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Selected docket entries for case 11−975

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Filed	Document Description	Page	Docket Text
03/14/2011	1		NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Cornell University Medical College and Wilfred Van Gorp, FILED. [234689] [11−975]
	1 Case FILED	4	
	1 Dkt_Ntc_BK_CV_PR_Tax	23	
03/14/2011	2 District Ct. Order Judgment RECEIVED	25	DISTRICT COURT ORDER, dated 02/09/2011, RECEIVED.[234698] [11−975]
03/14/2011			PAYMENT OF DOCKETING FEE, on behalf of Appellant Cornell University Medical College and Wilfred Van Gorp, district court receipt # E931673, FILED.[234699] [11−975]
03/14/2011	4		ELECTRONIC INDEX, in lieu of record, FILED.[234702] [11−975]
	4 Index/FRAP 10(d) in lieu of ROA FILED	36	
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03/24/2011	5 Acknowledgment and Notice of Appearance FILED	59	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Cornell University Medical College, FILED. Service date 03/24/2011 by CM/ECF.[243263] [11−975]
03/24/2011	6		FORM C, on behalf of Appellant Cornell University Medical College, FILED. Service date 03/24/2011 by CM/ECF.[243269] [11−975]
	6 Form C FILED	61	
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03/24/2011	7 Form D FILED	105	FORM D, on behalf of Appellant Cornell University Medical College, FILED. Service date 03/24/2011 by CM/ECF.[243270] [11−975]
03/24/2011			NOTE: See lead case, 10−3297, containing complete set of docket entries.[243315] [11−975]
03/25/2011	11 Acknowledgment and Notice of Appearance FILED	106	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Wilfred Van Gorp, FILED. Service date 03/25/2011 by CM/ECF.[244616] [11−975]
03/30/2011	16 Notice_of_Case_Manager_Change	108	NEW CASE MANAGER, Jennifer Thompson, ASSIGNED.[248410] [11−975]
04/08/2011	18 Appellant/Petitioner Joint Brief & Special Appendix FILED	109	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Cornell University Medical College in 10−3297, 11−975, FILED. Service date 04/08/2011 by CM/ECF. [258001]

			[10−3297, 11−975]
04/08/2011	19 Acknowledgment and Notice of Appearance FILED	241	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee United States of America, FILED. Service date 04/08/2011 by CM/ECF.[258235] [11−975]
04/19/2011	23 Scheduling Notification RECEIVED	242	SCHEDULING NOTIFICATION, on behalf of Appellee United States of America in 10−3297, 11−975, informing Court of proposed due date 07/07/2011, RECEIVED. Service date 04/19/2011 by CM/ECF, email.[267545] [10−3297, 11−975]
04/22/2011	26 So_Ordered_sched_notification_ape	243	SO−ORDERED SCHEDULING NOTIFICATION, setting Appellee United States of America in 10−3297, 11−975 Brief due date as 07/07/2011, FILED.[270487] [10−3297, 11−975]
07/07/2011			ATTORNEY, Eva L. Dietz for Cornell University Medical College, in case 11−975 Eva L. Dietz for Cornell University Medical College, in case 10−3297 , [254034−2], ADDED.[333113] [10−3297, 11−975]
07/12/2011	33 Defective_Document_Notice	244	DEFECTIVE DOCUMENT, brief, [333083−2], on behalf of Appellee United States of America in 10−3297, 11−975, FILED.[336285] [10−3297, 11−975]
07/15/2011	34 Motion FILED	246	MOTION, to extend time to 07/28/2011, on behalf of Appellant Cornell University Medical College in 10−3297, 11−975, FILED. Service date 07/15/2011 by CM/ECF. [340365] [10−3297, 11−975]
07/15/2011	35 Supplementary Papers FILED	247	SUPPLEMENTARY PAPERS TO MOTION [34], on behalf of Appellant Cornell University Medical College in 10−3297, 11−975, FILED. Service date 07/15/2011 by CM/ECF.[340372][35] [10−3297, 11−975]
07/15/2011	36 ORAL ARGUMENT STATEMENT LR 34.1 (a) FILED	249	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Tracey Tiska for Appellant Cornell University Medical College in 10−3297, 11−975, FILED. Service date 07/15/2011 by CM/ECF. [340579] [10−3297, 11−975]
07/15/2011			CURED DEFECTIVE DOCUMENT, brief [33], on behalf of Appellee United States of America in 10−3297, 11−975, FILED.[340753] [10−3297, 11−975]
07/15/2011	41 ORAL ARGUMENT STATEMENT LR 34.1 (a) FILED	250	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Michael J. Salmanson, Esq. for Appellee United States of America in 10−3297, 11−975, FILED. Service date 07/15/2011 by CM/ECF. [340887] [10−3297, 11−975]
07/18/2011	42 ORAL ARGUMENT STATEMENT LR 34.1 (a) FILED **DOCUMENT COULD NOT BE RETRIEVED!**		ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Ms. Nina Minard Beattie for Appellant Wilfred Van Gorp in 10−3297, 11−975, FILED. Service date 07/18/2011 by CM/ECF. [341334] [10−3297, 11−975]
12/06/2011			CASE CALENDARING, for the week of 01/30/2012, PROPOSED.[464566] [10−3297, 11−975]

12/19/2011	49 Supplemental Oral Argument Statement LR34.1(a) FILED	251	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Michael J. Salmanson, Esq. for Appellee United States of America in 10−3297, 11−975, FILED. Service date 12/19/2011 by email, CM/ECF. [476182] [10−3297, 11−975]
12/28/2011			CASE CALENDARING, for argument on 01/30/2012, SET.[483835] [10−3297, 11−975]
01/03/2012	55		ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED.[486994] [10−3297, 11−975]
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	55 Notice_to_the_BAR	253	
01/04/2012			ATTORNEY, Robert B. Black, for Appellant Cornell University Medical College, TERMINATED.[487951] [10−3297, 11−975]
01/30/2012			CASE, before RDS, RR*, DC, C.JJ., HEARD.[511266] [10−3297, 11−975]
03/09/2012	58 Request for Argument CD RECEIVED	254	REQUEST FOR ARGUMENT CD, with fee, RECEIVED.[581304] [10−3297, 11−975]
03/20/2012			ARGUMENT CD, TRANSMITTED.[581306] [10−3297, 11−975]
09/05/2012	61		OPINION, the district court judgment is affirmed, by RDS, RR, DC, FILED.[710599] [10−3297, 11−975]
	61 Opinion FILED	256	
	61 Bill_of_Cost_Itemized_Notice_1	304	
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	61 Notice_of_Decision	307	
09/05/2012	62 Notice_of_Case_Manager_Change	308	NEW CASE MANAGER, Connie Mazariego, ASSIGNED.[710603] [10−3297, 11−975]
09/05/2012	65 Judgment FILED	309	JUDGMENT, FILED.[711793] [10−3297, 11−975]
09/18/2012	66		MOTION, for attorney's fees, on behalf of Appellee United States of America in 10−3297, 11−975, FILED. Service date 09/18/2012 by CM/ECF. [723260] [10−3297, 11−975]
	66 Motion FILED	310	
	66 Stipulation of parties	314	
	66 Form 1080	317	
09/26/2012	69		JUDGMENT MANDATE, ISSUED.[730115] [10−3297, 11−975]
	69 Judgment Mandate ISSUED	319	
	69 Opinion	320	
10/17/2012	72 Amended Judgment FILED	368	AMENDED JUDGMENT, FILED.[749329] [10−3297, 11−975]
10/17/2012	73 Corrected Mandate ISSUED	369	CORRECTED MANDATE, amended judgment, ISSUED.[749342] [10−3297, 11−975]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
ex rel. DANIEL FELDMAN,

Plaintiff,

v.

WILFRED VAN GORP and CORNELL UNIVERSITY,

Defendants.

Case No. 03-CV-8135 (WHP)

NOTICE OF APPEAL

Notice is hereby given that Defendants Wilfred van Gorp and Cornell University hereby appeal to the United States Court of Appeals for the Second Circuit from this Court's Memorandum and Order, dated February 9, 2011, in the above-referenced matter (attached hereto).

March 10, 2011

Respectfully submitted,

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CLOSED, APPEAL, ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:03−cv−08135−WHP

U.S.A v. Van Gorp, et al
Assigned to: Judge William H. Pauley, III
Demand: $0
Cause: 31:3729 False Claims Act

Date Filed: 10/14/2003
Date Terminated: 08/03/2010
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Plaintiff

Plaintiff

United States of America
ex rel, Daniel Feldman

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Defendant

Cornell University Medical College represented by **Tracey Ann Tiska**
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Robert Brian Black
(See above for address)
ATTORNEY TO BE NOTICED

Miscellaneous

Daniel Feldman represented by **Michael Joseph Salmanson**
Relator
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Scott B. Goldshaw
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/14/2003	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $ 150.00 RECEIPT # 488054. (gmo) (Entered: 10/16/2003)
10/14/2003		Magistrate Judge Debra C. Freeman is so designated. (gmo) (Entered: 10/16/2003)
04/23/2007	19	ORDER,The United States having declined to intervene in this action pursuant to the False Claims Act, 31 U.S.C.$3730(b)(4)(B), the Court Ordered that, the complaint shall be unsealed, and service upon defendants by the relator is authorized. The Government's Notice of Election to Decline Intervention shall be served by the plaintiff−relator upon defendants only after service of the complaint. The seal shall be lifted as to all other matters occurring in this action after the date of this Order. (Signed by Judge William H. Pauley III on 4/10/2007) (kj) (Entered: 04/26/2007)
04/23/2007	20	ENDORSED LETTER addressed to Judge William H. Pauley from Andrew D. O"Toole dated 11/13/03 re: Counsel writes to request that the November 7th Order be sealed nunc pro tunc, and that the complaint and the documents submitted with the complaint, this Court's orders and all other filings in this action remain under seal until 12/18/03, and until further order of the Court. The Government also respectfully requests that the initial pretrial conference in this matter be adjourned sine die and rescheduled after the Government has made its decision with respect to intervention. ENDORSEMENT: Application granted in part. All materials in this case will be filed under seal. The initial pre−trial conference will be held on

		2/20/03 at 9:30 a.m. So Ordered. (Signed by Judge William H. Pauley III on 11/19/03) (jco) DOCUMENT ORIGINALLY FILED UNDER SEAL. DOCUMENT UNSEALED AS PER ORDER DATED 4/23/07, DOCUMENT NUMBER 19. (Entered: 04/26/2007)
04/23/2007	21	MOTION for Michael J. Salmanson to Appear Pro Hac Vice. Document filed by United States of America.(jco) (Entered: 04/26/2007)
05/01/2007		CASHIERS OFFICE REMARK on 21 Motion to Appear Pro Hac Vice in the amount of $25.00, paid on 04/23/2007, Receipt Number 613036. (jd) (Entered: 05/01/2007)
05/01/2007	22	ORDER granting 21 Motion for Michael J. Salmanson to Appear Pro Hac Vice on behalf of plaintiff Daniel Feldman. (Signed by Judge William H. Pauley III on 4/25/07) (djc) (Entered: 05/01/2007)
05/01/2007		Transmission to Attorney Admissions Clerk. Transmitted re: 22 Order on Motion to Appear Pro Hac Vice, to the Attorney Admissions Clerk for updating of Attorney Information. (djc) (Entered: 05/01/2007)
05/03/2007	23	FILING ERROR − ELECTRONIC FILING IN NON−ECF CASE − WAIVER OF SERVICE RETURNED EXECUTED. Wilfred Van Gorp waiver sent on 4/26/2007, answer due 6/25/2007; Cornell University Medical College waiver sent on 4/26/2007, answer due 6/25/2007. Document filed by United States of America. (Goldshaw, Scott) Modified on 5/4/2007 (lb). (Entered: 05/03/2007)
05/03/2007	24	FILING ERROR − ELECTRONIC FILING IN NON−ECF CASE − NOTICE OF CHANGE OF ADDRESS by Scott B. Goldshaw on behalf of United States of America. New Address: Salmanson Goldshaw, PC, Two Penn Center, Suite 1230, 1500 JFK Blvd., Philadelphia, PA, USA 19102, 215−640−0593. (Goldshaw, Scott) Modified on 5/4/2007 (lb). (Entered: 05/03/2007)
05/04/2007		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − NON−ECF CASE ERROR. Note to Attorney Scott B. Goldshaw to MANUALLY RE−FILE Document WAIVER OF SERVICE RETURNED EXECUTED and NOTICE OF CHANGE OF ADDRESS, Document No. 23−24. This case is not ECF. (lb) (Entered: 05/04/2007)
05/09/2007	25	WAIVER OF SERVICE RETURNED EXECUTED. Cornell University Medical College waiver sent on 4/30/2007, answer due 6/29/2007. Document filed by United States of America. (tro) (Entered: 05/10/2007)
05/09/2007	26	WAIVER OF SERVICE RETURNED EXECUTED. Wilfred Van Gorp waiver sent on 4/30/2007, answer due 6/29/2007. Document filed by United States of America. (tro) (Entered: 05/10/2007)
05/09/2007	27	NOTICE OF CHANGE OF ADDRESS by Scott B. Goldshaw on behalf of United States of America. New Address: Two Penn Center, Suite 1230, 1500 JFK. Blvd., Philadelphia, PA, USA 19102, (215) 640−0593 (215) 640−0596− Fax goldshaw@salmangold.com. (tro) (Entered: 05/10/2007)
06/27/2007	29	ENDORSED LETTER addressed to Judge William H. Pauley from Brian Black dated 6/18/07 re: Counsel for defendant requests that Brian Black, the undersigned, be permitted to appear in his stead; Mr. Black is fully familiar with this matter. ENDORSEMENT: So Ordered. (Signed by Judge William H. Pauley III on 6/19/07) (js) (Entered: 07/03/2007)
07/06/2007	30	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Cornell University Medical College.(Black, Robert) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/06/2007)
07/06/2007	31	REPORT of Rule 26(f) Planning Meeting.(Black, Robert) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/06/2007)
07/12/2007	35	STIPULATION AND ORDER: IT IS HERBEY STIPULATED AND AGREED, by and between the undersigned attorneys, that defendants' time to answer or otherwise respond to the complaint in the above−captioned action shall be extended to and including July 13, 2007. SO ORDERED: (Signed by Judge

		William H. Pauley III on 07/06/07) (dcr) (Entered: 07/18/2007)
07/13/2007	32	ANSWER to Complaint. Document filed by Wilfred Van Gorp.(Beattie, Nina) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/13/2007)
07/13/2007	33	ANSWER to Complaint. Document filed by Cornell University Medical College.(Tiska, Tracey) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/13/2007)
07/16/2007	34	SCHEDULING ORDER: Fact Discovery shall be completed by 1/31/2008; Expert Discovery due by 3/28/2008. The parties shall submit by a joint pre−trial order due by 4/30/2008. Pretrial Conference set for 5/9/2008 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley III on 7/13/07) Copies Mailed By Chambers.(tro) (Entered: 07/18/2007)
07/24/2007	36	ORDER DESIGNATING CASE TO ECF STATUS: The Clerk of Court is directed to designate this action ECF nunc pro tunc. All subsequent Orders of this Court shall be issued through the ECF system. The parties shall make all filings via the ECF system and promptly provide this Court with courtesy copies of all filed papers. Within thirty (30) days of this Order, all counsel shall register as filing users in accordance with the Southern District's Procedures for Electronic Case Filing. (Signed by Judge William H. Pauley III on 7/17/07) Copies Mailed By Chambers.(tro) (Entered: 07/25/2007)
07/24/2007		Case Designated ECF. (tro) (Entered: 07/25/2007)
07/24/2007	37	SCHEDULING ORDER: Status Conference currently scheduled for 6/22/2070 at 11:45 a.m. is adjourned until 7/13/2007 at 11:15 AM in Courtroom 11D, 500 Pearl Street, New York, NY 10007 before Judge William H. Pauley III. (Signed by Judge William H. Pauley III on 6/21/2007) Copies mailed by chambers.(jar) (Entered: 07/25/2007)
11/19/2007	38	STIPULATED PROTECTIVE ORDER...regarding procedures to be followed that shall govern the handling of confidential material.... (Signed by Judge William H. Pauley III on 11/19/07) (tro) (Entered: 11/20/2007)
01/29/2008	39	SCHEDULING ORDER: Fact Discovery due by 3/14/08. Expert Discovery due by 5/16/2008. Joint Pretrial Order due by 6/13/2008. Final Pretrial Conference set for 7/11/2008 at 10:00 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 1/28/07) (tro) (Entered: 01/29/2008)
03/04/2008	44	ENDORSED LETTER addressed to Judge William H. Pauley from Michael Salmanson dated 2/26/08 re: Request to extend discovery. ENDORSEMENT: Application granted. Discovery is extended until 4/18/08. Expert discovery shall be completed by 6/20/08. The parties shall submit a joint pretrial order by 7/11/08. The Court will hold a final pretrial conference on 8/8/08 at 10:00 am. (Expert Discovery due by 6/20/2008. Joint Pretrial Order due by 7/11/2008. Final Pretrial Conference set for 8/8/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 2/29/08) (cd) (Entered: 03/04/2008)
04/10/2008	45	ENDORSED LETTER addressed to Judge WilliamH. Pauley from Tracey Tiska dated 4/2/08 re: Request that the pretrial conference set for 8/8 be moved to another date. ENDORSEMENT: Application granted. The conference is adjourned until 8/15/08 at 10:00 am. (Pretrial Conference reset for 8/15/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 4/7/08) (cd) (Entered: 04/10/2008)
05/02/2008	46	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 4/24/2008 re: counsel writes to request a one−month extension of the 6/20/2008 discovery deadline. The parties propose that the deadline for completion of expert discovery by 7/21/2008, and the deadline for the submission of the joint pre−trial order be 8/1/2008. The Court has already set the pre−trial conference for 8/15/2008 at 10:00 a.m. ENDORSEMENT: Application Granted. (Signed by Judge William H. Pauley, III on 4/30/2008) (jp) (Entered: 05/02/2008)
06/12/2008	47	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracy A. Tiska dated 5/23/2008 re: Requesting that the Court overrule Relator's objections to

		the interrogatories and compel a substantive response. ENDORSEMENT: This Court will hold a discovery conference on July 18, 2008 at 10:00 a.m. (Signed by Judge William H. Pauley, III on 6/3/208) (jpo) (Entered: 06/12/2008)
07/01/2008	50	ENDORSED LETTER addressed to Judge William H. Pauley from Tracey A. Tiska and Michael J. Salmanson dated 5/23/08 re: Counsel writes to jointly raise a discovery dispute that has arisen with respect to Cornells Second set of interrogatories (the Interrogatories). A copy of which is attached to this letter for the courts reference. ENDORSEMENT: The court will hold a discovery conference on July 18, 2008 at 10:00 a.m., (Discovery Hearing set for 7/18/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 6/3/08) (mme) (Entered: 08/15/2008)
07/22/2008	48	SCHEDULING ORDER: For the reasons set forth on the record, the Relator's objections to Defendant's interrogatories are sustained. The parties shall submit any pre−motion letters by August 5, 2008. This Court will hold a pre−motion conference on August 15, 2008 at 10:00 a.m., in lieu of the final pre−trial conference currently set for that time. The deadline for submission of the joint pre−trial order is adjourned until a date to be determined. (Signed by Judge William H. Pauley, III on 7/21/2008) (jfe) (Entered: 07/22/2008)
08/06/2008	49	ENDORSED LETTER addressed to Judge William H. Pauley from Michael J. Salmanson dated 7/8/08 Counsels jointly write to raise a discovery dispute regarding the production of certain declarations. Counsels hope that the court will add this item to the discovery conference to be held on July 18, 2008. ENDORSEMENT: This court will hold a discovery conference on August 15, 2008 in conjunction with the pre−motion conference set for that time. (Signed by Judge William H. Pauley, III on 8/4/08) (mme) (Entered: 08/06/2008)
08/15/2008	51	SCHEDULING ORDER: Relator shall conduct a two−hour deposition of Dr. Walton−Louis by 9/15/08. Relator's application to strike Dr. Berman's declaration is denied. The parties shall serve and file any motions in limine addressed to experts by 9/15/08. The parties shall serve and file any responses by 10/14/08. The parties shall serve and file any replies by 10/24/08. This Court will hear Oral Argument and hold a Status Conference on 11/20/2008 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 8/15/08) (tro) (Entered: 08/18/2008)
09/15/2008	52	FILING ERROR − ELECTRONIC FILING FOR NON−ECF DOCUMENT (PROPOSED ORDER) − MOTION in Limine *to Exclude Defendants' Expert Testimony*. Document filed by Daniel Feldman.(Goldshaw, Scott) Modified on 9/16/2008 (jar). (Entered: 09/15/2008)
09/15/2008	53	FILING ERROR − DEFICIENT DOCKET ENTRY − MEMORANDUM OF LAW in Support re: 52 MOTION in Limine *to Exclude Defendants' Expert Testimony*.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Goldshaw, Scott) Modified on 9/16/2008 (jar). (Entered: 09/15/2008)
09/15/2008	54	MOTION in Limine *to Preclude the Testimony of Relator's Expert*. Document filed by Wilfred Van Gorp, Cornell University Medical College. Return Date set for 11/20/2008 at 11:30 AM.(Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	55	MEMORANDUM OF LAW in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	56	DECLARATION of Dr. Robert A. Bornstein in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	57	DECLARATION of Dr. Marlene Oscar Berman in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)

09/15/2008	58	DECLARATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B (Pt. 1 of 4), # 3 Exhibit B (Pt. 2 of 4), # 4 Exhibit B (Pt. 3 of 4), # 5 Exhibit B (Pt. 4 of 4), # 6 Exhibit C (Pt. 1 of 5), # 7 Exhibit C (Pt. 2 of 5), # 8 Exhibit C (Pt. 3 of 5), # 9 Exhibit C (Pt. 4 of 5), # 10 Exhibit C (Pt. 5 of 5), # 11 Exhibit D, # 12 Exhibit E (Pt. 1 of 2), # 13 Exhibit E (Pt. 2 of 2), # 14 Exhibit F and G)(Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	59	ORDER: Counsel for the parties jointly requested clarification of this Court's August 15, 2008, Scheduling Order permitting Realtor to conduct a two−hour deposition of Dr. Walton−Louis. Relator is permitted to serve a subpoena duces tecum on Dr. Walton−Louis to obtain documents which bear on her testimony and the prior declaration she submitted to defense counsel. (Signed by Judge William H. Pauley, III on 9/15/08) (tro) (Entered: 09/16/2008)
09/15/2008		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − NON−ECF DOCUMENT ERROR. Note to Attorney Scott Goldshaw to E−MAIL Document No. 52 Proposed Order to judgments@nysd.uscourts.gov. This document is not filed via ECF. Then re−file Motion in Limine. (jar) (Entered: 09/16/2008)
09/15/2008		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Scott Goldshaw to RE−FILE Document 53 Memorandum of Law in Support of Motion. ERROR(S): Link supporting documents to correctly re−filed motion. (jar) (Entered: 09/16/2008)
09/16/2008	60	MOTION in Limine *To Exclude Defendants' Expert Testimony*. Document filed by Daniel Feldman. Return Date set for 11/20/2008 at 11:30 AM.(Goldshaw, Scott) (Entered: 09/16/2008)
09/16/2008	61	MEMORANDUM OF LAW in Support re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Goldshaw, Scott) (Entered: 09/16/2008)
10/14/2008	62	FILING ERROR − DEFICIENT DOCKET ENTRY − MEMORANDUM OF LAW in Opposition re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Daniel Feldman. (Attachments: # 1 Declaration of Michael J. Salmanson, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12)(Salmanson, Michael) Modified on 10/15/2008 (jar). (Entered: 10/14/2008)
10/14/2008	63	JOINT MEMORANDUM OF LAW in Opposition re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Certificate of Service)(Tiska, Tracey) (Entered: 10/14/2008)
10/14/2008	64	DECLARATION of Tracey A. Tiska in Opposition re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Certificate of Service)(Tiska, Tracey) (Entered: 10/14/2008)
10/14/2008		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael Salmanson to RE−FILE Document 62 Memorandum of Law in Opposition to Motion. ERROR(S): Each Supporting Document must be filed individually. Use event type Declaration in Support found under Other Answers. (jar) (Entered: 10/15/2008)
10/15/2008	65	MEMORANDUM OF LAW in Opposition re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/15/2008)
10/15/2008	66	DECLARATION of Michael J. Salmanson in Support re: 65 Memorandum of Law in Opposition to Motion. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, #

		7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12)(Salmanson, Michael) (Entered: 10/15/2008)
10/24/2008	67	REPLY MEMORANDUM OF LAW in Support re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*. *with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/24/2008)
10/24/2008	69	REPLY AFFIRMATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B − C, # 3 Exhibit D − H)(Beattie, Nina) (Entered: 10/24/2008)
10/24/2008		***STRICKEN DOCUMENT. Deleted document number 68 from the case record. The document was stricken from this case pursuant to 76 Endorsed Letter. (tve) (Entered: 02/25/2009)
11/24/2008	70	SCHEDULING ORDER: re defendants motion for summary judgment: Motion due by 1/9/2009. Response due by 2/6/2009. Reply due by 2/18/2009. Oral Argument set for 3/13/2009 at 11:30 AM before Judge William H. Pauley III. Status Conference set for 3/13/2009 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 11/24/08) Copies sent by chambers(cd) (Entered: 11/25/2008)
12/08/2008	71	TRANSCRIPT of proceedings held on 11/20/08 before Judge William H. Pauley, III. (pl) (Entered: 12/15/2008)
12/19/2008	72	MEMORANDUM &ORDER denying 54 Motion in Limine; granting in part and denying in part 60 Motion in Limine. (Signed by Judge William H. Pauley, III on 12/19/08) (ae) (Entered: 12/19/2008)
12/29/2008	73	ENDORSED LETTER addressed to Judge William H. Pauley from Emily Reisbaum dated 12/23/08 re: Therefore, defendants request permission to submit one joint memorandum of 40 pages. ENDORSEMENT: Application granted in part. Defendants may submit one joint brief of 35 pages in length. (Signed by Judge William H. Pauley, III on 12/24/08) (pl) (Entered: 12/29/2008)
02/06/2009	74	ENDORSED LETTER addressed to Judge William H.Pauley III from Tracey A. Tiska dated 1/28/2009 re: The parties respectfully request a slight modification to the current briefing schedule and for a clarification of Your Honor's prior order. Relator's counsel requests a short extension to file his response on Tuesday, February 10, instead of Friday, February 6. Defendants' counsel respectfully request that the due date for their reply brief be extended from Wednesday, February 18 to Tuesday, February 24 because of the school vacation schedules. Therefore the parties respectfully request that relator be permitted to file an opposition brief of the same length as defendants' brief in support of their summary judgment motion (35 pages). ENDORSEMENT: Application granted. So Ordered. (Signed by Judge William H. Pauley, III on 2/6/2009) (jfe) (Entered: 02/09/2009)
02/24/2009	75	ENDORSED LETTER addressed to Judge William H. Pauley, III from Tracey A. Tiska dated 2/17/2009 re: Defendants' request permission to submit one joint reply memorandum of 15 pages. ENDORSEMENT: Application granted. SO ORDERED. (Signed by Judge William H. Pauley, III on 2/24/2009) (tve) (Entered: 02/25/2009)
02/24/2009	76	ENDORSED LETTER addressed to Judge William H. Pauley, III from Eva L. Dietz dated 2/12/2009 re: Counsel writes on behalf of both defendants to submit a revised request to file Exhibit BBBB attached to the Declaration of Tracey A. Tiska under seal and also seeks leave to file Exhibit H of the Declaration of Emily Reisbaum as well as the memorandum of law in support of the Motion to Preclude under seal and to replace the "public version" of these papers currently on the public electronic docket with redacted versions. ENDORSEMENT: Applications granted. The materials identified above may be filed under seal. Defendants may withdraw and re−file redacted copies on ECF and unreacted copies under seal of Docket # 68. The Clerk shall strike docket #68 from the docket sheet and allow refiling as requested by Defendants. Defendants may also withdraw and file under seal Exhibit H to Docket # 69. SO ORDERED. (Signed by Judge William H. Pauley, III on 2/24/2009) (tve) Modified on 2/25/2009 (tve). Modified on 3/9/2009

		(tve). (Entered: 02/25/2009)
02/24/2009	77	SEALED DOCUMENT placed in vault.(rt) (Entered: 02/25/2009)
03/03/2009	78	SEALED DOCUMENT placed in vault.(jri) (Entered: 03/03/2009)
03/03/2009	79	ENDORSED LETTER addressed to Judge William H. Pauley from Heather K. McShain dated 2/25/2009 re: The government respectfully renews its request that the Court: (1) order a new briefing scheduled that will allow the government 30 days, until 3/16/2009, to file a Statement of Interest, and that defendants be permitted thirty days after receipt of the government's Statement of Interest in which to file a response; and (2) adjourn the 3/13/2009 date for oral argument to a date following defendants submission of their response to the government's Statement of Interest. ENDORSEMENT: Application granted. This Court will hold oral argument on 5/8/2009 at 11:00 a.m. SO ORDERED. (Signed by Judge William H. Pauley, III on 3/3/2009) (tve) Modified on 3/4/2009 (tve). (Entered: 03/04/2009)
03/05/2009	80	ENDORSED LETTER addressed to Judge William H. Pauley from R. Brian Black dated 2/25/09 re: Request on behalf of both defendants to file a confidential document under seal in connection with defendants' reply memorandum in support of their joint motion for summary judgment, as well as file a redacted "public version" of the reply memorandum et al. ENDORSEMENT: Application granted. Defendant may file their reply and Exhibit A under seal, and a redacted version on ECF. (Signed by Judge William H. Pauley, III on 3/5/09) (cd) (Entered: 03/06/2009)
03/11/2009	81	SEALED DOCUMENT placed in vault.(jri) (Entered: 03/11/2009)
03/11/2009	82	REPLY MEMORANDUM OF LAW in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	83	DECLARATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	84	CERTIFICATE OF SERVICE of Defendants' Reply Memorandum Of Law In Further Support Of Their Motion To Preclude The Testimony Of Relator's Expert, Dr. Brian Kimes And Declaration Of Emily Reisbaum. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	85	RULE 56.1 STATEMENT. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	86	MOTION for Summary Judgment. Document filed by Wilfred Van Gorp, Cornell University Medical College.(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	87	MEMORANDUM OF LAW in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	88	DECLARATION of Dr. Wilfred G. Van Gorp in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	89	DECLARATION of Tracey A. Tiska in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D part 1, # 5 Exhibit D part 2, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O, # 17 Exhibit P, # 18 Exhibit Q, # 19 Exhibit R, # 20 Exhibit S, # 21 Exhibit T, # 22 Exhibit U part 1, # 23 Exhibit U part 2, # 24 Exhibit U part 3, # 25 Exhibit V, # 26 Exhibit W, # 27 Exhibit X, # 28 Exhibit Y, # 29

		Exhibit Z, # 30 Errata AA, # 31 Exhibit BB, # 32 Exhibit CC, # 33 Exhibit DD, # 34 Exhibit EE, # 35 Exhibit FF, # 36 Exhibit GG, # 37 Exhibit HH, # 38 Exhibit II, # 39 Exhibit JJ, # 40 Exhibit KK, # 41 Exhibit LL, # 42 Exhibit MM, # 43 Exhibit NN, # 44 Exhibit OO, # 45 Exhibit PP, # 46 Exhibit QQ, # 47 Exhibit RR, # 48 Exhibit SS, # 49 Exhibit TT, # 50 Exhibit UU, # 51 Exhibit VV part 1, # 52 Exhibit VV part 2, # 53 Exhibit WW, # 54 Exhibit XX part 1, # 55 Exhibit XX part 2, # 56 Exhibit XX part 3, # 57 Exhibit XX part 4, # 58 Exhibit YY, # 59 Exhibit ZZ, # 60 Exhibit AAA, # 61 Exhibit BBB, # 62 Exhibit CCC, # 63 Exhibit DDD, # 64 Exhibit EEE, # 65 Exhibit FFF, # 66 Exhibit GGG, # 67 Exhibit HHH, # 68 Exhibit III, # 69 Exhibit JJJ, # 70 Exhibit KKK, # 71 Exhibit LLL, # 72 Exhibit MMM, # 73 Exhibit NNN, # 74 Exhibit OOO, # 75 Exhibit PPP, # 76 Exhibit QQQ, # 77 Exhibit RRR, # 78 Exhibit SSS, # 79 Exhibit TTT, # 80 Exhibit UUU, # 81 Exhibit VVV, # 82 Exhibit WWW, # 83 Exhibit XXX, # 84 Exhibit YYY, # 85 Exhibit ZZZ, # 86 Exhibit AAAA, # 87 Exhibit BBBB, # 88 Exhibit CCCC, # 89 Exhibit DDDD)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	90	CERTIFICATE OF SERVICE of Rule 56.1 Statement, Motion for Summary Judgment, Memorandum of Law, Declaration of Dr. Wilfred G. Van Gorp, and Declaration of Tracey A. Tiska. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	91	REPLY MEMORANDUM OF LAW in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	92	DECLARATION of Dr. Wilfred G. Van Gorp in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	93	DECLARATION of Tracey A. Tiska in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	94	CERTIFICATE OF SERVICE of Reply Memorandum of Law, Declaration of Dr. Wilfred G. Van Gorp, and Declaration of Tracey A. Tiska. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/16/2009	95	BRIEF re: 86 MOTION for Summary Judgment. *Statement of Interest of the United States*. Document filed by United States of America.(McShain, Heather) (Entered: 03/16/2009)
03/16/2009	96	CERTIFICATE OF SERVICE of Statement of Interest of the United States served on Counsel for Relator and Defendants on March 16, 2009. Service was made by Federal Express. Document filed by United States of America. (McShain, Heather) (Entered: 03/16/2009)
04/15/2009	97	NOTICE of Defendants' Response To The Statement Of Interest Of The United States Of America. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 04/15/2009)
04/24/2009	98	ENDORSED LETTER addressed to Judge William H Pauley from Michael Salmanson dated 4/20/09 re: Request that the Court formally grant Relator's request to: (1) file a redacted version of its papers in response to Defendants' Motion for Summary Judgment on the electronic docket; and (2) file the unredacted version of the papers under seal. ENDORSEMENT: Application granted. (Signed by Judge William H. Pauley, III on 4/23/09) (cd) (Entered: 04/24/2009)
04/24/2009	99	FILING ERROR − DEFICIENT DOCKET ENTRY (See document #102) − AMENDED REPLY MEMORANDUM OF LAW in Opposition re: 86 MOTION for Summary Judgment. *REDACTED with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) Modified on 4/27/2009 (jar). (Entered: 04/24/2009)

04/24/2009	100	COUNTER STATEMENT TO 85 Rule 56.1 Statement. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 04/24/2009)
04/24/2009	101	DECLARATION of Michael J. Salmanson in Opposition re: 86 MOTION for Summary Judgment.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R)(Salmanson, Michael) (Entered: 04/24/2009)
04/24/2009	102	REPLY MEMORANDUM OF LAW in Opposition re: 86 MOTION for Summary Judgment. *REDACTED with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 04/24/2009)
05/04/2009	103	SEALED DOCUMENT placed in vault.(jri) (Entered: 05/04/2009)
12/07/2009	104	MEMORANDUM &ORDER denying 86 Motion for Summary Judgment. For the reasons set forth in this Memorandum &Order, Defendants' motion for summary judgment is denied. The parties are directed to appear for a conference on 12/21/09 at 11:00 a.m. (Signed by Judge William H. Pauley, III on 12/7/09) (tro) (Entered: 12/08/2009)
12/18/2009	105	JOINT MOTION for Reconsideration. Document filed by Wilfred Van Gorp, Cornell University Medical College.(Black, Robert) (Entered: 12/18/2009)
12/18/2009	106	MEMORANDUM OF LAW in Support re: 105 JOINT MOTION for Reconsideration.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Black, Robert) (Entered: 12/18/2009)
12/22/2009	107	SCHEDULING ORDER: (1) Plaintiff shall file his opposition to Defendants' motion for reconsideration by January 8, 2010; (2) Defendants shall file any reply by January 15, 2010; (3) The parties shall submit a joint pre−trial order by March 26, 2010; and, (4) The Court will hold a final pre−trial conference on April 9, 2010 at 10:00 a.m. The Court will consider Defendants' motion for reconsideration on submission. SO ORDERED. (Signed by Judge William H. Pauley, III on 12/21/2009) (tve) (Entered: 12/23/2009)
01/08/2010	108	REPLY MEMORANDUM OF LAW in Opposition re: 105 JOINT MOTION for Reconsideration. *with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit Exhibits 1, 2 and 3)(Salmanson, Michael) (Entered: 01/08/2010)
01/15/2010	109	REPLY MEMORANDUM OF LAW in Support re: 105 JOINT MOTION for Reconsideration.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 01/15/2010)
03/23/2010	110	ENDORSED LETTER addressed to Judge William H. Pauley from Tracey Tiska dated 3/12/10 re: Request that the date for filing the pretrial order be adjourned three weeks after a decision is rendered on defendants' motion for reconsideration. ENDORSEMENT: Application granted. (Signed by Judge William H. Pauley, III on 3/22/10) (cd) (Entered: 03/23/2010)
04/12/2010	111	SCHEDULING ORDER NO. 15: Upon the request of both parties, the final pre−trial conference scheduled for 4/9/2010 is adjourned until 5/21/2010 at 11:15 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 4/9/2010) (tro) (Entered: 04/12/2010)
05/03/2010	112	NOTICE of Change of firm Name and Email Addresses. Document filed by Cornell University Medical College. (Tiska, Tracey) (Entered: 05/03/2010)
05/03/2010	113	MEMORANDUM AND ORDER denying 105 Motion for Reconsideration. For the further set forth in this Order, Defendants' motion for reconsideration is denied. SO ORDERED. (Signed by Judge William H. Pauley, III on 5/3/2010) (tve) (Entered: 05/03/2010)
05/06/2010	114	SCHEDULING ORDER NO. 16: The final pre−trial conference scheduled for 5/21/2010 at 11:15 a.m. is adjourned until 6/9/2010 at 2:00 p.m. before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 5/6/2010) (tro) (Entered: 05/07/2010)

06/09/2010	115	SCHEDULING ORDER NO. 17: Jury selection and trial will begin on July 12, 2010. The parties shall file any motions in limine by June 21, 2010. The parties shall file any oppositions by June 28, 2010. The parties shall file any replies by July 2, 2010. The parties shall submit briefing on what constitutes a "claim for payment" for purposes of assessing statutory damages by July 2, 2010. Finally, the parties shall submit proposed voir dire, a brief summary of the case, a joint request to charge, and proposed verdict sheet by July 2, 2010. (Signed by Judge William H. Pauley, III on 6/9/2010) (jfe) (Entered: 06/10/2010)
06/21/2010	116	MOTION in Limine *to Exclude Certain Evidence at Trial*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 06/21/2010)
06/21/2010	117	MEMORANDUM OF LAW in Support re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*. *with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12 Part 1, # 13 Exhibit 12 Part 2, # 14 Exhibit 12 Part 3, # 15 Exhibit 13, # 16 Exhibit 14, # 17 Exhibit 15)(Salmanson, Michael) (Entered: 06/21/2010)
06/21/2010	118	MOTION in Limine *To Exclude Exhibits And Testimony*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Certificate of Service)(Tiska, Tracey) (Entered: 06/21/2010)
06/21/2010	119	MEMORANDUM OF LAW in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 06/21/2010)
06/21/2010	120	DECLARATION of Tracey A. Tiska in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A)(Tiska, Tracey) (Entered: 06/21/2010)
06/23/2010	121	TRANSCRIPT of proceedings held on June 9, 2010 2:00 p.m. before Judge William H. Pauley, III. (ajc) (Entered: 06/23/2010)
06/28/2010	122	REPLY MEMORANDUM OF LAW in Opposition re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*. *with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 06/28/2010)
06/28/2010	123	MEMORANDUM OF LAW in Opposition re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 06/28/2010)
06/28/2010	124	DECLARATION of Tracey A. Tiska in Opposition re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A−D, # 2 Exhibit E−F)(Tiska, Tracey) (Entered: 06/28/2010)
07/01/2010	128	MOTION for Viviann Stapp to Appear Pro Hac Vice. Document filed by Wilfred Van Gorp.(mro) (Entered: 07/07/2010)
07/02/2010	125	REPLY MEMORANDUM OF LAW in Support re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*. *with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibits 16 − 20)(Salmanson, Michael) (Entered: 07/02/2010)
07/02/2010	126	REPLY MEMORANDUM OF LAW in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 07/02/2010)
07/02/2010	127	DECLARATION of Tracey A. Tiska in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit a)(Tiska, Tracey) (Entered: 07/02/2010)
07/07/2010	129	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 6/28/10 re: counsel for defendant respectfully requests permission to bring in electronic equipment that is not provided by the court's courtroom

		technology department. Specifically, we are requesting permission for the individuals, listed in this letter to bring electronic devices to the courthouse on July 9, 2010 through the end of the trial. ENDORSEMENT: Application denied for failure to comply with standing order M10−468 dated Feb. 18, 2010. (Signed by Judge William H. Pauley, III on 7/7/10) (pl) Modified on 7/7/2010 (pl). Modified on 7/7/2010 (pl). Modified on 7/7/2010 (pl). Modified on 7/8/2010 (ae). (Entered: 07/07/2010)
07/07/2010	130	ENDORSED LETTER addressed to Judge William H. Pauley III from Michael J. Salmanson dated 6/28/10 re: counsel for plaintiff respectfully requests permission for the individuals listed in this letter, to bring the following electronic equipment that is not provided by the court's technology department to the courthouse on July 12, 2010 through the end of trial. ENDORSEMENT: Application denied for failure to comply with standing order M10−468 dated Feb. 18, 2010. (Signed by Judge William H. Pauley, III on 7/7/10) (pl) (Entered: 07/07/2010)
07/08/2010	131	MEMORANDUM AND ORDER: For the foregoing reasons, relator's motions in limine are granted in part and denied in part, Defendants' motions in limine are denied in part, and decision on the balance of the parties' motions in limine is reserved until trial. So Ordered. (Signed by Judge William H. Pauley, III on 7/8/2010) (js) (Entered: 07/08/2010)
07/09/2010		CASHIERS OFFICE REMARK on 128 Motion to Appear Pro Hac Vice in the amount of $25.00, paid on 07/01/2010, Receipt Number 907905. (jd) (Entered: 07/09/2010)
07/12/2010	132	ORDER FOR ADMISSION PRO HAC VICE ON WRITTEN MOTION, granting 128 Motion for Viviann Stapp to Appear Pro Hac Vice. Additional relief as set forth in this Order. (Signed by Judge William H. Pauley, III on 7/12/10) (pl) (Entered: 07/12/2010)
07/14/2010	133	AMENDED JOINT PRETRIAL ORDER: Pursuant to Rule 6A of the Court's Individual Practices, trial counsel for the parties in the above captioned action respectfully submit this pre−trial order, as set forth in this Order. Document filed by Wilfred Van Gorp, Cornell University Medical College, Daniel Feldman.(jpo) (Entered: 07/15/2010)
07/16/2010	134	ORDER: This Court has already determined the measure of damages as a matter of law, so that issue will not be before the jury. Accordingly, Relator's request is denied, as set forth in this Order. (Signed by Judge William H. Pauley, III on 7/16/2010) (jpo) (Entered: 07/16/2010)
07/19/2010	135	LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 7/17/10 re: Counsel requests that the Court inform the jury on Monday that: "In a False Claims Act case, the Government has the option to intervene as a party or to decline to intervene. Because the Government may have decided not to intervene for any number of reasons, you should draw no inferences from the fact that the Government has declined to intervene in this case." Document filed by Wilfred Van Gorp, Cornell University Medical College. (djc) (Entered: 07/20/2010)
07/19/2010	136	LETTER addressed to Judge William H. Pauley III from Michael J. Salmanson dated 7/18/10 re: counsel writes in response to Mr. Black's letter of July 17, 2010 in regard to two issues which have arisen. Document filed by United States of America.(djc) (Entered: 07/20/2010)
07/23/2010	137	LETTER addressed to Judge William H. Pauley, III from R. Brikan Black dated 7/21/10 re: Counsel for defendant writes on behalf of Defendants Cornell University and Dr. Wilfred van Gorp to request that the Court strike and direct the jUry not to consider testimony by Relator regarding what he has referred to as "the incident" between himself and Dr. van Gorp's former partner. Document filed by Cornell University Medical College, Wilfred Van Gorp.(pl) (Entered: 07/23/2010)
07/23/2010	138	JURY VERDICT FORM.(mro) (Entered: 07/23/2010)
07/23/2010	139	LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 7/21/10 re: Defendants write in regards to the Court's draft Jury Charge. Defendants offer substitutions and additions as set forth in this letter. Document

		filed by Cornell University Medical College, Wilfred Van Gorp.(ae) (Entered: 07/23/2010)
07/30/2010	140	STATEMENT OF DAMAGES. Document filed by Daniel Feldman. (Attachments: # 1 Affidavit Declaration of Michael J. Salmanson with Exhibits)(Salmanson, Michael) (Entered: 07/30/2010)
08/03/2010	141	JUDGMENT #10,1328 in favor of United States of America against Cornell University Medical College, and Wilfred Van Gorp in the amount of $ 887,714.00. (Signed by Judge William H. Pauley, III on 8/3/10) (Attachments: # 1 notice of right to appeal)(ml) (Entered: 08/03/2010)
08/11/2010	142	AMENDED JUDGMENT # 10,1328 amending 141 Judgment, in favor of United States of America against Cornell University and Wilfred Van Gorp, jointly and severally, in the amount of $ 887,714.00. (Signed by Judge William H. Pauley, III on 8/11/10) (Attachments: # 1 NOTICE OF RIGHT TO APPPEAL)(ml) (Entered: 08/12/2010)
08/12/2010	143	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 8/10/2010 re: Defendants respectfully request permission to file their supporting brief after the August 31 deadline for the motion. Defendants Opening Brief served by September 16 (16 days after the August 31 motion filing date); Relator's Opposition Brief served by October 8; and Defendants Reply Brief served by October 20. ENDORSEMENT: APPLICATION GRANTED. SO ORDERED. (Signed by Judge William H. Pauley, III on 8/12/2010) (jmi) (Entered: 08/13/2010)
08/13/2010	144	NOTICE OF APPEAL from 142 Amended Judgment,. Document filed by Cornell University Medical College, Wilfred Van Gorp. Filing fee $ 455.00, receipt number E 911890. (nd) (Entered: 08/16/2010)
08/16/2010		Transmission of Notice of Appeal to the District Judge re: 144 Notice of Appeal. (nd) (Entered: 08/16/2010)
08/16/2010		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 144 Notice of Appeal. (nd) (Entered: 08/16/2010)
08/16/2010		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 120 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 134 Order, Set Deadlines/Hearings,, 127 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 126 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 141 Judgment, 85 Rule 56.1 Statement filed by Wilfred Van Gorp, Cornell University Medical College, 58 Declaration in Support of Motion,, filed by Wilfred Van Gorp, Cornell University Medical College, 69 Reply Affirmation in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 92 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 124 Declaration in Opposition to Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 44 Endorsed Letter, Set Deadlines/Hearings,,,, 66 Declaration in Support, filed by Daniel Feldman, 123 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 84 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 132 Order on Motion to Appear Pro Hac Vice, 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*. filed by Daniel Feldman, 130 Endorsed Letter,, 64 Declaration in Opposition to Motion, filed by Cornell University Medical College, 115 Scheduling Order,, 97 Notice (Other) filed by Wilfred Van Gorp, Cornell University Medical College, 59 Order, 79 Endorsed Letter, Set Hearings,,,,,, 50 Endorsed Letter, Set Hearings,,,, 125 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 67 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 33 Answer to Complaint filed by Cornell University Medical College, 75 Endorsed Letter, 137 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 96 Certificate of Service Other filed by United States of America, 70 Scheduling Order, 105 JOINT MOTION for Reconsideration. filed by Wilfred Van Gorp, Cornell University Medical College, 55 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 72 Order on Motion in Limine, 106 Memorandum of Law in Support of Motion filed by

