend to contradict the notion that the counties were committing fraud. (See U.S. ex rel. Bly-Magee v. Premo, 470 F.3d 914, 919 (9th Cir. 2006) ("…it is unlikely that an agency trying to cover up its fraud would reveal the requisite 'allegations or transactions' underlying the fraud in a public document.").)

The Ninth Circuit held that, despite the foregoing, the public disclosure at issue sufficed to require an original source inquiry, because

> all the material transactions giving rise to the Counties' allegedly unlawful cost-shifting schemes were publicly disclosed. That the disclosed transactions themselves may not have pointed directly to any wrongdoing is simply of no moment. See Hagood, 81 F.3d at 1473-74.

(A-1, at 202 F.3d 1244; emphasis added.) Accordingly, after finding that the relator was not an "original source," the Ninth Circuit affirmed the dismissal of the action for want of subject matter jurisdiction. (A-1, at 202 F.3d 1245.)

Similarly in the case at bar, the SCO report alleged facts showing that SCAN appeared to be receiving payments from both Medicare and Medi-Cal for some of the same health care services, and that, in developing SCAN's rates, DHCS did not take into account any Medicare revenue to SCAN or SCAN's costs. (See State's Opp. Brief, Endnote 1 and GD Fact nos. 140-144.) This is exactly what Swoben's first and second causes of action allege (albeit with zeal and certainty) (Id.) As in A-1, these causes of action reiterate various conclusions in the public disclosure (the SCO report) and then add allegations that the defendant (here, SCAN) committed fraud and FCA violations. In other words, the SCO report states the material transactions underlying the (purported) fraud that Swoben alleges. In A-1, there were no public allegations of the ambulance companies' actually overcharging Medicare. Similarly, Swoben asserts that there was no

allegation in the SCO report that SCAN actually defrauded Medi-Cal.[18] This absence of a public fraud allegation did not matter to the A-1 court, and it does not matter here. Under A-1, the SCO report satisfies Section 3730(e)(4)(A)'s "allegations or transactions" and "based upon" requirements and requires an original source inquiry.[19]

In addition, the United States incorporates California's Opp. Brief, Part III.D.

C. The SCO Report Was Publicly Disclosed.

In Malhotra, supra, the Ninth Circuit held that a disclosure "through one of the channels specified in the statute [31 U.S.C. § 3730(e)(4)(A)]" (Id., at 770 F.3d 858) to a single individual who then files a *qui tam* action after the disclosure will be considered "public" as to that individual, if that individual was an "outsider" to the government investigation that led to the disclosure. The Malhotra court held that in Seal 1 v. Seal A, 255 F.3d 1154 (9th Cir. 2001), the would-be relator "Gale was a 'member of the public' for purposes of the Zenith investigation because he was 'an outsider to the investigation.'" (Malhotra, at 770 F.3d 859, emphasis added.)[20] The Malhotra court also

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[18] Or at least he asserts this now. Back in January 2009, he thought that the SCO report was "serious enough" to incite the United States to pursue a fraud investigation of SCAN. (See facts discussed in California's Opp. Brief, Part II.)

[19] Swoben cannot refute the foregoing well-established principles. His attempt (Opening Brief, Parts III.B.3b and III.D and 11:2-6, 16:5-17:7, 23:21-25:16) relies chiefly upon U.S. ex rel. Foundation Aiding the Elderly v. Horizon West, 265 F.3d 1011, 1014-1015 (9th Cir. 2001, Opinion Amended, 275 F.3d 1189 (9th Cir. 2001), which in turn relies on A-1 and Alcan Elec. -- which, as discussed above, enunciate these principles. He also relies upon City of Hawthorne ex rel. Wohlner v. H&C Disposal Co., 109 Cal.App.4th 1668, 1685, 1 Cal.Rptr.3d 312 (2003), which relies upon Foundation Aiding the Elderly and thus is subject to the same deficiency.