		Wilfred Van Gorp, Cornell University Medical College, 83 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 90 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 63 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 101 Declaration in Opposition to Motion, filed by Daniel Feldman, 143 Endorsed Letter,, 108 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*. filed by Wilfred Van Gorp, Cornell University Medical College, 128 MOTION for Viviann Stapp to Appear Pro Hac Vice. filed by Wilfred Van Gorp, 30 Rule 7.1 Corporate Disclosure Statement filed by Cornell University Medical College, 47 Endorsed Letter, Set Deadlines/Hearings,, 109 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 87 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 133 Proposed Pretrial Order, filed by Daniel Feldman, Wilfred Van Gorp, Cornell University Medical College, 61 Memorandum of Law in Support of Motion, filed by Daniel Feldman, 49 Endorsed Letter, Set Hearings,, 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 140 Statement of Damages filed by Daniel Feldman, 74 Endorsed Letter, Set Deadlines/Hearings,,,,,,, 113 Order on Motion for Reconsideration, 65 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 100 Counter Statement to Rule 56.1 filed by Daniel Feldman, 39 Scheduling Order, 45 Endorsed Letter, Set Deadlines/Hearings,, 136 Letter, filed by United States of America, 95 Brief filed by United States of America, 104 Order on Motion for Summary Judgment, 117 Memorandum of Law in Support of Motion,, filed by Daniel Feldman, 112 Notice (Other) filed by Cornell University Medical College, 38 Protective Order, 73 Endorsed Letter, 119 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 111 Scheduling Order, 56 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 121 Transcript, 131 Order on Motion in Limine,,, 31 Rule 26(f) Discovery Plan Report, 86 MOTION for Summary Judgment. filed by Wilfred Van Gorp, Cornell University Medical College, 122 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 94 Certificate of Service Other filed by Wilfred Van Gorp, Cornell University Medical College, 135 Letter,, filed by Wilfred Van Gorp, Cornell University Medical College, 76 Endorsed Letter,,,, 98 Endorsed Letter, 129 Endorsed Letter,, 48 Scheduling Order,, 82 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 51 Scheduling Order,, 46 Endorsed Letter, Set Deadlines/Hearings,,,, 80 Endorsed Letter,, 116 MOTION in Limine *to Exclude Certain Evidence at Trial*. filed by Daniel Feldman, 89 Declaration in Support of Motion,,,,,,, filed by Wilfred Van Gorp, Cornell University Medical College, 32 Answer to Complaint filed by Wilfred Van Gorp, 107 Scheduling Order, Set Motion and RRDeadlines/Hearings,, 102 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 118 MOTION in Limine *To Exclude Exhibits And Testimony*. filed by Wilfred Van Gorp, Cornell University Medical College, 91 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 93 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 142 Amended Judgment, 88 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 139 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 57 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 114 Scheduling Order, 110 Endorsed Letter, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 08/16/2010)
08/17/2010	145	TRANSCRIPT of proceedings held on July 12, 13, 14, 15, 19, 2010 before Judge William H. Pauley, III. (bw) (Entered: 08/17/2010)
08/17/2010	146	MOTION for Attorney Fees *Notice of Motion*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 08/17/2010)
08/17/2010	147	MEMORANDUM OF LAW in Support re: 146 MOTION for Attorney Fees *Notice of Motion*.. Document filed by Daniel Feldman. (Attachments: # 1 Declaration of Michael Salmanson with Exhibits)(Salmanson, Michael) (Entered: 08/17/2010)

08/17/2010	148	SUPERSEDEAS BOND # 0528322 in the amount of $ 985,363.00 posted by Cornell University Medical College, Wilfred Van Gorp. (dt) (Entered: 08/18/2010)
08/17/2010	149	TRANSCRIPT of proceedings held on July 20, 21, 22, 2010 before Judge William H. Pauley, III. (ja) (Entered: 08/19/2010)
08/25/2010	150	MOTION for New Trial., MOTION for Judgment as a Matter of Law. Document filed by Cornell University Medical College, Wilfred Van Gorp.(Tiska, Tracey) (Entered: 08/25/2010)
08/26/2010	151	MEMORANDUM OF LAW in Opposition re: 146 MOTION for Attorney Fees *Notice of Motion*.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/26/2010)
08/26/2010	152	MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*. Document filed by Cornell University Medical College, Wilfred Van Gorp.(Tiska, Tracey) (Entered: 08/26/2010)
08/26/2010	153	MEMORANDUM OF LAW in Support re: 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/26/2010)
09/02/2010	154	REPLY MEMORANDUM OF LAW in Support re: 146 MOTION for Attorney Fees *Notice of Motion*., 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*.. Document filed by Daniel Feldman. (Attachments: # 1 Supplemental Declaration of Michael J. Salmanson with Exhibit A)(Salmanson, Michael) (Entered: 09/02/2010)
09/08/2010	155	RESPONSE to Motion re: 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 09/08/2010)
09/16/2010	156	MEMORANDUM OF LAW in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 09/16/2010)
09/16/2010	157	DECLARATION of Tracey A. Tiska in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I part 1, # 10 Exhibit I part 2, # 11 Exhibit I part 3, # 12 Exhibit I part 4, # 13 Exhibit I part 5, # 14 Exhibit I part 6, # 15 Exhibit I part 7, # 16 Exhibit J, # 17 Exhibit K, # 18 Exhibit L, # 19 Exhibit M)(Tiska, Tracey) (Entered: 09/16/2010)
09/20/2010		***DELETED DOCUMENT. Deleted document number 158 Sealed Document. The document was incorrectly filed in this case. (cb) (Entered: 09/23/2010)
09/23/2010	158	ENDORSED LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 9/16/2010 re: All parties respectfully request that the Court stay determination of Relator's pending motion for attorney fees, Dkt. No. 146, until defendants' post−trial motion is decided. If the parties' joint request is granted, Defendants withdraw their motion for a stay, Dkt. No. 152, as moot. ENDORSEMENT: Application granted. The Clerk of Court is directed to terminate Docket Entry No. 152. So Ordered. (Signed by Judge William H. Pauley, III on 9/23/2010) (jfe) Modified on 9/27/2010 (jfe). (Entered: 09/27/2010)
10/04/2010	159	NOTICE OF CHANGE OF ADDRESS by Nina Minard Beattie on behalf of Wilfred Van Gorp. New Address: Brune &Richard LLP, One Battery Park Plaza, 34th Floor, New York, New York, 10004,. (Beattie, Nina) (Entered: 10/04/2010)
10/08/2010	160	MEMORANDUM OF LAW in Opposition re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law. *with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/08/2010)
10/20/2010	161	REPLY MEMORANDUM OF LAW in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Attachments: # 1 Reply Declaration of Tracey A. Tiska, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C part 1, # 5 Exhibit C

		part 2)(Tiska, Tracey) (Entered: 10/20/2010)
12/09/2010	162	MEMORANDUM AND ORDER: For reasons further set forth in said Order, Defendants' motion for judgment as a matter of law pursuant to FRCP 50(b) or, alternatively, for a new trial pursuant to FRCP 59 is denied. ORDER denying 150 Motion for New Trial; denying 150 Motion for Judgment as a Matter of Law. (Signed by Judge William H. Pauley, III on 12/9/10) (db) (Entered: 12/09/2010)
12/13/2010	163	FILING ERROR − DEFICIENT DOCKET ENTRY − SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service. Document filed by Daniel Feldman.(Salmanson, Michael) Modified on 12/14/2010 (ka). (Entered: 12/13/2010)
12/14/2010		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael Joseph Salmanson to RE−FILE Document 163 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service. ERROR(S): Filing Error of Declaration of Michael J. Salmanson. Declaration must be filed individually. Use event code Declaration(non−motion) located under Other Answers. (ka) (Entered: 12/14/2010)
12/14/2010	164	SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 12/14/2010)
12/14/2010	165	DECLARATION of Michael J. Salmanson re: 164 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 12/14/2010)
02/08/2011	166	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College USCA Case Number 10−3297, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp) (nd). (Entered: 02/09/2011)
02/09/2011	167	MEMORANDUM AND ORDER: Motion practice over prevailing party fees is too often a time consuming endeavor requiring counsel and the Court to sift through minutiae. And it is always ancillary to the main event− a merits determination of the lawsuit. This motion is no exception. While the fee application has been pruned, this Court cannot help but wonder whether everyone's time might have been better spent. Relator Daniel Feldman's Motion for Attorneys' Fees, Costs and Expenses is granted in part and denied in part. Feldman's attorneys are awarded $602,898.63 in attorneys' fees and $25,862.15 in costs. Feldman is awarded his reasonable expenses in the amount of $3,121.47. The Clerk of Court is directed to terminate the motion pending at docket entries #146 and #164. (Signed by Judge William H. Pauley, III on 2/9/2011) (js) (Entered: 02/09/2011)
02/14/2011		Second Supplemental ROA Sent to USCA (Electronic File). Certified Supplemental Indexed record on Appeal Electronic Files for 167 Order on Motion for Attorney Fees, 159 Notice of Change of Address filed by Wilfred Van Gorp, 154 Reply Memorandum of Law in Support of Motion, filed by Daniel Feldman, 158 Endorsed Letter, 161 Reply Memorandum of Law in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 163 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Declaration and Certificate of Service* filed by Daniel Feldman, 153 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 165 Declaration filed by Daniel Feldman, 160 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 151 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 156 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 146 MOTION for Attorney Fees *Notice of Motion*. filed by Daniel Feldman, 147 Memorandum of Law in Support of Motion filed by Daniel Feldman, 148 Bond filed by Wilfred Van Gorp, Cornell University Medical College, 162 Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, 155 Response to Motion filed by Daniel Feldman, 164 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*. filed by Daniel Feldman, 166 Supplemental ROA Sent to

		USCA − Index, 157 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses* filed by Wilfred Van Gorp, Cornell University Medical College, 150 MOTION for New Trial MOTION for Judgment as a Matter of Law filed by Wilfred Van Gorp, Cornell University Medical College USCA Case Number 10−3297, were transmitted to the U.S. Court of Appeals. (tp) (Entered: 02/14/2011)
03/10/2011	168	NOTICE OF APPEAL from 167 Memorandum and Order. Document filed by Cornell University Medical College, Wilfred Van Gorp. Filing fee $ 455.00, receipt number E 931673. (nd) (Entered: 03/10/2011)
03/10/2011		Transmission of Notice of Appeal to the District Judge re: 168 Notice of Appeal. (nd) (Entered: 03/10/2011)
03/10/2011		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 168 Notice of Appeal. (nd) (Entered: 03/10/2011)
03/10/2011		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 168 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 120 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 134 Order, Set Deadlines/Hearings,, 127 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 126 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 141 Judgment, 85 Rule 56.1 Statement filed by Wilfred Van Gorp, Cornell University Medical College, 58 Declaration in Support of Motion,, filed by Wilfred Van Gorp, Cornell University Medical College, 69 Reply Affirmation in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 92 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 124 Declaration in Opposition to Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 44 Endorsed Letter, Set Deadlines/Hearings,,,, 66 Declaration in Support, filed by Daniel Feldman, 123 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 84 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 132 Order on Motion to Appear Pro Hac Vice, 60 MOTION in Limine To Exclude Defendants' Expert Testimony. filed by Daniel Feldman, 130 Endorsed Letter,, 64 Declaration in Opposition to Motion, filed by Cornell University Medical College, 115 Scheduling Order,, 97 Notice (Other) filed by Wilfred Van Gorp, Cornell University Medical College, 59 Order, 79 Endorsed Letter, Set Hearings,,,,,, 50 Endorsed Letter, Set Hearings,,,, 125 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 67 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 33 Answer to Complaint filed by Cornell University Medical College, 75 Endorsed Letter, 137 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 96 Certificate of Service Other filed by United States of America, 70 Scheduling Order, 105 JOINT MOTION for Reconsideration. filed by Wilfred Van Gorp, Cornell University Medical College, 55 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 72 Order on Motion in Limine, 106 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 83 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 90 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 63 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 101 Declaration in Opposition to Motion, filed by Daniel Feldman, 143 Endorsed Letter,, 108 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 54 MOTION in Limine to Preclude the Testimony of Relator's Expert. filed by Wilfred Van Gorp, Cornell University Medical College, 128 MOTION for Viviann Stapp to Appear Pro Hac Vice. filed by Wilfred Van Gorp, 30 Rule 7.1 Corporate Disclosure Statement filed by Cornell University Medical College, 47 Endorsed Letter, Set Deadlines/Hearings,, 109 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 87 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 133 Proposed Pretrial Order, filed by Daniel Feldman,

		Wilfred Van Gorp, Cornell University Medical College, 61 Memorandum of Law in Support of Motion, filed by Daniel Feldman, 49 Endorsed Letter, Set Hearings,, 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 140 Statement of Damages filed by Daniel Feldman, 74 Endorsed Letter, Set Deadlines/Hearings,,,,,, 113 Order on Motion for Reconsideration, 65 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 100 Counter Statement to Rule 56.1 filed by Daniel Feldman, 39 Scheduling Order, 45 Endorsed Letter, Set Deadlines/Hearings,, 136 Letter, filed by United States of America, 95 Brief filed by United States of America, 104 Order on Motion for Summary Judgment, 117 Memorandum of Law in Support of Motion,, filed by Daniel Feldman, 112 Notice (Other) filed by Cornell University Medical College, 38 Protective Order, 73 Endorsed Letter, 119 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 111 Scheduling Order, 56 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 121 Transcript, 131 Order on Motion in Limine,,, 31 Rule 26(f) Discovery Plan Report, 86 MOTION for Summary Judgment. filed by Wilfred Van Gorp, Cornell University Medical College, 122 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 94 Certificate of Service Other filed by Wilfred Van Gorp, Cornell University Medical College, 135 Letter,, filed by Wilfred Van Gorp, Cornell University Medical College, 76 Endorsed Letter,,,, 98 Endorsed Letter, 129 Endorsed Letter,, 48 Scheduling Order,, 82 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 51 Scheduling Order,, 46 Endorsed Letter, Set Deadlines/Hearings,,,, 80 Endorsed Letter,, 116 MOTION in Limine to Exclude Certain Evidence at Trial. filed by Daniel Feldman, 89 Declaration in Support of Motion,,,,,,, filed by Wilfred Van Gorp, Cornell University Medical College, 32 Answer to Complaint filed by Wilfred Van Gorp, 107 Scheduling Order, Set Motion and RRDeadlines/Hearings,, 102 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 118 MOTION in Limine To Exclude Exhibits And Testimony. filed by Wilfred Van Gorp, Cornell University Medical College, 91 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 93 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 142 Amended Judgment, 88 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 139 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 57 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 114 Scheduling Order, 110 Endorsed Letter, 167 Order on Motion for Attorney Fees, 159 Notice of Change of Address filed by Wilfred Van Gorp, 154 Reply Memorandum of Law in Support of Motion, filed by Daniel Feldman, 158 Endorsed Letter, 161 Reply Memorandum of Law in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 163 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service filed by Daniel Feldman, 153 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 165 Declaration filed by Daniel Feldman, 160 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 151 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 156 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 146 MOTION for Attorney Fees Notice of Motion. filed by Daniel Feldman, 147 Memorandum of Law in Support of Motion filed by Daniel Feldman, 148 Bond filed by Wilfred Van Gorp, Cornell University Medical College, 162 Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, 155 Response to Motion filed by Daniel Feldman, 164 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Certificate of Service. filed by Daniel Feldman, 166 Supplemental ROA Sent to USCA − Index, 157 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 152 MOTION to Stay An Award Of Attorneys' Fees, Costs And Expenses filed by Wilfred Van Gorp, Cornell University Medical College, 150 MOTION for New Trial MOTION for Judgment as a Matter of Law filed by Wilfred Van Gorp, Cornell University Medical College were transmitted to the U.S. Court of Appeals. (nd) (Entered: 03/10/2011)

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: March 15, 2011
Docket #: 11-975

Short Title: United States of America v. Van Gorp, et al

DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

DOCKETING NOTICE

A notice of appeal filed by Cornell University Medical College and Wilfred Van Gorp in the above referenced case was docketed today as 11-975 (con.). This number must appear on all documents related to this case that are filed in this Court. For pro se parties the docket sheet with the caption page, and an Acknowledgment and Notice of Appearance Form are enclosed. In counseled cases the docket sheet is available on PACER. Counsel must access the Acknowledgment and Notice of Appearance Form from this Court's website http://www.ca2.uscourts.gov.

The form must be completed and returned within 14 days of the date of this notice. The form requires the following information:

YOUR CORRECT CONTACT INFORMATION: Review the party information on the docket sheet and note any incorrect information in writing on the Acknowledgment and Notice of Appearance Form.

The Court will contact one counsel per party or group of collectively represented parties when serving notice or issuing our order. Counsel must designate on the Acknowledgment and Notice of Appearance a lead attorney to accept all notices from this Court who, in turn will, be responsible for notifying any associated counsel.

CAPTION: Attached is the full caption in this matter. This Court must use the district court caption See FRAP 12(a), 32(a). Please review this attachment carefully and promptly advise this Court of any improper or inaccurate designations in writing on the Acknowledgment and Notice of Appearance form. If a party has been terminated from the case the caption may reflect that

change only if the district court judge ordered that the caption be amended.

APPELLATE DESIGNATIONS: Please review whether appellant is listed correctly on the party listing page of the docket sheet and in the caption. If there is an error, please note on the Acknowledgment and Notice of Appearance Form. Timely submission of the Acknowledgment and Notice of Appearance Form will constitute compliance with the requirement to file a Representation Statement required by FRAP 12(b).

For additional information consult the Court's instructions posted on the website.

Inquiries regarding this case may be directed to 212-857-8551.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.* DANIEL FELDMAN,

Plaintiff/Relator,

-against-

WILFRED VAN GORP & CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants.

03 Civ. 8135 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Relator Daniel Feldman ("Feldman" or "Relator") filed this action pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. against Dr. Wilfred van Gorp ("van Gorp") and Cornell University Medical College ("Cornell" and, together, "Defendants"). Following an eight-day trial, a jury returned a verdict in favor of Feldman on three of his five claims. Feldman now moves for an award of attorneys' fees pursuant to 31 U.S.C. § 3730(d)(2). For the following reasons, Feldman's motion is granted in part and denied in part.

BACKGROUND

Familiarity with this Court's prior opinions is presumed. See United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 5094402 (S.D.N.Y. Dec. 9, 2010); United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 2911606 (S.D.N.Y. July 8, 2010); United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 1948592 (S.D.N.Y. May 3, 2010); United States ex rel. Feldman v. Van Gorp, 674 F. Supp. 2d 475 (S.D.N.Y. 2009); Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2008 WL 5429871 (S.D.N.Y.

Dec. 19, 2008).

I. The Litigation

Feldman filed this qui tam action claiming that Defendants submitted false claims to obtain federal research funds administered by the National Institute of Health. Feldman alleged five distinct series of false claims: one arising out of the initial grant application, and four based on subsequent yearly renewal applications and progress reports. Feldman claimed that Defendants' representations in the application and progress reports differed materially from actual implementation of the grant. A jury returned a verdict in favor of Feldman on three of the five claims. This Court awarded damages in the amount of $887,714. That amount was considerably less than the $1,359,000 sought by Feldman.

II. Fees and Costs

Feldman's attorneys, Salmanson Goldshaw, seek fees totaling $726,711.25 and an additional $37,927.87 in costs. Feldman seeks reimbursement of $3,121.47 for expenses incurred as a result of the litigation. (Mot. for Attorneys' Fees, Costs and Expenses ("Mot.") 2; Relator's Supplemental Declaration in Support of Motion for Attorneys' Fees, Costs and Expenses ("Relator's Supp. Decl.") ¶ 1.) The attorneys' fee calculation was based on the following figures:

Legal Professional	Position	Hourly Rate	Hours	Fee
Michael J. Salmanson	Shareholder	$495.00	1138.30*	$563,458.50
Scott B. Goldshaw	Shareholder	$400.00	132.15*	$52,860.00
Michele M. Rovinsky	Associate	$250.00	33.70	$8,425.00
Katie R. Eyer	Associate	$275.00	140.10*	$38,527.50
Brian C. McGoldrick	Paralegal	$90.00	260.80	$23,472.00
Laura M. Zulick	Paralegal	$90.00	100.05	$9,004.50
Christopher Chancler	Paralegal	$90.00	99.50	$8,955.00
Delvita Reid	Paralegal	$90.00	28.00	$2,520.00
Subtotal				$707,222.50

(Mot. 8.) Although Salmanson Goldshaw is located in Philadelphia, the Shareholder and Paralegal hourly rates are based on the New York market, while those for the Associates are based on the Philadelphia market.

In addition, Salmanson Goldshaw seeks to recover fees for travel time at a 50% discounted rate, as follows:

Legal Professional	Position	Hourly Rate	Hours	Fee
Michael J. Salmanson	Shareholder	$247.50	60.50	$14,973.75
Scott B. Goldshaw	Shareholder	$200.00	12.00	$2,400.00
Michele M. Rovinsky	Associate	$125.00	6.00	$750.00
Katie R. Eyer	Associate	$137.50	6.00	$825.00
Brian C. McGoldrick	Paralegal	$45.00	12.00	$540.00
Subtotal				$19,488.75

(Mot. 13.) Most—though not all—of this time consisted of travel between New York and Philadelphia.

DISCUSSION

I. Legal Standard

31 U.S.C § 3730(d)(2) provides that "[i]f the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall . . . receive

* This figure represents the sum of hours requested in the initial Motion for Attorneys' Fees and subsequent Relator's Supplemental Petition.

an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2). The question of how much to award as attorneys' fees is left to the discretion of the district court. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183 (2d Cir. 1996). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). This figure is called the "presumptively reasonable fee" or "lodestar." See Grant v. Martinez, 973 F.2d 96, 99, 101 (2d Cir. 1992); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany, 522 F.3d 182, 186-90 (2d Cir. 2008). In determining a reasonable hourly rate, a district court must "bear in mind all of the case-specific variables . . . relevant to the reasonableness of attorneys' fees" including those set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).[1] Arbor Hill, 522 F.3d at 190.

Courts may not compensate counsel for hours that are "excessive, redundant, or otherwise unnecessary." Hensley, 461 U.S. at 434. The court can reduce a fee award "by specific amounts in response to specific objections." United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 601 F. Supp. 2d 45, 50 (D.D.C. 2009). However, "the Court can also reduce fees 'by a reasonable amount without providing an item-by-item accounting.'" Miller, 601 F. Supp. 2d at 50 (quoting Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 973 (D.C. Cir. 2004)). "Culling through the minutiae of the time records each time a fee petition is

[1] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717-19.

submitted . . . would be impossible 'lest [the Court] abdicate the remainder of its judicial responsibilities for an indefinite time period.'" Miller, 601 F. Supp. 2d at 50-51 (quoting Cobell v. Norton, 407 F. Supp. 2d 140, 166 (D.D.C. 2005)).

Defendants do not dispute the reasonableness of Feldman's proffered rates, and this Court finds them reasonable. Moreover, aside from the specific objections discussed below, Defendants do not dispute the reasonableness of the number of hours expended on this litigation. Thus, this Court begins its analysis with a presumptively reasonable fee of $726,711.25.

II. Attorneys' Fees

A. Travel Time

Defendants argue that because Feldman hired counsel from Philadelphia rather than New York, he should not be entitled to attorneys' fees for travel time. Under the "forum rule," "courts should generally use the hourly rates employed in the district in which the reviewing court sits in calculating the presumptively reasonable fee." Simmons v. N.Y. City Transit Auth., 575 F.3d 170, 174 (2d Cir. 2009). However, a corollary to this rule is that expenses and fees related to travel must be excluded from an award of attorneys' fees if "the hypothetical reasonable client who wishes to spend the least amount necessary to litigate the matter . . . would have retained local counsel."[2] Imbeault v. Rick's Cabaret Int'l, Inc., 08 Civ.

[2] Feldman cites cases in which an award of attorneys' fees included travel-related fees and expenses for out-of-state counsel. See, e.g., Scott v. Hand, 07 Civ. 0221 (TJM), 2010 WL 1507016 (N.D.N.Y. Apr. 15, 2010). However, the corollary rule excluding fees for travel time is more consistent with Simmons because it "promotes cost-consciousness, increases the probability that attorneys will receive no more than the relevant market would normally permit, and encourages litigants to litigate with their own pocketbooks in mind, instead of their opponents'." Simmons, 575 F.3d at 176. In any case, hours spent travelling by out-of-district attorneys are not hours "reasonably expended" where competent counsel is available within the district.

5458 (GEL), 2009 WL 2482134, at *8 (S.D.N.Y. Aug. 13, 2009). Here, there is no indication that qualified counsel was unavailable in New York, or that New York counsel was unlikely to achieve similar success. Thus, a hypothetical reasonable client would have chosen New York counsel in order to prevent unnecessary travel costs, and this Court will not award attorneys' fees for time spent travelling between Philadelphia and New York.

Unfortunately, that does not end the analysis. While Feldman's attorneys billed a total of $19,488.75 in travel time, not all of it related to travel between Philadelphia and New York. The following travel time of Salmanson is compensable: (1) travel to Potomac, MD to depose Defendants' expert, James Pike (3 hours); (2) travel to Columbus, OH to depose Defendants' expert/fact witness Robert Bornstein (3 hours); (3) travel to Washington D.C. for the deposition of Dr. Stoff (4 hours); and (4) travel to Baltimore, MD for the deposition of Dr. Kimes (4 hours). At a 50% billing discount for 14 hours, Salmanson is entitled to $3,465 in attorneys' fees for travel. In addition, because Rovinsky's and Eyer's rates are based on Philadelphia—not New York City—market rates, the "corollary" to the forum rule does not apply, and Feldman may recover the travel expenses associated with these attorneys in the amount of $1,575. Overall, Salmanson Goldshaw is entitled to $5,040 in attorneys' fees for travel time. Thus, the lodestar is reduced by $14,448.75.

Defendants also assert that Salmanson is not entitled to 15.50 hours for travel time included under four invoices for "professional services." However, Salmanson has affirmed that two of these entries did not incorporate travel time. (See Salmanson Supp. Decl. ¶ 4.) Salmanson cannot, on the other hand, verify whether the remaining two entries included travel time and concedes that an additional six hours of his time should constitute "travel time."

Accordingly, the lodestar is reduced by an additional $2,970.[3]

In sum, based on the above reductions in travel time hours, this Court reduces the presumptively reasonable fee by $17,418.75, to a total of $709,292.50.

B. Relator's Degree of Success

In determining whether partial success requires a downward adjustment of the presumptively reasonable fee, this Court conducts a two-step inquiry. "At step one of this analysis, the district court examines whether the plaintiff failed to succeed on any claims wholly unrelated to the claims on which the plaintiff succeeded. The hours spent on such unsuccessful claims should be excluded from the calculation." Grant, 973 F.2d at 101. "At step two, the district court determines whether there are any unsuccessful claims interrelated with the successful claims. If such unsuccessful claims exist, the court must determine whether the plaintiff's level of success warrants a reduction in the fee award." Grant, 973 F.2d at 101. If a plaintiff has obtained "excellent results," the attorney should be fully compensated. Grant, 973 F.2d at 101 (citing Hensley, 461 U.S. at 435). "A plaintiff's lack of success on some of his claims does not require the court to reduce the lodestar amount where the successful and the unsuccessful claims were interrelated and required essentially the same proof." Murphy v. Lynn, 188 F.3d 938, 952 (2d Cir. 1997). Moreover, where "the successful and unsuccessful claims are 'inextricably intertwined' and 'involve a common core of facts or [are] based on related legal theories,' it is not abuse of discretion for the court to award the entire fee." Reed, 95 F.3d at 1183.

Here, the successful and unsuccessful claims were interrelated. Although each of

[3] Feldman asserts that the lodestar should be reduced by $1,485 to account for 50% hourly billing rate for attorney travel time. However, because this travel was between Philadelphia and New York City, Feldman may not recover any fees for this time.

the five alleged false claims was discreet—occurring in separate applications and progress reports at yearly intervals—liability for each depended on that claim's relationship to the same common core of facts: the actual implementation of the program funded by the grant. These facts cannot be segregated neatly into the yearly intervals set by the application and progress reports. Rather, many of the program's shortcomings—such as the time spent on research and the time spent with HIV/AIDS patients—were alleged to continue throughout the course of the grant. Moreover, the legal theories on which each of the five false claims are based were not just related, but identical: violation of §§ 3729(a)(1), (a)(2), and (a)(7) of the FCA. Liability under each of these sections requires a showing that the defendant "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." Mikes v. Strauss, 274 F.3d 687, 695 (2d Cir. 2001). Thus, work performed on the separate claims cannot be easily partitioned. Accordingly, the claims were not wholly unrelated, and this Court declines to subtract the unsuccessful claims from the lodestar calculation.

Defendants argue that a fee of over $700,000 is excessive because a reasonable litigant would not expend this sum in order to recover damages of $887,000. However, "a presumptively correct lodestar figure should not be reduced simply because a plaintiff received a low damage award," and the ratio of attorneys' fees to damages in this case is well within acceptable limits. See Grant, 973 F.3d at 99, 101-02 (upholding a fee award of $512,590 where the case settled for only $60,000). In addition, Defendants argue that the fee is excessive because the damage award fell short of the $1,359,000 Feldman sought. However, the awarded damages to Feldman are substantial and not a mere "technical victory." See Lunday v. City of Albany, 42 F.2d 131, 135 (2d Cir. 1994) (court did not abuse discretion awarding attorneys' fees

of $115,425, where plaintiff sought $7,130,000 but was awarded only $35,000).

Nevertheless, Feldman's success was not complete. "If . . . a plaintiff has achieved only partial or limited success, the [lodestar] may be an excessive amount . . . even where plaintiff's claims were interrelated." Hensley, 461 U.S. at 436. Given the substantial commonalities between the successful and unsuccessful claims, this Court declines to reduce the lodestar by the percentage of unsuccessful claims. However, the Court finds that a 15% reduction in the lodestar is appropriate. See Greenbaum v. Svenska Handelsbanken, N.Y., 998 F. Supp. 301, 307 (S.D.N.Y. 1998) (reducing the lodestar by 10% where the plaintiff prevailed on claims for sex discrimination and retaliation but failed on claims for sexual harassment and age discrimination). Accordingly, Feldman is entitled to $602,898.63 in attorneys' fees.

III. Costs

A. Travel Costs and Pro Hac Vice Motions

Descending to the granular level, Defendants next challenge travel costs incurred by Feldman's attorneys. "[A]wards of attorneys' fees . . . under fee-shifting statutes . . . normally include those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients." Reichman, 818 F.2d at 283; Betancourt v. Giuliani, 325 F. Supp. 2d 330, 335 (S.D.N.Y. 2004). Feldman seeks to recover a total of $8,988.51 in travel costs. However, for the same reasons that the Feldman is not entitled to attorneys' fees for travel time, he is not entitled to recover costs related to travel between Philadelphia and New York. Because competent counsel was available within the district, these travel costs were not reasonably incurred.

Accordingly, this Court subtracts $8,152.72 from the total costs.[4] Relator is also not entitled to costs related to delivery of boxes of exhibits and demonstratives from Philadelphia to New York City for trial, and then back to Philadelphia, in the amount of $2,675. Lastly, this Court subtracts costs related to Salmanson's pro hac vice motion, in the amount of $1,238 ($1,188 for preparation of the motion and $50 in costs for Certificates of Good Standing). In sum, this Court subtracts $12,065.72 in travel-related costs from Feldman's recoverable costs.

B. Copying Costs

Finally, descending even further to the microscopic level, Defendants challenge Feldman's photocopying costs. They argue that only certain photocopying and reproduction costs are "taxable" under 28 U.S.C § 1920 and that Feldman has provided insufficient detail for this Court to determine which of Relator's photocopying costs are taxable here. However, fee shifting statutes permit recovery of costs beyond those considered "taxable" under § 1920. Reichman v. Bonsignore, Briganti & Mazzotta P.C., 818 F.2d 278, 283 (2d Cir. 1987). This includes costs related to photocopying and reproduction. See, e.g., Betancourt, 325 F. Supp. 2d at 335-36. Moreover, Relator has submitted a detailed itemized accounting of its photocopying costs, which this Court finds sufficient to support an award of copying costs.

[4] In making this determination, this Court finds that the Relator may be reimbursed for the following travel expenses, totaling $835.79: $140.19 for travel to the Kimes deposition; $126.60 for travel to the Pike deposition, $155.00 for travel to the Bornstein deposition; $137.00 for Eyer's travel to New York City on July 2, 2010 (this expense entry was $274 for travel for two people; this Court assumes for these purposes that one-half of this entry was for Eyer's travel expenses); $160 for Eyer's travel to New York City on July 7, 2010 (this expense entry was $320 for travel for two people; this Court again assumes that one-half of this entry was for Eyer's travel expenses); and $117 for Rovinsky's travel to New York City on February 6, 2008. Although the Relator's summary of travel hours (discussed above) indicates that additional travel expenses might be recoverable, these expenses cannot be determined with certainty from the expense reports submitted to this Court.

C. Feldman's Reasonable Expenses

The False Claims Act permits recovery of "reasonable expenses which the court finds to have been necessarily incurred." 31 U.S.C. § 3730(d)(2). This Court has reviewed Feldman's expenses and finds that they were reasonable and necessarily incurred. Accordingly, Feldman is entitled to compensation for $3,121.47 in expenses resulting from this litigation.

CONCLUSION

Motion practice over prevailing party fees is too often a time-consuming endeavor requiring counsel and the Court to sift through minutiae. And it is always ancillary to the main event—a merits determination of the lawsuit. This motion is no exception. While the fee application has been pruned, this Court cannot help but wonder whether everyone's time might have been better spent.

Relator Daniel Feldman's Motion for Attorneys' Fees, Costs and Expenses is granted in part and denied in part. Feldman's attorneys are awarded $602,898.63 in attorneys' fees and $25,862.15 in costs. Feldman is awarded his reasonable expenses in the amount of $3,121.47. The Clerk of Court is directed to terminate the motion pending at docket entries #146 and #164.

Dated: February 9, 2011
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

All Counsel of Record

NYSD_ECF_Pool@nysd.uscourts.gov
03/10/2011 04:51 PM

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Subject Activity in Case 1:03-cv-08135-WHP U.S.A v. Van Gorp, et al Appeal Record Sent to USCA - Electronic File

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U.S. District Court

Southern District of New York

Notice of Electronic Filing

The following transaction was entered on 3/10/2011 at 4:51 PM EST and filed on 3/10/2011

Case Name:	U.S.A v. Van Gorp, et al
Case Number:	1:03-cv-08135-WHP
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WARNING: CASE CLOSED on 08/03/2010	
Document Number:	No document attached

Docket Text:

Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for [168] Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, [120] Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [134] Order, Set Deadlines/Hearings,, [127] Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [126] Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [141] Judgment, [85] Rule 56.1 Statement filed by Wilfred Van Gorp, Cornell University Medical College, [58] Declaration in Support of Motion,, filed by Wilfred Van Gorp, Cornell University Medical College, [69] Reply Affirmation in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, [92] Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University

Medical College, [124] Declaration in Opposition to Motion, filed by Wilfred Van Gorp, Cornell University Medical College, [44] Endorsed Letter, Set Deadlines/Hearings,,,, [66] Declaration in Support, filed by Daniel Feldman, [123] Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, [84] Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, [132] Order on Motion to Appear Pro Hac Vice, [60] MOTION in Limine To Exclude Defendants' Expert Testimony. filed by Daniel Feldman, [130] Endorsed Letter,, [64] Declaration in Opposition to Motion, filed by Cornell University Medical College, [115] Scheduling Order,, [97] Notice (Other) filed by Wilfred Van Gorp, Cornell University Medical College, [59] Order, [79] Endorsed Letter, Set Hearings,,,,,, [50] Endorsed Letter, Set Hearings,,,, [125] Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, [67] Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, [33] Answer to Complaint filed by Cornell University Medical College, [75] Endorsed Letter, [137] Letter, filed by Wilfred Van Gorp, Cornell University Medical College, [96] Certificate of Service Other filed by United States of America, [70] Scheduling Order, [105] JOINT MOTION for Reconsideration. filed by Wilfred Van Gorp, Cornell University Medical College, [55] Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [72] Order on Motion in Limine, [106] Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [83] Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, [90] Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, [63] Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, [101] Declaration in Opposition to Motion, filed by Daniel Feldman, [143] Endorsed Letter,, [108] Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, [54] MOTION in Limine to Preclude the Testimony of Relator's Expert. filed by Wilfred Van Gorp, Cornell University Medical College, [128] MOTION for Viviann Stapp to Appear Pro Hac Vice. filed by Wilfred Van Gorp, [30] Rule 7.1 Corporate Disclosure Statement filed by Cornell University Medical College, [47] Endorsed Letter, Set Deadlines/Hearings,, [109] Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [87] Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [133] Proposed Pretrial Order, filed by Daniel Feldman, Wilfred Van Gorp, Cornell University Medical College, [61] Memorandum of Law in Support of Motion, filed by Daniel Feldman, [49] Endorsed Letter, Set Hearings,, [144] Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, [140] Statement of Damages filed by Daniel Feldman, [74] Endorsed Letter, Set Deadlines/Hearings,,,,,, [113] Order on Motion for Reconsideration, [65] Memorandum of Law in Opposition to Motion filed by Daniel Feldman, [100] Counter Statement to Rule 56.1 filed by Daniel Feldman, [39] Scheduling Order, [45] Endorsed Letter, Set Deadlines/Hearings,, [136] Letter, filed by United States of America, [95] Brief filed by United States of America, [104] Order on Motion for Summary Judgment, [117] Memorandum of Law in

Support of Motion,, filed by Daniel Feldman, [112] Notice (Other) filed by Cornell University Medical College, [38] Protective Order, [73] Endorsed Letter, [119] Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [111] Scheduling Order, [56] Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [121] Transcript, [131] Order on Motion in Limine,,, [31] Rule 26(f) Discovery Plan Report, [86] MOTION for Summary Judgment. filed by Wilfred Van Gorp, Cornell University Medical College, [122] Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, [94] Certificate of Service Other filed by Wilfred Van Gorp, Cornell University Medical College, [135] Letter,, filed by Wilfred Van Gorp, Cornell University Medical College, [76] Endorsed Letter,,,, [98] Endorsed Letter, [129] Endorsed Letter,, [48] Scheduling Order,, [82] Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [51] Scheduling Order,, [46] Endorsed Letter, Set Deadlines/Hearings,,,, [80] Endorsed Letter,, [116] MOTION in Limine to Exclude Certain Evidence at Trial. filed by Daniel Feldman, [89] Declaration in Support of Motion,,,,,,, filed by Wilfred Van Gorp, Cornell University Medical College, [32] Answer to Complaint filed by Wilfred Van Gorp, [107] Scheduling Order, Set Motion and R&R Deadlines/Hearings,, [102] Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, [118] MOTION in Limine To Exclude Exhibits And Testimony. filed by Wilfred Van Gorp, Cornell University Medical College, [91] Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [93] Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, [142] Amended Judgment, [88] Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [139] Letter, filed by Wilfred Van Gorp, Cornell University Medical College, [57] Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [114] Scheduling Order, [110] Endorsed Letter, [167] Order on Motion for Attorney Fees, [159] Notice of Change of Address filed by Wilfred Van Gorp, [154] Reply Memorandum of Law in Support of Motion, filed by Daniel Feldman, [158] Endorsed Letter, [161] Reply Memorandum of Law in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, [163] SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service filed by Daniel Feldman, [153] Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [165] Declaration filed by Daniel Feldman, [160] Memorandum of Law in Opposition to Motion filed by Daniel Feldman, [151] Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, [156] Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, [146] MOTION for Attorney Fees Notice of Motion. filed by Daniel Feldman, [147] Memorandum of Law in Support of Motion filed by Daniel Feldman, [148] Bond filed by Wilfred Van Gorp, Cornell University Medical College, [162] Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, [155] Response to Motion filed by Daniel Feldman, [164] SUPPLEMENTAL MOTION for Attorney Fees Costs and

Expenses with Certificate of Service. filed by Daniel Feldman, [166] Supplemental ROA Sent to USCA - Index, [157] Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, [152] MOTION to Stay An Award Of Attorneys' Fees, Costs And Expenses filed by Wilfred Van Gorp, Cornell University Medical College, [150] MOTION for New Trial MOTION for Judgment as a Matter of Law filed by Wilfred Van Gorp, Cornell University Medical College were transmitted to the U.S. Court of Appeals. (nd)

1:03-cv-08135-WHP Notice has been electronically mailed to:

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Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:03−cv−08135−WHP

U.S.A v. Van Gorp, et al
Assigned to: Judge William H. Pauley, III
Demand: $0
Cause: 31:3729 False Claims Act

Date Filed: 10/14/2003
Date Terminated: 08/03/2010
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Plaintiff

Plaintiff

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ex rel, Daniel Feldman

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Defendant

Cornell University Medical College represented by **Tracey Ann Tiska**
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Miscellaneous