[20] See also, U.S. ex rel. Putnam v. Eastern Idaho Reg. Med. Ctr., 2009 WL 2901233, *6 (D.Idaho Sept. 8, 2009), emphasis added (In Seal 1, "[t]he Ninth Circuit explained that the relator was a member of the public for purposes of the Zenith investigation because he was an 'outsider' to that investigation. *Id.* at 1161."); U.S. ex rel. Friedland v. Environ-Mental Chemical Corporation, et al., 2003 WL 23315783, *12 (N.D.Cal. Dec

(footnote cont'd on next page)

held that the subject disclosure (a deposition) "constitutes a public disclosure as to the Malhotras. The Malhotras were 'outsiders' to the administrative investigation conducted by the Trustee's Office …."[21]

The Malhotra court promulgated a bright line test for determining "outsider" status. If, at the time of the alleged public disclosure to the individual, the individual is neither a current employee of the investigation's target (here, SCAN) nor an employee of the government that conducted the investigation, then the individual is an "outsider" to the investigation. (Id.) Finding that the Malhotra relators satisfied neither criterion at the time of the disclosure (and also not during the investigation that led to it), the Court held that the disclosure was a "public" disclosure as to those relators. This finding enabled the Court to affirm the dismissal of the action due to lack of subject matter jurisdiction.[22]

Swoben was not employed by the California government (or by the federal government) or by SCAN during the SCO's investigation up through the time the SCO report was disclosed to him. (GD Fact no. 30.) Accordingly, under Malhotra, he was an outsider to the investigation.

Swoben was a SCAN employee as late as 2006 (UF 1) (prior to the SCO investigation, which started in 2008 (GD Fact no. 136)). But this does not make him an "insider" under Malhotra. The Malhotra court's reasoning and citation of precedent clarify that insider status requires -- if not employment by the investigating government (which criterion Swoben cannot satisfy) -- then current employment by the target at the

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30, 2003) (held: a disclosure to the relator was public as to him solely because he was an outsider to the government's investigation that generated the disclosure).

[21] Id. In that holding, the court mentions no other requirement other than a relator's "outsider" status for a disclosure's being "public" as to that relator.

[22] See also, Friedland, supra, at 2003 WL 23315783, *12, finding that the relator (who was not a government employee) was an outsider because he was not employed by the defendant.

time of the relevant disclosure (which criterion, again, Swoben cannot satisfy). The Malhotra court stated (at 770 F.3d 859):

> In Seal 1, we had no occasion to define with precision the meaning of "outsider." Gale [the relator in Seal 1] was neither an employee of the target of the investigation (Zenith) nor an employee of the government -- the two categories of individuals who, even under the broadest reading of our precedents, could be deemed "insiders." See United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1518–19 (9th Cir.1995), vacated on other grounds, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997); United States ex rel. Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1419–20 (9th Cir.1991). That made it easy to conclude that Gale was an "outsider" to the Zenith investigation.

Schumer is the only one of the two cases cited in the Malhotra quote above that concerned employment by the target of an investigation. (Hagood concerned solely government employment.) Schumer concerned solely the target's current employees at the time of the alleged public disclosure. In the pages cited in the Malhotra quote above, the Schumer court holds that disclosure of government audits to current employees of Hughes (the investigation's target) and of Northrop (the prime contractor) would not constitute a public disclosure, because

> … treatment of company employees as members of the public is unrealistic. Unlike others who come across information related to fraud, an "innocent employee who comes forward with allegations of fraud by her employer knows that her job may be in jeopardy." [Citation omitted.] Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure. Because disclosure of such allegations could reflect negatively on both Northrop and Hughes, this reasoning applies to employees of both

companies.

Schumer, 63 F.3d at 1518. The Schumer Court did not discuss disclosure to former employees (for example, Swoben), and its reasoning above does not apply to former employees. No former employee worries that "…'her job might be in jeopardy…,'" because she has no such job with her former employer, the investigation's target. Nor does she typically have "a strong economic incentive to protect the information from outsiders" to her former employer. Her economic interests and those of her former employer are no longer aligned.

Once the SCO report was disclosed to him (between June 30, 2008 (the date of the report) and July 13, 2009 (UF 17), Swoben, as a former employee of SCAN, did not protect SCAN's interests. Instead, he did the opposite: he sent a copy of the SCO report twice to the federal government, trying to incite a federal investigation of SCAN. (GD Fact nos. 120-131.) In short, he acted as a member of the public, not as a SCAN employee whose interest lay in protecting SCAN.