Daniel Feldman represented by **Michael Joseph Salmanson**
Relator
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LEAD ATTORNEY
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Scott B. Goldshaw
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/14/2003	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $ 150.00 RECEIPT # 488054. (gmo) (Entered: 10/16/2003)
10/14/2003		Magistrate Judge Debra C. Freeman is so designated. (gmo) (Entered: 10/16/2003)
04/23/2007	19	ORDER,The United States having declined to intervene in this action pursuant to the False Claims Act, 31 U.S.C.$3730(b)(4)(B), the Court Ordered that, the complaint shall be unsealed, and service upon defendants by the relator is authorized. The Government's Notice of Election to Decline Intervention shall be served by the plaintiff−relator upon defendants only after service of the complaint. The seal shall be lifted as to all other matters occurring in this action after the date of this Order. (Signed by Judge William H. Pauley III on 4/10/2007) (kj) (Entered: 04/26/2007)
04/23/2007	20	ENDORSED LETTER addressed to Judge William H. Pauley from Andrew D. O"Toole dated 11/13/03 re: Counsel writes to request that the November 7th Order be sealed nunc pro tunc, and that the complaint and the documents submitted with the complaint, this Court's orders and all other filings in this action remain under seal until 12/18/03, and until further order of the Court. The Government also respectfully requests that the initial pretrial conference in this matter be adjourned sine die and rescheduled after the Government has made its decision with respect to intervention. ENDORSEMENT: Application granted in part. All materials in this case will be filed under seal. The initial pre−trial conference will be held on

		2/20/03 at 9:30 a.m. So Ordered. (Signed by Judge William H. Pauley III on 11/19/03) (jco) DOCUMENT ORIGINALLY FILED UNDER SEAL. DOCUMENT UNSEALED AS PER ORDER DATED 4/23/07, DOCUMENT NUMBER 19. (Entered: 04/26/2007)
04/23/2007	21	MOTION for Michael J. Salmanson to Appear Pro Hac Vice. Document filed by United States of America.(jco) (Entered: 04/26/2007)
05/01/2007		CASHIERS OFFICE REMARK on 21 Motion to Appear Pro Hac Vice in the amount of $25.00, paid on 04/23/2007, Receipt Number 613036. (jd) (Entered: 05/01/2007)
05/01/2007	22	ORDER granting 21 Motion for Michael J. Salmanson to Appear Pro Hac Vice on behalf of plaintiff Daniel Feldman. (Signed by Judge William H. Pauley III on 4/25/07) (djc) (Entered: 05/01/2007)
05/01/2007		Transmission to Attorney Admissions Clerk. Transmitted re: 22 Order on Motion to Appear Pro Hac Vice, to the Attorney Admissions Clerk for updating of Attorney Information. (djc) (Entered: 05/01/2007)
05/03/2007	23	FILING ERROR − ELECTRONIC FILING IN NON−ECF CASE − WAIVER OF SERVICE RETURNED EXECUTED. Wilfred Van Gorp waiver sent on 4/26/2007, answer due 6/25/2007; Cornell University Medical College waiver sent on 4/26/2007, answer due 6/25/2007. Document filed by United States of America. (Goldshaw, Scott) Modified on 5/4/2007 (lb). (Entered: 05/03/2007)
05/03/2007	24	FILING ERROR − ELECTRONIC FILING IN NON−ECF CASE − NOTICE OF CHANGE OF ADDRESS by Scott B. Goldshaw on behalf of United States of America. New Address: Salmanson Goldshaw, PC, Two Penn Center, Suite 1230, 1500 JFK Blvd., Philadelphia, PA, USA 19102, 215−640−0593. (Goldshaw, Scott) Modified on 5/4/2007 (lb). (Entered: 05/03/2007)
05/04/2007		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − NON−ECF CASE ERROR. Note to Attorney Scott B. Goldshaw to MANUALLY RE−FILE Document WAIVER OF SERVICE RETURNED EXECUTED and NOTICE OF CHANGE OF ADDRESS, Document No. 23−24. This case is not ECF. (lb) (Entered: 05/04/2007)
05/09/2007	25	WAIVER OF SERVICE RETURNED EXECUTED. Cornell University Medical College waiver sent on 4/30/2007, answer due 6/29/2007. Document filed by United States of America. (tro) (Entered: 05/10/2007)
05/09/2007	26	WAIVER OF SERVICE RETURNED EXECUTED. Wilfred Van Gorp waiver sent on 4/30/2007, answer due 6/29/2007. Document filed by United States of America. (tro) (Entered: 05/10/2007)
05/09/2007	27	NOTICE OF CHANGE OF ADDRESS by Scott B. Goldshaw on behalf of United States of America. New Address: Two Penn Center, Suite 1230, 1500 JFK. Blvd., Philadelphia, PA, USA 19102, (215) 640−0593 (215) 640−0596− Fax goldshaw@salmangold.com. (tro) (Entered: 05/10/2007)
06/27/2007	29	ENDORSED LETTER addressed to Judge William H. Pauley from Brian Black dated 6/18/07 re: Counsel for defendant requests that Brian Black, the undersigned, be permitted to appear in his stead; Mr. Black is fully familiar with this matter. ENDORSEMENT: So Ordered. (Signed by Judge William H. Pauley III on 6/19/07) (js) (Entered: 07/03/2007)
07/06/2007	30	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Cornell University Medical College.(Black, Robert) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/06/2007)
07/06/2007	31	REPORT of Rule 26(f) Planning Meeting.(Black, Robert) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/06/2007)
07/12/2007	35	STIPULATION AND ORDER: IT IS HERBEY STIPULATED AND AGREED, by and between the undersigned attorneys, that defendants' time to answer or otherwise respond to the complaint in the above−captioned action shall be extended to and including July 13, 2007. SO ORDERED: (Signed by Judge

		William H. Pauley III on 07/06/07) (dcr) (Entered: 07/18/2007)
07/13/2007	32	ANSWER to Complaint. Document filed by Wilfred Van Gorp.(Beattie, Nina) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/13/2007)
07/13/2007	33	ANSWER to Complaint. Document filed by Cornell University Medical College.(Tiska, Tracey) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/13/2007)
07/16/2007	34	SCHEDULING ORDER: Fact Discovery shall be completed by 1/31/2008; Expert Discovery due by 3/28/2008. The parties shall submit by a joint pre−trial order due by 4/30/2008. Pretrial Conference set for 5/9/2008 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley III on 7/13/07) Copies Mailed By Chambers.(tro) (Entered: 07/18/2007)
07/24/2007	36	ORDER DESIGNATING CASE TO ECF STATUS: The Clerk of Court is directed to designate this action ECF nunc pro tunc. All subsequent Orders of this Court shall be issued through the ECF system. The parties shall make all filings via the ECF system and promptly provide this Court with courtesy copies of all filed papers. Within thirty (30) days of this Order, all counsel shall register as filing users in accordance with the Southern District's Procedures for Electronic Case Filing. (Signed by Judge William H. Pauley III on 7/17/07) Copies Mailed By Chambers.(tro) (Entered: 07/25/2007)
07/24/2007		Case Designated ECF. (tro) (Entered: 07/25/2007)
07/24/2007	37	SCHEDULING ORDER: Status Conference currently scheduled for 6/22/2070 at 11:45 a.m. is adjourned until 7/13/2007 at 11:15 AM in Courtroom 11D, 500 Pearl Street, New York, NY 10007 before Judge William H. Pauley III. (Signed by Judge William H. Pauley III on 6/21/2007) Copies mailed by chambers.(jar) (Entered: 07/25/2007)
11/19/2007	38	STIPULATED PROTECTIVE ORDER...regarding procedures to be followed that shall govern the handling of confidential material.... (Signed by Judge William H. Pauley III on 11/19/07) (tro) (Entered: 11/20/2007)
01/29/2008	39	SCHEDULING ORDER: Fact Discovery due by 3/14/08. Expert Discovery due by 5/16/2008. Joint Pretrial Order due by 6/13/2008. Final Pretrial Conference set for 7/11/2008 at 10:00 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 1/28/07) (tro) (Entered: 01/29/2008)
03/04/2008	44	ENDORSED LETTER addressed to Judge William H. Pauley from Michael Salmanson dated 2/26/08 re: Request to extend discovery. ENDORSEMENT: Application granted. Discovery is extended until 4/18/08. Expert discovery shall be completed by 6/20/08. The parties shall submit a joint pretrial order by 7/11/08. The Court will hold a final pretrial conference on 8/8/08 at 10:00 am. (Expert Discovery due by 6/20/2008. Joint Pretrial Order due by 7/11/2008. Final Pretrial Conference set for 8/8/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 2/29/08) (cd) (Entered: 03/04/2008)
04/10/2008	45	ENDORSED LETTER addressed to Judge WilliamH. Pauley from Tracey Tiska dated 4/2/08 re: Request that the pretrial conference set for 8/8 be moved to another date. ENDORSEMENT: Application granted. The conference is adjourned until 8/15/08 at 10:00 am. (Pretrial Conference reset for 8/15/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 4/7/08) (cd) (Entered: 04/10/2008)
05/02/2008	46	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 4/24/2008 re: counsel writes to request a one−month extension of the 6/20/2008 discovery deadline. The parties propose that the deadline for completion of expert discovery by 7/21/2008, and the deadline for the submission of the joint pre−trial order be 8/1/2008. The Court has already set the pre−trial conference for 8/15/2008 at 10:00 a.m. ENDORSEMENT: Application Granted. (Signed by Judge William H. Pauley, III on 4/30/2008) (jp) (Entered: 05/02/2008)
06/12/2008	47	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracy A. Tiska dated 5/23/2008 re: Requesting that the Court overrule Relator's objections to

		the interrogatories and compel a substantive response. ENDORSEMENT: This Court will hold a discovery conference on July 18, 2008 at 10:00 a.m. (Signed by Judge William H. Pauley, III on 6/3/208) (jpo) (Entered: 06/12/2008)
07/01/2008	50	ENDORSED LETTER addressed to Judge William H. Pauley from Tracey A. Tiska and Michael J. Salmanson dated 5/23/08 re: Counsel writes to jointly raise a discovery dispute that has arisen with respect to Cornells Second set of interrogatories (the Interrogatories). A copy of which is attached to this letter for the courts reference. ENDORSEMENT: The court will hold a discovery conference on July 18, 2008 at 10:00 a.m., (Discovery Hearing set for 7/18/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 6/3/08) (mme) (Entered: 08/15/2008)
07/22/2008	48	SCHEDULING ORDER: For the reasons set forth on the record, the Relator's objections to Defendant's interrogatories are sustained. The parties shall submit any pre−motion letters by August 5, 2008. This Court will hold a pre−motion conference on August 15, 2008 at 10:00 a.m., in lieu of the final pre−trial conference currently set for that time. The deadline for submission of the joint pre−trial order is adjourned until a date to be determined. (Signed by Judge William H. Pauley, III on 7/21/2008) (jfe) (Entered: 07/22/2008)
08/06/2008	49	ENDORSED LETTER addressed to Judge William H. Pauley from Michael J. Salmanson dated 7/8/08 Counsels jointly write to raise a discovery dispute regarding the production of certain declarations. Counsels hope that the court will add this item to the discovery conference to be held on July 18, 2008. ENDORSEMENT: This court will hold a discovery conference on August 15, 2008 in conjunction with the pre−motion conference set for that time. (Signed by Judge William H. Pauley, III on 8/4/08) (mme) (Entered: 08/06/2008)
08/15/2008	51	SCHEDULING ORDER: Relator shall conduct a two−hour deposition of Dr. Walton−Louis by 9/15/08. Relator's application to strike Dr. Berman's declaration is denied. The parties shall serve and file any motions in limine addressed to experts by 9/15/08. The parties shall serve and file any responses by 10/14/08. The parties shall serve and file any replies by 10/24/08. This Court will hear Oral Argument and hold a Status Conference on 11/20/2008 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 8/15/08) (tro) (Entered: 08/18/2008)
09/15/2008	52	FILING ERROR − ELECTRONIC FILING FOR NON−ECF DOCUMENT (PROPOSED ORDER) − MOTION in Limine *to Exclude Defendants' Expert Testimony*. Document filed by Daniel Feldman.(Goldshaw, Scott) Modified on 9/16/2008 (jar). (Entered: 09/15/2008)
09/15/2008	53	FILING ERROR − DEFICIENT DOCKET ENTRY − MEMORANDUM OF LAW in Support re: 52 MOTION in Limine *to Exclude Defendants' Expert Testimony*.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Goldshaw, Scott) Modified on 9/16/2008 (jar). (Entered: 09/15/2008)
09/15/2008	54	MOTION in Limine *to Preclude the Testimony of Relator's Expert*. Document filed by Wilfred Van Gorp, Cornell University Medical College. Return Date set for 11/20/2008 at 11:30 AM.(Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	55	MEMORANDUM OF LAW in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	56	DECLARATION of Dr. Robert A. Bornstein in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	57	DECLARATION of Dr. Marlene Oscar Berman in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)

09/15/2008	58	DECLARATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B (Pt. 1 of 4), # 3 Exhibit B (Pt. 2 of 4), # 4 Exhibit B (Pt. 3 of 4), # 5 Exhibit B (Pt. 4 of 4), # 6 Exhibit C (Pt. 1 of 5), # 7 Exhibit C (Pt. 2 of 5), # 8 Exhibit C (Pt. 3 of 5), # 9 Exhibit C (Pt. 4 of 5), # 10 Exhibit C (Pt. 5 of 5), # 11 Exhibit D, # 12 Exhibit E (Pt. 1 of 2), # 13 Exhibit E (Pt. 2 of 2), # 14 Exhibit F and G)(Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	59	ORDER: Counsel for the parties jointly requested clarification of this Court's August 15, 2008, Scheduling Order permitting Realtor to conduct a two−hour deposition of Dr. Walton−Louis. Relator is permitted to serve a subpoena duces tecum on Dr. Walton−Louis to obtain documents which bear on her testimony and the prior declaration she submitted to defense counsel. (Signed by Judge William H. Pauley, III on 9/15/08) (tro) (Entered: 09/16/2008)
09/15/2008		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − NON−ECF DOCUMENT ERROR. Note to Attorney Scott Goldshaw to E−MAIL Document No. 52 Proposed Order to judgments@nysd.uscourts.gov. This document is not filed via ECF. Then re−file Motion in Limine. (jar) (Entered: 09/16/2008)
09/15/2008		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Scott Goldshaw to RE−FILE Document 53 Memorandum of Law in Support of Motion. ERROR(S): Link supporting documents to correctly re−filed motion. (jar) (Entered: 09/16/2008)
09/16/2008	60	MOTION in Limine *To Exclude Defendants' Expert Testimony*. Document filed by Daniel Feldman. Return Date set for 11/20/2008 at 11:30 AM.(Goldshaw, Scott) (Entered: 09/16/2008)
09/16/2008	61	MEMORANDUM OF LAW in Support re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Goldshaw, Scott) (Entered: 09/16/2008)
10/14/2008	62	FILING ERROR − DEFICIENT DOCKET ENTRY − MEMORANDUM OF LAW in Opposition re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Daniel Feldman. (Attachments: # 1 Declaration of Michael J. Salmanson, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12)(Salmanson, Michael) Modified on 10/15/2008 (jar). (Entered: 10/14/2008)
10/14/2008	63	JOINT MEMORANDUM OF LAW in Opposition re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Certificate of Service)(Tiska, Tracey) (Entered: 10/14/2008)
10/14/2008	64	DECLARATION of Tracey A. Tiska in Opposition re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Certificate of Service)(Tiska, Tracey) (Entered: 10/14/2008)
10/14/2008		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael Salmanson to RE−FILE Document 62 Memorandum of Law in Opposition to Motion. ERROR(S): Each Supporting Document must be filed individually. Use event type Declaration in Support found under Other Answers. (jar) (Entered: 10/15/2008)
10/15/2008	65	MEMORANDUM OF LAW in Opposition re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/15/2008)
10/15/2008	66	DECLARATION of Michael J. Salmanson in Support re: 65 Memorandum of Law in Opposition to Motion. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, #

		7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12)(Salmanson, Michael) (Entered: 10/15/2008)
10/24/2008	67	REPLY MEMORANDUM OF LAW in Support re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*. *with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/24/2008)
10/24/2008	69	REPLY AFFIRMATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B − C, # 3 Exhibit D − H)(Beattie, Nina) (Entered: 10/24/2008)
10/24/2008		***STRICKEN DOCUMENT. Deleted document number 68 from the case record. The document was stricken from this case pursuant to 76 Endorsed Letter. (tve) (Entered: 02/25/2009)
11/24/2008	70	SCHEDULING ORDER: re defendants motion for summary judgment: Motion due by 1/9/2009. Response due by 2/6/2009. Reply due by 2/18/2009. Oral Argument set for 3/13/2009 at 11:30 AM before Judge William H. Pauley III. Status Conference set for 3/13/2009 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 11/24/08) Copies sent by chambers(cd) (Entered: 11/25/2008)
12/08/2008	71	TRANSCRIPT of proceedings held on 11/20/08 before Judge William H. Pauley, III. (pl) (Entered: 12/15/2008)
12/19/2008	72	MEMORANDUM &ORDER denying 54 Motion in Limine; granting in part and denying in part 60 Motion in Limine. (Signed by Judge William H. Pauley, III on 12/19/08) (ae) (Entered: 12/19/2008)
12/29/2008	73	ENDORSED LETTER addressed to Judge William H. Pauley from Emily Reisbaum dated 12/23/08 re: Therefore, defendants request permission to submit one joint memorandum of 40 pages. ENDORSEMENT: Application granted in part. Defendants may submit one joint brief of 35 pages in length. (Signed by Judge William H. Pauley, III on 12/24/08) (pl) (Entered: 12/29/2008)
02/06/2009	74	ENDORSED LETTER addressed to Judge William H.Pauley III from Tracey A. Tiska dated 1/28/2009 re: The parties respectfully request a slight modification to the current briefing schedule and for a clarification of Your Honor's prior order. Relator's counsel requests a short extension to file his response on Tuesday, February 10, instead of Friday, February 6. Defendants' counsel respectfully request that the due date for their reply brief be extended from Wednesday, February 18 to Tuesday, February 24 because of the school vacation schedules. Therefore the parties respectfully request that relator be permitted to file an opposition brief of the same length as defendants' brief in support of their summary judgment motion (35 pages). ENDORSEMENT: Application granted. So Ordered. (Signed by Judge William H. Pauley, III on 2/6/2009) (jfe) (Entered: 02/09/2009)
02/24/2009	75	ENDORSED LETTER addressed to Judge William H. Pauley, III from Tracey A. Tiska dated 2/17/2009 re: Defendants' request permission to submit one joint reply memorandum of 15 pages. ENDORSEMENT: Application granted. SO ORDERED. (Signed by Judge William H. Pauley, III on 2/24/2009) (tve) (Entered: 02/25/2009)
02/24/2009	76	ENDORSED LETTER addressed to Judge William H. Pauley, III from Eva L. Dietz dated 2/12/2009 re: Counsel writes on behalf of both defendants to submit a revised request to file Exhibit BBBB attached to the Declaration of Tracey A. Tiska under seal and also seeks leave to file Exhibit H of the Declaration of Emily Reisbaum as well as the memorandum of law in support of the Motion to Preclude under seal and to replace the "public version" of these papers currently on the public electronic docket with redacted versions. ENDORSEMENT: Applications granted. The materials identified above may be filed under seal. Defendants may withdraw and re−file redacted copies on ECF and unreacted copies under seal of Docket # 68. The Clerk shall strike docket #68 from the docket sheet and allow refiling as requested by Defendants. Defendants may also withdraw and file under seal Exhibit H to Docket # 69. SO ORDERED. (Signed by Judge William H. Pauley, III on 2/24/2009) (tve) Modified on 2/25/2009 (tve). Modified on 3/9/2009

		(tve). (Entered: 02/25/2009)
02/24/2009	77	SEALED DOCUMENT placed in vault.(rt) (Entered: 02/25/2009)
03/03/2009	78	SEALED DOCUMENT placed in vault.(jri) (Entered: 03/03/2009)
03/03/2009	79	ENDORSED LETTER addressed to Judge William H. Pauley from Heather K. McShain dated 2/25/2009 re: The government respectfully renews its request that the Court: (1) order a new briefing scheduled that will allow the government 30 days, until 3/16/2009, to file a Statement of Interest, and that defendants be permitted thirty days after receipt of the government's Statement of Interest in which to file a response; and (2) adjourn the 3/13/2009 date for oral argument to a date following defendants submission of their response to the government's Statement of Interest. ENDORSEMENT: Application granted. This Court will hold oral argument on 5/8/2009 at 11:00 a.m. SO ORDERED. (Signed by Judge William H. Pauley, III on 3/3/2009) (tve) Modified on 3/4/2009 (tve). (Entered: 03/04/2009)
03/05/2009	80	ENDORSED LETTER addressed to Judge William H. Pauley from R. Brian Black dated 2/25/09 re: Request on behalf of both defendants to file a confidential document under seal in connection with defendants' reply memorandum in support of their joint motion for summary judgment, as well as file a redacted "public version" of the reply memorandum et al. ENDORSEMENT: Application granted. Defendant may file their reply and Exhibit A under seal, and a redacted version on ECF. (Signed by Judge William H. Pauley, III on 3/5/09) (cd) (Entered: 03/06/2009)
03/11/2009	81	SEALED DOCUMENT placed in vault.(jri) (Entered: 03/11/2009)
03/11/2009	82	REPLY MEMORANDUM OF LAW in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	83	DECLARATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	84	CERTIFICATE OF SERVICE of Defendants' Reply Memorandum Of Law In Further Support Of Their Motion To Preclude The Testimony Of Relator's Expert, Dr. Brian Kimes And Declaration Of Emily Reisbaum. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	85	RULE 56.1 STATEMENT. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	86	MOTION for Summary Judgment. Document filed by Wilfred Van Gorp, Cornell University Medical College.(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	87	MEMORANDUM OF LAW in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	88	DECLARATION of Dr. Wilfred G. Van Gorp in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	89	DECLARATION of Tracey A. Tiska in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D part 1, # 5 Exhibit D part 2, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O, # 17 Exhibit P, # 18 Exhibit Q, # 19 Exhibit R, # 20 Exhibit S, # 21 Exhibit T, # 22 Exhibit U part 1, # 23 Exhibit U part 2, # 24 Exhibit U part 3, # 25 Exhibit V, # 26 Exhibit W, # 27 Exhibit X, # 28 Exhibit Y, # 29

		Exhibit Z, # 30 Errata AA, # 31 Exhibit BB, # 32 Exhibit CC, # 33 Exhibit DD, # 34 Exhibit EE, # 35 Exhibit FF, # 36 Exhibit GG, # 37 Exhibit HH, # 38 Exhibit II, # 39 Exhibit JJ, # 40 Exhibit KK, # 41 Exhibit LL, # 42 Exhibit MM, # 43 Exhibit NN, # 44 Exhibit OO, # 45 Exhibit PP, # 46 Exhibit QQ, # 47 Exhibit RR, # 48 Exhibit SS, # 49 Exhibit TT, # 50 Exhibit UU, # 51 Exhibit VV part 1, # 52 Exhibit VV part 2, # 53 Exhibit WW, # 54 Exhibit XX part 1, # 55 Exhibit XX part 2, # 56 Exhibit XX part 3, # 57 Exhibit XX part 4, # 58 Exhibit YY, # 59 Exhibit ZZ, # 60 Exhibit AAA, # 61 Exhibit BBB, # 62 Exhibit CCC, # 63 Exhibit DDD, # 64 Exhibit EEE, # 65 Exhibit FFF, # 66 Exhibit GGG, # 67 Exhibit HHH, # 68 Exhibit III, # 69 Exhibit JJJ, # 70 Exhibit KKK, # 71 Exhibit LLL, # 72 Exhibit MMM, # 73 Exhibit NNN, # 74 Exhibit OOO, # 75 Exhibit PPP, # 76 Exhibit QQQ, # 77 Exhibit RRR, # 78 Exhibit SSS, # 79 Exhibit TTT, # 80 Exhibit UUU, # 81 Exhibit VVV, # 82 Exhibit WWW, # 83 Exhibit XXX, # 84 Exhibit YYY, # 85 Exhibit ZZZ, # 86 Exhibit AAAA, # 87 Exhibit BBBB, # 88 Exhibit CCCC, # 89 Exhibit DDDD)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	90	CERTIFICATE OF SERVICE of Rule 56.1 Statement, Motion for Summary Judgment, Memorandum of Law, Declaration of Dr. Wilfred G. Van Gorp, and Declaration of Tracey A. Tiska. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	91	REPLY MEMORANDUM OF LAW in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	92	DECLARATION of Dr. Wilfred G. Van Gorp in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	93	DECLARATION of Tracey A. Tiska in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	94	CERTIFICATE OF SERVICE of Reply Memorandum of Law, Declaration of Dr. Wilfred G. Van Gorp, and Declaration of Tracey A. Tiska. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/16/2009	95	BRIEF re: 86 MOTION for Summary Judgment. *Statement of Interest of the United States*. Document filed by United States of America.(McShain, Heather) (Entered: 03/16/2009)
03/16/2009	96	CERTIFICATE OF SERVICE of Statement of Interest of the United States served on Counsel for Relator and Defendants on March 16, 2009. Service was made by Federal Express. Document filed by United States of America. (McShain, Heather) (Entered: 03/16/2009)
04/15/2009	97	NOTICE of Defendants' Response To The Statement Of Interest Of The United States Of America. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 04/15/2009)
04/24/2009	98	ENDORSED LETTER addressed to Judge William H Pauley from Michael Salmanson dated 4/20/09 re: Request that the Court formally grant Relator's request to: (1) file a redacted version of its papers in response to Defendants' Motion for Summary Judgment on the electronic docket; and (2) file the unredacted version of the papers under seal. ENDORSEMENT: Application granted. (Signed by Judge William H. Pauley, III on 4/23/09) (cd) (Entered: 04/24/2009)
04/24/2009	99	FILING ERROR − DEFICIENT DOCKET ENTRY (See document #102) − AMENDED REPLY MEMORANDUM OF LAW in Opposition re: 86 MOTION for Summary Judgment. *REDACTED with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) Modified on 4/27/2009 (jar). (Entered: 04/24/2009)

04/24/2009	100	COUNTER STATEMENT TO 85 Rule 56.1 Statement. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 04/24/2009)
04/24/2009	101	DECLARATION of Michael J. Salmanson in Opposition re: 86 MOTION for Summary Judgment.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R)(Salmanson, Michael) (Entered: 04/24/2009)
04/24/2009	102	REPLY MEMORANDUM OF LAW in Opposition re: 86 MOTION for Summary Judgment. *REDACTED with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 04/24/2009)
05/04/2009	103	SEALED DOCUMENT placed in vault.(jri) (Entered: 05/04/2009)
12/07/2009	104	MEMORANDUM &ORDER denying 86 Motion for Summary Judgment. For the reasons set forth in this Memorandum &Order, Defendants' motion for summary judgment is denied. The parties are directed to appear for a conference on 12/21/09 at 11:00 a.m. (Signed by Judge William H. Pauley, III on 12/7/09) (tro) (Entered: 12/08/2009)
12/18/2009	105	JOINT MOTION for Reconsideration. Document filed by Wilfred Van Gorp, Cornell University Medical College.(Black, Robert) (Entered: 12/18/2009)
12/18/2009	106	MEMORANDUM OF LAW in Support re: 105 JOINT MOTION for Reconsideration.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Black, Robert) (Entered: 12/18/2009)
12/22/2009	107	SCHEDULING ORDER: (1) Plaintiff shall file his opposition to Defendants' motion for reconsideration by January 8, 2010; (2) Defendants shall file any reply by January 15, 2010; (3) The parties shall submit a joint pre−trial order by March 26, 2010; and, (4) The Court will hold a final pre−trial conference on April 9, 2010 at 10:00 a.m. The Court will consider Defendants' motion for reconsideration on submission. SO ORDERED. (Signed by Judge William H. Pauley, III on 12/21/2009) (tve) (Entered: 12/23/2009)
01/08/2010	108	REPLY MEMORANDUM OF LAW in Opposition re: 105 JOINT MOTION for Reconsideration. *with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit Exhibits 1, 2 and 3)(Salmanson, Michael) (Entered: 01/08/2010)
01/15/2010	109	REPLY MEMORANDUM OF LAW in Support re: 105 JOINT MOTION for Reconsideration.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 01/15/2010)
03/23/2010	110	ENDORSED LETTER addressed to Judge William H. Pauley from Tracey Tiska dated 3/12/10 re: Request that the date for filing the pretrial order be adjourned three weeks after a decision is rendered on defendants' motion for reconsideration. ENDORSEMENT: Application granted. (Signed by Judge William H. Pauley, III on 3/22/10) (cd) (Entered: 03/23/2010)
04/12/2010	111	SCHEDULING ORDER NO. 15: Upon the request of both parties, the final pre−trial conference scheduled for 4/9/2010 is adjourned until 5/21/2010 at 11:15 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 4/9/2010) (tro) (Entered: 04/12/2010)
05/03/2010	112	NOTICE of Change of firm Name and Email Addresses. Document filed by Cornell University Medical College. (Tiska, Tracey) (Entered: 05/03/2010)
05/03/2010	113	MEMORANDUM AND ORDER denying 105 Motion for Reconsideration. For the further set forth in this Order, Defendants' motion for reconsideration is denied. SO ORDERED. (Signed by Judge William H. Pauley, III on 5/3/2010) (tve) (Entered: 05/03/2010)
05/06/2010	114	SCHEDULING ORDER NO. 16: The final pre−trial conference scheduled for 5/21/2010 at 11:15 a.m. is adjourned until 6/9/2010 at 2:00 p.m. before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 5/6/2010) (tro) (Entered: 05/07/2010)

06/09/2010	115	SCHEDULING ORDER NO. 17: Jury selection and trial will begin on July 12, 2010. The parties shall file any motions in limine by June 21, 2010. The parties shall file any oppositions by June 28, 2010. The parties shall file any replies by July 2, 2010. The parties shall submit briefing on what constitutes a "claim for payment" for purposes of assessing statutory damages by July 2, 2010. Finally, the parties shall submit proposed voir dire, a brief summary of the case, a joint request to charge, and proposed verdict sheet by July 2, 2010. (Signed by Judge William H. Pauley, III on 6/9/2010) (jfe) (Entered: 06/10/2010)
06/21/2010	116	MOTION in Limine *to Exclude Certain Evidence at Trial*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 06/21/2010)
06/21/2010	117	MEMORANDUM OF LAW in Support re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*. *with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12 Part 1, # 13 Exhibit 12 Part 2, # 14 Exhibit 12 Part 3, # 15 Exhibit 13, # 16 Exhibit 14, # 17 Exhibit 15)(Salmanson, Michael) (Entered: 06/21/2010)
06/21/2010	118	MOTION in Limine *To Exclude Exhibits And Testimony*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Certificate of Service)(Tiska, Tracey) (Entered: 06/21/2010)
06/21/2010	119	MEMORANDUM OF LAW in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 06/21/2010)
06/21/2010	120	DECLARATION of Tracey A. Tiska in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A)(Tiska, Tracey) (Entered: 06/21/2010)
06/23/2010	121	TRANSCRIPT of proceedings held on June 9, 2010 2:00 p.m. before Judge William H. Pauley, III. (ajc) (Entered: 06/23/2010)
06/28/2010	122	REPLY MEMORANDUM OF LAW in Opposition re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*. *with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 06/28/2010)
06/28/2010	123	MEMORANDUM OF LAW in Opposition re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 06/28/2010)
06/28/2010	124	DECLARATION of Tracey A. Tiska in Opposition re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A−D, # 2 Exhibit E−F)(Tiska, Tracey) (Entered: 06/28/2010)
07/01/2010	128	MOTION for Viviann Stapp to Appear Pro Hac Vice. Document filed by Wilfred Van Gorp.(mro) (Entered: 07/07/2010)
07/02/2010	125	REPLY MEMORANDUM OF LAW in Support re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial*. *with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibits 16 − 20)(Salmanson, Michael) (Entered: 07/02/2010)
07/02/2010	126	REPLY MEMORANDUM OF LAW in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 07/02/2010)
07/02/2010	127	DECLARATION of Tracey A. Tiska in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit a)(Tiska, Tracey) (Entered: 07/02/2010)
07/07/2010	129	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 6/28/10 re: counsel for defendant respectfully requests permission to bring in electronic equipment that is not provided by the court's courtroom

		technology department. Specifically, we are requesting permission for the individuals, listed in this letter to bring electronic devices to the courthouse on July 9, 2010 through the end of the trial. ENDORSEMENT: Application denied for failure to comply with standing order M10−468 dated Feb. 18, 2010. (Signed by Judge William H. Pauley, III on 7/7/10) (pl) Modified on 7/7/2010 (pl). Modified on 7/7/2010 (pl). Modified on 7/7/2010 (pl). Modified on 7/8/2010 (ae). (Entered: 07/07/2010)
07/07/2010	130	ENDORSED LETTER addressed to Judge William H. Pauley III from Michael J. Salmanson dated 6/28/10 re: counsel for plaintiff respectfully requests permission for the individuals listed in this letter, to bring the following electronic equipment that is not provided by the court's technology department to the courthouse on July 12, 2010 through the end of trial. ENDORSEMENT: Application denied for failure to comply with standing order M10−468 dated Feb. 18, 2010. (Signed by Judge William H. Pauley, III on 7/7/10) (pl) (Entered: 07/07/2010)
07/08/2010	131	MEMORANDUM AND ORDER: For the foregoing reasons, relator's motions in limine are granted in part and denied in part, Defendants' motions in limine are denied in part, and decision on the balance of the parties' motions in limine is reserved until trial. So Ordered. (Signed by Judge William H. Pauley, III on 7/8/2010) (js) (Entered: 07/08/2010)
07/09/2010		CASHIERS OFFICE REMARK on 128 Motion to Appear Pro Hac Vice in the amount of $25.00, paid on 07/01/2010, Receipt Number 907905. (jd) (Entered: 07/09/2010)
07/12/2010	132	ORDER FOR ADMISSION PRO HAC VICE ON WRITTEN MOTION, granting 128 Motion for Viviann Stapp to Appear Pro Hac Vice. Additional relief as set forth in this Order. (Signed by Judge William H. Pauley, III on 7/12/10) (pl) (Entered: 07/12/2010)
07/14/2010	133	AMENDED JOINT PRETRIAL ORDER: Pursuant to Rule 6A of the Court's Individual Practices, trial counsel for the parties in the above captioned action respectfully submit this pre−trial order, as set forth in this Order. Document filed by Wilfred Van Gorp, Cornell University Medical College, Daniel Feldman.(jpo) (Entered: 07/15/2010)
07/16/2010	134	ORDER: This Court has already determined the measure of damages as a matter of law, so that issue will not be before the jury. Accordingly, Relator's request is denied, as set forth in this Order. (Signed by Judge William H. Pauley, III on 7/16/2010) (jpo) (Entered: 07/16/2010)
07/19/2010	135	LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 7/17/10 re: Counsel requests that the Court inform the jury on Monday that: "In a False Claims Act case, the Government has the option to intervene as a party or to decline to intervene. Because the Government may have decided not to intervene for any number of reasons, you should draw no inferences from the fact that the Government has declined to intervene in this case." Document filed by Wilfred Van Gorp, Cornell University Medical College. (djc) (Entered: 07/20/2010)
07/19/2010	136	LETTER addressed to Judge William H. Pauley III from Michael J. Salmanson dated 7/18/10 re: counsel writes in response to Mr. Black's letter of July 17, 2010 in regard to two issues which have arisen. Document filed by United States of America.(djc) (Entered: 07/20/2010)
07/23/2010	137	LETTER addressed to Judge William H. Pauley, III from R. Brikan Black dated 7/21/10 re: Counsel for defendant writes on behalf of Defendants Cornell University and Dr. Wilfred van Gorp to request that the Court strike and direct the jUry not to consider testimony by Relator regarding what he has referred to as "the incident" between himself and Dr. van Gorp's former partner. Document filed by Cornell University Medical College, Wilfred Van Gorp.(pl) (Entered: 07/23/2010)
07/23/2010	138	JURY VERDICT FORM.(mro) (Entered: 07/23/2010)
07/23/2010	139	LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 7/21/10 re: Defendants write in regards to the Court's draft Jury Charge. Defendants offer substitutions and additions as set forth in this letter. Document

		filed by Cornell University Medical College, Wilfred Van Gorp.(ae) (Entered: 07/23/2010)
07/30/2010	140	STATEMENT OF DAMAGES. Document filed by Daniel Feldman. (Attachments: # 1 Affidavit Declaration of Michael J. Salmanson with Exhibits)(Salmanson, Michael) (Entered: 07/30/2010)
08/03/2010	141	JUDGMENT #10,1328 in favor of United States of America against Cornell University Medical College, and Wilfred Van Gorp in the amount of $ 887,714.00. (Signed by Judge William H. Pauley, III on 8/3/10) (Attachments: # 1 notice of right to appeal)(ml) (Entered: 08/03/2010)
08/11/2010	142	AMENDED JUDGMENT # 10,1328 amending 141 Judgment, in favor of United States of America against Cornell University and Wilfred Van Gorp, jointly and severally, in the amount of $ 887,714.00. (Signed by Judge William H. Pauley, III on 8/11/10) (Attachments: # 1 NOTICE OF RIGHT TO APPPEAL)(ml) (Entered: 08/12/2010)
08/12/2010	143	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 8/10/2010 re: Defendants respectfully request permission to file their supporting brief after the August 31 deadline for the motion. Defendants Opening Brief served by September 16 (16 days after the August 31 motion filing date); Relator's Opposition Brief served by October 8; and Defendants Reply Brief served by October 20. ENDORSEMENT: APPLICATION GRANTED. SO ORDERED. (Signed by Judge William H. Pauley, III on 8/12/2010) (jmi) (Entered: 08/13/2010)
08/13/2010	144	NOTICE OF APPEAL from 142 Amended Judgment,. Document filed by Cornell University Medical College, Wilfred Van Gorp. Filing fee $ 455.00, receipt number E 911890. (nd) (Entered: 08/16/2010)
08/16/2010		Transmission of Notice of Appeal to the District Judge re: 144 Notice of Appeal. (nd) (Entered: 08/16/2010)
08/16/2010		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 144 Notice of Appeal. (nd) (Entered: 08/16/2010)
08/16/2010		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 120 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 134 Order, Set Deadlines/Hearings,, 127 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 126 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 141 Judgment, 85 Rule 56.1 Statement filed by Wilfred Van Gorp, Cornell University Medical College, 58 Declaration in Support of Motion,, filed by Wilfred Van Gorp, Cornell University Medical College, 69 Reply Affirmation in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 92 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 124 Declaration in Opposition to Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 44 Endorsed Letter, Set Deadlines/Hearings,,,, 66 Declaration in Support, filed by Daniel Feldman, 123 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 84 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 132 Order on Motion to Appear Pro Hac Vice, 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*. filed by Daniel Feldman, 130 Endorsed Letter,, 64 Declaration in Opposition to Motion, filed by Cornell University Medical College, 115 Scheduling Order,, 97 Notice (Other) filed by Wilfred Van Gorp, Cornell University Medical College, 59 Order, 79 Endorsed Letter, Set Hearings,,,,,, 50 Endorsed Letter, Set Hearings,,,, 125 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 67 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 33 Answer to Complaint filed by Cornell University Medical College, 75 Endorsed Letter, 137 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 96 Certificate of Service Other filed by United States of America, 70 Scheduling Order, 105 JOINT MOTION for Reconsideration. filed by Wilfred Van Gorp, Cornell University Medical College, 55 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 72 Order on Motion in Limine, 106 Memorandum of Law in Support of Motion filed by

		Wilfred Van Gorp, Cornell University Medical College, 83 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 90 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 63 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 101 Declaration in Opposition to Motion, filed by Daniel Feldman, 143 Endorsed Letter,, 108 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*. filed by Wilfred Van Gorp, Cornell University Medical College, 128 MOTION for Viviann Stapp to Appear Pro Hac Vice. filed by Wilfred Van Gorp, 30 Rule 7.1 Corporate Disclosure Statement filed by Cornell University Medical College, 47 Endorsed Letter, Set Deadlines/Hearings,, 109 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 87 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 133 Proposed Pretrial Order, filed by Daniel Feldman, Wilfred Van Gorp, Cornell University Medical College, 61 Memorandum of Law in Support of Motion, filed by Daniel Feldman, 49 Endorsed Letter, Set Hearings,, 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 140 Statement of Damages filed by Daniel Feldman, 74 Endorsed Letter, Set Deadlines/Hearings,,,,,,, 113 Order on Motion for Reconsideration, 65 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 100 Counter Statement to Rule 56.1 filed by Daniel Feldman, 39 Scheduling Order, 45 Endorsed Letter, Set Deadlines/Hearings,, 136 Letter, filed by United States of America, 95 Brief filed by United States of America, 104 Order on Motion for Summary Judgment, 117 Memorandum of Law in Support of Motion,, filed by Daniel Feldman, 112 Notice (Other) filed by Cornell University Medical College, 38 Protective Order, 73 Endorsed Letter, 119 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 111 Scheduling Order, 56 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 121 Transcript, 131 Order on Motion in Limine,,, 31 Rule 26(f) Discovery Plan Report, 86 MOTION for Summary Judgment. filed by Wilfred Van Gorp, Cornell University Medical College, 122 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 94 Certificate of Service Other filed by Wilfred Van Gorp, Cornell University Medical College, 135 Letter,, filed by Wilfred Van Gorp, Cornell University Medical College, 76 Endorsed Letter,,,, 98 Endorsed Letter, 129 Endorsed Letter,, 48 Scheduling Order,, 82 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 51 Scheduling Order,, 46 Endorsed Letter, Set Deadlines/Hearings,,,, 80 Endorsed Letter,, 116 MOTION in Limine *to Exclude Certain Evidence at Trial*. filed by Daniel Feldman, 89 Declaration in Support of Motion,,,,,,, filed by Wilfred Van Gorp, Cornell University Medical College, 32 Answer to Complaint filed by Wilfred Van Gorp, 107 Scheduling Order, Set Motion and RRDeadlines/Hearings,, 102 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 118 MOTION in Limine *To Exclude Exhibits And Testimony*. filed by Wilfred Van Gorp, Cornell University Medical College, 91 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 93 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 142 Amended Judgment, 88 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 139 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 57 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 114 Scheduling Order, 110 Endorsed Letter, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 08/16/2010)
08/17/2010	145	TRANSCRIPT of proceedings held on July 12, 13, 14, 15, 19, 2010 before Judge William H. Pauley, III. (bw) (Entered: 08/17/2010)
08/17/2010	146	MOTION for Attorney Fees *Notice of Motion*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 08/17/2010)
08/17/2010	147	MEMORANDUM OF LAW in Support re: 146 MOTION for Attorney Fees *Notice of Motion*.. Document filed by Daniel Feldman. (Attachments: # 1 Declaration of Michael Salmanson with Exhibits)(Salmanson, Michael) (Entered: 08/17/2010)