For the foregoing reasons, under Malhotra, Swoben was an outsider to the investigation that led to the SCO report.[23] Therefore, under Malhotra, the SCO report is a "public" disclosure as to Swoben. [24]

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[23] Malhotra is over four years later than Putnam, supra (D.Idaho 2009) (cited in Swoben's Opening Brief, 14:16-20); and Malhotra's bright line "outsider" test, discussed above, is utterly different from Putnam's "outsider" test -- which is whether the "[r]elator had independent knowledge about [the] defendants' alleged fraud before [the government's investigation] … began …." Putnam, 2009 WL 2901233, *7. Thus, after Malhotra, the Putnam outsider test is no longer good law. Nor, therefore, is the Putnam holding that Swoben cites (2009 WL 2901233, *6-7). Putnam also never describes at all what, exactly, the government disclosed to the relator and when – thereby making it impossible to analogize, regarding government disclosures to a relator, from Putnam to the case at bar.

[24] The Malhotra bright-line "outsider" test eliminates further factual inquiry into whether Swoben was an "outsider." But if one were needed, it would be clear that Swoben was far more an outsider than was the relator Gale in Seal 1, supra.

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Malhotra also interpreted a second requirement for a disclosure to be "public" (as to its recipient) that the Seal 1 decision enunciated (although Malhotra itself does not hold that this is a requirement):

> All that *Seal 1* requires is that the recipient of the disclosure be "[1] an outsider to the investigation [2] who *now* seeks to profit from it as an FCA relator."

(Malhotra at 770 F.3d 860, italics in the original; other emphasis added.) In neither Seal 1 nor Malhotra does the court discuss what it means to profit, as a relator, from a government investigation. It could mean simply that the would-be relator realizes that the government is investigating an issue, and he decides to try to obtain a share, pursuant to 31 U.S.C. § 3730(d) or Cal. Gov't Code § 12652(g)(2), of a government's financial recovery that he argues is related to that issue. That certainly occurred in Swoben's case: He filed his *qui tam* action after learning of the SCO investigation (and report), and he alerts the Court now (and has told the governments repeatedly) that he wants a share based on the Medi-Cal allegations in his Complaint. (Swoben Opp., Brief, 1:8-9.)

Or it could mean that the relator learned something from the investigation

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During its investigation, (1) the U.S. Attorney's Office ("USAO") allowed Gale to review documents raising the possibility of Zenith's alleged fraud, (2) the USAO made oral statements to Gale raising that possibility, and (3) Gale signed a declaration requiring him to keep confidential the information he obtained from the USAO. Id., at 1157, 1162. Yet the Ninth Circuit still found Gale to be an outsider to the Zenith investigation. There is no evidence that (1) Swoben reviewed any SCO documents; (2) that, during its investigation, the SCO told Swoben that SCAN had possibly committed fraud; or (3) that Swoben ever signed anything requiring him to keep confidential any information he obtained from the SCO. The evidence is to the contrary. (GD Fact nos. 93-95; see footnote 14 above. (Indeed, as to no. (2), Swoben claims that even the SCO's report contains no fraud allegation against SCAN.) For this reason and many others, the chief SCO investigator himself found Swoben to be an outsider to the SCO investigation. (GD Fact no. 96.)

(or the disclosure resulting therefrom) that assisted him in making (or making up) his fraud allegations. In Seal 1, the relator did not know of the possibility of a Zenith fraud until he received the disclosures in the government's investigation. (Id., at 255 F.3d 1158.) In Malhotra, the relators had a "suspicion" that the defendant had received kickbacks, but did not learn that he actually had received them, until they attended the investigating government's deposition of the person who had paid the kickbacks. (Id, at 770 F.3d 860.)