08/17/2010	148	SUPERSEDEAS BOND # 0528322 in the amount of $ 985,363.00 posted by Cornell University Medical College, Wilfred Van Gorp. (dt) (Entered: 08/18/2010)
08/17/2010	149	TRANSCRIPT of proceedings held on July 20, 21, 22, 2010 before Judge William H. Pauley, III. (ja) (Entered: 08/19/2010)
08/25/2010	150	MOTION for New Trial., MOTION for Judgment as a Matter of Law. Document filed by Cornell University Medical College, Wilfred Van Gorp.(Tiska, Tracey) (Entered: 08/25/2010)
08/26/2010	151	MEMORANDUM OF LAW in Opposition re: 146 MOTION for Attorney Fees *Notice of Motion*.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/26/2010)
08/26/2010	152	MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*. Document filed by Cornell University Medical College, Wilfred Van Gorp.(Tiska, Tracey) (Entered: 08/26/2010)
08/26/2010	153	MEMORANDUM OF LAW in Support re: 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/26/2010)
09/02/2010	154	REPLY MEMORANDUM OF LAW in Support re: 146 MOTION for Attorney Fees *Notice of Motion*., 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*.. Document filed by Daniel Feldman. (Attachments: # 1 Supplemental Declaration of Michael J. Salmanson with Exhibit A)(Salmanson, Michael) (Entered: 09/02/2010)
09/08/2010	155	RESPONSE to Motion re: 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 09/08/2010)
09/16/2010	156	MEMORANDUM OF LAW in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 09/16/2010)
09/16/2010	157	DECLARATION of Tracey A. Tiska in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I part 1, # 10 Exhibit I part 2, # 11 Exhibit I part 3, # 12 Exhibit I part 4, # 13 Exhibit I part 5, # 14 Exhibit I part 6, # 15 Exhibit I part 7, # 16 Exhibit J, # 17 Exhibit K, # 18 Exhibit L, # 19 Exhibit M)(Tiska, Tracey) (Entered: 09/16/2010)
09/20/2010		***DELETED DOCUMENT. Deleted document number 158 Sealed Document. The document was incorrectly filed in this case. (cb) (Entered: 09/23/2010)
09/23/2010	158	ENDORSED LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 9/16/2010 re: All parties respectfully request that the Court stay determination of Relator's pending motion for attorney fees, Dkt. No. 146, until defendants' post−trial motion is decided. If the parties' joint request is granted, Defendants withdraw their motion for a stay, Dkt. No. 152, as moot. ENDORSEMENT: Application granted. The Clerk of Court is directed to terminate Docket Entry No. 152. So Ordered. (Signed by Judge William H. Pauley, III on 9/23/2010) (jfe) Modified on 9/27/2010 (jfe). (Entered: 09/27/2010)
10/04/2010	159	NOTICE OF CHANGE OF ADDRESS by Nina Minard Beattie on behalf of Wilfred Van Gorp. New Address: Brune &Richard LLP, One Battery Park Plaza, 34th Floor, New York, New York, 10004,. (Beattie, Nina) (Entered: 10/04/2010)
10/08/2010	160	MEMORANDUM OF LAW in Opposition re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law. *with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/08/2010)
10/20/2010	161	REPLY MEMORANDUM OF LAW in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Attachments: # 1 Reply Declaration of Tracey A. Tiska, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C part 1, # 5 Exhibit C

		part 2)(Tiska, Tracey) (Entered: 10/20/2010)
12/09/2010	162	MEMORANDUM AND ORDER: For reasons further set forth in said Order, Defendants' motion for judgment as a matter of law pursuant to FRCP 50(b) or, alternatively, for a new trial pursuant to FRCP 59 is denied. ORDER denying 150 Motion for New Trial; denying 150 Motion for Judgment as a Matter of Law. (Signed by Judge William H. Pauley, III on 12/9/10) (db) (Entered: 12/09/2010)
12/13/2010	163	FILING ERROR − DEFICIENT DOCKET ENTRY − SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service. Document filed by Daniel Feldman.(Salmanson, Michael) Modified on 12/14/2010 (ka). (Entered: 12/13/2010)
12/14/2010		***NOTE TO ATTORNEY TO RE−FILE DOCUMENT − DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael Joseph Salmanson to RE−FILE Document 163 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service. ERROR(S): Filing Error of Declaration of Michael J. Salmanson. Declaration must be filed individually. Use event code Declaration(non−motion) located under Other Answers. (ka) (Entered: 12/14/2010)
12/14/2010	164	SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 12/14/2010)
12/14/2010	165	DECLARATION of Michael J. Salmanson re: 164 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 12/14/2010)
02/08/2011	166	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College USCA Case Number 10−3297, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp) (nd). (Entered: 02/09/2011)
02/09/2011	167	MEMORANDUM AND ORDER: Motion practice over prevailing party fees is too often a time consuming endeavor requiring counsel and the Court to sift through minutiae. And it is always ancillary to the main event− a merits determination of the lawsuit. This motion is no exception. While the fee application has been pruned, this Court cannot help but wonder whether everyone's time might have been better spent. Relator Daniel Feldman's Motion for Attorneys' Fees, Costs and Expenses is granted in part and denied in part. Feldman's attorneys are awarded $602,898.63 in attorneys' fees and $25,862.15 in costs. Feldman is awarded his reasonable expenses in the amount of $3,121.47. The Clerk of Court is directed to terminate the motion pending at docket entries #146 and #164. (Signed by Judge William H. Pauley, III on 2/9/2011) (js) (Entered: 02/09/2011)
02/14/2011		Second Supplemental ROA Sent to USCA (Electronic File). Certified Supplemental Indexed record on Appeal Electronic Files for 167 Order on Motion for Attorney Fees, 159 Notice of Change of Address filed by Wilfred Van Gorp, 154 Reply Memorandum of Law in Support of Motion, filed by Daniel Feldman, 158 Endorsed Letter, 161 Reply Memorandum of Law in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 163 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Declaration and Certificate of Service* filed by Daniel Feldman, 153 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 165 Declaration filed by Daniel Feldman, 160 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 151 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 156 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 146 MOTION for Attorney Fees *Notice of Motion*. filed by Daniel Feldman, 147 Memorandum of Law in Support of Motion filed by Daniel Feldman, 148 Bond filed by Wilfred Van Gorp, Cornell University Medical College, 162 Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, 155 Response to Motion filed by Daniel Feldman, 164 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*. filed by Daniel Feldman, 166 Supplemental ROA Sent to

		USCA − Index, 157 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses* filed by Wilfred Van Gorp, Cornell University Medical College, 150 MOTION for New Trial MOTION for Judgment as a Matter of Law filed by Wilfred Van Gorp, Cornell University Medical College USCA Case Number 10−3297, were transmitted to the U.S. Court of Appeals. (tp) (Entered: 02/14/2011)
03/10/2011	168	NOTICE OF APPEAL from 167 Memorandum and Order. Document filed by Cornell University Medical College, Wilfred Van Gorp. Filing fee $ 455.00, receipt number E 931673. (nd) (Entered: 03/10/2011)
03/10/2011		Transmission of Notice of Appeal to the District Judge re: 168 Notice of Appeal. (nd) (Entered: 03/10/2011)
03/10/2011		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 168 Notice of Appeal. (nd) (Entered: 03/10/2011)
03/10/2011		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 168 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 120 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 134 Order, Set Deadlines/Hearings,, 127 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 126 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 141 Judgment, 85 Rule 56.1 Statement filed by Wilfred Van Gorp, Cornell University Medical College, 58 Declaration in Support of Motion,, filed by Wilfred Van Gorp, Cornell University Medical College, 69 Reply Affirmation in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 92 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 124 Declaration in Opposition to Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 44 Endorsed Letter, Set Deadlines/Hearings,,,, 66 Declaration in Support, filed by Daniel Feldman, 123 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 84 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 132 Order on Motion to Appear Pro Hac Vice, 60 MOTION in Limine To Exclude Defendants' Expert Testimony. filed by Daniel Feldman, 130 Endorsed Letter,, 64 Declaration in Opposition to Motion, filed by Cornell University Medical College, 115 Scheduling Order,, 97 Notice (Other) filed by Wilfred Van Gorp, Cornell University Medical College, 59 Order, 79 Endorsed Letter, Set Hearings,,,,,, 50 Endorsed Letter, Set Hearings,,,, 125 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 67 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 33 Answer to Complaint filed by Cornell University Medical College, 75 Endorsed Letter, 137 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 96 Certificate of Service Other filed by United States of America, 70 Scheduling Order, 105 JOINT MOTION for Reconsideration. filed by Wilfred Van Gorp, Cornell University Medical College, 55 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 72 Order on Motion in Limine, 106 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 83 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 90 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 63 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 101 Declaration in Opposition to Motion, filed by Daniel Feldman, 143 Endorsed Letter,, 108 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 54 MOTION in Limine to Preclude the Testimony of Relator's Expert. filed by Wilfred Van Gorp, Cornell University Medical College, 128 MOTION for Viviann Stapp to Appear Pro Hac Vice. filed by Wilfred Van Gorp, 30 Rule 7.1 Corporate Disclosure Statement filed by Cornell University Medical College, 47 Endorsed Letter, Set Deadlines/Hearings,, 109 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 87 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 133 Proposed Pretrial Order, filed by Daniel Feldman,

		Wilfred Van Gorp, Cornell University Medical College, 61 Memorandum of Law in Support of Motion, filed by Daniel Feldman, 49 Endorsed Letter, Set Hearings,, 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 140 Statement of Damages filed by Daniel Feldman, 74 Endorsed Letter, Set Deadlines/Hearings,,,,,, 113 Order on Motion for Reconsideration, 65 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 100 Counter Statement to Rule 56.1 filed by Daniel Feldman, 39 Scheduling Order, 45 Endorsed Letter, Set Deadlines/Hearings,, 136 Letter, filed by United States of America, 95 Brief filed by United States of America, 104 Order on Motion for Summary Judgment, 117 Memorandum of Law in Support of Motion,, filed by Daniel Feldman, 112 Notice (Other) filed by Cornell University Medical College, 38 Protective Order, 73 Endorsed Letter, 119 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 111 Scheduling Order, 56 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 121 Transcript, 131 Order on Motion in Limine,,, 31 Rule 26(f) Discovery Plan Report, 86 MOTION for Summary Judgment. filed by Wilfred Van Gorp, Cornell University Medical College, 122 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 94 Certificate of Service Other filed by Wilfred Van Gorp, Cornell University Medical College, 135 Letter,, filed by Wilfred Van Gorp, Cornell University Medical College, 76 Endorsed Letter,,,, 98 Endorsed Letter, 129 Endorsed Letter,, 48 Scheduling Order,, 82 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 51 Scheduling Order,, 46 Endorsed Letter, Set Deadlines/Hearings,,,, 80 Endorsed Letter,, 116 MOTION in Limine to Exclude Certain Evidence at Trial. filed by Daniel Feldman, 89 Declaration in Support of Motion,,,,,,, filed by Wilfred Van Gorp, Cornell University Medical College, 32 Answer to Complaint filed by Wilfred Van Gorp, 107 Scheduling Order, Set Motion and RRDeadlines/Hearings,, 102 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 118 MOTION in Limine To Exclude Exhibits And Testimony. filed by Wilfred Van Gorp, Cornell University Medical College, 91 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 93 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 142 Amended Judgment, 88 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 139 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 57 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 114 Scheduling Order, 110 Endorsed Letter, 167 Order on Motion for Attorney Fees, 159 Notice of Change of Address filed by Wilfred Van Gorp, 154 Reply Memorandum of Law in Support of Motion, filed by Daniel Feldman, 158 Endorsed Letter, 161 Reply Memorandum of Law in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 163 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service filed by Daniel Feldman, 153 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 165 Declaration filed by Daniel Feldman, 160 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 151 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 156 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 146 MOTION for Attorney Fees Notice of Motion. filed by Daniel Feldman, 147 Memorandum of Law in Support of Motion filed by Daniel Feldman, 148 Bond filed by Wilfred Van Gorp, Cornell University Medical College, 162 Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, 155 Response to Motion filed by Daniel Feldman, 164 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Certificate of Service. filed by Daniel Feldman, 166 Supplemental ROA Sent to USCA − Index, 157 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 152 MOTION to Stay An Award Of Attorneys' Fees, Costs And Expenses filed by Wilfred Van Gorp, Cornell University Medical College, 150 MOTION for New Trial MOTION for Judgment as a Matter of Law filed by Wilfred Van Gorp, Cornell University Medical College were transmitted to the U.S. Court of Appeals. (nd) (Entered: 03/10/2011)

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: March 15, 2011
Docket #: 11-975
Short Title: United States of America v. Van Gorp, et al

DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

NOTICE OF RECORD ON APPEAL FILED

In the above referenced case the document indicated below has been filed in the Court.

____ Record on Appeal - Certified List

____ Record on Appeal - CD ROM

____ Record on Appeal - Paper Documents

__x__ Record on Appeal - Electronic Index

____ Record on Appeal - Paper Index

Inquiries regarding this case may be directed to 212-857-8551.

ACKNOWLEDGMENT AND NOTICE OF APPEARANCE

Short Title: United States of America v. van Gorp Docket No.: 11-975

Lead Counsel of Record (name/firm) or Pro se Party (name): Tracey Tiska, Hogan Lovells US LLP

Appearance for (party/designation): Cornell University, Defendant-Appellant

DOCKET SHEET ACKNOWLEDGMENT/AMENDMENTS

Caption as indicated is:
( ) Correct
(✓) Incorrect. See attached caption page with corrections.

Appellate Designation is:
(✓) Correct
( ) Incorrect. The following parties do not wish to participate in this appeal:
Parties: _____
( ) Incorrect. Please change the following parties' designations:

Party	Correct Designation

Contact Information for Lead Counsel/Pro Se Party is:
(✓) Correct
( ) Incorrect or Incomplete, and should be amended as follows:

Name: Tracey Tiska
Firm: Hogan Lovells US LLP
Address: 875 Third Avenue,, New York, NY 10022
Telephone: 212.918.3620 Fax: 212.918.3100
Email: tracey.tiska@hoganlovells.com

RELATED CASES

( ) This case has not been before this Court previously.
( ) This case has been before this Court previously. The short title, docket number, and citation are: _____

(✓) Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers, and citations are: U.S.A. v. van Gorp, 10-3297

CERTIFICATION

I certify that (✓) I am admitted to practice in this Court and, if required by LR 46.1(a)(2), have renewed my admission on _____ OR that ( ) I applied for admission on _____ or renewal on _____. If the Court has not yet admitted me or approved my renewal, I have completed Addendum A.

Signature of Lead Counsel of Record: s/ Tracey Tiska
Type or Print Name: Tracey Tiska
OR
Signature of pro se litigant: _____
Type or Print Name: _____
( ) I am a pro se litigant who is not an attorney.
( ) I am an incarcerated pro se litigant.

Corrected Caption

Substitute “Cornell University” for “Cornell University Medical College”

United States of America, ex rel, Daniel Feldman
Plaintiff - Appellee

Wilfred Van Gorp
Defendant - Appellant

Cornell University
Defendant - Appellant

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
CIVIL APPEAL PRE-ARGUMENT STATEMENT (FORM C)

1. SEE NOTICE ON REVERSE. **2. PLEASE TYPE OR PRINT.** **3. STAPLE ALL ADDITIONAL PAGES**

Case Caption:	District Court or Agency:	Judge:
United States of America ex rel. Daniel Feldman, Plaintiff-Appellee v. Wilfred van Gorp, Defendant-Appellant and Cornell University, Defendant-Appellant	Southern District of New York	William H. Pauley, III
	Date the Order or Judgment Appealed from was Entered on the Docket: 02/09/2011	District Court Docket No.: 03-cv-8135
	Date the Notice of Appeal was Filed: 03/10/2011	Is this a Cross Appeal? ☐ Yes ☑ No

	Counsel's Name:	Address:	Telephone No.:	Fax No.:	E-mail:
Attorney(s) for Appellant(s): ☐ Plaintiff ☑ Defendant	Tracey Tiska	Hogan Lovells US LLP 875 Third Avenue New York, NY 10022	212-918-3620	212-918-3100	tracey.tiska@hoganlovells.com
	Nina Minard Beattie	Brune & Richard P.C. One Battery Park Plaza New York, NY 10004	212-668-1900	212-668-0315	nbeattie@bruneandrichard.com
Attorney(s) for Appellee(s): ☑ Plaintiff ☐ Defendant	Michael J. Salmanson Scott B. Goldshaw	Salmanson Goldshaw P.C. 2 Penn Center, Suite 1230 1500 JFK Boulevard Philadelphia, PA 19102	(215) 640-0593	(215) 640-0596	msalman@salmangold.com goldshaw@salmangold.com

Has Transcript Been Prepared?	Approx. Number of Transcript Pages:	Number of Exhibits Appended to Transcript:	Has this matter been before this Circuit previously? ☐ Yes ☑ No If Yes, provide the following: Case Name: 2d Cir. Docket No.: Reporter Citation: (i.e., F.3d or Fed. App.)
No	0	0	

***ADDENDUM "A"*: COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; (3) A COPY OF THE NOTICE OF APPEAL AND A CURRENT COPY OF THE LOWER COURT DOCKET SHEET; AND (4) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS APPEAL, INCLUDING TRANSCRIPTS OF ORDERS ISSUED FROM THE BENCH OR IN CHAMBERS.**

***ADDENDUM "B"*: COUNSEL MUST ATTACH TO THIS FORM A LIST OF THE ISSUES PROPOSED TO BE RAISED ON APPEAL, AS WELL AS THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.**

PART A: JURISDICTION

1. Federal Jurisdiction		2. Appellate Jurisdiction	
☐ U.S. a party	☐ Diversity	☑ Final Decision	☐ Order Certified by District Judge (i.e., Fed. R. Civ. P. 54(b))
☑ Federal question (U.S. not a party)	☐ Other (specify): _____	☐ Interlocutory Decision Appealable As of Right	☐ Other (specify): _____

IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.

PART B: DISTRICT COURT DISPOSITION (Check as many as apply)

1. Stage of Proceedings

- ☐ Pre-trial
- ☐ During trial
- ☑ After trial

2. Type of Judgment/Order Appealed

- ☐ Default judgment
- ☐ Dismissal/FRCP 12(b)(1) lack of subj. matter juris.
- ☐ Dismissal/FRCP 12(b)(6) failure to state a claim
- ☐ Dismissal/28 U.S.C. § 1915(e)(2) frivolous complaint
- ☐ Dismissal/28 U.S.C. § 1915(e)(2) other dismissal
- ☐ Dismissal/other jurisdiction
- ☐ Dismissal/merit
- ☐ Judgment / Decision of the Court
- ☐ Summary judgment
- ☐ Declaratory judgment
- ☐ Jury verdict
- ☐ Judgment NOV
- ☐ Directed verdict
- ☑ Other (specify): Attys fees and costs

3. Relief

- ☑ Damages:
  - ☑ Sought: $ 767,760.59
  - ☑ Granted: $ 631,882.25
  - ☑ Denied: $ 135,878.34
- ☐ Injunctions:
  - ☐ Preliminary
  - ☐ Permanent
  - ☐ Denied

PART C: NATURE OF SUIT (Check as many as apply)

1. Federal Statutes

- ☐ Antitrust
- ☐ Bankruptcy
- ☐ Banks/Banking
- ☐ Civil Rights
- ☐ Commerce,
- ☐ Energy
- ☐ Commodities
- ☑ Other (specify): False Claims Act
- ☐ Communications
- ☐ Consumer Protection
- ☐ Copyright ☐ Patent
- ☐ Trademark
- ☐ Election
- ☐ Soc. Security
- ☐ Environmental
- ☐ Freedom of Information Act
- ☐ Immigration
- ☐ Labor
- ☐ OSHA
- ☐ Securities
- ☐ Tax

2. Torts

- ☐ Admiralty/ Maritime
- ☐ Assault / Defamation
- ☐ FELA
- ☐ Products Liability
- ☐ Other (Specify):

3. Contracts

- ☐ Admiralty/ Maritime
- ☐ Arbitration
- ☐ Commercial
- ☐ Employment
- ☐ Insurance
- ☐ Negotiable Instruments
- ☐ Other

4. Prisoner Petitions

- ☐ Civil Rights
- ☐ Habeas Corpus
- ☐ Mandamus
- ☐ Parole
- ☐ Vacate Sentence
- ☐ Other

5. Other

- ☐ Forfeiture/Penalty
- ☐ Real Property
- ☐ Treaty (specify): _____
- ☐ Other (specify): _____

6. General

- ☐ Arbitration
- ☐ Attorney Disqualification
- ☐ Class Action
- ☐ Counsel Fees
- ☐ Shareholder Derivative
- ☐ Transfer

7. Will appeal raise constitutional issue(s)?

☐ Yes ☑ No

Will appeal raise a matter of first impression?

☐ Yes ☑ No

1. Is any matter relative to this appeal still pending below? ☐ Yes, specify: _____ ☑ No

2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:

   (A) Arises from substantially the same case or controversy as this appeal? ☑ Yes ☐ No

   (B) Involves an issue that is substantially similar or related to an issue in this appeal? ☐ Yes ☑ No

If yes, state whether ☑ "A," or ☐ "B," or ☐ both are applicable, and provide in the spaces below the following information on the *other* action(s):

Case Name:	Docket No.	Citation:	Court or Agency:
U.S. ex rel. Feldman v. van Gorp	10-3297		S.D.N.Y.

Name of Appellant:
Wilfred van Gorp and Cornell University

Date:	Signature of Counsel of Record:
03/24/2011	S/Tracey Tiska

NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court, you have only 14 days in which to complete the following important steps:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Second Circuit in accordance with LR 25.1.
3. Pay the $455 docketing fee to the Clerk of the United States District Court unless you are authorized to prosecute the appeal without payment.

PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 DAYS, YOUR APPEAL WILL BE DISMISSED. *SEE* LOCAL RULE 12.1.

ADDENDUM A

1. **Nature of the Action**: This appeal arises from a case brought under the False Claims Act, 31 U.S.C. 3729 et seq. After the Government declined to intervene in the matter, Relator Daniel Feldman pursued his allegation that Defendants Cornell University and Wilfred van Gorp submitted false claims in connection with a five year training grant funded by the National Institutes of Health.

2. **Result Below**: After a jury found liability as to three of five alleged claims, the Court (Pauley, J.) entered an order awarding Relator attorneys' fees, costs, and expenses. Having previously appealed the Judgment (Dkt. No. 10-3297), Defendants hereby appeal the order awarding fees, costs, and expenses.

The following are attached:

Exhibit 1. Notice of Appeal, dated March 10, 2011

Exhibit 2. Docket Sheet for SDNY, as of March 24, 2011

Exhibit 3. Memorandum and Order, dated February 9, 2011

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
ex rel. DANIEL FELDMAN,

Plaintiff,

v.

WILFRED VAN GORP and CORNELL UNIVERSITY,

Defendants.

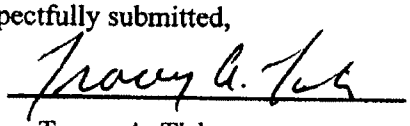
Case No. 03-CV-8135 (WHP)

NOTICE OF APPEAL

Notice is hereby given that Defendants Wilfred van Gorp and Cornell University hereby appeal to the United States Court of Appeals for the Second Circuit from this Court's Memorandum and Order, dated February 9, 2011, in the above-referenced matter (attached hereto).

March 10, 2011

Respectfully submitted,

By: 

Tracey A. Tiska
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Eva L. Dietz
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Nina Beattie
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F: (212) 668-0315
Counsel for Defendant Wilfred van Gorp

Exhibit 2

CLOSED, APPEAL, ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:03-cv-08135-WHP

U.S.A v. Van Gorp, et al
Assigned to: Judge William H. Pauley, III
Demand: $0
Cause: 31:3729 False Claims Act

Date Filed: 10/14/2003
Date Terminated: 08/03/2010
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Plaintiff

Plaintiff

United States of America
ex rel, Daniel Feldman

represented by **Scott B. Goldshaw**
Salmanson Goldshaw, P.C.
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Fax: (215) 640-0596
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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PRO HAC VICE
ATTORNEY TO BE NOTICED

V.

Defendant

Wilfred Van Gorp

represented by **Nina Minard Beattie**
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PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant

Cornell University Medical College represented by **Tracey Ann Tiska**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert Brian Black
(See above for address)
ATTORNEY TO BE NOTICED

Miscellaneous

Daniel Feldman represented by **Michael Joseph Salmanson**
Relator
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Scott B. Goldshaw
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/14/2003	1	COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636 (c). FILING FEE $ 150.00 RECEIPT # 488054. (gmo) (Entered: 10/16/2003)
10/14/2003		Magistrate Judge Debra C. Freeman is so designated. (gmo) (Entered: 10/16/2003)
04/23/2007	19	ORDER,The United States having declined to intervene in this action pursuant to the False Claims Act, 31 U.S.C.$3730(b)(4)(B), the Court Ordered that, the complaint shall be unsealed, and service upon defendants by the relator is authorized. The Government's Notice of Election to Decline Intervention shall be served by the plaintiff-relator upon defendants only after service of the complaint. The seal shall be lifted as to all other matters occurring in this action after the date of this Order. (Signed by Judge William H. Pauley III on 4/10/2007) (kj) (Entered: 04/26/2007)
04/23/2007	20	ENDORSED LETTER addressed to Judge William H. Pauley from Andrew D. O"Toole dated 11/13/03 re: Counsel writes to request that the November 7th Order be sealed nunc pro tunc, and that the complaint and the documents submitted with the complaint, this Court's orders and all other filings in this action remain under seal until 12/18/03, and until further order of the Court. The Government also respectfully requests that the initial pretrial conference in this matter be adjourned sine die and rescheduled after the Government has made its decision with respect to intervention. ENDORSEMENT: Application granted in part. All materials in this case will be filed under seal. The initial pre-trial conference will be held on 2/20/03 at 9:30 a.m. So Ordered. (Signed by Judge William H. Pauley III on 11/19/03) (jco) DOCUMENT ORIGINALLY FILED UNDER SEAL. DOCUMENT UNSEALED AS PER ORDER DATED 4/23/07, DOCUMENT NUMBER 19. (Entered: 04/26/2007)
04/23/2007	21	MOTION for Michael J. Salmanson to Appear Pro Hac Vice. Document filed by United States of America.(jco) (Entered: 04/26/2007)
05/01/2007		CASHIERS OFFICE REMARK on 21 Motion to Appear Pro Hac Vice in the amount of $25.00, paid on 04/23/2007, Receipt Number 613036. (jd) (Entered: 05/01/2007)
05/01/2007	22	ORDER granting 21 Motion for Michael J. Salmanson to Appear Pro Hac Vice on behalf of plaintiff Daniel Feldman. (Signed by Judge William H. Pauley III on 4/25/07) (djc) (Entered: 05/01/2007)
05/01/2007		Transmission to Attorney Admissions Clerk. Transmitted re: 22 Order on Motion to Appear Pro Hac Vice, to the Attorney Admissions Clerk for updating of Attorney Information. (djc) (Entered: 05/01/2007)
05/03/2007	23	FILING ERROR - ELECTRONIC FILING IN NON-ECF CASE - WAIVER

		OF SERVICE RETURNED EXECUTED. Wilfred Van Gorp waiver sent on 4/26/2007, answer due 6/25/2007; Cornell University Medical College waiver sent on 4/26/2007, answer due 6/25/2007. Document filed by United States of America. (Goldshaw, Scott) Modified on 5/4/2007 (lb). (Entered: 05/03/2007)
05/03/2007	24	FILING ERROR - ELECTRONIC FILING IN NON-ECF CASE - NOTICE OF CHANGE OF ADDRESS by Scott B. Goldshaw on behalf of United States of America. New Address: Salmanson Goldshaw, PC, Two Penn Center, Suite 1230, 1500 JFK Blvd., Philadelphia, PA, USA 19102, 215-640-0593. (Goldshaw, Scott) Modified on 5/4/2007 (lb). (Entered: 05/03/2007)
05/04/2007		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - NON-ECF CASE ERROR. Note to Attorney Scott B. Goldshaw to MANUALLY RE-FILE Document WAIVER OF SERVICE RETURNED EXECUTED and NOTICE OF CHANGE OF ADDRESS, Document No. 23-24. This case is not ECF. (lb) (Entered: 05/04/2007)
05/09/2007	25	WAIVER OF SERVICE RETURNED EXECUTED. Cornell University Medical College waiver sent on 4/30/2007, answer due 6/29/2007. Document filed by United States of America. (tro) (Entered: 05/10/2007)
05/09/2007	26	WAIVER OF SERVICE RETURNED EXECUTED. Wilfred Van Gorp waiver sent on 4/30/2007, answer due 6/29/2007. Document filed by United States of America. (tro) (Entered: 05/10/2007)
05/09/2007	27	NOTICE OF CHANGE OF ADDRESS by Scott B. Goldshaw on behalf of United States of America. New Address: Two Penn Center, Suite 1230, 1500 JFK. Blvd., Philadelphia, PA, USA 19102, (215) 640-0593 (215) 640-0596-Fax goldshaw@salmangold.com. (tro) (Entered: 05/10/2007)
06/27/2007	29	ENDORSED LETTER addressed to Judge William H. Pauley from Brian Black dated 6/18/07 re: Counsel for defendant requests that Brian Black, the undersigned, be permitted to appear in his stead; Mr. Black is fully familiar with this matter. ENDORSEMENT: So Ordered. (Signed by Judge William H. Pauley III on 6/19/07) (js) (Entered: 07/03/2007)
07/06/2007	30	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Cornell University Medical College.(Black, Robert) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/06/2007)
07/06/2007	31	REPORT of Rule 26(f) Planning Meeting.(Black, Robert) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/06/2007)
07/12/2007	35	STIPULATION AND ORDER: IT IS HERBEY STIPULATED AND AGREED, by and between the undersigned attorneys, that defendants' time to answer or otherwise respond to the complaint in the above-captioned action shall be extended to and including July 13, 2007. SO ORDERED: (Signed by Judge William H. Pauley III on 07/06/07) (dcr) (Entered: 07/18/2007)
07/13/2007	32	ANSWER to Complaint. Document filed by Wilfred Van Gorp.(Beattie, Nina) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/13/2007)

07/13/2007	33	ANSWER to Complaint. Document filed by Cornell University Medical College.(Tiska, Tracey) Modified on 7/16/2007 (lb). Modified on 8/1/2007 (Rivera, Jazmin). (Entered: 07/13/2007)
07/16/2007	34	SCHEDULING ORDER: Fact Discovery shall be completed by 1/31/2008; Expert Discovery due by 3/28/2008. The parties shall submit by a joint pre-trial order due by 4/30/2008. Pretrial Conference set for 5/9/2008 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley III on 7/13/07) Copies Mailed By Chambers.(tro) (Entered: 07/18/2007)
07/24/2007	36	ORDER DESIGNATING CASE TO ECF STATUS: The Clerk of Court is directed to designate this action ECF nunc pro tunc. All subsequent Orders of this Court shall be issued through the ECF system. The parties shall make all filings via the ECF system and promptly provide this Court with courtesy copies of all filed papers. Within thirty (30) days of this Order, all counsel shall register as filing users in accordance with the Southern District's Procedures for Electronic Case Filing. (Signed by Judge William H. Pauley III on 7/17/07) Copies Mailed By Chambers.(tro) (Entered: 07/25/2007)
07/24/2007		Case Designated ECF. (tro) (Entered: 07/25/2007)
07/24/2007	37	SCHEDULING ORDER: Status Conference currently scheduled for 6/22/2070 at 11:45 a.m. is adjourned until 7/13/2007 at 11:15 AM in Courtroom 11D, 500 Pearl Street, New York, NY 10007 before Judge William H. Pauley III. (Signed by Judge William H. Pauley III on 6/21/2007) Copies mailed by chambers.(jar) (Entered: 07/25/2007)
11/19/2007	38	STIPULATED PROTECTIVE ORDER...regarding procedures to be followed that shall govern the handling of confidential material.... (Signed by Judge William H. Pauley III on 11/19/07) (tro) (Entered: 11/20/2007)
01/29/2008	39	SCHEDULING ORDER: Fact Discovery due by 3/14/08. Expert Discovery due by 5/16/2008. Joint Pretrial Order due by 6/13/2008. Final Pretrial Conference set for 7/11/2008 at 10:00 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 1/28/07) (tro) (Entered: 01/29/2008)
03/04/2008	44	ENDORSED LETTER addressed to Judge William H. Pauley from Michael Salmanson dated 2/26/08 re: Request to extend discovery. ENDORSEMENT: Application granted. Discovery is extended until 4/18/08. Expert discovery shall be completed by 6/20/08. The parties shall submit a joint pretrial order by 7/11/08. The Court will hold a final pretrial conference on 8/8/08 at 10:00 am. (Expert Discovery due by 6/20/2008. Joint Pretrial Order due by 7/11/2008. Final Pretrial Conference set for 8/8/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 2/29/08) (cd) (Entered: 03/04/2008)
04/10/2008	45	ENDORSED LETTER addressed to Judge WilliamH. Pauley from Tracey Tiska dated 4/2/08 re: Request that the pretrial conference set for 8/8 be moved to another date. ENDORSEMENT: Application granted. The conference is adjourned until 8/15/08 at 10:00 am. (Pretrial Conference reset for 8/15/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 4/7/08) (cd) (Entered: 04/10/2008)

05/02/2008	46	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 4/24/2008 re: counsel writes to request a one-month extension of the 6/20/2008 discovery deadline. The parties propose that the deadline for completion of expert discovery by 7/21/2008, and the deadline for the submission of the joint pre-trial order be 8/1/2008. The Court has already set the pre-trial conference for 8/15/2008 at 10:00 a.m. ENDORSEMENT: Application Granted. (Signed by Judge William H. Pauley, III on 4/30/2008) (jp) (Entered: 05/02/2008)
06/12/2008	47	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracy A. Tiska dated 5/23/2008 re: Requesting that the Court overrule Relator's objections to the interrogatories and compel a substantive response. ENDORSEMENT: This Court will hold a discovery conference on July 18, 2008 at 10:00 a.m. (Signed by Judge William H. Pauley, III on 6/3/208) (jpo) (Entered: 06/12/2008)
07/01/2008	50	ENDORSED LETTER addressed to Judge William H. Pauley from Tracey A. Tiska and Michael J. Salmanson dated 5/23/08 re: Counsel writes to jointly raise a discovery dispute that has arisen with respect to Cornells Second set of interrogatories (the Interrogatories). A copy of which is attached to this letter for the courts reference. ENDORSEMENT: The court will hold a discovery conference on July 18, 2008 at 10:00 a.m., (Discovery Hearing set for 7/18/2008 at 10:00 AM before Judge William H. Pauley III.) (Signed by Judge William H. Pauley, III on 6/3/08) (mme) (Entered: 08/15/2008)
07/22/2008	48	SCHEDULING ORDER: For the reasons set forth on the record, the Relator's objections to Defendant's interrogatories are sustained. The parties shall submit any pre-motion letters by August 5, 2008. This Court will hold a pre-motion conference on August 15, 2008 at 10:00 a.m., in lieu of the final pre-trial conference currently set for that time. The deadline for submission of the joint pre-trial order is adjourned until a date to be determined. (Signed by Judge William H. Pauley, III on 7/21/2008) (jfe) (Entered: 07/22/2008)
08/06/2008	49	ENDORSED LETTER addressed to Judge William H. Pauley from Michael J. Salmanson dated 7/8/08 Counsels jointly write to raise a discovery dispute regarding the production of certain declarations. Counsels hope that the court will add this item to the discovery conference to be held on July 18, 2008. ENDORSEMENT: This court will hold a discovery conference on August 15, 2008 in conjunction with the pre-motion conference set for that time. (Signed by Judge William H. Pauley, III on 8/4/08) (mme) (Entered: 08/06/2008)
08/15/2008	51	SCHEDULING ORDER: Relator shall conduct a two-hour deposition of Dr. Walton-Louis by 9/15/08. Relator's application to strike Dr. Berman's declaration is denied. The parties shall serve and file any motions in limine addressed to experts by 9/15/08. The parties shall serve and file any responses by 10/14/08. The parties shall serve and file any replies by 10/24/08. This Court will hear Oral Argument and hold a Status Conference on 11/20/2008 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 8/15/08) (tro) (Entered: 08/18/2008)
09/15/2008	52	FILING ERROR - ELECTRONIC FILING FOR NON-ECF DOCUMENT (PROPOSED ORDER) - MOTION in Limine *to Exclude Defendants' Expert*

		Testimony. Document filed by Daniel Feldman.(Goldshaw, Scott) Modified on 9/16/2008 (jar). (Entered: 09/15/2008)
09/15/2008	53	FILING ERROR - DEFICIENT DOCKET ENTRY - MEMORANDUM OF LAW in Support re: 52 MOTION in Limine *to Exclude Defendants' Expert Testimony*.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Goldshaw, Scott) Modified on 9/16/2008 (jar). (Entered: 09/15/2008)
09/15/2008	54	MOTION in Limine *to Preclude the Testimony of Relator's Expert*. Document filed by Wilfred Van Gorp, Cornell University Medical College. Return Date set for 11/20/2008 at 11:30 AM.(Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	55	MEMORANDUM OF LAW in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	56	DECLARATION of Dr. Robert A. Bornstein in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	57	DECLARATION of Dr. Marlene Oscar Berman in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	58	DECLARATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B (Pt. 1 of 4), # 3 Exhibit B (Pt. 2 of 4), # 4 Exhibit B (Pt. 3 of 4), # 5 Exhibit B (Pt. 4 of 4), # 6 Exhibit C (Pt. 1 of 5), # 7 Exhibit C (Pt. 2 of 5), # 8 Exhibit C (Pt. 3 of 5), # 9 Exhibit C (Pt. 4 of 5), # 10 Exhibit C (Pt. 5 of 5), # 11 Exhibit D, # 12 Exhibit E (Pt. 1 of 2), # 13 Exhibit E (Pt. 2 of 2), # 14 Exhibit F and G)(Beattie, Nina) (Entered: 09/15/2008)
09/15/2008	59	ORDER: Counsel for the parties jointly requested clarification of this Court's August 15, 2008, Scheduling Order permitting Realtor to conduct a two-hour deposition of Dr. Walton-Louis. Relator is permitted to serve a subpoena duces tecum on Dr. Walton-Louis to obtain documents which bear on her testimony and the prior declaration she submitted to defense counsel. (Signed by Judge William H. Pauley, III on 9/15/08) (tro) (Entered: 09/16/2008)
09/15/2008		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - NON-ECF DOCUMENT ERROR. Note to Attorney Scott Goldshaw to E-MAIL Document No. 52 Proposed Order to judgments@nysd.uscourts.gov. This document is not filed via ECF. Then re-file Motion in Limine. (jar) (Entered: 09/16/2008)
09/15/2008		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DEFICIENT

		DOCKET ENTRY ERROR. Note to Attorney Scott Goldshaw to RE-FILE Document 53 Memorandum of Law in Support of Motion. ERROR(S): Link supporting documents to correctly re-filed motion. (jar) (Entered: 09/16/2008)
09/16/2008	60	MOTION in Limine *To Exclude Defendants' Expert Testimony*. Document filed by Daniel Feldman. Return Date set for 11/20/2008 at 11:30 AM. (Goldshaw, Scott) (Entered: 09/16/2008)
09/16/2008	61	MEMORANDUM OF LAW in Support re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Goldshaw, Scott) (Entered: 09/16/2008)
10/14/2008	62	FILING ERROR - DEFICIENT DOCKET ENTRY - MEMORANDUM OF LAW in Opposition re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Daniel Feldman. (Attachments: # 1 Declaration of Michael J. Salmanson, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12)(Salmanson, Michael) Modified on 10/15/2008 (jar). (Entered: 10/14/2008)
10/14/2008	63	JOINT MEMORANDUM OF LAW in Opposition re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Certificate of Service)(Tiska, Tracey) (Entered: 10/14/2008)
10/14/2008	64	DECLARATION of Tracey A. Tiska in Opposition re: 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*.. Document filed by Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Certificate of Service)(Tiska, Tracey) (Entered: 10/14/2008)
10/14/2008		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael Salmanson to RE-FILE Document 62 Memorandum of Law in Opposition to Motion. ERROR (S): Each Supporting Document must be filed individually. Use event type Declaration in Support found under Other Answers. (jar) (Entered: 10/15/2008)
10/15/2008	65	MEMORANDUM OF LAW in Opposition re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/15/2008)
10/15/2008	66	DECLARATION of Michael J. Salmanson in Support re: 65 Memorandum of Law in Opposition to Motion. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12)(Salmanson, Michael) (Entered: 10/15/2008)
10/24/2008	67	REPLY MEMORANDUM OF LAW in Support re: 60 MOTION in Limine

		To Exclude Defendants' Expert Testimony. with Certificate of Service. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/24/2008)
10/24/2008	69	REPLY AFFIRMATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert.*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B - C, # 3 Exhibit D - H)(Beattie, Nina) (Entered: 10/24/2008)
10/24/2008		***STRICKEN DOCUMENT. Deleted document number 68 from the case record. The document was stricken from this case pursuant to 76 Endorsed Letter. (tve) (Entered: 02/25/2009)
11/24/2008	70	SCHEDULING ORDER: re defendants motion for summary judgment: Motion due by 1/9/2009. Response due by 2/6/2009. Reply due by 2/18/2009. Oral Argument set for 3/13/2009 at 11:30 AM before Judge William H. Pauley III. Status Conference set for 3/13/2009 at 11:30 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 11/24/08) Copies sent by chambers(cd) (Entered: 11/25/2008)
12/08/2008	71	TRANSCRIPT of proceedings held on 11/20/08 before Judge William H. Pauley, III. (pl) (Entered: 12/15/2008)
12/19/2008	72	MEMORANDUM & ORDER denying 54 Motion in Limine; granting in part and denying in part 60 Motion in Limine. (Signed by Judge William H. Pauley, III on 12/19/08) (ae) (Entered: 12/19/2008)
12/29/2008	73	ENDORSED LETTER addressed to Judge William H. Pauley from Emily Reisbaum dated 12/23/08 re: Therefore, defendants request permission to submit one joint memorandum of 40 pages. ENDORSEMENT: Application granted in part. Defendants may submit one joint brief of 35 pages in length. (Signed by Judge William H. Pauley, III on 12/24/08) (pl) (Entered: 12/29/2008)
02/06/2009	74	ENDORSED LETTER addressed to Judge William H.Pauley III from Tracey A. Tiska dated 1/28/2009 re: The parties respectfully request a slight modification to the current briefing schedule and for a clarification of Your Honor's prior order. Relator's counsel requests a short extension to file his response on Tuesday, February 10, instead of Friday, February 6. Defendants' counsel respectfully request that the due date for their reply brief be extended from Wednesday, February 18 to Tuesday, February 24 because of the school vacation schedules. Therefore the parties respectfully request that relator be permitted to file an opposition brief of the same length as defendants' brief in support of their summary judgment motion (35 pages). ENDORSEMENT: Application granted. So Ordered. (Signed by Judge William H. Pauley, III on 2/6/2009) (jfe) (Entered: 02/09/2009)
02/24/2009	75	ENDORSED LETTER addressed to Judge William H. Pauley, III from Tracey A. Tiska dated 2/17/2009 re: Defendants' request permission to submit one joint reply memorandum of 15 pages. ENDORSEMENT: Application granted. SO ORDERED. (Signed by Judge William H. Pauley, III on 2/24/2009) (tve) (Entered: 02/25/2009)

02/24/2009	76	ENDORSED LETTER addressed to Judge William H. Pauley, III from Eva L. Dietz dated 2/12/2009 re: Counsel writes on behalf of both defendants to submit a revised request to file Exhibit BBBB attached to the Declaration of Tracey A. Tiska under seal and also seeks leave to file Exhibit H of the Declaration of Emily Reisbaum as well as the memorandum of law in support of the Motion to Preclude under seal and to replace the "public version" of these papers currently on the public electronic docket with redacted versions. ENDORSEMENT: Applications granted. The materials identified above may be filed under seal. Defendants may withdraw and re-file redacted copies on ECF and unreacted copies under seal of Docket # 68. The Clerk shall strike docket #68 from the docket sheet and allow refiling as requested by Defendants. Defendants may also withdraw and file under seal Exhibit H to Docket # 69. SO ORDERED. (Signed by Judge William H. Pauley, III on 2/24/2009) (tve) Modified on 2/25/2009 (tve). Modified on 3/9/2009 (tve). (Entered: 02/25/2009)
02/24/2009	77	SEALED DOCUMENT placed in vault.(rt) (Entered: 02/25/2009)
03/03/2009	78	SEALED DOCUMENT placed in vault.(jri) (Entered: 03/03/2009)
03/03/2009	79	ENDORSED LETTER addressed to Judge William H. Pauley from Heather K. McShain dated 2/25/2009 re: The government respectfully renews its request that the Court: (1) order a new briefing scheduled that will allow the government 30 days, until 3/16/2009, to file a Statement of Interest, and that defendants be permitted thirty days after receipt of the government's Statement of Interest in which to file a response; and (2) adjourn the 3/13/2009 date for oral argument to a date following defendants submission of their response to the government's Statement of Interest. ENDORSEMENT: Application granted. This Court will hold oral argument on 5/8/2009 at 11:00 a.m. SO ORDERED. (Signed by Judge William H. Pauley, III on 3/3/2009) (tve) Modified on 3/4/2009 (tve). (Entered: 03/04/2009)
03/05/2009	80	ENDORSED LETTER addressed to Judge William H. Pauley from R. Brian Black dated 2/25/09 re: Request on behalf of both defendants to file a confidential document under seal in connection with defendants' reply memorandum in support of their joint motion for summary judgment, as well as file a redacted "public version" of the reply memorandum et al. ENDORSEMENT: Application granted. Defendant may file their reply and Exhibit A under seal, and a redacted version on ECF. (Signed by Judge William H. Pauley, III on 3/5/09) (cd) (Entered: 03/06/2009)
03/11/2009	81	SEALED DOCUMENT placed in vault.(jri) (Entered: 03/11/2009)
03/11/2009	82	REPLY MEMORANDUM OF LAW in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	83	DECLARATION of Emily Reisbaum in Support re: 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A,

		# 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	84	CERTIFICATE OF SERVICE of Defendants' Reply Memorandum Of Law In Further Support Of Their Motion To Preclude The Testimony Of Relator's Expert, Dr. Brian Kimes And Declaration Of Emily Reisbaum. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	85	RULE 56.1 STATEMENT. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	86	MOTION for Summary Judgment. Document filed by Wilfred Van Gorp, Cornell University Medical College.(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	87	MEMORANDUM OF LAW in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	88	DECLARATION of Dr. Wilfred G. Van Gorp in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	89	DECLARATION of Tracey A. Tiska in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D part 1, # 5 Exhibit D part 2, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O, # 17 Exhibit P, # 18 Exhibit Q, # 19 Exhibit R, # 20 Exhibit S, # 21 Exhibit T, # 22 Exhibit U part 1, # 23 Exhibit U part 2, # 24 Exhibit U part 3, # 25 Exhibit V, # 26 Exhibit W, # 27 Exhibit X, # 28 Exhibit Y, # 29 Exhibit Z, # 30 Errata AA, # 31 Exhibit BB, # 32 Exhibit CC, # 33 Exhibit DD, # 34 Exhibit EE, # 35 Exhibit FF, # 36 Exhibit GG, # 37 Exhibit HH, # 38 Exhibit II, # 39 Exhibit JJ, # 40 Exhibit KK, # 41 Exhibit LL, # 42 Exhibit MM, # 43 Exhibit NN, # 44 Exhibit OO, # 45 Exhibit PP, # 46 Exhibit QQ, # 47 Exhibit RR, # 48 Exhibit SS, # 49 Exhibit TT, # 50 Exhibit UU, # 51 Exhibit VV part 1, # 52 Exhibit VV part 2, # 53 Exhibit WW, # 54 Exhibit XX part 1, # 55 Exhibit XX part 2, # 56 Exhibit XX part 3, # 57 Exhibit XX part 4, # 58 Exhibit YY, # 59 Exhibit ZZ, # 60 Exhibit AAA, # 61 Exhibit BBB, # 62 Exhibit CCC, # 63 Exhibit DDD, # 64 Exhibit EEE, # 65 Exhibit FFF, # 66 Exhibit GGG, # 67 Exhibit HHH, # 68 Exhibit III, # 69 Exhibit JJJ, # 70 Exhibit KKK, # 71 Exhibit LLL, # 72 Exhibit MMM, # 73 Exhibit NNN, # 74 Exhibit OOO, # 75 Exhibit PPP, # 76 Exhibit QQQ, # 77 Exhibit RRR, # 78 Exhibit SSS, # 79 Exhibit TTT, # 80 Exhibit UUU, # 81 Exhibit VVV, # 82 Exhibit WWW, # 83 Exhibit XXX, # 84 Exhibit YYY, # 85 Exhibit ZZZ, # 86 Exhibit AAAA, # 87 Exhibit BBBB, # 88 Exhibit CCCC, # 89 Exhibit DDDD)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	90	CERTIFICATE OF SERVICE of Rule 56.1 Statement, Motion for Summary Judgment, Memorandum of Law, Declaration of Dr. Wilfred G. Van Gorp,

		and Declaration of Tracey A. Tiska. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	91	REPLY MEMORANDUM OF LAW in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	92	DECLARATION of Dr. Wilfred G. Van Gorp in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	93	DECLARATION of Tracey A. Tiska in Support re: 86 MOTION for Summary Judgment.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Tiska, Tracey) (Entered: 03/11/2009)
03/11/2009	94	CERTIFICATE OF SERVICE of Reply Memorandum of Law, Declaration of Dr. Wilfred G. Van Gorp, and Declaration of Tracey A. Tiska. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 03/11/2009)
03/16/2009	95	BRIEF re: 86 MOTION for Summary Judgment. *Statement of Interest of the United States*. Document filed by United States of America.(McShain, Heather) (Entered: 03/16/2009)
03/16/2009	96	CERTIFICATE OF SERVICE of Statement of Interest of the United States served on Counsel for Relator and Defendants on March 16, 2009. Service was made by Federal Express. Document filed by United States of America. (McShain, Heather) (Entered: 03/16/2009)
04/15/2009	97	NOTICE of Defendants' Response To The Statement Of Interest Of The United States Of America. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 04/15/2009)
04/24/2009	98	ENDORSED LETTER addressed to Judge William H Pauley from Michael Salmanson dated 4/20/09 re: Request that the Court formally grant Relator's request to: (1) file a redacted version of its papers in response to Defendants' Motion for Summary Judgment on the electronic docket; and (2) file the unredacted version of the papers under seal. ENDORSEMENT: Application granted. (Signed by Judge William H. Pauley, III on 4/23/09) (cd) (Entered: 04/24/2009)
04/24/2009	99	FILING ERROR - DEFICIENT DOCKET ENTRY (See document #102) - AMENDED REPLY MEMORANDUM OF LAW in Opposition re: 86 MOTION for Summary Judgment. *REDACTED with Certificate of Service.* Document filed by Daniel Feldman. (Salmanson, Michael) Modified on 4/27/2009 (jar). (Entered: 04/24/2009)
04/24/2009	100	COUNTER STATEMENT TO 85 Rule 56.1 Statement. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 04/24/2009)
04/24/2009	101	DECLARATION of Michael J. Salmanson in Opposition re: 86 MOTION for Summary Judgment.. Document filed by Daniel Feldman. (Attachments: # 1

		Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R)(Salmanson, Michael) (Entered: 04/24/2009)
04/24/2009	102	REPLY MEMORANDUM OF LAW in Opposition re: 86 MOTION for Summary Judgment. *REDACTED with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 04/24/2009)
05/04/2009	103	SEALED DOCUMENT placed in vault.(jri) (Entered: 05/04/2009)
12/07/2009	104	MEMORANDUM & ORDER denying 86 Motion for Summary Judgment. For the reasons set forth in this Memorandum & Order, Defendants' motion for summary judgment is denied. The parties are directed to appear for a conference on 12/21/09 at 11:00 a.m. (Signed by Judge William H. Pauley, III on 12/7/09) (tro) (Entered: 12/08/2009)
12/18/2009	105	JOINT MOTION for Reconsideration. Document filed by Wilfred Van Gorp, Cornell University Medical College.(Black, Robert) (Entered: 12/18/2009)
12/18/2009	106	MEMORANDUM OF LAW in Support re: 105 JOINT MOTION for Reconsideration.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Black, Robert) (Entered: 12/18/2009)
12/22/2009	107	SCHEDULING ORDER: (1) Plaintiff shall file his opposition to Defendants' motion for reconsideration by January 8, 2010; (2) Defendants shall file any reply by January 15, 2010; (3) The parties shall submit a joint pre-trial order by March 26, 2010; and, (4) The Court will hold a final pre-trial conference on April 9, 2010 at 10:00 a.m. The Court will consider Defendants' motion for reconsideration on submission. SO ORDERED. (Signed by Judge William H. Pauley, III on 12/21/2009) (tve) (Entered: 12/23/2009)
01/08/2010	108	REPLY MEMORANDUM OF LAW in Opposition re: 105 JOINT MOTION for Reconsideration. *with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit Exhibits 1, 2 and 3)(Salmanson, Michael) (Entered: 01/08/2010)
01/15/2010	109	REPLY MEMORANDUM OF LAW in Support re: 105 JOINT MOTION for Reconsideration.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 01/15/2010)
03/23/2010	110	ENDORSED LETTER addressed to Judge William H. Pauley from Tracey Tiska dated 3/12/10 re: Request that the date for filing the pretrial order be adjourned three weeks after a decision is rendered on defendants' motion for reconsideration. ENDORSEMENT: Application granted. (Signed by Judge William H. Pauley, III on 3/22/10) (cd) (Entered: 03/23/2010)
04/12/2010	111	SCHEDULING ORDER NO. 15: Upon the request of both parties, the final pre-trial conference scheduled for 4/9/2010 is adjourned until 5/21/2010 at 11:15 AM before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 4/9/2010) (tro) (Entered: 04/12/2010)
05/03/2010	112	NOTICE of Change of firm Name and Email Addresses. Document filed by

		Cornell University Medical College. (Tiska, Tracey) (Entered: 05/03/2010)
05/03/2010	113	MEMORANDUM AND ORDER denying 105 Motion for Reconsideration. For the further set forth in this Order, Defendants' motion for reconsideration is denied. SO ORDERED. (Signed by Judge William H. Pauley, III on 5/3/2010) (tve) (Entered: 05/03/2010)
05/06/2010	114	SCHEDULING ORDER NO. 16: The final pre-trial conference scheduled for 5/21/2010 at 11:15 a.m. is adjourned until 6/9/2010 at 2:00 p.m. before Judge William H. Pauley III. (Signed by Judge William H. Pauley, III on 5/6/2010) (tro) (Entered: 05/07/2010)
06/09/2010	115	SCHEDULING ORDER NO. 17: Jury selection and trial will begin on July 12, 2010. The parties shall file any motions in limine by June 21, 2010. The parties shall file any oppositions by June 28, 2010. The parties shall file any replies by July 2, 2010. The parties shall submit briefing on what constitutes a "claim for payment" for purposes of assessing statutory damages by July 2, 2010. Finally, the parties shall submit proposed voir dire, a brief summary of the case, a joint request to charge, and proposed verdict sheet by July 2, 2010. (Signed by Judge William H. Pauley, III on 6/9/2010) (jfe) (Entered: 06/10/2010)
06/21/2010	116	MOTION in Limine *to Exclude Certain Evidence at Trial*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 06/21/2010)
06/21/2010	117	MEMORANDUM OF LAW in Support re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial. with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12 Part 1, # 13 Exhibit 12 Part 2, # 14 Exhibit 12 Part 3, # 15 Exhibit 13, # 16 Exhibit 14, # 17 Exhibit 15)(Salmanson, Michael) (Entered: 06/21/2010)
06/21/2010	118	MOTION in Limine *To Exclude Exhibits And Testimony*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Certificate of Service)(Tiska, Tracey) (Entered: 06/21/2010)
06/21/2010	119	MEMORANDUM OF LAW in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony.*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 06/21/2010)
06/21/2010	120	DECLARATION of Tracey A. Tiska in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony.*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A)(Tiska, Tracey) (Entered: 06/21/2010)
06/23/2010	121	TRANSCRIPT of proceedings held on June 9, 2010 2:00 p.m. before Judge William H. Pauley, III. (ajc) (Entered: 06/23/2010)
06/28/2010	122	REPLY MEMORANDUM OF LAW in Opposition re: 118 MOTION in Limine *To Exclude Exhibits And Testimony. with Certificate of Service*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 06/28/2010)

06/28/2010	123	MEMORANDUM OF LAW in Opposition re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial.*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 06/28/2010)
06/28/2010	124	DECLARATION of Tracey A. Tiska in Opposition re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial.*. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit A-D, # 2 Exhibit E-F)(Tiska, Tracey) (Entered: 06/28/2010)
07/01/2010	128	MOTION for Viviann Stapp to Appear Pro Hac Vice. Document filed by Wilfred Van Gorp.(mro) (Entered: 07/07/2010)
07/02/2010	125	REPLY MEMORANDUM OF LAW in Support re: 116 MOTION in Limine *to Exclude Certain Evidence at Trial. with Certificate of Service*. Document filed by Daniel Feldman. (Attachments: # 1 Exhibits 16 - 20)(Salmanson, Michael) (Entered: 07/02/2010)
07/02/2010	126	REPLY MEMORANDUM OF LAW in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Tiska, Tracey) (Entered: 07/02/2010)
07/02/2010	127	DECLARATION of Tracey A. Tiska in Support re: 118 MOTION in Limine *To Exclude Exhibits And Testimony*.. Document filed by Wilfred Van Gorp, Cornell University Medical College. (Attachments: # 1 Exhibit a)(Tiska, Tracey) (Entered: 07/02/2010)
07/07/2010	129	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 6/28/10 re: counsel for defendant respectfully requests permission to bring in electronic equipment that is not provided by the court's courtroom technology department. Specifically, we are requesting permission for the individuals, listed in this letter to bring electronic devices to the courthouse on July 9, 2010 through the end of the trial. ENDORSEMENT: Application denied for failure to comply with standing order M10-468 dated Feb. 18, 2010. (Signed by Judge William H. Pauley, III on 7/7/10) (pl) Modified on 7/7/2010 (pl). Modified on 7/7/2010 (pl). Modified on 7/7/2010 (pl). Modified on 7/8/2010 (ae). (Entered: 07/07/2010)
07/07/2010	130	ENDORSED LETTER addressed to Judge William H. Pauley III from Michael J. Salmanson dated 6/28/10 re: counsel for plaintiff respectfully requests permission for the individuals listed in this letter, to bring the following electronic equipment that is not provided by the court's technology department to the courthouse on July 12, 2010 through the end of trial. ENDORSEMENT: Application denied for failure to comply with standing order M10-468 dated Feb. 18, 2010. (Signed by Judge William H. Pauley, III on 7/7/10) (pl) (Entered: 07/07/2010)
07/08/2010	131	MEMORANDUM AND ORDER: For the foregoing reasons, relator's motions in limine are granted in part and denied in part, Defendants' motions in limine are denied in part, and decision on the balance of the parties' motions in limine is reserved until trial. So Ordered. (Signed by Judge William H. Pauley, III on 7/8/2010) (js) (Entered: 07/08/2010)
07/09/2010		CASHIERS OFFICE REMARK on 128 Motion to Appear Pro Hac Vice in

		the amount of $25.00, paid on 07/01/2010, Receipt Number 907905. (jd) (Entered: 07/09/2010)
07/12/2010	132	ORDER FOR ADMISSION PRO HAC VICE ON WRITTEN MOTION, granting 128 Motion for Viviann Stapp to Appear Pro Hac Vice. Additional relief as set forth in this Order. (Signed by Judge William H. Pauley, III on 7/12/10) (pl) (Entered: 07/12/2010)
07/14/2010	133	AMENDED JOINT PRETRIAL ORDER: Pursuant to Rule 6A of the Court's Individual Practices, trial counsel for the parties in the above captioned action respectfully submit this pre-trial order, as set forth in this Order. Document filed by Wilfred Van Gorp, Cornell University Medical College, Daniel Feldman.(jpo) (Entered: 07/15/2010)
07/16/2010	134	ORDER: This Court has already determined the measure of damages as a matter of law, so that issue will not be before the jury. Accordingly, Relator's request is denied, as set forth in this Order. (Signed by Judge William H. Pauley, III on 7/16/2010) (jpo) (Entered: 07/16/2010)
07/19/2010	135	LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 7/17/10 re: Counsel requests that the Court inform the jury on Monday that: "In a False Claims Act case, the Government has the option to intervene as a party or to decline to intervene. Because the Government may have decided not to intervene for any number of reasons, you should draw no inferences from the fact that the Government has declined to intervene in this case." Document filed by Wilfred Van Gorp, Cornell University Medical College. (djc) (Entered: 07/20/2010)
07/19/2010	136	LETTER addressed to Judge William H. Pauley III from Michael J. Salmanson dated 7/18/10 re: counsel writes in response to Mr. Black's letter of July 17, 2010 in regard to two issues which have arisen. Document filed by United States of America.(djc) (Entered: 07/20/2010)
07/23/2010	137	LETTER addressed to Judge William H. Pauley, III from R. Brikan Black dated 7/21/10 re: Counsel for defendant writes on behalf of Defendants Cornell University and Dr. Wilfred van Gorp to request that the Court strike and direct the jUry not to consider testimony by Relator regarding what he has referred to as "the incident" between himself and Dr. van Gorp's former partner. Document filed by Cornell University Medical College, Wilfred Van Gorp.(pl) (Entered: 07/23/2010)
07/23/2010	138	JURY VERDICT FORM.(mro) (Entered: 07/23/2010)
07/23/2010	139	LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 7/21/10 re: Defendants write in regards to the Court's draft Jury Charge. Defendants offer substitutions and additions as set forth in this letter. Document filed by Cornell University Medical College, Wilfred Van Gorp. (ae) (Entered: 07/23/2010)
07/30/2010	140	STATEMENT OF DAMAGES. Document filed by Daniel Feldman. (Attachments: # 1 Affidavit Declaration of Michael J. Salmanson with Exhibits)(Salmanson, Michael) (Entered: 07/30/2010)

08/03/2010	141	JUDGMENT #10,1328 in favor of United States of America against Cornell University Medical College, and Wilfred Van Gorp in the amount of $ 887,714.00. (Signed by Judge William H. Pauley, III on 8/3/10) (Attachments: # 1 notice of right to appeal)(ml) (Entered: 08/03/2010)
08/11/2010	142	AMENDED JUDGMENT # 10,1328 amending 141 Judgment, in favor of United States of America against Cornell University and Wilfred Van Gorp, jointly and severally, in the amount of $ 887,714.00. (Signed by Judge William H. Pauley, III on 8/11/10) (Attachments: # 1 NOTICE OF RIGHT TO APPPEAL)(ml) (Entered: 08/12/2010)
08/12/2010	143	ENDORSED LETTER addressed to Judge William H. Pauley III from Tracey A. Tiska dated 8/10/2010 re: Defendants respectfully request permission to file their supporting brief after the August 31 deadline for the motion. Defendants Opening Brief served by September 16 (16 days after the August 31 motion filing date); Relator's Opposition Brief served by October 8; and Defendants Reply Brief served by October 20. ENDORSEMENT: APPLICATION GRANTED. SO ORDERED. (Signed by Judge William H. Pauley, III on 8/12/2010) (jmi) (Entered: 08/13/2010)
08/13/2010	144	NOTICE OF APPEAL from 142 Amended Judgment,. Document filed by Cornell University Medical College, Wilfred Van Gorp. Filing fee $ 455.00, receipt number E 911890. (nd) (Entered: 08/16/2010)
08/16/2010		Transmission of Notice of Appeal to the District Judge re: 144 Notice of Appeal. (nd) (Entered: 08/16/2010)
08/16/2010		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 144 Notice of Appeal. (nd) (Entered: 08/16/2010)
08/16/2010		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 120 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 134 Order, Set Deadlines/Hearings,, 127 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 126 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 141 Judgment, 85 Rule 56.1 Statement filed by Wilfred Van Gorp, Cornell University Medical College, 58 Declaration in Support of Motion,, filed by Wilfred Van Gorp, Cornell University Medical College, 69 Reply Affirmation in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 92 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 124 Declaration in Opposition to Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 44 Endorsed Letter, Set Deadlines/Hearings,,,, 66 Declaration in Support, filed by Daniel Feldman, 123 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 84 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 132 Order on Motion to Appear Pro Hac Vice, 60 MOTION in Limine *To Exclude Defendants' Expert Testimony*. filed by Daniel Feldman, 130 Endorsed Letter,, 64 Declaration in Opposition to Motion, filed by Cornell University Medical College, 115 Scheduling Order,, 97 Notice (Other) filed by Wilfred Van Gorp, Cornell University Medical

College, 59 Order, 79 Endorsed Letter, Set Hearings,,,,,, 50 Endorsed Letter, Set Hearings,,,, 125 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 67 Reply Memorandum of Law in Support of Motion filed by Daniel Feldman, 33 Answer to Complaint filed by Cornell University Medical College, 75 Endorsed Letter, 137 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 96 Certificate of Service Other filed by United States of America, 70 Scheduling Order, 105 JOINT MOTION for Reconsideration. filed by Wilfred Van Gorp, Cornell University Medical College, 55 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 72 Order on Motion in Limine, 106 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 83 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 90 Certificate of Service Other, filed by Wilfred Van Gorp, Cornell University Medical College, 63 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 101 Declaration in Opposition to Motion, filed by Daniel Feldman, 143 Endorsed Letter,, 108 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 54 MOTION in Limine *to Preclude the Testimony of Relator's Expert.* filed by Wilfred Van Gorp, Cornell University Medical College, 128 MOTION for Viviann Stapp to Appear Pro Hac Vice. filed by Wilfred Van Gorp, 30 Rule 7.1 Corporate Disclosure Statement filed by Cornell University Medical College, 47 Endorsed Letter, Set Deadlines/Hearings,, 109 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 87 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 133 Proposed Pretrial Order, filed by Daniel Feldman, Wilfred Van Gorp, Cornell University Medical College, 61 Memorandum of Law in Support of Motion, filed by Daniel Feldman, 49 Endorsed Letter, Set Hearings,, 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 140 Statement of Damages filed by Daniel Feldman, 74 Endorsed Letter, Set Deadlines/Hearings,,,,,, 113 Order on Motion for Reconsideration, 65 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 100 Counter Statement to Rule 56.1 filed by Daniel Feldman, 39 Scheduling Order, 45 Endorsed Letter, Set Deadlines/Hearings,, 136 Letter, filed by United States of America, 95 Brief filed by United States of America, 104 Order on Motion for Summary Judgment, 117 Memorandum of Law in Support of Motion,, filed by Daniel Feldman, 112 Notice (Other) filed by Cornell University Medical College, 38 Protective Order, 73 Endorsed Letter, 119 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 111 Scheduling Order, 56 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 121 Transcript, 131 Order on Motion in Limine,,, 31 Rule 26(f) Discovery Plan Report, 86 MOTION for Summary Judgment. filed by Wilfred Van Gorp, Cornell University Medical College, 122 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 94 Certificate of Service Other filed by Wilfred Van Gorp, Cornell University Medical College, 135 Letter,, filed by Wilfred Van Gorp, Cornell University Medical College, 76 Endorsed Letter,,,, 98 Endorsed Letter, 129 Endorsed Letter,, 48 Scheduling Order,, 82 Reply Memorandum of Law in Support of

		Motion filed by Wilfred Van Gorp, Cornell University Medical College, 51 Scheduling Order,, 46 Endorsed Letter, Set Deadlines/Hearings,,,, 80 Endorsed Letter,, 116 MOTION in Limine *to Exclude Certain Evidence at Trial.* filed by Daniel Feldman, 89 Declaration in Support of Motion,,,,,,, filed by Wilfred Van Gorp, Cornell University Medical College, 32 Answer to Complaint filed by Wilfred Van Gorp, 107 Scheduling Order, Set Motion and R&R Deadlines/Hearings,, 102 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 118 MOTION in Limine *To Exclude Exhibits And Testimony.* filed by Wilfred Van Gorp, Cornell University Medical College, 91 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 93 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 142 Amended Judgment, 88 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 139 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 57 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 114 Scheduling Order, 110 Endorsed Letter, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 08/16/2010)
08/17/2010	145	TRANSCRIPT of proceedings held on July 12, 13, 14, 15, 19, 2010 before Judge William H. Pauley, III. (bw) (Entered: 08/17/2010)
08/17/2010	146	MOTION for Attorney Fees *Notice of Motion*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 08/17/2010)
08/17/2010	147	MEMORANDUM OF LAW in Support re: 146 MOTION for Attorney Fees *Notice of Motion.*. Document filed by Daniel Feldman. (Attachments: # 1 Declaration of Michael Salmanson with Exhibits)(Salmanson, Michael) (Entered: 08/17/2010)
08/17/2010	148	SUPERSEDEAS BOND # 0528322 in the amount of $ 985,363.00 posted by Cornell University Medical College, Wilfred Van Gorp. (dt) (Entered: 08/18/2010)
08/17/2010	149	TRANSCRIPT of proceedings held on July 20, 21, 22, 2010 before Judge William H. Pauley, III. (ja) (Entered: 08/19/2010)
08/25/2010	150	MOTION for New Trial., MOTION for Judgment as a Matter of Law. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/25/2010)
08/26/2010	151	MEMORANDUM OF LAW in Opposition re: 146 MOTION for Attorney Fees *Notice of Motion.*. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/26/2010)
08/26/2010	152	MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses.* Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/26/2010)
08/26/2010	153	MEMORANDUM OF LAW in Support re: 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses.*. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 08/26/2010)

09/02/2010	154	REPLY MEMORANDUM OF LAW in Support re: 146 MOTION for Attorney Fees *Notice of Motion.*, 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses.*. Document filed by Daniel Feldman. (Attachments: # 1 Supplemental Declaration of Michael J. Salmanson with Exhibit A)(Salmanson, Michael) (Entered: 09/02/2010)
09/08/2010	155	RESPONSE to Motion re: 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses.*. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 09/08/2010)
09/16/2010	156	MEMORANDUM OF LAW in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Tiska, Tracey) (Entered: 09/16/2010)
09/16/2010	157	DECLARATION of Tracey A. Tiska in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I part 1, # 10 Exhibit I part 2, # 11 Exhibit I part 3, # 12 Exhibit I part 4, # 13 Exhibit I part 5, # 14 Exhibit I part 6, # 15 Exhibit I part 7, # 16 Exhibit J, # 17 Exhibit K, # 18 Exhibit L, # 19 Exhibit M)(Tiska, Tracey) (Entered: 09/16/2010)
09/20/2010		***DELETED DOCUMENT. Deleted document number 158 Sealed Document. The document was incorrectly filed in this case. (cb) (Entered: 09/23/2010)
09/23/2010	158	ENDORSED LETTER addressed to Judge William H. Pauley, III from R. Brian Black dated 9/16/2010 re: All parties respectfully request that the Court stay determination of Relator's pending motion for attorney fees, Dkt. No. 146, until defendants' post-trial motion is decided. If the parties' joint request is granted, Defendants withdraw their motion for a stay, Dkt. No. 152, as moot. ENDORSEMENT: Application granted. The Clerk of Court is directed to terminate Docket Entry No. 152. So Ordered. (Signed by Judge William H. Pauley, III on 9/23/2010) (jfe) Modified on 9/27/2010 (jfe). (Entered: 09/27/2010)
10/04/2010	159	NOTICE OF CHANGE OF ADDRESS by Nina Minard Beattie on behalf of Wilfred Van Gorp. New Address: Brune & Richard LLP, One Battery Park Plaza, 34th Floor, New York, New York, 10004,. (Beattie, Nina) (Entered: 10/04/2010)
10/08/2010	160	MEMORANDUM OF LAW in Opposition re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law. *with Certificate of Service.* Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 10/08/2010)
10/20/2010	161	REPLY MEMORANDUM OF LAW in Support re: 150 MOTION for New Trial. MOTION for Judgment as a Matter of Law.. Document filed by Cornell University Medical College, Wilfred Van Gorp. (Attachments: # 1 Reply Declaration of Tracey A. Tiska, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C part 1, # 5 Exhibit C part 2)(Tiska, Tracey) (Entered: 10/20/2010)

12/09/2010	162	MEMORANDUM AND ORDER: For reasons further set forth in said Order, Defendants' motion for judgment as a matter of law pursuant to FRCP 50(b) or, alternatively, for a new trial pursuant to FRCP 59 is denied. ORDER denying 150 Motion for New Trial; denying 150 Motion for Judgment as a Matter of Law. (Signed by Judge William H. Pauley, III on 12/9/10) (db) (Entered: 12/09/2010)
12/13/2010	163	FILING ERROR - DEFICIENT DOCKET ENTRY - SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service. Document filed by Daniel Feldman.(Salmanson, Michael) Modified on 12/14/2010 (ka). (Entered: 12/13/2010)
12/14/2010		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael Joseph Salmanson to RE-FILE Document 163 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service. ERROR(S): Filing Error of Declaration of Michael J. Salmanson. Declaration must be filed individually. Use event code Declaration(non-motion) located under Other Answers. (ka) (Entered: 12/14/2010)
12/14/2010	164	SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*. Document filed by Daniel Feldman.(Salmanson, Michael) (Entered: 12/14/2010)
12/14/2010	165	DECLARATION of Michael J. Salmanson re: 164 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service*.. Document filed by Daniel Feldman. (Salmanson, Michael) (Entered: 12/14/2010)
02/08/2011	166	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for 144 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College USCA Case Number 10-3297, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp) (nd). (Entered: 02/09/2011)
02/09/2011	167	MEMORANDUM AND ORDER: Motion practice over prevailing party fees is too often a time consuming endeavor requiring counsel and the Court to sift through minutiae. And it is always ancillary to the main event- a merits determination of the lawsuit. This motion is no exception. While the fee application has been pruned, this Court cannot help but wonder whether everyone's time might have been better spent. Relator Daniel Feldman's Motion for Attorneys' Fees, Costs and Expenses is granted in part and denied in part. Feldman's attorneys are awarded $602,898.63 in attorneys' fees and $25,862.15 in costs. Feldman is awarded his reasonable expenses in the amount of $3,121.47. The Clerk of Court is directed to terminate the motion pending at docket entries #146 and #164. (Signed by Judge William H. Pauley, III on 2/9/2011) (js) (Entered: 02/09/2011)
02/14/2011		Second Supplemental ROA Sent to USCA (Electronic File). Certified Supplemental Indexed record on Appeal Electronic Files for 167 Order on Motion for Attorney Fees, 159 Notice of Change of Address filed by Wilfred

		Van Gorp, 154 Reply Memorandum of Law in Support of Motion, filed by Daniel Feldman, 158 Endorsed Letter, 161 Reply Memorandum of Law in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 163 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Declaration and Certificate of Service* filed by Daniel Feldman, 153 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 165 Declaration filed by Daniel Feldman, 160 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 151 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 156 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 146 MOTION for Attorney Fees *Notice of Motion.* filed by Daniel Feldman, 147 Memorandum of Law in Support of Motion filed by Daniel Feldman, 148 Bond filed by Wilfred Van Gorp, Cornell University Medical College, 162 Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, 155 Response to Motion filed by Daniel Feldman, 164 SUPPLEMENTAL MOTION for Attorney Fees *Costs and Expenses with Certificate of Service.* filed by Daniel Feldman, 166 Supplemental ROA Sent to USCA - Index, 157 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 152 MOTION to Stay *An Award Of Attorneys' Fees, Costs And Expenses* filed by Wilfred Van Gorp, Cornell University Medical College, 150 MOTION for New Trial MOTION for Judgment as a Matter of Law filed by Wilfred Van Gorp, Cornell University Medical College USCA Case Number 10-3297, were transmitted to the U.S. Court of Appeals. (tp) (Entered: 02/14/2011)
03/10/2011	168	NOTICE OF APPEAL from 167 Memorandum and Order. Document filed by Cornell University Medical College, Wilfred Van Gorp. Filing fee $ 455.00, receipt number E 931673. (nd) (Entered: 03/10/2011)
03/10/2011		Transmission of Notice of Appeal to the District Judge re: 168 Notice of Appeal. (nd) (Entered: 03/10/2011)
03/10/2011		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 168 Notice of Appeal. (nd) (Entered: 03/10/2011)
03/10/2011		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 168 Notice of Appeal filed by Wilfred Van Gorp, Cornell University Medical College, 120 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 134 Order, Set Deadlines/Hearings,, 127 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 126 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 141 Judgment, 85 Rule 56.1 Statement filed by Wilfred Van Gorp, Cornell University Medical College, 58 Declaration in Support of Motion,, filed by Wilfred Van Gorp, Cornell University Medical College, 69 Reply Affirmation in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 92 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 124 Declaration in Opposition to Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 44 Endorsed

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Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 121 Transcript, 131 Order on Motion in Limine,,, 31 Rule 26(f) Discovery Plan Report, 86 MOTION for Summary Judgment. filed by Wilfred Van Gorp, Cornell University Medical College, 122 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 94 Certificate of Service Other filed by Wilfred Van Gorp, Cornell University Medical College, 135 Letter,, filed by Wilfred Van Gorp, Cornell University Medical College, 76 Endorsed Letter,,,, 98 Endorsed Letter, 129 Endorsed Letter,, 48 Scheduling Order,, 82 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 51 Scheduling Order,, 46 Endorsed Letter, Set Deadlines/Hearings,,,, 80 Endorsed Letter,, 116 MOTION in Limine to Exclude Certain Evidence at Trial. filed by Daniel Feldman, 89 Declaration in Support of Motion,,,,,,, filed by Wilfred Van Gorp, Cornell University Medical College, 32 Answer to Complaint filed by Wilfred Van Gorp, 107 Scheduling Order, Set Motion and R&R Deadlines/Hearings,, 102 Reply Memorandum of Law in Oppisition to Motion filed by Daniel Feldman, 118 MOTION in Limine To Exclude Exhibits And Testimony. filed by Wilfred Van Gorp, Cornell University Medical College, 91 Reply Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 93 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 142 Amended Judgment, 88 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 139 Letter, filed by Wilfred Van Gorp, Cornell University Medical College, 57 Declaration in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 114 Scheduling Order, 110 Endorsed Letter, 167 Order on Motion for Attorney Fees, 159 Notice of Change of Address filed by Wilfred Van Gorp, 154 Reply Memorandum of Law in Support of Motion, filed by Daniel Feldman, 158 Endorsed Letter, 161 Reply Memorandum of Law in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 163 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Declaration and Certificate of Service filed by Daniel Feldman, 153 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 165 Declaration filed by Daniel Feldman, 160 Memorandum of Law in Opposition to Motion filed by Daniel Feldman, 151 Memorandum of Law in Opposition to Motion filed by Wilfred Van Gorp, Cornell University Medical College, 156 Memorandum of Law in Support of Motion filed by Wilfred Van Gorp, Cornell University Medical College, 146 MOTION for Attorney Fees Notice of Motion. filed by Daniel Feldman, 147 Memorandum of Law in Support of Motion filed by Daniel Feldman, 148 Bond filed by Wilfred Van Gorp, Cornell University Medical College, 162 Order on Motion for New Trial, Order on Motion for Judgment as a Matter of Law, 155 Response to Motion filed by Daniel Feldman, 164 SUPPLEMENTAL MOTION for Attorney Fees Costs and Expenses with Certificate of Service. filed by Daniel Feldman, 166 Supplemental ROA Sent to USCA - Index, 157 Declaration in Support of Motion, filed by Wilfred Van Gorp, Cornell University Medical College, 152 MOTION to Stay An Award Of Attorneys' Fees, Costs And Expenses filed by Wilfred Van Gorp, Cornell University Medical College, 150 MOTION for New Trial MOTION for Judgment as a Matter of Law filed by Wilfred Van Gorp, Cornell University

		Medical College were transmitted to the U.S. Court of Appeals. (nd) (Entered: 03/10/2011)
03/14/2011	169	SUPERSEDEAS BOND # 0528330 in the amount of $ 701,390.00 posted by Cornell University Medical College, Wilfred Van Gorp. (dt) (Entered: 03/14/2011)
03/18/2011	170	JOINT STIPULATION. IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for all parties to this action, that the record on appeal shall be supplemented with the following materials: 1. All exhibits admitted during the course of the trial (as listed in attached Appendix A); 2. Transcript of pre-trial hearing on July 18, 2008; 3. Transcript of pre-trial hearing on May 8, 2009; and 4. Defendants' post-trial letter submission, dated July 30, 2010. IT IS FURTHER STIPULATED AND AGREED that Defendant Cornell University shall maintain custody of the documents referenced above until the Court of Appeals for the Second Circuit requests them. (Signed by Judge William H. Pauley, III on 3/18/2011) (rjm) (Entered: 03/18/2011)

Exhibit 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.* DANIEL FELDMAN,

Plaintiff/Relator,

-against-

WILFRED VAN GORP & CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants.

03 Civ. 8135 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Relator Daniel Feldman ("Feldman" or "Relator") filed this action pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. against Dr. Wilfred van Gorp ("van Gorp") and Cornell University Medical College ("Cornell" and, together, "Defendants"). Following an eight-day trial, a jury returned a verdict in favor of Feldman on three of his five claims. Feldman now moves for an award of attorneys' fees pursuant to 31 U.S.C. § 3730(d)(2). For the following reasons, Feldman's motion is granted in part and denied in part.

BACKGROUND

Familiarity with this Court's prior opinions is presumed. See United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 5094402 (S.D.N.Y. Dec. 9, 2010); United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 2911606 (S.D.N.Y. July 8, 2010); United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 1948592 (S.D.N.Y. May 3, 2010); United States ex rel. Feldman v. Van Gorp, 674 F. Supp. 2d 475 (S.D.N.Y. 2009); Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2008 WL 5429871 (S.D.N.Y.

Dec. 19, 2008).

I. The Litigation

Feldman filed this qui tam action claiming that Defendants submitted false claims to obtain federal research funds administered by the National Institute of Health. Feldman alleged five distinct series of false claims: one arising out of the initial grant application, and four based on subsequent yearly renewal applications and progress reports. Feldman claimed that Defendants' representations in the application and progress reports differed materially from actual implementation of the grant. A jury returned a verdict in favor of Feldman on three of the five claims. This Court awarded damages in the amount of $887,714. That amount was considerably less than the $1,359,000 sought by Feldman.

II. Fees and Costs

Feldman's attorneys, Salmanson Goldshaw, seek fees totaling $726,711.25 and an additional $37,927.87 in costs. Feldman seeks reimbursement of $3,121.47 for expenses incurred as a result of the litigation. (Mot. for Attorneys' Fees, Costs and Expenses ("Mot.") 2; Relator's Supplemental Declaration in Support of Motion for Attorneys' Fees, Costs and Expenses ("Relator's Supp. Decl.") ¶ 1.) The attorneys' fee calculation was based on the following figures:

Michael J. Salmanson	Shareholder	$495.00	1138.30*	$563,458.50
Scott B. Goldshaw	Shareholder	$400.00	132.15*	$52,860.00
Michele M. Rovinsky	Associate	$250.00	33.70	$8,425.00
Katie R. Eyer	Associate	$275.00	140.10*	$38,527.50
Brian C. McGoldrick	Paralegal	$90.00	260.80	$23,472.00
Laura M. Zulick	Paralegal	$90.00	100.05	$9,004.50
Christopher Chancler	Paralegal	$90.00	99.50	$8,955.00
Delvita Reid	Paralegal	$90.00	28.00	$2,520.00

(Mot. 8.) Although Salmanson Goldshaw is located in Philadelphia, the Shareholder and Paralegal hourly rates are based on the New York market, while those for the Associates are based on the Philadelphia market.

In addition, Salmanson Goldshaw seeks to recover fees for travel time at a 50% discounted rate, as follows:

Michael J. Salmanson	Shareholder	$247.50	60.50	$14,973.75
Scott B. Goldshaw	Shareholder	$200.00	12.00	$2,400.00
Michele M. Rovinsky	Associate	$125.00	6.00	$750.00
Katie R. Eyer	Associate	$137.50	6.00	$825.00
Brian C. McGoldrick	Paralegal	$45.00	12.00	$540.00

(Mot. 13.) Most—though not all—of this time consisted of travel between New York and Philadelphia.

DISCUSSION

I. Legal Standard

31 U.S.C § 3730(d)(2) provides that "[i]f the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall . . . receive

* This figure represents the sum of hours requested in the initial Motion for Attorneys' Fees and subsequent Relator's Supplemental Petition.

an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2). The question of how much to award as attorneys' fees is left to the discretion of the district court. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183 (2d Cir. 1996). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). This figure is called the "presumptively reasonable fee" or "lodestar." See Grant v. Martinez, 973 F.2d 96, 99, 101 (2d Cir. 1992); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany, 522 F.3d 182, 186-90 (2d Cir. 2008). In determining a reasonable hourly rate, a district court must "bear in mind all of the case-specific variables . . . relevant to the reasonableness of attorneys' fees" including those set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).[1] Arbor Hill, 522 F.3d at 190.

Courts may not compensate counsel for hours that are "excessive, redundant, or otherwise unnecessary." Hensley, 461 U.S. at 434. The court can reduce a fee award "by specific amounts in response to specific objections." United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 601 F. Supp. 2d 45, 50 (D.D.C. 2009). However, "the Court can also reduce fees 'by a reasonable amount without providing an item-by-item accounting.'" Miller, 601 F. Supp. 2d at 50 (quoting Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 973 (D.C. Cir. 2004)). "Culling through the minutiae of the time records each time a fee petition is

[1] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717-19.

submitted . . . would be impossible 'lest [the Court] abdicate the remainder of its judicial responsibilities for an indefinite time period.'" Miller, 601 F. Supp. 2d at 50-51 (quoting Cobell v. Norton, 407 F. Supp. 2d 140, 166 (D.D.C. 2005)).

Defendants do not dispute the reasonableness of Feldman's proffered rates, and this Court finds them reasonable. Moreover, aside from the specific objections discussed below, Defendants do not dispute the reasonableness of the number of hours expended on this litigation. Thus, this Court begins its analysis with a presumptively reasonable fee of $726,711.25.

II. Attorneys' Fees

A. Travel Time

Defendants argue that because Feldman hired counsel from Philadelphia rather than New York, he should not be entitled to attorneys' fees for travel time. Under the "forum rule," "courts should generally use the hourly rates employed in the district in which the reviewing court sits in calculating the presumptively reasonable fee." Simmons v. N.Y. City Transit Auth., 575 F.3d 170, 174 (2d Cir. 2009). However, a corollary to this rule is that expenses and fees related to travel must be excluded from an award of attorneys' fees if "the hypothetical reasonable client who wishes to spend the least amount necessary to litigate the matter . . . would have retained local counsel."[2] Imbeault v. Rick's Cabaret Int'l, Inc., 08 Civ.

[2] Feldman cites cases in which an award of attorneys' fees included travel-related fees and expenses for out-of-state counsel. See, e.g., Scott v. Hand, 07 Civ. 0221 (TJM), 2010 WL 1507016 (N.D.N.Y. Apr. 15, 2010). However, the corollary rule excluding fees for travel time is more consistent with Simmons because it "promotes cost-consciousness, increases the probability that attorneys will receive no more than the relevant market would normally permit, and encourages litigants to litigate with their own pocketbooks in mind, instead of their opponents'." Simmons, 575 F.3d at 176. In any case, hours spent travelling by out-of-district attorneys are not hours "reasonably expended" where competent counsel is available within the district.

5458 (GEL), 2009 WL 2482134, at *8 (S.D.N.Y. Aug. 13, 2009). Here, there is no indication that qualified counsel was unavailable in New York, or that New York counsel was unlikely to achieve similar success. Thus, a hypothetical reasonable client would have chosen New York counsel in order to prevent unnecessary travel costs, and this Court will not award attorneys' fees for time spent travelling between Philadelphia and New York.

Unfortunately, that does not end the analysis. While Feldman's attorneys billed a total of $19,488.75 in travel time, not all of it related to travel between Philadelphia and New York. The following travel time of Salmanson is compensable: (1) travel to Potomac, MD to depose Defendants' expert, James Pike (3 hours); (2) travel to Columbus, OH to depose Defendants' expert/fact witness Robert Bornstein (3 hours); (3) travel to Washington D.C. for the deposition of Dr. Stoff (4 hours); and (4) travel to Baltimore, MD for the deposition of Dr. Kimes (4 hours). At a 50% billing discount for 14 hours, Salmanson is entitled to $3,465 in attorneys' fees for travel. In addition, because Rovinsky's and Eyer's rates are based on Philadelphia—not New York City—market rates, the "corollary" to the forum rule does not apply, and Feldman may recover the travel expenses associated with these attorneys in the amount of $1,575. Overall, Salmanson Goldshaw is entitled to $5,040 in attorneys' fees for travel time. Thus, the lodestar is reduced by $14,448.75.

Defendants also assert that Salmanson is not entitled to 15.50 hours for travel time included under four invoices for "professional services." However, Salmanson has affirmed that two of these entries did not incorporate travel time. (See Salmanson Supp. Decl. ¶ 4.) Salmanson cannot, on the other hand, verify whether the remaining two entries included travel time and concedes that an additional six hours of his time should constitute "travel time."

Accordingly, the lodestar is reduced by an additional $2,970.[3]

In sum, based on the above reductions in travel time hours, this Court reduces the presumptively reasonable fee by $17,418.75, to a total of $709,292.50.

B. Relator's Degree of Success

In determining whether partial success requires a downward adjustment of the presumptively reasonable fee, this Court conducts a two-step inquiry. "At step one of this analysis, the district court examines whether the plaintiff failed to succeed on any claims wholly unrelated to the claims on which the plaintiff succeeded. The hours spent on such unsuccessful claims should be excluded from the calculation." Grant, 973 F.2d at 101. "At step two, the district court determines whether there are any unsuccessful claims interrelated with the successful claims. If such unsuccessful claims exist, the court must determine whether the plaintiff's level of success warrants a reduction in the fee award." Grant, 973 F.2d at 101. If a plaintiff has obtained "excellent results," the attorney should be fully compensated. Grant, 973 F.2d at 101 (citing Hensley, 461 U.S. at 435). "A plaintiff's lack of success on some of his claims does not require the court to reduce the lodestar amount where the successful and the unsuccessful claims were interrelated and required essentially the same proof." Murphy v. Lynn, 188 F.3d 938, 952 (2d Cir. 1997). Moreover, where "the successful and unsuccessful claims are 'inextricably intertwined' and 'involve a common core of facts or [are] based on related legal theories,' it is not abuse of discretion for the court to award the entire fee." Reed, 95 F.3d at 1183.