Similarly, before he received the SCO report, Swoben did not and could not know -- and indeed asked the SCO to find out in its investigation -- whether DHCS had actually considered SCAN's Medicare revenues in setting SCAN's Medi-Cal capitation rate. (See Part II, above.) The SCO report (1) answered this question and (2) provided the additional information that also, in the rate-setting process, DHCS had not considered SCAN's costs of providing Medi-Cal services. (Id.) The SCO report's information about lack of consideration of revenues, gilded with the charge that SCAN was to blame for "fail[ing]to disclose [to DHCS] SCAN's receipts of monies from the Medicare Social HMO contract," became an essential allegation of Swoben's Complaint. (See GD Fact no. 97.) In his Second Amended Complaint, ¶ 16, 5:14-27 (emphasis added), Swoben also took advantage of the SCO report's information about lack of consideration of costs, and added the charge that SCAN was to blame for "failing to submit cost reports and other financial reports and information to Medi-Cal that disclosed SCAN's true costs (in light of SCAN's receipt of monies from the Medicare Social HMO contract) of the services to be provided under the Medi-Cal contract …." (GD Fact no. 98. Swoben now asserts that this second charge, regarding costs, was always (somehow) in his original Complaint. (GD Fact no. 22.) In other words, Swoben's original Complaint (as interpreted by Swoben) reiterated the key conclusions in the SCO report about what SCAN financial information DHCS, in the rate-setting process, did not consider. These conclusions were an

essential link in blaming SCAN for the alleged "overpayments." Swoben's Complaint (as interpreted by Swoben (GD Fact no. 22)) concluded that DHCS did not consider the information because SCAN had hidden it. (GD Fact no. 99.)

For all of the foregoing reasons, Swoben "…'*now* seeks to profit from [the SCO investigation (and report)] … as an FCA relator.'" Malhotra at 770 F.3d 859, emphasis in the original. Because of this, and because Swoben was an outsider to the SCO's investigation, Lowenthal's office's disclosure to Swoben of the SCO report was a public disclosure, as to Swoben and his *qui tam* suit.

D. Barajas Does Not Apply to Swoben's First Cause of Action, for Violations of the Federal FCA.[25]

In U.S. ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University, 161 F.3d 533, 536 (9th Cir. 1998), the Ninth Circuit noted that

> [t]he rationale of Barajas [is] that the government should not be able to stifle a plaintiff's *qui tam* suit by launching a public investigation ….

This rationale, the court said, applied in Barajas because there the federal government itself made the public disclosure (a criminal indictment). The court accordingly found that Barajas should not apply where someone other than the federal government (in Biddle, the relator himself) was involved in the public disclosure by making the allegations of fraud public. Id. In the present case,[26] the federal government did not make the public disclosure; the State of California did (UFs 13-17; GD Fact no. 100), and Swoben himself sent the SCO report to third parties (UF 18). The federal government did not participate in the SCO's investigation, or in the drafting or

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[25] See Swoben's Opening Brief, 14:20-15:1, 23:12-16, citing U.S. ex rel Barajas v. Northrop Corp., 5 F.3d 407 (9th Cir. 1993).

[26] Assuming *arguendo* that Barajas could apply outside its own narrow factual confines (alleged public disclosures occurring solely during the litigation of a *qui tam* action) to the present situation -- in which the SCO report was disclosed some months before Swoben filed his original Complaint. Barajas does not so apply. See California's Opp. Brief, Part III.F, incorporated by reference herein.

dissemination of the SCO report. (GD Fact no. 101.) The chief SCO investigator (GD Fact no. 73) recalled that no one from the federal government even knew about the SCO investigation or the SCO report until well after the SCO sent its report to Senator Lowenthal. (GD Fact no. 102.) Nor has Swoben argued that, or cited any evidence that, the federal government made public either the SCO report or its allegations, either in the relevant time (prior to Swoben's filing his complaint) or even for years thereafter. (Nor do we believe that the federal government did so.) Accordingly, Barajas does not apply to the Court's subject matter jurisdiction over the first cause of action (for violations of the federal FCA).

IV. CONCLUSION

For the foregoing reasons, and those set forth in California's Opp. Brief, Swoben's motion for partial summary adjudication should be denied. In addition, for the reasons set forth in California's Opp. Brief and above, the Court should find now that the SCO report is a public disclosure as to Swoben and this action.

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