Here, the successful and unsuccessful claims were interrelated. Although each of

[3] Feldman asserts that the lodestar should be reduced by $1,485 to account for 50% hourly billing rate for attorney travel time. However, because this travel was between Philadelphia and New York City, Feldman may not recover any fees for this time.

the five alleged false claims was discreet—occurring in separate applications and progress reports at yearly intervals—liability for each depended on that claim's relationship to the same common core of facts: the actual implementation of the program funded by the grant. These facts cannot be segregated neatly into the yearly intervals set by the application and progress reports. Rather, many of the program's shortcomings—such as the time spent on research and the time spent with HIV/AIDS patients—were alleged to continue throughout the course of the grant. Moreover, the legal theories on which each of the five false claims are based were not just related, but identical: violation of §§ 3729(a)(1), (a)(2), and (a)(7) of the FCA. Liability under each of these sections requires a showing that the defendant "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." Mikes v. Strauss, 274 F.3d 687, 695 (2d Cir. 2001). Thus, work performed on the separate claims cannot be easily partitioned. Accordingly, the claims were not wholly unrelated, and this Court declines to subtract the unsuccessful claims from the lodestar calculation.

Defendants argue that a fee of over $700,000 is excessive because a reasonable litigant would not expend this sum in order to recover damages of $887,000. However, "a presumptively correct lodestar figure should not be reduced simply because a plaintiff received a low damage award," and the ratio of attorneys' fees to damages in this case is well within acceptable limits. See Grant, 973 F.3d at 99, 101-02 (upholding a fee award of $512,590 where the case settled for only $60,000). In addition, Defendants argue that the fee is excessive because the damage award fell short of the $1,359,000 Feldman sought. However, the awarded damages to Feldman are substantial and not a mere "technical victory." See Lunday v. City of Albany, 42 F.2d 131, 135 (2d Cir. 1994) (court did not abuse discretion awarding attorneys' fees

of $115,425, where plaintiff sought $7,130,000 but was awarded only $35,000).

Nevertheless, Feldman's success was not complete. "If . . . a plaintiff has achieved only partial or limited success, the [lodestar] may be an excessive amount . . . even where plaintiff's claims were interrelated." Hensley, 461 U.S. at 436. Given the substantial commonalities between the successful and unsuccessful claims, this Court declines to reduce the lodestar by the percentage of unsuccessful claims. However, the Court finds that a 15% reduction in the lodestar is appropriate. See Greenbaum v. Svenska Handelsbanken, N.Y., 998 F. Supp. 301, 307 (S.D.N.Y. 1998) (reducing the lodestar by 10% where the plaintiff prevailed on claims for sex discrimination and retaliation but failed on claims for sexual harassment and age discrimination). Accordingly, Feldman is entitled to $602,898.63 in attorneys' fees.

III. Costs

A. Travel Costs and Pro Hac Vice Motions

Descending to the granular level, Defendants next challenge travel costs incurred by Feldman's attorneys. "[A]wards of attorneys' fees . . . under fee-shifting statutes . . . normally include those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients." Reichman, 818 F.2d at 283; Betancourt v. Giuliani, 325 F. Supp. 2d 330, 335 (S.D.N.Y. 2004). Feldman seeks to recover a total of $8,988.51 in travel costs. However, for the same reasons that the Feldman is not entitled to attorneys' fees for travel time, he is not entitled to recover costs related to travel between Philadelphia and New York. Because competent counsel was available within the district, these travel costs were not reasonably incurred.

Accordingly, this Court subtracts $8,152.72 from the total costs.[4] Relator is also not entitled to costs related to delivery of boxes of exhibits and demonstratives from Philadelphia to New York City for trial, and then back to Philadelphia, in the amount of $2,675. Lastly, this Court subtracts costs related to Salmanson's pro hac vice motion, in the amount of $1,238 ($1,188 for preparation of the motion and $50 in costs for Certificates of Good Standing). In sum, this Court subtracts $12,065.72 in travel-related costs from Feldman's recoverable costs.

B. Copying Costs

Finally, descending even further to the microscopic level, Defendants challenge Feldman's photocopying costs. They argue that only certain photocopying and reproduction costs are "taxable" under 28 U.S.C § 1920 and that Feldman has provided insufficient detail for this Court to determine which of Relator's photocopying costs are taxable here. However, fee shifting statutes permit recovery of costs beyond those considered "taxable" under § 1920. Reichman v. Bonsignore, Briganti & Mazzotta P.C., 818 F.2d 278, 283 (2d Cir. 1987). This includes costs related to photocopying and reproduction. See, e.g., Betancourt, 325 F. Supp. 2d at 335-36. Moreover, Relator has submitted a detailed itemized accounting of its photocopying costs, which this Court finds sufficient to support an award of copying costs.

[4] In making this determination, this Court finds that the Relator may be reimbursed for the following travel expenses, totaling $835.79: $140.19 for travel to the Kimes deposition; $126.60 for travel to the Pike deposition, $155.00 for travel to the Bornstein deposition; $137.00 for Eyer's travel to New York City on July 2, 2010 (this expense entry was $274 for travel for two people; this Court assumes for these purposes that one-half of this entry was for Eyer's travel expenses); $160 for Eyer's travel to New York City on July 7, 2010 (this expense entry was $320 for travel for two people; this Court again assumes that one-half of this entry was for Eyer's travel expenses); and $117 for Rovinsky's travel to New York City on February 6, 2008. Although the Relator's summary of travel hours (discussed above) indicates that additional travel expenses might be recoverable, these expenses cannot be determined with certainty from the expense reports submitted to this Court.

C. Feldman's Reasonable Expenses

The False Claims Act permits recovery of "reasonable expenses which the court finds to have been necessarily incurred." 31 U.S.C. § 3730(d)(2). This Court has reviewed Feldman's expenses and finds that they were reasonable and necessarily incurred. Accordingly, Feldman is entitled to compensation for $3,121.47 in expenses resulting from this litigation.

CONCLUSION

Motion practice over prevailing party fees is too often a time-consuming endeavor requiring counsel and the Court to sift through minutiae. And it is always ancillary to the main event—a merits determination of the lawsuit. This motion is no exception. While the fee application has been pruned, this Court cannot help but wonder whether everyone's time might have been better spent.

Relator Daniel Feldman's Motion for Attorneys' Fees, Costs and Expenses is granted in part and denied in part. Feldman's attorneys are awarded $602,898.63 in attorneys' fees and $25,862.15 in costs. Feldman is awarded his reasonable expenses in the amount of $3,121.47. The Clerk of Court is directed to terminate the motion pending at docket entries #146 and #164.

Dated: February 9, 2011
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

All Counsel of Record

ADDENDUM B

Defendants-Appellants Cornell University and Wilfred van Gorp plan to raise the issue that the Court's award of Relator's attorneys' fees, costs, and expenses should be reversed for reasons stated in Defendants-Appellants' prior appeal. A reversal on the merits requires automatic reversal of an award of fees, costs, and expenses.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CIVIL APPEAL TRANSCRIPT INFORMATION (FORM D)

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THIS SECTION MUST BE COMPLETED BY COUNSEL FOR APPELLANT

CASE TITLE	DISTRICT	DOCKET NUMBER
United States of America ex rel. Daniel Feldman, Plaintiff-Appellee v. Wilfred van Gorp, Defendant-Appellant and Cornell University, Defendant-Appellant	Southern District of New York	03-cv-8135
	JUDGE William H. Pauley, III	**APPELLANT** Cornell University and Wilfred van Gorp
	COURT REPORTER Southern District Court Reporters	**COUNSEL FOR APPELLANT** Tracey Tiska, Hogan Lovells US LLP

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COUNSEL'S SIGNATURE	DATE
S/Tracey Tiska	03/24/2011

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ACKNOWLEDGMENT AND NOTICE OF APPEARANCE

Short Title: U.S.A. v. Van Gorp, et al Docket No.: 11-975

Lead Counsel of Record (name/firm) or Pro se Party (name): Nina M. Beattie, Esq. / Brune & Richard LLP

Appearance for (party/designation): Wilfred van Gorp / Defendant - Appellant

DOCKET SHEET ACKNOWLEDGMENT/AMENDMENTS

Caption as indicated is:
( ) Correct
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Appellate Designation is:
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Parties: _____
( ) Incorrect. Please change the following parties' designations:
Party Correct Designation

Contact Information for Lead Counsel/Pro Se Party is:
( ) Correct
(✓) Incorrect or Incomplete, and should be amended as follows:

Name: Nina M. Beattie, Esq.
Firm: Brune & Richard LLP
Address: One Battery Park Plaza,, New York, NY 10004
Telephone: 212-668-1900 Fax: 212-668-0315
Email: nbeattie@bruneandrichard.com

RELATED CASES

( ) This case has not been before this Court previously.
( ) This case has been before this Court previously. The short title, docket number, and citation are: _____

(✓) Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers, and citations are: U.S.A. v. Van Gorp, et al / 10-3297

CERTIFICATION

I certify that (✓) I am admitted to practice in this Court and, if required by LR 46.1(a)(2), have renewed my admission on _____ OR that ( ) I applied for admission on _____ or renewal on _____. If the Court has not yet admitted me or approved my renewal, I have completed Addendum A.

Signature of Lead Counsel of Record: s/ Nina Beattie
Type or Print Name: Nina M. Beattie
OR
Signature of pro se litigant: _____
Type or Print Name: _____
( ) I am a pro se litigant who is not an attorney.
( ) I am an incarcerated pro se litigant.

Caption Page:

United States of America ex rel, Daniel Feldman,

Plaintiff-Appellee

Wilfred van Gorp,

Defendant-Appellant

Cornell University,

Defendant-Appellant

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: March 30, 2011
Docket #: 11-975 cv
Short Title: United States of America v. Van Gorp, et al

DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

NOTICE OF CASE MANAGER CHANGE

The case manager assigned to this matter has been changed.

Inquiries regarding this case may be directed to . (212) 857-8613

10-3297-cv(L), 11-0975-cv(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA ex rel. DANIEL FELDMAN,

Plaintiff-Appellee,

– v. –

WILFRED VAN GORP and CORNELL UNIVERSITY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANTS-APPELLANTS CORNELL UNIVERSITY AND WILFRED VAN GORP

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CORPORATE DISCLOSURE STATEMEMT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Defendant-Appellant Cornell University, a New York education corporation, hereby certifies that there are no corporate parents of Cornell University and no publicly held corporation owns an interest in Cornell University.

Dated: April 8, 2011
New York, New York

By: /s/ Tracey A. Tiska
Tracey A. Tiska

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IN THE
United States Court of Appeals for the Second Circuit

NO. 10-3297(L), 11-975(CON)

UNITED STATES OF AMERICA ex rel. DANIEL FELDMAN,
Plaintiff-Appellee,

– v. –

WILFRED VAN GORP and CORNELL UNIVERSITY,
Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

This appeal involves important issues concerning the application of the False Claims Act ("FCA") to training grants sponsored by the National Institutes of Health ("NIH"). NIH provided grant funds for Cornell University and one of its professors, Wilfred van Gorp, Ph.D., to develop and run a training program for post-doctoral fellows in clinical research of neuropsychology of HIV/AIDS. Cornell and Dr. van Gorp did just that. One of the fellows, who failed to complete the training, became dissatisfied with the program and sought to transform his dissatisfaction into a fraud claim, even though NIH never expressed any dissatisfaction with the implementation or outcomes of the training program. As a

result, one of the nation's leading research institutions has been ordered to refund the full amount of the funding for three years of the training grant, with treble damages, $32,000 in penalties, and pay hundreds of thousands of dollars of Relator's attorneys' fees and costs—notwithstanding that the program successfully trained fellows in research in neuropsychology of HIV/AIDS.

This is not the paradigm FCA case involving sub-standard equipment or overcharging for goods and services sold to the government; there was no fraud. Cornell, through Dr. van Gorp and others, provided research training in the neuropsychology of HIV/AIDS. The fellows who participated in the program received the benefit of that training; and the grant funds were spent as directed by NIH. Relator Daniel Feldman stipulated that NIH understands that a program director will make changes from the aspirational statements in the training grant application to implement the program and that NIH does not expect a program director to notify the agency of every change made. He also stipulated to the fact that there is disagreement among NIH officials on what information a program director should include in seeking to renew funding for the program after the initial funding decision. Despite admitting these key facts about expected programmatic changes, Relator contended that a "fraud" took place because the fellows were not trained exactly as described in the grant application to NIH, his chief complaint

being that the training program focused less on HIV than he expected after reading that application.

Relator thus alleged that the 1997 grant application was a false claim, as were the four annual renewal applications, because the training was not implemented as described in the grant application and the renewals did not report certain changes that he thought were relevant to the program's goals and objectives even though the fellows received training in neuropsychology of HIV/AIDS. The jury found no FCA violation on the application or the first renewal, but it found Cornell and Dr. van Gorp liable for the final three renewals. It did so despite the complete lack of evidence or testimony that NIH had any concerns with the quality or content of Cornell's training program. Nor was there any evidence that the manner in which Cornell implemented the training program harmed NIH or impaired in any way satisfaction of NIH's goals and objectives in funding the training program.

This appeal challenges pre-trial and post-trial rulings of the District Court (William H. Pauley, III, J.) that misinterpreted the FCA and related caselaw. The result of those rulings is an unprecedented and unjustified expansion of FCA liability. Before the case even got to trial, the District Court ruled on damages as a matter of law. In so doing, it not only usurped the role of the jury, but also

disregarded the plain language of the FCA ("the amount of damages the Government sustains *because of*" the alleged misconduct) and abandoned the proper measure of damages in an FCA case—that the government is entitled to the difference between the value of the work promised and the value of the work it received. The court's erroneous damages ruling came in resolving a motion *in limine* and was made without considering any evidence. The District Court simply held that, as a matter of law, the award of damages in FCA cases involving NIH training grants automatically equals three times every dollar NIH paid on any grant application or renewal found to be a false claim. The District Court did not require Relator to present evidence—much less prove—that an alleged falsity caused NIH to pay monies it would not otherwise have paid or that the government received no benefit in funding the grant. In awarding *per se* damages of three times every dollar of NIH funding on a grant renewal, the District Court ignored—and precluded the jury from considering—the outstanding results of a training program that far exceeded NIH's goals in funding the grant.

Moreover, at trial, Relator failed to present evidence that a false statement in the annual renewals was material to NIH's funding decision. As a result, the jury's verdict on the final three renewals cannot be sustained—especially given the stipulated facts that NIH understood changes would be made, did not expect to be

notified of all those changes, and had no unified expectation about what information should be included in a renewal application.

The District Court upheld the jury's verdict by essentially eliminating the materiality element of FCA liability. It held that every statement or omission in a renewal application was by definition material because NIH conceivably asked for it. The court exacerbated this error by basing its analysis on ambiguous NIH instructions that did not fairly put grant recipients on notice about what information was to be reported; indeed, the stipulated facts showed that NIH itself did not have a consistent view of what should be reported. The court's ruling ignored the significant and undisputed discretion that NIH accords program directors to run a training program. Moreover, the District Court found that these instructions were sufficient to support the jury's finding on materiality notwithstanding the absence of evidence about how NIH used the information or how it might affect decisions to fund renewal periods for a grant. Without evidence connecting the requested information to NIH's funding decision, the jury could do nothing but speculate as to whether the alleged false statements were material to NIH's funding decision. Compounding the lack of evidence on materiality, the District Court excluded as irrelevant and prejudicial the only real evidence of NIH's views of the alleged fraud when it excluded evidence that NIH

took no action against Cornell or Dr. van Gorp in response to Relator's same complaints to NIH about the training. The District Court's decision on materiality stands for the flawed principle that information broadly requested by an agency is *per se* material to its funding decisions.

The implications of this case extend beyond Cornell and Dr. van Gorp to scores of NIH-funded research institutions offering training programs across the country. If affirmed, the rulings in this case will drastically alter how such research institutions provide training and impact the ability of NIH to oversee these training grants—all without input (or even a complaint about this grant) from NIH. Furthermore, the verdict in this case undermines the well-established principles of judicial restraint in cases of academic judgment as articulated in cases like *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), and most recently in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2989 (2010). Here, in the absence of testimony or evidence that NIH viewed these academic issues as fraud, the jury was improperly allowed to second-guess the training and education decisions of Cornell and Dr. van Gorp.

The District Court's judgment should be reversed.

JURISDICTIONAL STATEMENT

Relator asserted subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3729, *et seq*. (A237.) The District Court entered judgment on a jury

verdict against Defendants on August 3, 2010 (A3636-3638) and entered an amended judgment on August 11, 2010. (SPA33-35.) Defendants filed a timely notice of appeal on August 13, 2010. (A3639-3642.) On Second Circuit Form C, filed September 2, 2010, Defendants stated that, relative to the appeal, their Rules 50(b) and 59 post-trial motion, dated August 25, 2010, was still pending in the District Court. (2d Cir. Docket No. 19.) The District Court denied Defendants' motion on December 9, 2010. (SPA36-46.) Defendants notified this Court of the denial of the post-trial motion by letters, dated December 13 and 14, 2010, enclosing copies of the District Court's memorandum and order. (2d Cir. Docket Nos. 44, 47.) The District Court awarded Relator attorneys' fees, costs, and expenses on February 9, 2011. (SPA47-57.) Defendants filed a timely notice of appeal of the order on fees and costs on March 10, 2011. (Docket No. 55.) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed error in removing the factual question of damages from the jury and holding as a matter of law on a motion *in limine* that any FCA violation would entitle the government to three times the amount paid on any NIH training grant initial application or renewal application.

2. Whether, standing alone, NIH instructions for completing grant renewal applications are sufficient as a matter of law to establish that a false

statement was material to NIH's decision to continue to fund a training grant when the instructions fail to unambiguously identify what information must be disclosed on renewal applications and lack any explanation of what information NIH considers in making the funding decision.

3. Whether the District Court abused its discretion by granting Relator's motion *in limine* to exclude evidence that NIH did not take any action against Cornell or Dr. van Gorp in response to the complaints made by Relator concerning the same factual allegations at issue in this case.

STATEMENT OF THE CASE

Relator filed a one-count sealed complaint under the *qui tam* provisions of the FCA (the "Complaint") in October 2003 alleging that Cornell and Dr. van Gorp submitted two false claims for payment in connection with a training grant funded by NIH. (A20-119.) The Government declined to intervene in the case in April 2007. (A120.)

After discovery ended, on January 9, 2009, Defendants moved for summary judgment. (A154-155.) On December 7, 2009, the District Court denied the Defendants' motion. (A196-208.) On December 18, 2009, Defendants moved for reconsideration on an issue the District Court had not addressed—whether Relator should be limited to statutory penalties because there was no evidence that the government was injured. (A209, 211.) On May 3, 2010, the District Court denied

reconsideration, holding that "if the fact-finder concludes that the government would not have awarded the grant absent the false claims, it may properly conclude that the measure of damages is the total amount the government paid." (A214.)

Two months later, on July 8, 2010, the District Court removed the issue of damages and causation from the jury altogether and established the amount of damages as a matter of law. (SPA8, 24.)

The case was tried to a jury for eight days in July 2010. At the close of Relator's case, Defendants moved for a directed verdict under Rule 50(a), and the court reserved decision. (A1839.) On July 22, 2010, the jury found Cornell and Dr. van Gorp not liable for the grant application or first renewal, but found that they were liable for the next three renewals. (SPA31-32.) On August 3, 2010, the court entered a judgment automatically imposing treble damages on the total amount paid under the three renewals and awarded the maximum statutory penalties. (A3636-3638 (awarding treble damages of $855,714 and penalties of $32,000).)

On August 13, 2010, Cornell and Dr. van Gorp filed a notice of appeal. (A3639-3642.) On August 25, 2010, they also filed a renewed motion for judgment as a matter of law under Rule 50(b) arguing that there was insufficient evidence to support the verdict or, in the alternative, that they were entitled to a new trial under Rule 59 because of the court's error in removing the question of

damages from the jury. (A3645-3646.) On December 9, 2010, the District Court denied Defendants' post-trial motion. (SPA36-46.)

STATEMENT OF FACTS

I. T32 Training Grants

NIH supports research by awarding grants. One of its funding programs is the Ruth L. Kirschstein National Research Service Award Institutional Research Training Grant, known as a "T32 training grant." (A2560-2586.) Unlike NIH grants that fund projects under the direction of an investigator with specific research objectives, the purpose of a T32 grant is to fund training of research fellows. (A2563 ("The objective of the [T32 training grant] is to provide predoctoral and postdoctoral research training opportunities for individuals interested in pursuing research careers in biomedical, behavioral and clinical research.").) In other words, a T32 grant funds training, not research itself. NIH uses these grants "to help ensure that a diverse and highly trained workforce is available to assume leadership roles related to the Nation's biomedical and behavioral research agenda." (A2563-2564.) Each T32 grant designates a faculty member at the recipient institution (the "grantee") to serve as the "Program Director." (A2567.) The Program Director provides "the overall direction, management and administration of the research training program." (A2567.)

The parties stipulated to a number of key facts about how T32 grants work in practice. To obtain funding, a research institution must submit an initial grant application to NIH that is subject to a competitive review by an Initial Review

Group ("IRG") that consists of non-NIH employees who are experts in scientific fields related to the application. (A1954-1955.) Each IRG member scores the application based on his or her view of its merit. (A1955.) T32 grants are typically approved for one year of funding with a recommendation to fund up to four additional years. (A1956.)

In contrast to the competitive initial grant application, a grantee submits a "non-competitive" renewal application, also referred to as an annual report, for each year of additional funding. (A1956.) NIH directs that the grantees be "brief" in the renewal and provide a summary of the trainees' activities during the previous funding period. (A1956, 2472.) Renewal applications are reviewed only by NIH Program and Grants Management Officers; they are not competitively scored as with the initial application process. (A1956.) NIH reviews the renewal application to determine if the budget is appropriate and look at the progress made under the grant. (A1956.)

A variety of government documents provide information about implementing T32 grants. (A1446-1447.) Four of these relate to post-funding reporting for T32 grants: (1) National Research Service Award ("NRSA") Program Announcement (the "Program Announcement"); (2) NRSA Guidelines (the "Guidelines"); (3) Instructions for Application for a Continuation Grant (the

"Renewal Instructions"); and (4) 45 C.F.R. § 74.51 (the "Regulations"). These documents identify only three circumstances in which a grantee must receive NIH approval to make a change to a funded training program—a change in program aims or research area, a change in Program Director, and a change of grantee. (A2580, 2657.)

The only other guidance as to post-funding reporting requirements in these documents is that:

- Grantees should notify NIH of (i) "problems, delays, or adverse conditions which *materially impair* the ability to meet the objectives of the award;" or (ii) "developments that have a significant impact on the award-supported activities." 45 C.F.R. § 74.51(f) (emphasis supplied).
- Grantees should provide in their annual progress report "brief information" with "[a] comparison of actual accomplishments with the goals and objectives established for the period" and a statement of "[r]easons why established goals were not met, if appropriate." *Id.* § 74.51(d).
- In the renewal application, grantees should provide a "brief presentation" focused on a "description of the training objective and goals for the reporting period" and "any difficulties encountered by the program." (A2472.)
- In the renewal application, grantees are also instructed to describe the research projects and course work of current trainees and to list all trainee publications not previously reported. (A2473.)
- In the annual progress reports, grantees should identify faculty members who have left or joined the program, describe recruiting experiences, and state any recommended improvements. (A2581-2582.)

Relator also stipulated to a number of facts concerning the discretion given to a Program Director in running a T32 training program. Relator stipulated that

NIH understands that a T32 training grant will not "be implemented exactly as outlined in the application and that a Program Director may make adjustments to the training" and must have "latitude and discretion" when implementing the training. (A1613-1614.) "NIH does not expect to be notified of every change from the application that is made during the implementation of the grant." (A1614.) Significantly, "NIH program officials disagree on what information should be included" in a renewal. (A1614.)

Apart from these stipulations, Relator offered no evidence about how NIH approaches the processing of non-competitive renewals for T32 grants. Before joining Cornell, Dr. van Gorp had trained more than 30 fellows on a multi-year T32 grant at UCLA. (A1855-1856.) Consistent with the requirements of 45 C.F.R. § 74.51(f), Dr. van Gorp testified that he understood the renewal applications needed to report only those "difficulties" that, in the judgment of the Program Director, "seriously impede reaching the goals and objectives, the aims, of the proposal." (A1595.) There was no contrary evidence on this point.

II. Cornell's T32 Grant

A. Submission and Review of the Initial Application

In April 1997, Cornell and Dr. van Gorp submitted an application to NIH for a T32 training grant entitled "Neuropsychology of HIV/AIDS Fellowship" (the "Grant Application" or "Application"). (A2254-2376.) The Application identified

Dr. van Gorp as the Program Director and requested funding to train post-doctoral fellows "in child and adult clinical and research neuropsychology with a strong emphasis upon research training with HIV/AIDS." (A2255.) Over 100 pages long, the Application identified many potential opportunities that could be utilized as part of the training. For example, it listed several research sources already available at Cornell and identified at least 14 scientists who had agreed to be available if any fellow sought assistance in that scientist's field of expertise. (A2295-2299, 2303-2306.) Most of the trial focused on whether statements in the Grant Application were true.

The IRG that reviewed the Application gave it a high priority score and recommended funding for two fellows per year. (A1962, 2475-2476.) NIH approved funding for two fellows for an initial year and recommended that the program be funded for four additional years. (A2548.) Like other T32 grants, the bulk of the funding would pay the fellows a stipend, as well as training-related fees and expenses (such as the cost of attending conferences and participating in online courses). (A2548, 2550.) Neither Dr. van Gorp nor any other T32 faculty member received salary support from the grant. (A2548, 2550.)

B. Post-Funding Submissions

After the initial funding year, four Renewal Applications were submitted to NIH.[1] (A2377-2433.) The Years 3-5 Renewals included progress report summaries that described the activities of each fellow for the preceding 12-month period, including their ongoing and anticipated research projects and publications. (A2402-2406, A2411-2415, A2422-2427.) The fellows prepared the descriptions of their activities in the Renewals, and the information accurately described their activities while training at Cornell. (A1055, 1141, 1213-1217, 1248, 1325-1327, 3068.) NIH approved each of the four Renewal Applications. (A1061, 2551-2559.)

C. The Fellows Received Substantial Training in Clinical Research in Neuropsychology and HIV/AIDS

Dr. van Gorp served as the Program Director until October 1, 2001. During that time, four fellows completed the training program: Drs. Elizabeth Ryan, Evan Drake, Clifford Smith, and Kimberly Walton Louis.[2] (A1269.) Relator, Dr. Daniel Feldman, was a fellow for 15 months, but he quit before completing his two year commitment to pursue a business opportunity. (A1269, 1764, 2687, 3030.) In October 2001, Dr. van Gorp left Cornell to join Columbia University and was

[1] The Renewal Applications are referred to as the Year 2 Renewal, Year 3 Renewal, Year 4 Renewal, and Year 5 Renewal.

[2] Dr. Louis trained at Cornell for two years, but was funded on this Grant for only one year. (A1297-1298.)

replaced—with NIH approval—by Dr. Marlene Cloitre as Program Director. (A2032, 2685-2686.) Three other fellows participated in the program, but they trained under both Drs. van Gorp and Cloitre: Drs. Nancy Hartwell, Colleen Ewing, and Sandra Hunt. (A2034.)

The four fellows who completed the training program with Dr. van Gorp testified at trial. (A894, 1109, 1240, 1346.) Relator also testified. (A1617.) There was no evidence at trial on the training of Drs. Hartwell, Ewing, and Hunt even though Relator was seeking a return of the grant funds used for their training.

It is undisputed that during the training program, the fellows (including Relator):

- conducted neuropsychological tests on research subjects and clinical patients (A962, 1004, 1185, 1299, 1712, 1714, 2132, 2140, 3607, 3613);
- conducted clinical research through numerous projects (A1029, 1136-1137, 1249, 1416-1420, 1711-1712, 1706-1707, 3051);
- planned research projects (A990-991, 1196, 1249, 1377-1378, 1417, 1743-1744, 3069-3079);
- developed and wrote grant proposals, two of which were funded (970-971, 1188-1191, 1366, 1420-1422, 1712-1713, 2485-2492, 2688-2753, 2754-2801, 2802-2897);
- attended didactics, lectures and seminars (1039-1042, 1130-1131, 1208-1211, 1214-1215, 1216-1217, 1321-1324, 1426-1427, 1712);
- attended regular group and individual training sessions with Dr. van Gorp (1042, 1044, 1428, 1784);

- consulted other faculty members (A909-910, 915, 1033-1039, 1188, 1201-1202, 1326-1328, 1416, 1419, 1712, 1743);
- prepared research posters, published abstracts, and co-presented their research at neuropsychology conferences and seminars (A993-995, 1003-1004, 1007, 1010, 1011, 1012-1013, 1187-1188, 1198, 1313-1317, 1376, 1382, 1419, 1712, 1733, 2950-2951, 2952-2953, 2954, 2955, 2956, 3038-3048);
- performed forensic neuropsychological evaluations (A927, 1117, 1273, 1350, 1680);
- attended neuropsychology conferences (A1199, 1317-1318, 1712);
- reviewed journal submissions as *ad hoc* reviewers (A1028, 1197-1198, 1422);
- published book chapters and articles (1006, 1011-1012, 1186-1187, 1193, 1196-1197, 1382-1383, 2898-2920, 2928-2930, 2921-2927); and
- wrote manuscripts (A996-997, 1013, 1196, 1313, 1712, 1733, 2931-2949, 3167-3188).

The fellows' training focused on the neuropsychology of HIV. The fellows that completed their training with Dr. van Gorp had access to hundreds of HIV research subjects and ample opportunity to conduct neuropsychological evaluations on these individuals and analyze related data. (A962, 1184-1185, 1268, 1597, 2134-2135, 2139-2140, 3609, 3612-3613.) The two largest such research projects—"Return to Work with HIV/AIDS: Neuropsychiatric Factors" and "Neuropsychological Prediction of 'Real World' Functional Capacity"—exemplified the extensive training that the fellows received.

Return to Work. The fellows prepared the grant application for this project, which involved the study of neuropsychological and psychological/psychiatric predictors of success in the ability of a person with HIV to return to work after illness. (A1025-1026, 1366, 1723-1724, 2688-2753.) NIH approved funding for the fellows' Return to Work application.[3] (A1881.) There were over 700 testing sessions on over 260 research subjects enrolled in the study, all of whom had HIV/AIDS. (A2139, 3612.) The fellows co-authored three publications and made six presentations based on the Return to Work research. (A1024-1025, 1122-1124, 1186-1188, 1314-1317, 2928-2930, 2955, 2956.)

Real World. This project investigated the functional consequence of cognitive and motor impairments on the performance of "real world" tasks, like reading a subway map and balancing a checkbook. (A2485-2492.) The National Academy of Neuropsychology funded this project. (A998.) The fellows designed the methods to be used in the study, prepared the grant application, and worked with the study's research subjects—over three-quarters of whom had HIV/AIDS. (A970-971, 974-975, 1712-1714, 2134-2135, 3609.) The fellows made two presentations based on this research. (A1003-1004, 3038-3048.)

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[3] Dr. Bornstein, an expert in neuropsychology of HIV and training fellows in that field, testified that the fact that these fellows obtained NIH funding for this grant was impressive and a testament to the quality of the training they received. (A1981.)

In addition, to the Return to Work and Real World projects, the fellows worked on several other HIV-related research projects, and they published articles and abstracts and made presentations based on this additional HIV-related research. (A915, 990-991, 993-997, 1006-1007, 1012-1013, 1082, 1122-1124, 1136, 1138, 1151-1152, 1181-1185, 1186-1188, 1196, 1235, 1249, 1313, 1317, 1318, 1377-1378, 1382, 1417, 1418, 1420-1421, 2754-2801, 2921-2927, 2928-2930, 2931-2949, 2950-2951, 2952-2953, 3167-3188.)

The Renewals included descriptions of the fellows' work on both the Return to Work and the Real World projects and the many other projects that they worked on during the program. (A2403-2405, 2411-2414, 2422-2425.) Thus, NIH was aware of the types of research projects being undertaken by the fellows when it approved the Renewals.

* * * * *

In sum, each of the four fellows who completed the program with Dr. van Gorp was trained in clinical research in neuropsychology of HIV/AIDS, and each testified that the program gave them experience in, an understanding of and/or expertise in neuropsychology of HIV/AIDS. Dr Ryan testified that she "gained experience in research in HIV during the fellowship" that helped her in conducting subsequent HIV-related research. (A985-986, 989.) Dr. Drake testified that he

had a "very good" fellowship through which HIV research was available and he learned about HIV. (A1426, 1430-1431.) As Dr. Drake described it, the fellows "were all there training in HIV. That was part of the spirit of the place." (A1380.) Likewise, Dr. Smith testified that he had a "great" fellowship during which he performed HIV-related research and "acquired an understanding of the neuropsychology of HIV infection." (A1130, 1181, 1221.) Dr. Louis testified that she had an "excellent educational experience" that gave her expertise in the neuropsychology of AIDS. (A1296, 1331-1332.)

Even Relator admitted that he was trained during his 15 months on the program. In Relator's own words, "the fellowship provide[d] a bountiful research and clinical experience" and when he left the fellowship he described his time at Cornell as his "most productive year to date." (A3030.) He also confirmed that he "generated a number of research projects" during the fellowship, and also wrote grants, designed research tests, wrote manuscripts, made poster presentations, attended classes, consulted faculty, saw clinical patients (both HIV and non-HIV), and attended neuropsychology conferences. (A1712.) While Relator could not dispute that he received training, he offered numerous complaints as to his opinion of the "quality" of the training. For example, he admitted to consulting with primary faculty members and other Cornell professors, but was not satisfied with

the consultations. (A1695-1696, 1752-1753.) Likewise, he admitted that courses were offered, but complained he was never told that he was required to attend. (A1747-1750.) And although he acknowledged that the grant writing experience during the program was beneficial, he found the work clerical, calling himself "copy boy." (A1689, 1723-1724.) These complaints highlight the problem with applying the FCA to an academic dispute involving Program Director discretion to implement training programs. Relator turned his disappointment with how Dr. van Gorp ran the training program into an FCA action seeking to force Cornell to refund every penny of funding for the entire five year program—even though the other fellows credited the program's good work.

D. Outcome of the Training Program at Cornell

By NIH's standards, the program at Cornell was a success. All of the fellows who completed their training with Dr. van Gorp have gone on to clinical research careers, and two even secured NIH funding in research on the neuropsychology of HIV/AIDS. That is exactly what NIH hopes to achieve when it funds a training grant. (A1957.) Dr. Ryan remained at Cornell as an Instructor of Psychology in Psychiatry and the Director of the Return to Work with HIV project and then became an Assistant Professor of Psychiatry and Pathology at Mount Sinai School of Medicine, where she received NIH funding to conduct research on the neuropsychology of HIV. (A895, 915-916, 979, 985, 1070, 3081-

3166, 3521.) In 2009, she returned to Cornell as an Assistant Professor of Psychology and Psychiatry. (A895.) Dr. Drake became an Assistant Professor of Clinical Neuropsychology at Columbia University where he is involved in clinical research related to epilepsy. (A1347, 1409.) Dr. Smith went to Rush University Medical Center as an Assistant Professor of Behavioral Sciences, where he conducted NIH-funded research on the neuropsychology of HIV/AIDS. (A1179-1180, 3539.) Finally, Dr. Louis worked as a clinical researcher at a pharmaceutical company, conducting research related to HIV/AIDS, and then joined the Howard University Departments of Psychiatry and Pharmacology, where she assessed HIV-positive subjects in her work involving mood disorders and alcohol. (A1294-1296, 3526-3527.) She was awarded an NIH career development grant in 2005. (A3528.) Dr. Louis then joined the University of Medicine and Dentistry of New Jersey, where she continued to be involved in clinical research. (A1296-1297.)

Because T32 grants focus on the development of researchers, NIH measures the success of a T32 training grant by the extent to which the fellows pursue research careers after they complete the program. (A1957.) It is rarely the case that all the fellows who complete a T32 program go on to research or academic careers. (A1982-1983.) As a result, a T32 grant is considered a "resounding success" if a high percentage of the fellows go on to research or academic careers.

(A1981-1983.) In this case, *all* of the fellows who completed their training with Dr. van Gorp at Cornell achieved these aims. (A895, 985, 1179-1180, 1294-1296, 1346-1347.) Each of these fellows credits the training they received with Dr. van Gorp at Cornell with preparing them for their post-fellowship clinical research careers. (A989, 1221, 1331-1332, 1430-1431.) Not only did the fellows themselves demonstrate that they received clinical research training in neuropsychology of HIV/AIDS. Dr. Bornstein, a neuropsychologist specializing in HIV/AIDS with vast experience training fellows, also testified that the training program implemented by Dr. van Gorp achieved the goals of the grant. (A1981.) Dr. Bornstein testified that based on the careers of the fellows after the training program, the training program at Cornell was "a resounding success" and the training equivalent of "batting 1,000." (A1981-1983.) Relator offered no contrary expert opinion.

PROCEEDINGS BELOW

I. Relator's Allegations

Relator identified two false claims for payment in his Complaint—the Initial Grant Application and the Year 5 Renewal. (A22.) The Complaint alleged that the Application included false statements about (i) the curriculum (*i.e.*, that certain courses were listed in the Application but not offered to the fellows as described) (A23); (ii) how fellows' time would be split between research and clinical work

(*i.e.*, that fellows spent less time on research activities than was described in the application) (A24); (iii) the composition of clinical patient population (*i.e.*, the clinical patients seen by the fellows were not predominantly HIV+) (A24); and (iv) the availability of faculty members (*i.e.*, that fellows did not work with all of the primary faculty members listed in the Application) (A25-26). The Complaint further alleged that the Year 5 Renewal was false because Dr. van Gorp had not implemented the program as described in the Application and because the new faculty members identified in the Renewal had not worked with the fellows. (A23, 26.)

During discovery, Relator identified as false claims for payment—for the first time—the Year 2, 3, and 4 Renewals. (A137.) He also alleged new categories of alleged falsities that included, among others: (i) research projects were not assigned as described in the Application; (ii) changes made to the composition of the training committee and the frequency of its meeting from what was described in the Application; (iii) Dr. van Gorp did not use the sample form attached to the Application when he evaluated the fellows; and (iv) some of the fellows did not have an interest in HIV work prior to joining the program. (A238-239.) Relator admitted that his claim of falsity for some statements was based simply on the fact that he did not know if the statement was true (A141), and that other statements he

pointed to as "false" were "aspirational" statements that could not possibly be false. (A141, 143.) The subjective nature of these alleged false statements underscores the inappropriateness of imposing FCA liability here.

II. Pre-Trial Proceedings

On January 9, 2009, Defendants moved for summary judgment. (A154-155.) Defendants raised both Relator's lack of evidence necessary to establish the elements of an FCA violation (*i.e.*, materiality, scienter, and falsity) or damages and Relators' improper attempt to expand the case to include false claims and false statements not pleaded in his Complaint.[4] (A157-158, 161-162, 336-338.) On December 7, 2009, the Court denied the motion. (A196-208.) In its ruling, the court failed to address Relator's lack of proof of damages or whether Relator would be limited to the allegations in the Complaint. On December 18, 2009, Defendants moved for reconsideration concerning damages, which the District Court denied on May 3, 2010. (A209-215.) At that time, the District Court ruled that it would be up to the "fact-finder" to determine damages. (A214.)

[4] A relator is not authorized to use discovery to add new claims after the government declines to intervene. 1 John T. Boese, Civil False Claims and Qui Tam Actions § 4.04[C] at 4-169 (3d ed. 2007-1); *accord U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 231 (1st Cir. 2004); *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559-60 (8th Cir. 2006).

Before trial, Relator filed a motion *in limine* to exclude various types of evidence from the trial, including: (i) the fact that NIH and other agencies, including the American Psychology Association ("APA") and the New York State Department of Education ("NYSDOE"), had taken no action against Cornell and Dr. van Gorp in response to complaints Relator made to those agencies; and (ii) the "success" of the grant as evidenced by the post-fellowship careers of the fellows who completed the training program. (A299-300.) The court granted Relator's motion as to both types of evidence (SPA3-8), finding that the agency determinations, including NIH's, were, at most, only "marginally relevant" and evidence thereof would be misleading and a waste of time. (SPA5-6.) With respect to evidence of the "success" of the grant, the District Court granted the motion to exclude all such evidence and ruled as a matter of law on the measure of damages in this case, even though that issue—and evidence related to it—was not before the court. The court found that the Grant "produced no tangible benefit for the Government." (SPA8.) Based on that finding, the court reasoned that whether the goals of the Grant may have been fulfilled by the fellows' post-training careers was irrelevant to the issue of damages. (SPA8.) The court held that, as a matter of law, if the jury found liability on any of the five false claims for payment, damages would be the amount that was paid by the government as a result of that false claim.

(SPA8.) The District Court made this ruling without ever requiring Relator to establish the necessary causal link between an alleged false statement and the government's payment and without Relator presenting any evidence that the government received no benefit from the Grant. Moreover, the court never provided Cornell or Dr. van Gorp with an opportunity to present contrary evidence on causation or on the benefit that the government received from the Grant.

III. The Trial

This case was tried for eight days in July 2010. When the trial began, Relator still had not pinpointed the false statements he would be pursuing.[5] In fact, the court expressed frustration over the testimony concerning the alleged falsities. When Defendants attempted to question some of the fellows about whether the evaluation form in the Application would have been beneficial to their training experience, the court called Defendants' inquiry "silly" in front of the jury. (A1430.) But in fact, that line of questioning was necessary to refute Relator's allegation that Defendants violated the FCA by not using the evaluation form in the Application. (A238-239.) That line of inquiry could be characterized as "silly"

[5] Before trial, the parties submitted a joint pre-trial order, which was required to state "the claims and defenses that [each] party has asserted which remain to be tried." (Rule 6(A)(iv) of the Individual Practices of Judge William H. Pauley, III.) Relator yet again failed to identify the specific false statements at issue and instead identified only general categories—six in the Application and three in the Renewals. (A238-239.)

only to the extent that Relator's allegations of an FCA violation based on whether the evaluation form was used were "silly."

Despite the smorgasbord of false statements alleged by Relator, at trial there was no evidence that any of the changes impeded the objectives of the grant or diminished its HIV focus. For example, even though there were many fewer HIV+ clinical patients than anticipated, the fellows gained clinical experience by performing identical evaluations on HIV+ subjects enrolled in the various research projects. (A1339, 1878.) As another example, Relator asserted but failed to demonstrate that the fellows spent more time on clinical work than what was provided for in the Application; in the end, it was undisputed that the fellows performed far less than the one clinical evaluation per week provided for in the Application. (A1051-1052, 1756-1757, 2309, 3608.) Likewise, although Relator claimed that some of the fellows recruited by Dr. van Gorp were not interested in HIV research, none of the fellows testified that they lacked an interest in HIV research. Indeed, one of Relator's most peculiar arguments at trial was that Dr. Smith lacked sufficient interest in HIV research, notwithstanding that Dr. Smith went on to pursue a career in clinical research in neuropsychology of HIV. (A1179-80, 1526, 1701-1702.) Such arguments, and there were many of this ilk,

underscored the extent to which Relator's case turned on his opinion about the academic gravitas of the training program.

The jury returned a general verdict finding Cornell and Dr. van Gorp not liable on the Application and Year 2 Renewal, but liable on the Year 3, 4, and 5 Renewals. (SPA31-32.) On August 3, 2010, the District Court entered judgment imposing damages in treble the amount NIH paid for the last three renewal years of the grant and awarding the maximum statutory penalties—$855,714 plus statutory penalties of $32,000 for a total judgment of $887,714. (A3636-3638; *see also* SPA33-35 (amended judgment correcting the case caption).)

On December 9, 2010, the District Court denied Defendants' post-trial motion under Rules 50(b) and 59 for judgment as a matter of law or a new trial. (SPA36-46.) Relator also moved for attorney's fees and costs pursuant to 31 U.S.C. § 3730(d)(2), requesting $726,711.25 in fees and $37,927.87 in costs. (A3643, 3647-3648, SPA48.) Defendants opposed the application because, among other reasons, Relator had limited success since he prevailed on only three of the five claims. (SPA53-55.) On February 9, 2011, the District Court issued an Order awarding Relator $602,898.63 in fees and $25,862.15 in costs. (SPA47-57.) On March 11, 2011, Cornell and Dr. van Gorp filed a notice of appeal from the fee award, which was consolidated with this appeal. (2d Cir. Case No. 11-975.)

SUMMARY OF ARGUMENT

The District Court made a series of errors in its pre- and post-trial rulings. As a result, Cornell and Dr. van Gorp have been subjected to liability and treble damages under the FCA even though: (i) Relator presented no evidence of materiality for the Renewals; (ii) the court excluded key evidence showing that the false statements at issue here were not material; and (iii) Relator never proved damages.

1. The Court should set aside the verdict and order a new trial on the Year 3, 4 and 5 Renewals because the District Court erred when it held as a matter of law that liability on any false claim automatically would result in damages equal to the amount paid for that grant year. In an FCA case, "automatic equation of the government's payments with its damages is mistaken." *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1278 (D.C. Cir. 2010) (hereinafter "*SAIC*"). The proper measure of damages under the FCA is the difference between the value of the work promised and the value received. By contrast, notwithstanding the fact that Cornell provided a successful training program, the judgment here requires the University to forfeit all of the grant funds, all of which were properly expended as directed, times three. Notably, this erroneous ruling was made in response to Relator's motion *in limine* to prevent Defendants from presenting certain evidence at trial; there was no evidentiary hearing, and no party

proffered any evidence on damages in connection with the motion. Though required to do so to recover under the FCA, Relator never submitted any evidence of: (i) causation between the false statements and the government's payment; or (ii) the value of the services provided to the government.

2. The Court should set aside the verdict and enter judgment for Cornell and Dr. van Gorp on the Year 3, 4 and 5 Renewals because there was no evidence to sustain the jury's finding that the Renewals contained actionable false statements material to NIH's funding decision. To establish materiality in an FCA case, Relator must prove that a specific false statement in a claim for payment had the natural tendency to influence the government's decision to pay the claim. In finding materiality, the District Court allowed the jury to ignore stipulated facts and rely entirely on NIH's ambiguous Renewal Instructions. Without evidence concerning the funding decisions on T32 renewals, the District Court allowed the jury improperly to guess what statements in the Renewals could influence the funding decision and simply assume that a statement was material merely because NIH asked for the information.

3. The Court should set aside the verdict and order a new trial on the Year 3, 4 and 5 Renewals because the District Court abused its discretion in excluding highly relevant evidence concerning materiality. In granting Relator's

motion *in limine*, the District Court held that evidence that NIH—the alleged victim here—took no action in response to Relator's complaints about the training program was irrelevant. The fact that NIH did not take any action directly implicates the question of whether any of the allegedly false statements could influence a funding decision. Moreover, the District Court's concern that this evidence was misleading was unfounded because this evidence was related to the central issue in the case (*i.e.*, were the statements false and material *to NIH funding*). The exclusion of evidence concerning an element of the FCA is an abuse of discretion and warrants vacating a jury verdict and ordering a new trial. *See U.S. ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 315-16 (1st Cir. 2010).

ARGUMENT

I. The District Court Erred By Taking The Question of Damages And Causation From The Jury

The FCA provides for an award of three times "the amount of damages which the Government sustains *because of* the act of that person." 31 U.S.C. §3729(a)(1) (emphasis added). Here, the District Court's decision to presume damages and causation as a matter of law ignored the plain language of the statute. As a result of that ruling, the jury never considered or determined whether the government "sustain[ed]" damages, the "amount" of damages, or whether any damages were "because of" Cornell or Dr. van Gorp's conduct. It is the job of the

jury in an FCA case, as the factfinder, to determine the number of FCA violations and the amount of actual damages suffered by the United States, if any. *See, e.g.*, *SAIC*, 626 F.3d at 1278 (reversing jury verdict because improper jury instruction on damages led to an "automatic equation of the government's payments with its damages").

The court's pre-trial ruling on damages was legally erroneous: it relieved Relator of his burden of establishing that a false statement in the Renewals caused injury to the government and prevented Defendants from presenting the jury with evidence about the value of Defendants' services on the T32 grant. In fact, the ruling contradicted the District Court's own prior ruling that actual damages was a question of fact for the jury. (A214.)

Like all legal conclusions, the District Court's pre-trial ruling on damages is reviewed *de novo*. *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 101 (2d Cir. 2001) (*de novo* review of district court's decision not to charge jury on punitive damages).[6]

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[6] Although the denial of a motion *in limine* is typically reviewed for abuse of discretion, an appellate court reviews *de novo* any conclusions of law made in ruling on that motion. *See, e.g.*, *United States v. Wade*, No. 09-16473, 2010 WL 3817820, at *7 n.6 (11th Cir. Oct. 1, 2010). That is because when a district court's discretionary decision "'rests on an error of law (such as the application of the wrong legal principle),' a district court necessarily abuses its discretion." *United States v. Treacy*, No. 09-3939-CR, 2011 WL 799781, at *7 (2d Cir. Mar. 9, 2011) (quoting *United States v. Figueroa*, 548 F.3d 222, 226-27 (2d Cir. 2008)).

A. The Relator Has the Burden to Prove the Fact and Amount of Damages

Relator must prove any damages by a preponderance of the evidence. *See, e.g., U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 923 (4th Cir. 2003) ("The FCA specifically places the burden of proving damages on the government. Because . . . the *qui tam* relator[] stands in the place of the government, he must assume the government's burden of proof as to damages in an FCA case.") (internal citation omitted). Without adequate evidence of damages from Relator, the District Court had no basis to rule on the actual damages suffered by the government.

This Court held decades ago that the correct measure of damages in an FCA case is the difference between the amount of money paid and the amount of any value received. In *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971), the Court affirmed a trial court's measure of damages as "correct" where it "adopted the method used by other courts in False Claims cases," citing *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966), *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D.N.J. 1955), and *United States v. American Packing Corp.*, 125 F. Supp. 788 (D.N.J. 1954). In *Woodbury*, the Ninth Circuit explained that "the measure of the government's damages would be the amount that it paid out by reason of the false statements *over and above* what it

would have paid if the claims had been truthful," which turned on whether there was evidence that the value of what the government received was less than what it paid. 359 F.2d at 379 (emphasis added); *accord Ben Grunstein & Sons*, 137 F. Supp. at 204 (proper measure of damages is the difference between the value the person defrauded would have received but for the fraud and the value of what was in fact received); *American Packing Corp.*, 125 F. Supp. at 791 (damages must be determined by "ascertain[ing] the difference between the value of what the Government was entitled to receive under the contracts and the value of what actually it received").

As this standard makes clear, to prove damages (in any amount), a relator must show causation—a causal connection between the payment and the false statement. 31 U.S.C. 3729(a) (recovery for "damages which the Government sustains *because of*" the violation) (emphasis added); *accord United States v. Hibbs*, 568 F.2d 347, 349 (3d Cir. 1977); *U.S. ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995). In other words, actual damages under the FCA cannot be awarded if the "same loss would have been suffered by the government had the [false statement] been accurate." *Hibbs*, 568 F.2d at 351 (vacating damage award because the government's injury was caused by defaults by mortgagors and decreased value of security not by defendant's false

certification). Moreover, to prove that the amount of damages was the entire amount of the grant, a relator would be required to prove that the government received no value—at all—through the grant work it funded. *See, e.g.*, *Harrison*, 352 F.3d at 923 (rejecting relator's claim for all monies paid by the government because even though the defendant "ran afoul of the fair bidding requirements, there was no evidence adduced at trial suggesting that [it] failed to perform the work that it was required to perform . . . or that the government did not receive the benefit of the work"); *United States v. Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995) (finding no FCA damages because the government failed to establish the value of benefit received), *aff'd*, 86 F.3d 1159 (8th Cir. 1996); *United States v. Bd. of Educ. of Union City*, 697 F. Supp. 167, 173 (D.N.J. 1988) ("[I]f absolutely zero benefit was received by the government, it must be proved.").

The D.C. Circuit's recent decision in *SAIC* reinforces these principles. In *SAIC*, the defendant contractually agreed to provide technical assistance and expert analysis to the government. The government pursued an FCA case based on the defendant's failure to disclose conflicts of interest and sought to recover the full amount the government paid under the contracts. At trial, the district court instructed the jury that in determining damages, it "should not attempt to account for the value of services, if any, that SAIC conferred upon the [government]." 626

F.3d at 1278. Not surprisingly, the jury returned a verdict finding actual damages of the full amount paid on the contracts. *Id.* The D.C. Circuit vacated the jury verdict because the jury instruction "compelled the jury to assess as damages the actual amount of payments the government made to SAIC." *Id.* Such an "automatic equation of the government's payments with its damages is mistaken" because "the proper measure of damages is the difference between the value of the goods or services actually provided by the contractor and the value the goods or services would have had to the government had they been delivered as promised." *Id.* A discounting of the amount paid by the value received is necessary to "put[ ] the government in the same position as it would have been if the defendant's claims had not been false." *Id.*

The District Court's pre-trial damages ruling assumed that *any* alleged falsity would have led NIH to discontinue funding the grant entirely if it had known the truth. In other words, without proof, the District Court concluded that any false statement would necessarily strip all value from the training provided by Cornell and Dr. van Gorp.[7]

[7] By deciding this issue in a vacuum, the District Court held that any of Relator's numerous alleged false statements—no matter how trivial—would have led NIH to cease all funding. Given the range of alleged false statements, it is all the more astonishing that the District Court would draw such a conclusion without any evidence.

B. The District Court's Improperly Invaded the Province of the Jury

The District Court dismissed Defendants' arguments on the basis that the Renewal Applications "were prerequisites for continued funding," finding, without evidence, that if a claim included any false statements, "the Government did not get 'the benefit of the bargain.'" (SPA 44.) That reasoning is circular. Submitting a claim for payment is required to obtain funding. But presentment of a false claim for payment does not *ipso facto* mean that the government was injured. If so, damages would be automatic disgorgement in all FCA cases. Moreover, that reasoning completely ignores that there was no evidence before the District Court as to the benefit to the government or the value of services provided through the grant as implemented. While a relator might offer sufficient evidence that a claim amount and the damages amount are equal, and a jury might make that determination upon considering that evidence, here, Relator was never put to that test.

In its rulings on damages, the District Court relied primarily on *U.S. ex rel. Longhi v. Lithium Power Tech., Inc.*, 575 F.3d 458, 473 (5th Cir. 2009). (SPA7-8, 44.) But *Longhi* does not support the court's ruling. *Longhi* involved small business grants for product development. The false statements at issue in *Longhi* concerned the defendant's eligibility for funding in the first place. *Id*. at 464. In

Longhi, the government (directly, not through a relator) moved for summary judgment and met its evidentiary burden of proving damages through admissible undisputed evidence that the defendant would never have been approved for funding absent the false statements about its qualifications. *Id.* at 462. That record is very different than the District Court's determination here on a motion *in limine* without evidence. Next, in *Longhi*, the government proved causation by submitting uncontested evidence of a causal link between the false statements and the payments: the grant evaluators testified that they would not have approved the funding absent the false statements in the grant proposals. *Id.* at 472. Here, there was no such evidence. In addition, the government in *Longhi* proceeded on a fraudulent inducement theory under which it sought to prove that the defendant fraudulently induced the government to award grants for which the defendant was not qualified. Here, however, Relator did not pursue a fraudulent inducement theory. Nor could one be read into the case *post-hoc*, because the jury found no liability on the initial Application.

The other cases cited by the District Court are no more relevant or useful as support for the court's ruling. *United States v. Mackby* (cited at SPA7) was also a fraudulent inducement case in which the defendant, who was not eligible to bill Medicare, used his father's Medicare PIN number to submit claims for payments to

which he was not entitled. 339 F.3d 1013, 1018-19 (9th Cir. 2003). Because Mackby was not eligible to bill the government, the entire amount paid on the claims was "over and above what [the government] would have paid if the claims had been truthful." *Id.* *United States v. Rogan* (cited at SPA7-8) is similarly off-base because it involved Medicare claims ineligible for reimbursement because of underlying violations of anti-kickback laws. 517 F.3d 449, 452 (7th Cir. 2008). And in *United States v. TDC Management Corp.* (cited at SPA8), there was unrebutted summary judgment evidence in the form of declarations from government officials that they would not have made the contested payments had they known the truth about the defendant's monthly progress reports; thus, "there was no genuine issue of fact regarding causation and reliance, nor any need for an evidentiary hearing." 288 F.3d 421, 428 (D.C. Cir. 2002).

In sum, the District Court's ruling on damages was wrong. Because Relator never proved damages, the jury's verdict finding liability on the Year 3, 4 and 5 Renewals should be vacated, and a new trial on these Renewals should be granted.

C. The District Court's Erroneous Ruling on Damages Warrants a New Trial

On remand, a jury in this case cannot decide damages in a vacuum. "It is well established that a partial new trial may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the

others that a trial of it alone may be had without injustice." *Brooks v. Brattleboro Mem. Hosp.*, 958 F.2d 525, 530 (2d Cir. 1992) (internal quotations omitted). A partial retrial is not appropriate if "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to the denial of a fair trial." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

Here, damages on the Year 3, 4, and 5 Renewals cannot be determined without a retrial on liability for those Renewals because damages cannot be determined without knowing the basis for liability—*i.e.*, the purportedly false statements in the Renewals. But, the Verdict Form does not specify the basis for liability. The jury below completed a general verdict form, answering only whether the Defendants violated the FCA as to each purported false claim. (SPA31-32.) Nor is the basis for liability clear in the record. Relator did not litigate a single theory of liability; he instead introduced evidence to support multiple and varied allegations of false statements and other purported omissions under the FCA. Without understanding the context for liability, a new jury could never calculate damages. An award of actual damages under the FCA requires an assessment of the injury to the Government *caused by* the false statements. 31

U.S.C. § 3729(a) (person liable for "amount of damages which the Government sustains because of the act of that person"). If the new jury does know the false statements on which liability was based, it cannot determine the damages caused by these false statements, if any.

For a jury to assess damages, the parties must re-litigate the issue of liability on the Year 3, 4, and 5 Renewals.[8]

II. Defendants Were Entitled to Judgment as a Matter of Law Because Relator Failed to Present Evidence that Any False Statement was Material to Payment on the Renewals

Relator bore the burden at trial to prove that a false statement in the Renewal Applications was material to NIH's decision to continue funding the grant. *See, e.g.*, *U.S. ex rel. Loughren v. Unum Group*, 613 F.3d 300, 307 (1st Cir. 2010); 1 John T. Boese, Civil False Claims and Qui Tam Actions § 2.04, 2-171-72 (3d ed. 2006 & Supp. 2010). Materiality is a component of FCA liability that must be "rigorously" enforced to "ensure that government contractors will not face 'onerous and unforeseen FCA liability.'" *SAIC*, 626 F.3d at 1271. Here, this element was not enforced; it was abandoned. Relator did not dispute that he was obligated to prove materiality, and he agreed that the funding decision for a grant application is distinct from the funding decision for a renewal. (A245, 309, 1956.)

[8] Relator has not appealed the judgment on the Application and Year 1 Renewal.

Yet, he offered no evidence regarding the renewal funding process or the materiality of any allegedly false statement in the Renewals. The only evidence that Relator presented to the jury concerning materiality went to what was material on an initial grant application.[9] Because Relator failed to meet his burden on materiality, Cornell and Dr. van Gorp are entitled to judgment as a matter of law.

Judgment as a matter of law should be granted where a plaintiff fails to prove any element of his claim. *Goldhirsh Group., Inc. v. Alpert*, 107 F.3d 105, 110 (2d Cir. 1997) (reversing district court for failure to grant judgment as a matter of law). This Court reviews the denial of a post-trial motion for judgment as a matter of law *de novo*, applying the same standard as the district court. *Doctor's Assocs., Inc. v. Weible*, 92 F.3d 108, 111 (2d Cir. 1996). Under that standard, the Court looks to see whether the plaintiff presented "affirmative evidence" of each element; without such affirmative evidence, "'[t]he jury's findings could only have been the result of sheer surmise and conjecture'" and must be set aside. *Goldhirsh Group*, 107 F.3d at 110 (quoting *Mattivi v. South African Marine Corp., Huguenot*, 618 F.2d 163, 169 (2d Cir. 1980)).

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[9] On Summary Judgment, the District Court held that the Summary Statement—a document prepared by the IRG after its review of the Application—"create[d] a disputed issue of material fact" regarding materiality. (A203-204.) The Summary Statement, however, is not relevant to the Renewals. (A1954-1956.)

A. Relator Did Not Present Affirmative Evidence Establishing that a False Statement was Material to NIH's Funding Decisions for Renewal Applications for T32 Grant Funding

A false statement is material only if it has a "natural tendency to influence, or [is] capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Materiality requires more than a hypothetical connection between a falsehood and a funding decision, because the jury must find that the false statement "was *predictably* capable of affecting . . . the official decision." *Kungys v. United States*, 485 U.S. 759, 771 (1988) (emphasis added). "[F]or purposes of determining the natural tendency of a misrepresentation to affect a decision . . . what is relevant is what would have ensued from official knowledge of the misrepresented fact . . . ." *Id.* at 775. As this Court has explained in a non-FCA case, assessing materiality "requires examination of the factors the decisionmaker would employ." *United States v. Rigas*, 490 F.3d 208, 235 (2d Cir. 2007). Simply because a defendant is required to provide information does not mean that the information is material. *Id.* at 234. Material means something more than just relevant. "To be 'relevant' means to be related to the issue. To be 'material' means to have *probative weight*, i.e., reasonably likely to influence the tribunal in making a determination required to be made." *Id.* (emphasis added) (internal quotations omitted).

Relator's post-trial theory that materiality is established by the Renewal Instructions was contrary to Relator's theory at trial that the Renewal Instructions require that all changes be reported in a renewal, not just "material" changes. (A2167.) Despite this inconsistency, the District Court found those Renewal Instructions sufficient to establish materiality. (SPA39-40.)

In denying motions directed to the issue of materiality, the District Court relied on the following evidence:

- A joint stipulation stating that "[a]fter the initial funding year, a grantee must submit a noncompetitive renewal application to receive the additional recommended funding for each year thereafter. Each renewal includes a progress report which NIH expects will provide information about the trainees activities during the previous funding period." (SPA38-39.)
- A statement in the Renewal Instructions indicating that "Progress Reports provide information to awarding component staff that is essential in the assessment of changes in scope or research objectives . . . from those actually funded. They are also an important information source for the awarding component staff in preparing annual reports, in planning programs, and in communicating scientific accomplishments to the public and to Congress." (SPA39.)
- A statement in the Renewal Instructions directing grantees to "[h]ighlight progress in implementation and developments or changes that have occurred. Note any difficulties encountered by the program. Describe changes in the program for the next budget period, including changes in training faculty and significant changes in available space and/or facilities." (SPA39.)
- A statement in the Program Announcement asking for "information describing which, if any faculty and/or mentors have left the program." (SPA39.)

But none of these statements, taken individually or together, establish what information was material to NIH's funding decisions on renewals. These sections lack specifics; instead, they seek an opinion—the Program Director's judgment or assessment of how training is going. They focus on generalities, not detailed accounting. The requests for "highlights" or "difficulties" underscore the subjective nature of the information sought. In that regard, it is hardly surprising that, as stipulated, NIH officials themselves disagree about what information should be included in the renewals. (A1614.) Perhaps the failure to submit a progress report of any kind with a renewal application might lead NIH to suspend funding, but otherwise these communications do not explain what information NIH considers in deciding to continue funding on a multi-year training grant. Yet without such evidence, the jury was simply left to speculate that any falsity was material. The "evidence" found sufficient for materiality by the District Court is discussed in turn.

B. Stipulating that a Renewal Application Must Be Submitted, With a Progress Report, Does Not Establish Whether Any False Statement Made Therein Is Material to NIH's Funding Decision

The parties stipulated that a renewal application must be submitted to receive additional funding and must contain a progress report. (A1956.) Period. That stipulation does not establish or support a reasonable inference of what is material to NIH's funding decision on a renewal application. By relying on the

stipulation as "evidence" that the false statements in the Renewals were material, the District Court conflated the mere act of presenting a claim with what statements in the Renewals were material to the funding decision. Materiality cannot be established, as a matter of law, simply by pointing to the fact that a claim was presented. Every FCA case involves a claim for payment; it is a *qui tam* plaintiff's burden to prove that a false statement in a claim for payment could influence a funding decision. *U.S. ex rel. Sanders v. N. Am. Bus Indus.*, No. JFM 02-3084, 2007 WL 80922 (D. Md. Jan. 3, 2007) (materiality is a separate element of the FCA that cannot be proven by falsity or scienter), *aff'd*, 546 F.3d 288 (4th Cir. 2008).

C. The Renewal Instructions and Program Announcement Do Not Establish Whether a False Statement in The Renewal Applications Was Material to NIH's Funding Decision

The District Court relied on two sections in the Renewal Instructions and one section in the Program Announcement in concluding that Relator established materiality. The first section states that the progress report submitted with a renewal application will "provide information to awarding component staff that is essential in the assessment of changes in scope or research objectives . . . from those actually funded." But this statement, which appears in the general section of the Renewal Instructions (A2462) does not appear even to apply to T32 grants. Rather, the instructions specific to T32 renewals in the Renewal Instructions direct

T32 grantees to "[u]se the following Instructions to prepare a progress report . . . ." (A2470, 2472.) Moreover, other NIH guidance provides that T32 grantees should follow the T32-specific instructions of the Renewal Instructions. (A2581.) Furthermore, that the "information" is "essential" to assess . . . changes in scope or research objectives" further underscores that this section does not apply to T32 grants. Unlike a grant to fund a specific research, there are no "research objectives" in a training grant. The parties did not stipulate that every statement in the Renewal Instructions applies to T32 grants (A1446-1447), and Relator never presented any evidence to the jury that the quoted general instruction applied to T32 grants. In fact, no witness was ever asked about this section, nor was it read or provided to the jury.

Regardless, this general instruction does not establish what "information" in a renewal is "essential" much less that it is "essential" because it could influence the funding decision. Relator's burden was to prove that specific false statements were material, not that some unspecified information may have been requested. This section simply states that the information is "essential" to assess "changes in scope or research objectives." There was no evidence from which the jury could conclude that the alleged false statements constituted a "change in scope" that could have caused a different funding decision, especially when Relator was

arguing to the jury that all changes (not just material changes) needed to be reported. (A2167.) Moreover, the provision itself makes clear that the "information" is used for several purposes, including "planning programs" and "communicating scientific accomplishments to the public and to Congress." (A2462.)

The second section from the Renewal Instructions relied upon by the District Court fares no better. That provision requires a grantee to "[n]ote any difficulties" and "[d]escribe changes." (A2472.) The jury had no guidance about what NIH considers "difficulties" or "changes," much less what NIH does with information concerning "difficulties" or "changes." At most, this instruction establishes that "difficulties" or "changes" (whatever they are) should be noted in a renewal. The jury could only guess that "changes" and "difficulties" included the false statements at issue and then further guess that these statements could have influenced NIH's funding decisions.

The third statement relied upon by the District Court, from the Program Announcement, likewise is not evidence of materiality. This statement simply requests that the progress report include information about faculty members who have left (or joined) the program. (A2581.) Again, this statement provides no insight as to why NIH requests this information or how it is used.

Thus, none of these statements provides evidence that any alleged falsity in the Year 3, 4, or 5 Renewals had a natural tendency to affect NIH's funding decision for those years. As an example, one of the alleged falsities at issue in the Renewals is that Cornell and Dr. van Gorp should have notified NIH that certain T32 faculty members had changed institutions. (A1485.) But there was no evidence that NIH would have considered that piece of information in deciding to continue funding; there is no way to know why the information was requested. As another example, Relator claims that Cornell and Dr. van Gorp should have reported in the Renewals that some of the courses identified in the Application had changed or were being taught informally. (A1551-1552.) Again, assuming that information should have been reported, there is nothing in the record suggesting that NIH would terminate a five year grant based on a change to a few of the many courses listed in the Application, especially given the stipulations regarding the discretion of the Program Director to shape the training approach. (A1613-1614.) An analysis of each alleged falsity in the Renewals would lead to the same conclusion because the Renewal Instructions and the Program Announcement are silent as to what information matters to NIH for purposes of its funding decision.

D. Undisputed Evidence Precluded Post-Trial Assertions that the Renewal Instructions are Evidence of What Is Material

The undisputed facts are completely at odds with Relator's theory that the Renewal Instructions prove that the false statements in the Renewal Applications for Years 3, 4 and 5 were material. The parties in fact stipulated to all of the following:

- When funding T32 training grants, NIH does not expect that the program will be carried out exactly as outlined in the application. (A1613.)
- NIH knows that a Program Director like Dr. van Gorp may make adjustments to the training program as it progresses. (A1613-1614.)
- NIH does not expect to be notified of every change from the initial grant application made during the implementation of the grant. (A1614.)
- NIH program officials themselves disagree on what information should be included in a progress report. (A1614.)

Based on these stipulations, without more information, the jury had no legal basis for determining which "changes" should have been reported much less which ones NIH wanted to know about because they could influence a funding decision. The jury could only guess and speculate.

E. The Renewal Instructions Are Not "Unambiguous"

The District Court allowed the verdict to stand based on its view that the Renewal Instructions are "unambiguous" and make clear through their "plain language" what is material to NIH in evaluating renewal applications. (SPA39-40.) That holding is unsustainable. The question is "whether the language at issue has a

plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Renewal Instructions do not have a plain and unambiguous meaning with regard to this dispute. They refer to reporting "difficulties" and "changes" in a progress report, without specifying what changes or difficulties must be reported under what circumstances. The parties stipulated to the fact that NIH expects a program director to make changes to the training program and does not expect to be notified of all changes. (A1613-1614.) They also stipulated that NIH officials themselves disagree on what information should be included in a renewal application. (A1614.) Based on these agreed facts, the requirement to report "changes" in the Renewal Instructions cannot be unambiguous. A grantee is not unambiguously told to report *all* changes when everyone agrees that NIH does not expect to hear about all changes—and specifically tells grantees to be "brief" in their progress reports. (A2472.) Because only some changes are required to be reported to NIH in a renewal, but the Renewal Instructions do not define *which* changes should be reported, these Instructions are necessarily ambiguous and cannot establish a legal standard for materiality. The District Court erred in denying judgment as a matter of law based on a purported lack of ambiguity in the Instructions.

F. Materiality Must Be Decided in the Context of a Training Grant

Training is an art; there is no one-size-fits-all approach to it. (A1984-1985.) Relator claims that elements of the training program outlined in Dr. van Gorp's Grant Application were so important to NIH that it might have terminated funding if it had known that those elements were not present. On the other hand, Dr. van Gorp disagrees that any changes in the program would be material to NIH's funding decisions because the program was always on track to meet its goal of training fellows in neuropsychology of HIV. Moreover, the stipulations in this case expressly acknowledged that "Program Directors may make adjustments to the training program as it progresses," "have leeway to tailor the training," and "ha[ve] latitude and discretion when implementing a T32 training grant." (A1613-14.) The District Court simply concluded that the Renewal Instructions sufficiently resolved this dispute to sustain a jury verdict because grantees must disclose "difficulties encountered by the program." (SPA39.)

The District Court's ruling, however, ignores the reality of NIH-funded post-doctoral training that, as the parties agreed, "NIH does not expect that the grant will be implemented exactly as outlined in the application" and "does not expect to be notified of every change from the application that is made during the implementation of the grant." (A1613-14.) As further stipulated, NIH does not anticipate "substantial programmatic involvement with the recipient during the

performance" of a grant. (A1613.) Because these training programs are fraught with daily decisions by a program director concerning the appropriate means of training a group of diverse fellows, NIH does not seek to micromanage the academic judgment of qualified directors. Yet, that is exactly what the District Court's ruling implies.

In pursuing this academic dispute as a fraud case under the FCA, Relator has pressed for liability in an area that the courts traditionally have been reluctant to subject to undue scrutiny. In numerous contexts, the Supreme Court has recognized that universities must make "complex educational judgments in [] areas that lie[] primarily within the expertise of the university." *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003). These educational judgments often require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (citation omitted); *accord Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2989 (2010) ("Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'"). And specifically in the FCA context, courts have been skeptical of

claims premised on scientific disputes or reasonable disagreements. *E.g.*, *U.S. ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992) ("The Act is concerned with ferreting out wrongdoing, not scientific errors."); *accord U.S. ex rel. K&R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983-984 (D.C. Cir. 2008) (citing *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69-70 (2007)). All of these concerns resonate here.

This dispute between program director and fellow about training methodology should not be the basis for FCA liability; it simply is not what the FCA was meant to redress. And there is no evidence that NIH would have considered alleged changes in the program to be anything more than a "complex educational judgment" squarely left in the program director's discretion, as stipulated. Moreover, the Renewal Instructions alone, even to the extent that document could be read to require disclosure of specific information (a questionable inference in light of the stipulated facts), say nothing about what information in the Renewals bears on NIH's funding decisions. And if this Court holds—as did the District Court—that, standing alone, a request to disclose "difficulties" on an NIH form is sufficient to deem any information under the broadest interpretation of that request to be material to NIH grant funding, it will radically impact NIH reporting policy without NIH ever having been heard on the

issue. In the overall context of the claims here, Relator failed to prove materiality as a matter of law.

III. The District Court Erred In Excluding Evidence of NIH's Response to Relator's Complaints About the Training Program

In July 2001, Relator anonymously submitted a letter to NIH complaining about the training program. (A1786, 2987.) Relator sent NIH another letter in March 2002 about the program—this time identifying himself. (A3009-3029.) The allegations in the July and March letters are the same as the factual allegations in the Complaint here. (A20-28, 1786, 3009-3029.) NIH never took any action against Cornell or Dr. van Gorp and notified Relator that it was closing the case. (A667-668.) The District Court excluded this evidence because NIH's standard in evaluating Relator's allegations was unclear and under Fed. R. Evid. 403. (SPA5-6.) The District Court's ruling was an abuse of discretion that warrants a new trial.

This Court reviews the District Court's exclusion of evidence under an abuse of discretion standard.[10] *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 224 (2d Cir. 1999). An abuse of discretion can stem from an error of law or an error of fact. *Id.* Under this standard, a new trial is warranted "if a substantial right of a party is affected—as when a jury's judgment would be swayed in a material fashion by the

[10] Relator also made complaints to the APA and NYSDOE about the program. Neither agency took any action. (SPA4.)

error." *Arlio v. Lively*, 474 F.3d 46, 51 (2d Cir. 2007) (granting new trial); *see also Williams v. Long Island R.R. Co.*, 196 F.3d 402, 408 (2d Cir. 1999) ("Although determinations of relevance are entrusted to the sound discretion of the trial judge, they will be reversed when they constitute an abuse of discretion.").

A. The District Court Abused Its Discretion When It Found That Evidence of NIH's Inaction in Response to Relator's Complaints About the Training Program Was Irrelevant

Under Fed. R. Evid. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relator's case is that Cornell and Dr. van Gorp defrauded NIH. That NIH took no action after Relator made complaints to the agency is plainly relevant. Despite knowing about Relator's complaints concerning the training program, NIH did not stop funding the grant, did not request any changes be made to the training, and did not reprimand Cornell or Dr. van Gorp. Instead, NIH continued to use Dr. van Gorp as an IRG expert to evaluate grant applications. (A1858.) If NIH—the alleged victim on whose behalf Relator was proceeding—did not find that a response was warranted, the jury should have been allowed to consider those facts in deciding whether Cornell or Dr. van Gorp committed fraud on the agency.

Courts have recognized that an agency's action or inaction in response to complaints about conduct that later forms the basis for a relator's *qui tam* action

are relevant to whether an FCA violation occurred. For example, in *United States v. Southland Management*, the Fifth Circuit focused on the inaction of the relevant government agency as a reason to affirm judgment in favor of the defendant. 326 F.3d 669 (5th Cir. 2003). The fact that the agency "was willing to work with" the defendants and continued providing subsidies after being made aware of the matters at issue in the FCA lawsuit showed that the claims "cannot be false under the False Claims Act as a matter of law." *Id.* at 677; *see also id.* at 680 (concurring op.) (the government's inaction evidenced the "immateriality" of the alleged falsity). In *U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp.*, this Court noted that even though government knowledge is not a bar to an FCA action, it "may be relevant to . . . liability." 985 F.2d 1148, 1156-57 (2d Cir. 1993).

The District Court excluded this evidence because it was unclear what standards NIH uses "to determine the existence of misconduct and whether those standards are at all similar to an FCA claim." (SPA5.) That misses the point of the evidence. Defendants sought to use the evidence to show that the statements were neither "false" nor "material" to NIH (and that the government had not suffered any damages, if that issue had been presented to the jury). Defendants thus were prevented from presenting the jury with a key aspect of their defense: that NIH

heard about the allegations and took no action.[11] Put simply, the District Court's ruling affected a "substantial right" of Cornell and Dr. van Gorp—their right to present evidence that could cause a "jury's judgment [to] be swayed in a material fashion" as to whether Relator met his burden on falsity or materiality. *Arlio*, 474 F.3d at 51.

B. The District Court Abused Its Discretion In Finding that Evidence of NIH's Inaction Was Prejudicial Under F.R.E. 403

Rule 403 provides that evidence can be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. The District Court did not even attempt to explain how the evidence of NIH's inaction met this standard. It noted only that admitting the APA evidence would lead to a discussion about whether the APA had considered the trial evidence. (SPA5.) That rationale does not apply to the NIH evidence because unlike the APA, NIH is the funding agency at the heart of this action.

[11] The District Court's reliance on *U.S. ex rel. El-Amin v. George Washington University*, 533 F. Supp. 2d 12 (D.D.C. 2008) (cited at SPA4-5), is misplaced because it dealt with whether an FCA defendant could use the government's decision not to intervene as evidence.

Moreover, the court supported its decision by citing non-FCA cases in which an age discrimination defendant sought to admit evidence of the EEOC's investigatory findings. (SPA5 (citing cases).) But an age discrimination plaintiff is not suing on behalf of the EEOC; Relator, in contrast, is suing on behalf of NIH. *See Woods v. Empire Health Choice, Inc.*, 574 F.3d 92, 97 (2d Cir. 2009) ("[A] relator brings suit on behalf of the Government to recover a remedy for a harm done to the Government."). And the excluded evidence speaks directly to what NIH did when presented with Relator's complaints—evidence directly relevant to Relator's claims in a way that EEOC findings are not. Relator told NIH about the "fraud" and that it was harmed; NIH saw nothing in those complaints that warranted taking action. Cornell and Dr. van Gorp should have been able to defend against Relator's FCA claim by telling the jury that. Relator could then have put on any rebuttal evidence about why *the jury* should find the statements were false and material despite *NIH's* lack of reaction when presented with those allegations. The District Court excluded evidence that was not only key for Cornell and Dr. van Gorp, but also the *only evidence in the record* concerning NIH's reaction to Relator's allegations. Because it was an abuse of discretion to ask the jury to return a verdict without knowing how NIH viewed the alleged misstatements, the verdict should be set aside and a new trial granted. *See*

Loughren, 613 F.3d at 315-16 (vacating jury verdict in FCA case; trial court abused its discretion in excluding evidence related to materiality).

CONCLUSION

The District Court's judgment should be reversed.

Dated: April 8, 2011
New York, New York

By: /s/ Tracey A. Tiska

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Tracey A. Tiska, counsel for Cornell University, one of the Defendants-Appellants in this appeal, hereby certifies that the foregoing brief is in 14-point Times New Roman proportional font and contains 13,487 words, as counted by the Hogan Lovells word-processing system.

Dated: April 8, 2011
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SPECIAL APPENDIX

SPECIAL APPENDIX
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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, *ex rel.* DANIEL FELDMAN,

Plaintiff,

-against-

WILFRED VAN GORP and CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants.

----------X

03 Civ. 8135 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Relator Daniel Feldman ("Feldman" or "Relator") brings this qui tam action on behalf of the United States under the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq., claiming that Defendants Dr. Wilfred van Gorp ("van Gorp") and Cornell University Medical College ("Cornell") submitted false claims in order to obtain federal research funds from the National Institutes of Health (the "NIH"). Relator and Defendants move in limine to exclude certain evidence at trial. For the following reasons, Relator's motions in limine are granted in part and denied in part, Defendants' motions in limine are denied in part, and decision on the balance of the parties' motions in limine is reserved until trial.

BACKGROUND

The factual and procedural background of this action is set forth in this Court's prior memoranda and orders. See United States ex rel. Feldman v. van Gorp, 674 F. Supp. 2d 475 (S.D.N.Y. 2009) ("Feldman II"), reconsideration denied by United States ex rel. Feldman v. van Gorp, No. 03 Civ. 8135 (WHP), 2010 WL 1948592 (S.D.N.Y. May 3, 2010) ("Feldman

III"); Feldman v. van Gorp, No. 03 Civ. 8135 (WHP), 2008 WL 5429871 (S.D.N.Y. Dec. 19, 2008) ("Feldman I").

In 1997, van Gorp, a professor of psychiatry at Cornell, applied for NIH grant funding for a "Neuropsychology of HIV/AIDS Fellowship." Van Gorp proposed that the Fellows would be "trained in child and adult clinical and research neuropsychology with a strong emphasis upon research training with HIV/AIDS." Van Gorp specified that the Fellows would devote 75% of their time to research and 25% to clinical work, the majority of which would involve HIV-positive individuals.

The NIH assigned the application to an Initial Review Group ("IRG") of twenty scientists. After three IRG members completed an initial review, all twenty members evaluated and scored van Gorp's application. These scores were averaged to arrive at a "priority score." The IRG submitted its priority score to the National Institute of Mental Health ("NIMH"), along with a Summary Statement on the application. Although the Summary Statement praised the proposed faculty, research models, and clinical populations, it cautioned:

> [T]he new HIV/AIDS Fellows may get too much clinical work and training in neuropsychology, compared to the desired research training in HIV/AIDS. A final concern is that since the Fellows' stipend will be supplemented for providing clinical services, their research experiences may be compromised.

Based on the Summary Statement's recommendation, the NIMH approved funding for van Gorp's fellowship as described in the application and subject to the applicable grant program legislation and regulations. After receiving initial funding, Cornell and van Gorp submitted renewal applications for continued funding in the following years. NIMH instructions required that renewal applications include progress reports "highlight[ing] progress in

implementation and developments or changes that have occurred" and "not[ing] any difficulties encountered by the program."

Relator claims that Cornell and van Gorp made false statements in both the grant application and the progress reports in violation of the FCA. He contends, inter alia, that certain courses described in the application were not taught, clinical work occupied significantly more than 25% of the Fellows' time, a majority of patients seen during the Fellows' clinical work were not HIV-positive, and significant programmatic changes were not disclosed in the progress reports. See Feldman II, 674 F. Supp. 2d at 479-480.

To establish liability under the FCA, a relator must show that the defendant (1) made a claim, (2) to the United States government, (3) that was false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury. Mikes v. Straus, 274 F.3d 687, 695 (2d Cir. 2001). In addition, a relator must show materiality of the false statements. See Feldman II, 674 F. Supp. 2d at 480. By Memorandum and Order dated December 7, 2009, this Court denied summary judgment, finding genuine issues of material fact existed for trial as to whether Defendants made false statements in their grant application and progress reports, whether these allegedly false statements were material, and whether Defendants acted with scienter. See Feldman II, 674 F. Supp. 2d at 479-481.

DISCUSSION

I. Relator's Motions In Limine

A. Non-Intervention by United States & Inaction by Outside Agencies

Relator moves to exclude as irrelevant any evidence regarding the decision of the United States Department of Justice ("DOJ") declining to intervene in this action. In addition, he

seeks to exclude, as irrelevant and unfairly prejudicial, any evidence with respect to the inaction of the NIH, the New York State Department of Education ("DOE"), and the American Psychological Association ("APA") in response to Relator's complaints. Defendants contend these agency determinations are relevant to the merits of Relator's claims.

The FCA expressly authorizes private individuals to bring a civil action claiming violations of the FCA "in the name of the Government." 31 U.S.C. § 3730(b)(1). When a relator brings a qui tam action, the government must investigate the claims and respond to the complaint by (1) intervening in the action, 31 U.S.C. § 3730(b)(4)(A); (2) declining to intervene and permitting the relator to conduct the action, 31 U.S.C. § 3730(b)(4)(B); or (3) moving to dismiss the action, 31 U.S.C. § 3730(c)(2)(A).

Because the government "may have a host of reasons for not pursuing a claim," courts "do not assume that in each instance in which the government declines intervention in an FCA case, it does so because it considers the evidence of wrongdoing insufficient or the qui tam relator's allegations [of] fraud to be without merit." United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006); see also United States ex rel. DeCarlo v. Kiewit/AFC Enters., 937 F. Supp. 1039, 1047 (S.D.N.Y. 1996) ("[N]on-intervention does not necessarily signal governmental disinterest in an action."). "[T]he plain language of the Act clearly anticipates that even after the Attorney General has 'diligently' investigated a violation [of the FCA], the Government will not necessarily pursue all meritorious claims." United States ex rel. Berge v. Bd. of Trustees, 104 F.3d 1453, 1458 (4th Cir. 1997), cert. denied, 522 U.S. 916 (1997). "[O]therwise there is little purpose to the qui tam provision permitting private attorneys general." Berge, 104 F.3d at 1458; see also United States ex rel. El-Amin v. George Washington Univ., 533 F. Supp. 2d 12, 21 (D.D.C. 2008) (assuming non-intervention is relevant to merits of

relator's claims "would seem antithetical to the purpose of the qui tam provision—to encourage private parties to litigate on behalf of the government"). Moreover, the DOJ's Statement of Interest explicitly provided that "the government's decision not to intervene in this case is not probative of any matter concerning the merits of relator's claims." (Statement of Interest of the United States at 2, U.S. ex rel. Feldman v. van Gorp, No. 03 Civ. 8135 (S.D.N.Y. Mar. 16, 2009) ECF No. 95.) Accordingly, the DOJ's decision not to intervene in this action is not relevant.

With respect to the inaction of the NIH, DOE, and APA, no discovery was conducted concerning the standards these agencies employ to determine the existence of misconduct and whether those standards are at all similar to the elements of an FCA claim. Cf. Berge, 533 F. Supp. 2d at 20 (without evidence of how the government "appraised the merits of [the] case," its decision is "not relevant"). Specifically, as to Relator's deposition testimony on the NIH decision, Relator does not, and indeed cannot, speak to the standards NIH used to judge the merits of his claims. With respect to the APA letter informing Relator that "an ethics case cannot be opened," the APA reviewed his complaint under the APA Ethics Code, a standard that does not bear on the merits of an FCA action.

Moreover, even where public agency determinations may be marginally relevant, the district court has discretion to exclude them on Rule 403 grounds. See Paolitto v. John Brown E&C, Inc., 151 F.3d 60, 64-65 (2d Cir. 1998) (noting that most circuits have left the admissibility of EEOC or other agency findings to the sound discretion of the district court). Introduction of the APA letter would force Relator to "attempt to expose the weaknesses of the [findings]," and draw the parties into "a protracted and unproductive struggle over how the evidence admitted at trial compared to the evidence considered by the agency." Paolitto, 151 F.3d at 65; Dodson v. CBS Broad. Inc., 423 F. Supp. 2d 331, 334 (S.D.N.Y. 2006). Such efforts

would "confuse [and] mislead the jury and result in an undue waste of time." Paolitto, 151 F.3d at 65.

Accordingly, evidence relating to the DOJ's decision not to intervene and the inaction of other agencies is excluded under Rules 402 and 403.

B. "Success" of the Grant

Relator moves to exclude evidence regarding the "success" of the grant—such as the Fellows' professional status or success in obtaining grants following their fellowships—as irrelevant. Relator contends that in Feldman III, this Court decided, as a matter of law, that the appropriate measure of damages is the full amount of the grant monies received. Relator submits that if this Court did not address that issue dispositively, it should rule as a matter of law on the proper amount of damages at this juncture and exclude damages evidence at trial.

Relator mistakes the reach of Feldman III. In Feldman III, this Court addressed Defendants' motion for reconsideration on the narrow question of "whether Relator's damages are limited to civil penalties under the FCA." 2010 WL 1948592, at *1. In denying Defendants' motion, this Court noted that courts employ different formulas for calculating damages under the FCA depending on the facts of the case. Feldman III, 2010 WL 1948592, at *1. Rather than adopting any formula as a matter of law, this Court determined that the jury could find "the measure of damages is the total amount the government paid." Feldman III, 2010 WL 1948592, at *2. Accordingly, the question of whether Defendants' damages are equal to the monies paid out is presented for the first time by this in limine motion.

Although damages to the United States are not a required element of an FCA claim, where they are sought pursuant to 31 U.S.C. § 3729(a), the Government, or the relator standing in its place, bears the burden of proving them by a preponderance of the evidence. 31

U.S.C. § 3731(d); United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 923 (4th Cir. 2003). "Ordinarily, the measure of the government's damages is the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." United States v. Mackby, 339 F.2d 1013, 1018 (9th Cir. 2003); see United States v. Bornstein, 423 U.S. 303, 317 n.13 (1976) (FCA damages are "equal to the difference between the market value [of the items] it received and retained, and the market value it would have received if they had been of the specified quality"). This formula is known as the "benefit of the bargain" theory of damages, and assessment of the amount of that benefit is within the province of the jury. See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., No. 06 Civ. 2860 (DLC), 2009 WL 1108517, at *1-2 (S.D.N.Y. Apr. 24, 2009) ("ADC") (collecting cases).

However, in cases "where there is no tangible benefit to the government and the intangible benefit to the government is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants." United States ex rel. Longhi v. Lithium Power Tech., Inc., 575 F.3d 458, 473 (5th Cir. 2009) (affirming summary judgment that FCA damages were full amount paid out by Government); ADC, 2009 WL 1108517, at *3 (ruling on motion in limine that the proper measure of damages was the full amount paid out). In these cases, evidence that defendant actually used federal monies to perform services "does not eliminate the government's injuries" because "[d]amages under the FCA flow from the false statement." Mackby, 339 F.3d at 1018 (noting that in the FCA's legislative history, Congress explicitly rejected a "no harm, no foul" approach to damages); see also United States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008) (Easterbrook, J.) (proper FCA damages were full amount paid out even though patients received the medical care reflected in the claim forms).

The NIH training grant at issue produced no tangible benefit for the Government. Moreover, it is of no moment that the grant's goals were partially fulfilled by certain Fellows procuring future funding or conducting further research in the field. See ADC, 2009 WL 1108517, at *3 (although defendant argued it "provided services to the United States by allocating funds . . . to deserving housing and community development projects," the actual service "was merely to take the United States' grant money" under the United States' conditions). The "benefit of the bargain" to the Government was the opportunity to provide funding on its terms to the best qualified candidates. See Longhi, 575 F.3d at 462, 473. As Judge Easterbrook observed, "[t]he government offers a subsidy . . . with conditions. When the conditions are not satisfied nothing is due. Thus the entire amount that [Defendants] received on these [] claims must be paid back." Rogan, 517 F.3d at 453.

Accordingly, in the event the jury finds Defendants liable for making materially false statements with the requisite scienter, the proper damages are the grant monies awarded as a result of each false statement. The parties have stipulated that the claims at issue are the initial grant application and the four subsequent Applications for Continuation of Grant. Because damages flow only from those claims on which the jury finds liability, the jury must apportion damages in the event that it finds liability for some statements but not others. See United States v. TDC Mgmt. Corp., Inc., 288 F.3d 421, 423 (D.C. Cir. 2002). Accordingly, Relator's motion to exclude evidence regarding the "success" of the grant is granted.

C. Relator's Performance, Reasons for Leaving & Relationship with van Gorp

Relator moves to exclude evidence concerning his performance as a Fellow or in subsequent positions, his reasons for leaving the fellowship, and his relationship with van Gorp as irrelevant and unduly prejudicial. "While relators indisputably have a stake in the outcome of

False Claims Act qui tam cases that they initiate, the Government remains the real party in interest in any action." United States ex rel. Mergent Servs. v. Flaherty, 540 F.3d 89, 93 (2d Cir. 2008). "All of the acts that make a person liable under [the False Claims Act] focus on the use of fraud to secure payment from the government." Unites States ex rel. Stevens v. Vermont Agency of Natural Res., 162 F.3d 195, 202 (2d Cir. 1998); Mergent, 540 F.3d at 93. As such, this Court will not permit distractive detours into irrelevant aspects of Relator's personal life. Further, whatever probative value Relator's post-fellowship job performance may have to his competence as a Fellow is substantially outweighed by the danger of confusing the jury, and considerations of undue delay and waste of court resources. See Fed. R. Evid. 403. Accordingly, Defendants are precluded from offering such evidence at trial.

However, that Relator left the fellowship early—completing only fifteen months of a twenty-three or twenty-four month training program—presents an alternative explanation for Relator's alleged training deficiencies. Defendants may properly raise this issue at trial. Moreover, Relator's performance as a Fellow and reasons for leaving the program are relevant to the extent they implicate, inter alia, his opportunities to work with research subjects and clinical patients, the availability of research subjects to other Fellows, and the impact of his early departure on his training. But this Court is not in a position to rule in limine on the relevance of each piece of evidence concerning Relator's performance and his reasons for leaving the fellowship. Accordingly, this Court reserves decision until such evidence is offered at trial.

As for Relator's relationship with van Gorp, this evidence is not relevant to any of the elements of an FCA claim. However, because Relator will testify at trial, Defendants are permitted to "raise to the jury any challenges to [his] credibility." Ramey v. Dist. 141, Int'l Assoc. of Machinists & Aerospace Workers, 378 F.3d 269, 283 (2d Cir. 2004). "The motivation

of a witness in testifying, including [his] possible self-interest and any bias or prejudice against the defendant, is one of the principal subjects for cross-examination." Henry v. Speckard, 22 F.3d 1209, 1214 (2d Cir. 1994). Accordingly, Relator's relationship with van Gorp is admissible at trial as evidence of bias and for purposes of impeachment. Relator may object to the admissibility of this evidence under Rule 403 as it is offered at trial.

D. Summaries of Research Files

Relator moves to exclude Defendants' proposed summaries of the total number of research subjects seen under the Return to Work Grant and the Real World Grant, and the proportion of those subjects who were HIV-positive. Relator contends that these summaries are irrelevant and misleading unless amended to (1) include summaries of the clinical files; (2) specify patients/subjects seen by specific Fellows and exclude those seen by persons who were not Fellows; (3) specify the time frame in which subjects were seen and exclude subjects seen under a different grant or fellowship; and (4) specify the number of patients/subjects seen for HIV-related disorders.

Rule 1006 allows admission of summaries when "(1) the evidence previously admitted is voluminous, and (2) review by the jury would be inconvenient." United States v. Whitfield, 590 F.3d 325, 364 (5th Cir. 2009). A summary must "be based on foundation testimony connecting it with the underlying evidence summarized, and must be based upon and fairly represent competent evidence already before the jury." Fagiola v. Nat'l Gypsum Co. AC & S., Inc., 906 F.2d 53, 57 (2d Cir. 1990) (internal citations omitted). First, because Defendants have agreed to summarize the clinical cases seen by the Fellows, that request is now moot. As to Relator's remaining objections, "[a] summary may include only evidence favoring one party, so long as the witness does not represent to the jury that he is summarizing all the evidence in the

case." Whitfield, 590 F.3d at 364. Moreover, "Rule 1006 does not require the fact finder to accept the information present on the summary charts as true." United States v. Massey, 89 F.3d 1433, 1441 n.9 (11th Cir. 1996).

Defendants' summaries are unquestionably relevant to core issues for trial—whether the Fellows performed substantially more clinical work and substantially less HIV-related work than was represented in statements to the NIH. As to the discrepancies identified by Relator, the Court of Appeals has held that objections that summaries "d[o] not fairly represent the documents and [are] excessively confusing and misleading go more to [their] weight than to [their] admissibility." Fagiola, 906 F.2d at 57. Relator's remedy is not exclusion of relevant evidence but rather cross-examination of the summary witness, presentation of contrary evidence, and careful instructions to the jury. Whitfield, 590 F.3d at 365 ("Full cross-examination and admonitions to the jury minimize the risk of prejudice."); Fagiola, 906 F.2d at 58 ("ample cross-examination" and judge's "careful instructions" ensured jury did not give summary "undue weight"). Accordingly, Relator's motion to exclude the summaries is denied.

E. Testimony of Review Committee Members

Finally, Relator moves to exclude certain trial testimony of four IRG members—Dr. Marlene Oscar Berman ("Dr. Berman"), Dr. Geoffrey Fong ("Dr. Fong"), Dr. William Woods ("Dr. Woods"), and Dr. Robert Bornstein ("Dr. Bornstein") (collectively, the "IRG Witnesses")—on grounds of relevance, unfair prejudice, and improper testimony under Fed. R. Evid. 701 and 702. Defendants offer Dr. Bornstein as a fact and expert witness, and Drs. Berman, Fong, and Woods only as fact witnesses.

1. Extension of Court's Prior In Limine Rulings

First, Relator seeks to extend this Court's prior in limine ruling on the admissibility of testimony by Dr. Bornstein to Drs. Berman, Fong and Woods. See Feldman I, 2008 WL 5429871, at *2-3. In that ruling, this Court held that "Dr. Bornstein is precluded from offering fact or expert testimony that Dr. van Gorp's changes would have had on the Grant Application's score, how the IRG would have viewed those changes, and whether the claims constituted false claims." Feldman I, 2008 WL 5429871, at *3. The reasoning underlying that holding applies with equal force to the testimony of Drs. Berman, Fong, and Woods. Because the IRG priority score was a composite score, Drs. Berman, Fong, and Woods could no more predict the impact of van Gorp's changes on the composite score than Dr. Bornstein. See Feldman I, 2008 WL 5429871, at *3. Moreover, they are similarly not qualified to speak on behalf of the committee concerning how the IRG would have viewed van Gorp's changes to the training program. See Feldman I, 2008 WL 5429871, at *3. Finally, Drs. Berman, Fong, and Woods are precluded from testifying as to whether van Gorp's claims constituted false claims because that is the ultimate issue in this action for the jury to decide. See Feldman I, 2008 WL 5429871, at *3. Accordingly, the parameters set forth for testimony by Dr. Bornstein in Feldman I apply to the other IRG Witnesses.

2. NIH Expectations & General Expectations for Grant Execution & Reporting

Relator further seeks to exclude testimony by the IRG Witnesses regarding the NIH's expectations, and general expectations in the research community, for grant execution and reporting. Drs. Berman, Fong, and Woods, as lay witnesses, and Dr. Bornstein in his capacity as a lay witness, may offer opinion testimony only if it is "rationally based on the perception of the witness." Fed. R. Evid. 701; U.S. v. Rea, 958 F.2d 1206, 1215 (2d Cir. 1992). Because the IRG

Witnesses were never employed by NIH, they cannot testify as to its expectations for grant execution and reporting. Similarly, lay testimony on the general expectations in the research community could not rise beyond conjecture. See Feldman I, 2008 WL 5429871, at *3.

Moreover, testimony by Dr. Bornstein in his capacity as an expert witness regarding the expectations of the NIH—like testimony on the opinions of other IRG members—would be speculative. See Feldman I, 2008 WL 5429871, at *3; Wright v. Stern, 450 F. Supp. 2d 335, 359 (S.D.N.Y. 2006) ("[E]xpert testimony should be excluded if it is speculative or conjectural."). However, Defendants may be able to establish at trial that Dr. Bornstein has the proper experience to testify in his expert capacity to the expectations of the general research community. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 126 (1999). Accordingly, Relator's motion to exclude IRG Witness testimony on the NIH's expectations and lay testimony on the expectations of the research community is granted. This Court reserves decision on expert testimony by Dr. Bornstein as to the expectations of the general research community.

3. Merits of van Gorp's Modified Program

Additionally, Relator seeks to exclude IRG Witness testimony regarding whether van Gorp's training program, as executed, was a "good" or "typical" program that fulfilled the stated goals of the grant. Defendants intend to call only Dr. Bornstein, in his expert capacity, to offer such testimony. Provided Dr. Bornstein's testimony does not go to the ultimate question of whether Defendants' statements were false, see Feldman I, 2008 WL 5429871, at *3, Relator concedes that such testimony is relevant to the falsity of van Gorp's statements in the progress reports. Moreover, testimony on whether the program fulfilled the goals of the grant may also go to materiality of the false statements and van Gorp's state of mind. Nonetheless, because the Court must ensure that Dr. Bornstein's dual role as both a fact and expert witness does not impair

the jury's ability to assess his credibility, United States v. Cruz, 363 F.3d 187, 195 (2d Cir. 2004), any ruling on this evidence can only be made in context at trial.

4. Members' Personal Views

Finally, Relator moves to exclude the IRG Witnesses' testimony on whether van Gorp's changes to the training program would have influenced their personal assessment of the grant. Relator contends that while "marginally relevant," this testimony is unfairly prejudicial, misleading, and likely to confuse the jury under Fed. R. Evid. 403. This Court disagrees.

As this Court found in denying summary judgment, a disputed fact issue exists for trial on whether the allegedly false statements were material to grant approval. See Feldman II, 674 F. Supp. 2d at 481. The IRG Witnesses' testimony on their own personal opinions is relevant to the materiality of the allegedly false statements, as well as to van Gorp's state of mind when he submitted the grant application and progress reports. See Mikes, 274 F.3d at 696; Feldman II, 674 F. Supp. 2d at 48 (relying on the affidavits of the IRG Witnesses in finding that genuine fact issues existed for trial).

As for Relator's argument that this testimony is unfairly prejudicial, "[t]he logical inferences resulting from proffered evidence do not engender the 'unfair prejudice' against which Rule 403 is directed." United States v. Davis, 878 F.2d 608, 615 (2d Cir. 1989). That the IRG Witnesses constituted only a minority of the committee and that none of them participated in the initial review of the grant proposal goes to the weight, and not the admissibility, of their testimony. Accordingly, Relator's motion to exclude IRG Witness testimony on their personal views of van Gorp's changes to the training program is denied.

II. Defendants' Motions In Limine

A. Witness Statements from Cornell's Internal Investigation

Defendants move to exclude certain statements made by the Fellows and by van Gorp during the course of Cornell's internal investigation of Relator's claims. Defendants assert that these statements are hearsay and therefore inadmissible in Relator's case-in-chief. However, Defendants do not seek to preclude their admission for impeachment purposes. Because Relator intends to introduce these statements for impeachment purposes only, Defendants' motion is denied as moot.

B. Employment Documents for van Gorp

Defendants also move to exclude on hearsay and relevance grounds Cornell's letter to van Gorp offering him employment and a memorandum from Cornell explaining the terms of his salary. They further seek to exclude any arguments by Relator at trial concerning van Gorp's motive and opportunity. Relator intends to introduce the offer letter and salary memorandum as evidence that van Gorp had motive and opportunity to prioritize revenue-generating clinical work over research, contrary to statements in the grant application and progress reports. Specifically, Cornell's offer letter to van Gorp stated its "expectation" that van Gorp's "program is to be self-supporting within six months." Similarly, the salary memorandum noted that van Gorp's appointment was "subject to the understanding that you will maintain a practice base sufficient to cover all practice expenses. . . ."

Statements offered to show their effect on the listener or reader are not hearsay. See United States v. Puzzo, 928 F.2d 1356, 1365 (2d Cir. 1991). One such effect may be to create motive. As in other fraud actions, a showing that "defendants had both motive and opportunity to commit fraud" may establish scienter under the FCA. U.S. ex rel. Anti-

Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., 495 F. Supp. 2d 375, 389 (S.D.N.Y. 2007). Because Relator seeks to offer the letter and memorandum to show their effect on van Gorp and not "to prove the truth of the matter asserted," Fed. R. Evid. 801(c), Defendants' hearsay argument fails.

Defendants further contend that, even if offered to show van Gorp's motive to misrepresent the clinical work performed by the Fellows, any motive and opportunity argument must be precluded because Relator presents no evidence that van Gorp improperly used the Fellows' time. This Court rejected that argument on summary judgment in finding sufficient evidence for trial that Defendants falsely described the allocation between research and clinical work. See Feldman II, 674 F. Supp. 2d at 479. That Defendants have marshaled contrary evidence goes to the weight, and not the admissibility, of the letter and memorandum. Relator's argument that van Gorp's motive is irrelevant given the ambiguity of the governing regulations has also been rejected by this Court. See Feldman II, 674 F. Supp. 2d at 481 (finding genuine fact issue on scienter where the instructions for progress reports required applicants to "[n]ote any difficulties encountered by the program"). To the extent Defendants contend introduction of van Gorp's salary at trial would be prejudicial, Relator has agreed to redact that information from the offer letter. Because the prejudicial salary information is being redacted, Defendants' motion to exclude the offer letter and salary memorandum are denied.

C. Testimony Concerning Research Activities of Other Fellows

Finally, Defendants move to exclude the trial testimony of Dr. Elizabeth Ryan ("Ryan") and Relator regarding the research activities of other Fellows for lack of personal knowledge. Under Fed. R. Evid. 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

In addition, a lay witness may testify to opinions and inferences only if they are "rationally based on the perception of the witness," that is, based on "first-hand knowledge or observation." Fed. R. Evid. 701(a); United States v. Garcia, 291 F.3d 127, 140 (2d Cir. 2002). Because personal knowledge "must be established to the court and jury," Garcia, 291 F.3d at 127, this Court cannot anticipate in limine what evidence of Relator's and Ryan's personal knowledge will be adduced at trial. Moreover, that Relator and Ryan did not observe all work done by other Fellows does not preclude them from testifying to what they did observe. Rule 401 requires only that evidence be probative, not conclusive, on a fact at issue to be relevant. Accordingly, this Court reserves decision on the admissibility of Ryan's and Relator's testimony until the evidence adduced at trial so warrants.

CONCLUSION

For the foregoing reasons, Relator's motions in limine are granted in part and denied in part, Defendants' motions in limine are denied in part, and decision on the balance of the parties' motions in limine is reserved until trial.

Dated: July 8, 2010
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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SPA-19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, *ex rel.* DANIEL FELDMAN,

Plaintiff,

-against-

WILFRED VAN GORP and CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants.

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03 Civ. 8135 (WHP)

ORDER

WILLIAM H. PAULEY III, District Judge:

By letter application dated July 15, 2010, Relator Daniel Feldman asks this Court to reconsider its trial ruling on his objection to testimony from Fellows concerning their post-fellowship employment and research activities. Relator contends that in seeking to introduce this evidence, Defendants requested reconsideration of this Court's Memorandum and Order dated July 8, 2010 (the "July 8 Order") on the parties' motions in limine.

As this Court stated during trial on July 14, 2010, the July 8 Order addressed whether this Court "should rule as a matter of law on the proper amount of damages at this juncture and exclude damages evidence at trial." (July 8 Order at *6.) This Court found that "in the event the jury finds Defendants liable for making materially false statements with the requisite scienter, the proper damages are the grant monies awarded as a result of each false statement." (July 8 Order at *8.) This Court's decision to exclude evidence of the "success" of the grant was therefore limited to the issue of damages. (See July 8 Order at *8.) Defendants are

not seeking to revisit the July 8 Order because they offer the testimony as relevant only to liability. (See Trial Transcript ("Tr.") at 406-407.)

To the extent Relator requests reconsideration of the July 14 trial ruling, reconsideration should "generally be denied unless the moving party can point to controlling decisions or data that the court overlooked . . . that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Relator has not done so here. He points to no facts or legal authorities showing that the Fellows' testimony on post-fellowship employment and research activities is not relevant to liability. Moreover, Relator's own counsel elicited such testimony from Dr. Elizabeth Ryan at the outset of trial. (Tr. at 128-129.)

Finally, this Court finds that the probative value of the Fellows' testimony on their post-fellowship employment and research activities is not "substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Relator contends this evidence could mislead the jury into thinking Defendants are not responsible for the full amount awarded in the event they find liability. However, this Court has already determined the measure of damages as a matter of law, so that issue will not be before the jury. Accordingly, Relator's request is denied.

Dated: July 16, 2010
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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But the relator utilized 123 minutes, and the defendants utilized 179 minutes. That is No. 1.

Now, I'm going to take what the parties suggested when we started this conference for a few moments this morning about the expert witness charge. I will conform the references to the doctor, and I'm accepting most of the suggestions on that charge and you'll get it reframed. I'll email it -- we'll email it to you tonight so you'll have it.

And we've discussed Mr. Salmanson's submission. And I understand that we have agreement on that.

So I'd like to turn to the letter from Mr. Black, and we can proceed through those charges, those proposed charges.

I'd like to turn to the big issue first, which if I can characterize it that way, I will say is the damages request from the defendants.

Mr. Salmanson, you want to be heard any further on that request? And I'll hear from Mr. Black.

MR. SALMANSON: It's my understanding, your Honor, that the way we've now drafted the jury verdict form, assuming that it's accepted, we don't need to have a damages instruction. And consistent with your prior order, that that's going to be decided by the Court. If they check Box 1, all the money goes back; if the first check is Box 3, then it's from that point forward that the money would go back. So a damages instruction isn't necessary.

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THE COURT: Well, since you've posed it in that hypothetical way, let me ask you this: What happens if the jury decides that the False Claims Act claim has been established with respect to the third progress report, but not the fourth and not the fifth; would it be the plaintiff's view that all of the monies paid by the government to fund the program as a result from the third false report through the fifth report are a liability of Cornell?

MR. SALMANSON: Yes, your Honor. And I think that's the logic of Logi, is if, in fact, at No. 3 you say, Well, if this is the way -- if this is, in fact, material, the form of damages is -- under this kind of subjective grant is the money could have stopped flowing at that point and, therefore, the money that flowed from any point from that point subsequently, there would not have been a fourth progress report or a fifth progress report, because it would have stopped right then and there. And so the money would have, in fact, not continued.

So it's our position it's the earliest predicate act from which the jury finds liability, assuming that it does so.

THE COURT: All right. Mr. Black?

MR. BLACK: Your Honor, for the position that we have laid out previously, we disagree with the application of law in this case, but understand the Court's order. And we thought that the damages instruction was appropriate, in conformity with the Court's order that the jury apportions damages.

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THE COURT: All right. Look, I've gone back, I've looked at my memorandum and order on the motion in limine. The defendants, in their letter -- and, by the way, I'll docket these letters so they are part of the record. Defendants proposed two additional instructions on damages: One on the measure of damages, and one on the effect of the damages instruction.

This Court has already determined the appropriate measure of damages as a matter of law in this Court's decision on the party's motions in limine back on July 8, which now seems an eternity ago.

This Court found that, quote, In the event the jury finds defendants liable for making materially false statements with the requisite scienter, the proper damages are the grant monies awarded as a result of each false statement.

Now, in this Court's July 16, 2010 order, I reiterated that I had already determined the measure of damages as a matter of law, so that issue will not be before the jury.

Each separate progress report is itself either a false statement or not based upon the jury verdict sheet that I've circulated in draft. So all that remains as to damages is essentially a ministerial task.

There are five claims at issue. To the extent that the jury finds liability only on some claims, damages will be awarded in the amount of the grant monies paid out on those

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claims. And since it's a matter of law and counsel want to argue this after a jury verdict, I'll give counsel the opportunity to do that.

But, in my view, there is no need for the jury to get involved in damages or to write this out on the verdict form. The Court can make the brief calculations. And so for those reasons, I'm going to decline to adopt the defendants' proposed charges on damages.

Now, the defendants also asked this Court to substitute a paragraph from Judge Sand's model instructions on the credibility charge concerning witness bias. I'm going to decline to do that.

The charge on witness credibility that I've given and proposed to give in this case has worked very well in the past and is utilized by many judges of this Court. I see no reason to substitute more verbiage, even if it is from Judge Sand's model instructions.

(Continued on next page)

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The defendants also propose adding an instruction on court commentary from the O'Malley model instructions. I do not see any need to do that, because in my instruction to the jury on page 2, at line 10 I state, "I remind you that nothing I've said during the trial or will say during these instructions is evidence. Similarly, the rulings I've made during the trial are not any indication of my views of what your decision should be." From my perspective, that covers the waterfront.

Defendants propose adding an instruction on summary exhibits, and I think that is appropriate and will add that instruction: It will be in the new draft that I circulate.

The defendants also propose adding an additional paragraph to the deposition charge in light of, as defendants argue, potential confusion among the jurors about the sworn depositions read into the record and the unsworn transcripts from Cornell's internal investigation. I'm going to decline to do that for a couple of reasons.

First, it would single out the Cornell interviews and cause further confusion in the minds of the jury, in my view, because it's a prior statement. And it would conflict with the impeachment charge, which begins by telling the jury that they "have heard evidence that at some earlier time witnesses have said or done something or failed to say or do something which counsel argues is inconsistent with the witness's trial

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testimony.

"Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence in determining the facts. Evidence of prior inconsistent statements was placed before you for the more limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted a prior statement."

Statements made to Cornell investigators fall squarely within that. I couldn't find anything in the transcript where someone referred to the Cornell interviews as depositions by Cornell. For that reason I'm going to decline to give that charge.

The defendants also propose adding on the false and fraudulent charge the following language, "The phrase 'known to be untrue' means a lie." That's colloquial, it's not judicial. O'Malley admits as much by not including it in its instruction but dropping it as a footnote. I'm not going to add that to the false and fraudulent charge.

Finally, with respect to the defendants' request for a charge on the unspecified incidents related to Dr. van Gorp's partner, the defendants are requesting that. I ask you to think about it. What is your pleasure?

MS. TISKA: We would like the instruction given, your Honor.

THE COURT: All right. I'm not going to single it out

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as a separate instruction. I'll find a place. If you think you can find a place that you'd like to see it, just send us an email.

MS. TISKA: We will do that.

THE COURT: Are there any other matters that counsel want to raise with respect to the charge?

MR. BLACK: There was one other instruction that we suggested.

THE COURT: Sure, go ahead.

MR. BLACK: It's number 7 in the letter.

THE COURT: We are not going to get into damages with the jury. Mr. Salmanson, what is your view on this?

MR. SALMANSON: Your Honor, if you remember, it was really related to Dr. Feldman's motivation in bringing the lawsuit. That was the context in which the questions were asked.

THE COURT: But I think that defense counsel's point is that Dr. Feldman misstated the law.

MR. SALMANSON: My argument, your Honor, is since they asked in the context of motivation, if that's his belief, then that goes to his motivation. If it turns out it's a hundred percent and he's wrong about that, that's the context in which the issue was raised and the only context in which it was raised. If he has a misapprehension in terms of what it is, that's his misapprehension and that's how he's motivated.

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THE COURT: I'm going to think about that one. I'll let you know first thing tomorrow morning.

MR. SALMANSON: Sure. Because then I might have to have him testify that that's his understanding even if he's wrong.

THE COURT: All right. Is there at this point any typographical errors that you spotted? Generally, in a charging conference I just turn pages, but you have made the process much easier, Mr. Black, by sending me a detailed letter. Anything else?

MR. BLACK: I didn't see anything, your Honor.

THE COURT: Anything further from the plaintiff, from the relator?

MR. SALMANSON: No, not on the jury charge.

THE COURT: Or Dr. van Gorp?

MS. BEATTIE: No, your Honor.

THE COURT: What about the verdict sheet? One of the things I left as an open question, though I included it, was a reference to the particular exhibit. I'd like to get counsel's view about that.

MR. BLACK: We would have no objection to that, your Honor.

MR. SALMANSON: We think it is a good idea, your Honor.

THE COURT: Any suggestion with respect to the

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question as I've framed it?

MR. SALMANSON: It's acceptable to us, your Honor.

MS. BEATTIE: Your Honor, we would prefer a verdict question that did actually lay out the elements, even if it was just in one question, for each claim. I think it is easier for the jury.

THE COURT: That's why there is a charge. There is not an affirmative defense here. The elements are summarized in four or five pages of the charge. That's what the case is about. I'm going to decline to break it down to was it material, was it false. It's all one kettle of fish for the jury to decide at the end of the day when they get to the verdict form. So I'm going to decline to do that.

Are there any additional requests to charge?

MR. SALMANSON: No, your Honor.

MS. BEATTIE: No, your Honor.

MR. BLACK: No.

THE COURT: Remember, we need a list of the exhibits that have been received in evidence. You need to agree on that and have it so we can give it to the jury. I'll ask you to agree tomorrow to sending in relator's Exhibits 1 through 5 so that the jury has them to key off of the jury verdict sheet.

MR. SALMANSON: Your Honor, on that one, I think we have all agreed that the exhibit as it was originally presented had all of those duplication errors, and we have I think agreed

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D/F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
ex rel. DANIEL FELDMAN

Plaintiff

v.

WILFRED VAN GORP
and
CORNELL UNIVERSITY
MEDICAL COLLEGE

Defendants

03-CIV-8135 (WHP)

VERDICT FORM

We, the Jury, unanimously find as follows:

I. GRANT APPLICATION — Relator's Exhibit 1

Do you find that the Relator, Daniel Feldman, has proved by a preponderance of the evidence that Defendants Wilfred van Gorp's and Cornell University's initial grant application violated the False Claims Act?

Yes ____
(No) ____

II. YEAR 2 CONTINUATION RENEWAL — Relator's Exhibit 2

Do you find that the Relator, Daniel Feldman, has proved by a preponderance of the evidence that Defendants Wilfred van Gorp's and Cornell University's Year 2 Continuation Renewal violated the False Claims Act?

Yes ____
(No) ____

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III. YEAR 3 CONTINUATION RENEWAL — Relator's Exhibit 3

Do you find that the Relator, Daniel Feldman, has proved by a preponderance of the evidence that Defendants Wilfred van Gorp's and Cornell University's Year 3 Continuation Renewal violated the False Claims Act?

(Yes) ____

No ____

IV. YEAR 4 CONTINUATION RENEWAL — Relator's Exhibit 4

Do you find that the Relator, Daniel Feldman, has proved by a preponderance of the evidence that Defendants Wilfred van Gorp's and Cornell University's Year 4 Continuation Renewal violated the False Claims Act?

(Yes) ____

No ____

V. YEAR 5 CONTINUATION RENEWAL — Relator's Exhibit 5

Do you find that the Relator, Daniel Feldman, has proved by a preponderance of the evidence that Defendants Wilfred van Gorp's and Cornell University's Year 5 Continuation Renewal violated the False Claims Act?

(Yes) ____

No ____

Dated: New York, NY
July 22, 2010

Linda Perlmutter
Jury Foreperson

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, *ex rel.* DANIEL FELDMAN,

Plaintiff,

-against-

WILFRED VAN GORP and CORNELL UNIVERSITY,

Defendants.

----------X

03 Civ. 8135 (WHP)

AMENDED FINAL JUDGMENT

WILLIAM H. PAULEY III, District Judge:

The issues in the above-entitled action having been brought on for trial before the Honorable William H. Pauley III, United States District Judge, and a jury on July 22, 2010, having returned a verdict in favor of the Plaintiff finding liability on the Continuation Renewals for Years Three, Four, and Five, it is,

ORDERED, ADJUDGED AND DECREED: That the Court awards damages as follows:

It is **ORDERED** that for the Year Three Continuation Renewal, judgment is entered against the Defendants Wilfred van Gorp and Cornell University jointly and severally for the amount of actual damages, $109,109, which this Court trebles under the False Claims Act to equal $327,327, plus a civil penalty of $10,000; and

It is **ORDERED** that for the Year Four Continuation Renewal, judgment is entered against the Defendants Wilfred van Gorp and Cornell University jointly and severally for the amount of actual damages, $115,379, which this Court trebles under the False Claims Act to equal $346,137.00, plus a civil penalty of $11,000; and

It is **ORDERED** that for the Year Five Continuation Renewal, judgment is entered against the Defendants Wilfred van Gorp and Cornell University jointly and severally for the amount of actual damages, $60,750, which this Court trebles under the False Claims Act to equal $182,250, plus a civil penalty of $11,000; and

The total damages are $855,714 in actual damages for monies paid out by reason of the false claims, plus $32,000 in civil penalties, for a total of $887,714 plus post-judgment.

The Court retains jurisdiction over any motion by Relator for attorney's fees, costs, and expenses.

Dated: August 11, 2010
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA
ex rel. DANIEL FELDMAN,

Plaintiff/Relator,

-against-

WILFRED VAN GORP and
CORNELL UNIVERSITY,

Defendants.

----------X

03 Civ. 8135 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Defendants Dr. Wilfred van Gorp ("van Gorp") and Cornell University ("Cornell") move for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or, alternatively, for a new trial pursuant to Fed. R. Civ. P. 59 following a jury verdict in favor of Plaintiff/Relator Daniel Feldman ("Feldman"). Feldman filed this qui tam action alleging that van Gorp and Cornell submitted false claims to obtain federal grant funds from the National Institutes of Health ("NIH"). Feldman claimed that a grant application titled "The Neuropsychology of HIV/AIDS" and its Continuation Renewals were fraudulent. Following an eight-day trial, a jury returned a verdict in favor of Feldman on the Continuation Renewals for years 3, 4, and 5 of the grant. Defendants assert that Feldman presented insufficient evidence at trial to support the jury's findings, and seek judgment as a matter of law or, alternatively, a new trial. For the following reasons, Defendants' motion is denied.

DISCUSSION

Familiarity with this Court's prior memoranda and orders is presumed. See United States ex rel. Feldman v. van Gorp, No. 03 Civ. 8135, 2010 WL 2911606 (S.D.N.Y. July 8, 2010) ("Feldman IV"); United States ex rel. Feldman v. van Gorp, 674 F. Supp. 2d 475 (S.D.N.Y. 2009) ("Feldman II"), reconsideration denied by United States ex rel. Feldman v. van Gorp, No. 03 Civ. 8135 (WHP), 2010 WL 1948592 (S.D.N.Y. May 3, 2010) ("Feldman III"); Feldman v. van Gorp, No. 03 Civ. 8135 (WHP), 2008 WL 5429871 (S.D.N.Y. Dec. 19, 2008) ("Feldman I").

I. Judgment as a Matter of Law

a. Legal Standard

A movant seeking to set aside a jury verdict faces a "high bar." Lavin-McEleney v. Marist Coll., 239 F.3d 476, 479 (2d Cir. 2001). "Where, as here, a jury has deliberated in a case and actually returned its verdict, a district court may set aside the verdict pursuant to Rule 50 only where there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.'" AMW Materials Testing, Inc. v. Town of Babylon, 584 F.3d 436, 456 (2d Cir. 2009) (quoting Cross v. N.Y. City Transit Auth., 417 F.3d 241, 248 (2d Cir. 2005)). In considering a motion for judgment as a matter of law, courts must "consider the evidence in the light most favorable to the party against whom the motion was made and . . . give that party the benefit of all reasonable inferences that the jury might have

drawn in his favor from the evidence." Black v. Finantra Capital, Inc., 418 F.3d 203, 208 (2d Cir. 2005) (quotation omitted). "A court evaluating such a motion 'cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury.'" Black, 418 F.3d at 209 (quoting Tolbert v. Queens Coll., 242 F.3d 58, 70 (2d Cir. 2001)).

b. Materiality

To establish that a false statement is material, a plaintiff must show that the statement had the "'natural tendency to influence, or [is] capable of influencing, the decision of the decision[-]making body to which it was addressed.'" U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., N.Y., 668 F. Supp. 2d 548, 569 (S.D.N.Y. 2009) (quoting Neder v. U.S., 527 U.S. 1, 16 (1999)); see also Feldman II, 674 F. Supp. 2d at 480-81. This test "focuses on the potential effect of the false statement when it is made rather than on the false statement's actual effect after it is discovered." Feldman II, 674 F. Supp. 2d at 480.

Defendants argue that this Court should set aside the jury's determination that the Continuation Renewals for years 3, 4, and 5 contained material misrepresentations because there was no evidence to support such a finding. Specifically, Defendants maintain that there was no testimony from an NIH official with decision-making authority and that the documentary evidence relied on by Feldman was insufficient. Those arguments are misplaced.

Feldman presented significant documentary evidence to support a finding of materiality. Defendants' counsel read the following language from the parties' Joint Stipulation to the jury:

> After the initial funding year, a grantee must submit a noncompetitive renewal application [Continuation Renewal] to receive the additional recommended funding for each year thereafter. Each renewal includes a

> progress report which NIH expects will provide information about the trainees activities during the previous funding period.

(Tr. at 1191.) Thus, the Continuation Renewal is a prerequisite to receipt of funding for successive years of a grant.

The parties also stipulated that NIH guidelines and instructions were applicable to the Progress Reports contained in the Continuation Renewals for the grants. Those guidelines and instructions were received in evidence without objection. (Tr. at 681-82.) And, the plain language of the NIH guidelines and instructions make clear what is material to NIH in evaluating Progress Reports:

> Progress Reports provide information to awarding component staff that is essential in the assessment of changes in scope or research objectives . . . from those actually funded. They are also an important information source for the awarding component staff in preparing annual reports, in planning programs, and in communicating scientific accomplishments to the public and to Congress.

(Reply Declaration of Tracey A. Tiska dated Oct. 20, 2010 ("Tiska Reply Decl.") Ex. 1: Plaintiff's Exhibit 10: Instructions for PHS 2590 ("PHS 2590") at 7.)

Moreover, the NIH Progress Report instructions request information that Feldman alleged Defendants should have included. Specifically, NIH directs grantees to:

> [h]ighlight progress in implementation and developments or changes that have occurred. Note any difficulties encountered by the program. Describe changes in the program for the next budget period, including changes in training faculty and significant changes in available space and/or facilities. . . .

(PHS 2590 at 7.) NIH instructions also require inclusion of "information describing which, if any, faculty and/or mentors have left the program." (Tiska Reply Decl. Ex. 2: Defendant's Exhibit B: T-32 Funding Announcement at VI.3.) Thus, the documentary evidence amply

supports the jury's finding on materiality.

Defendants also argue that the testimony of Dr. Robert Bornstein ("Bornstein"), a member of the initial review group ("IRG") recommending approval of the grant, was unrebutted. (See generally Tr. at 1187-1255.) But, Bornstein had no role in reviewing the Progress Reports. (Tr. at 1228-29.) Indeed, the Joint Stipulation Cornell's counsel read to the jury underscores that point:

> The renewal applications are reviewed only by the institute's program and grants manager officers. There is no review by an IRG like the one done on the initial grant application.

(Tr. at 1191.) Moreover, Bornstein had no independent recollection of reviewing the Grant Application. (Tr. at 1228-29.)

The absence of testimony by a government official supporting a finding of materiality does not mean that the jury was required to accept Bornstein's testimony. As Judge Easterbrook explained in United States v. Rogan, "a statement or omission is capable of influencing a decision even if those who make the decision are negligent and fail to appreciate the statement's significance." 517 F.3d 449, 452 (7th Cir. 2008). "[L]aws against fraud protect the gullible and the careless—perhaps especially the gullible and the careless—and could not serve that function if proof of materiality depended on establishing that the recipient of the statement would have protected his own interests." Rogan, 517 F.3d at 452.

In evaluating whether the Progress Reports had a "natural tendency" to influence the decision-making body, the jury was well within its bounds to credit NIH's unambiguous guidelines and instructions over Bornstein's conclusory testimony that little in the Grant Application really would have mattered to him had he remembered reviewing it at all.

Accordingly, Feldman offered sufficient evidence for the jury to find materiality as to the Continuation Renewals for years 3, 4, and 5 of the grant.

c. Scienter

To establish liability under the FCA, a plaintiff/relator must prove that the defendant made the false claim "knowingly." Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001). "The [False Claims] Act defines 'knowingly' as either: (1) possessing actual knowledge; (2) acting in deliberate ignorance of falsity; or (3) acting in reckless disregard of falsity." Mikes, 274 F.3d at 696 (citing 31 U.S.C. § 3729(b)). "[N]o proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

Feldman presented sufficient evidence at trial for the jury to find that Defendants acted knowingly. First, Dr. Elizabeth Ryan ("Ryan"), van Gorp's Chief Fellow, testified that she drafted the Year 3 Continuation Renewal under van Gorp's direction. (Tr. at 203-04.) Specifically, Ryan testified that van Gorp instructed her to misrepresent the Fellows' activities in the Progress Report:

> He gave me basically a template and wanted me to put some information into the template about what had gone on that year. And I read what was written and I said to him, 'But we never did this,' and he said 'Don't worry about it.'

(Tr. at 203.)

Feldman also introduced other evidence of affirmative misrepresentations. For example, Defendants stated in the Progress Report for year 3 that:

> There have been no alterations in the courses or training program from that listed in the original applications, except for the addition of two courses . . . . In addition to the didactic courses outlined in our original application (all of which are still applicable), we have been able to offer additional courses. . . .

(Plaintiff's Ex. 3: Application for Continuation of Grant dated Jan. 27, 1999 ("Year 3 Continuation Renewal") at 7-8.) Similarly, the Progress Reports for years 4 and 5 stated that "[t]he core structure of our training program has remained the same as in years past and to that described in our initial application. . . . This includes a core neuropsychology seminar . . . [and] an HIV/AIDS journal club." (Plaintiff's Ex. 4: Application for Continuation Grant dated Feb. 7, 2000 ("Year 4 Continuation Renewal") at 4; Plaintiff's Ex. 5: Application for Continuation Grant dated Jan. 30, 2001 ("Year 5 Continuation Renewal") at 5.) But, van Gorp himself conceded that alterations to the program had been made:

> [W]hen the grant was envisioned, it was envisioned as a course for a larger group of people in which speakers would come and so forth. But I modified it . . . so we actually did in essence a tutorial on the neuropsychology of HIV where we gave [Ryan] the book I edited. . . . We didn't just give them a book. They essentially got one-on-one tutoring in the neuropsychology of HIV that covered all the relevant topics.

(Tr. at 777.) In addition, Feldman and several other Fellows testified that the courses in the Grant Application were never taught and that the Training Committee did not meet. (Tr. at 135-37, 363-64, 613.) Feldman also presented evidence that Defendants knowingly made omissions. In particular, van Gorp testified that several individuals listed as "key personnel" left the program (Tr. at 712-13, 720-21), but the Continuation Renewals omitted mention of their departures.

In sum, the jury had ample evidence from which to find that Defendants acted knowingly in making false statements in the Year 3, Year 4, and Year 5 Progress Reports.

II. New Trial

a. Legal Standard

"In contrast to a motion for judgment as a matter of law, a motion for a new trial pursuant to Fed. R. Civ. P. 59 may be granted by the district court, although there is evidence to support the jury's verdict, so long as the district court determines that, in its independent judgment, 'the jury has reached a seriously erroneous result or [its] verdict is a miscarriage of justice.'" Nimely v. City of N.Y., 414 F.3d 381, 392 (2d Cir. 2005) (quoting Munafo v. Metro Transp. Auth., 381 F.3d 99, 105 (2d Cir. 2004)). Although a court is free to weigh the evidence and need not view it in the light most favorable to the verdict winner on a Rule 59 motion, it should "rarely disturb a jury's evaluation of a witness's credibility." DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 134 (2d Cir. 1998). "A court considering a Rule 59 motion for a new trial must bear in mind . . . that the court should only grant such a motion when the jury's verdict is egregious," DLC Mgmt. Corp., 163 F.3d at 134, or "the verdict is a miscarriage of justice," Parrish v. Sollecito, 280 F. Supp. 2d 145, 165 (S.D.N.Y. 2003) (internal quotation marks and citation omitted).

b. Weight of the Evidence

Defendants argue that, even if the evidence on materiality and scienter was sufficient to support the jury's verdict, this Court should find that the verdict was against the weight of the evidence. However, there was ample evidence to support the jury's findings. In addition, this Court observed the demeanor of the trial witnesses. Feldman was as credible and honest a witness as this Court has seen. His testimony was compelling. In contrast, van Gorp's presentation bore indicia of a well-rehearsed performance. It was within the jury's discretion to

discount his stagecraft.

Accordingly, Defendants have failed to show that the jury's verdict was erroneous, let alone egregious, or that it constitutes a miscarriage of justice. See DLC Mgmt. Corp., 163 F.3d at 134.

c. Measure of Damages

Finally, Defendants contend that a new trial is warranted because this Court decided on the parties' motions in limine that, "if the jury finds Defendants liable for making materially false statements with the requisite scienter, the proper damages are the grant monies awarded as a result of each false statement." Feldman IV, 2010 WL 2911606, at *5. Defendants contend that ruling improperly removed the determination of damages from the jury. Defendants' arguments, in large part, retread arguments presented on the in limine motions. This Court analyzed the damages issue in its July 8, 2010 Memorandum and Order, and sees no reason to revisit it here. See Feldman IV, 2010 WL 2911606, at *5.

Defendants' only new argument is that Feldman did not prove "a direct causal relationship . . . between the funds received by Defendants and their false statements," Longhi v. Lithium Power Tech., Inc., 575 F.3d 458, 473 (5th Cir. 2009), because the jury found liability on the Continuation Renewals but not on the Initial Grant Application. That argument, however, presents a distinction without a difference. The Continuation Renewals, as discussed above, were prerequisites for continued funding. The jury found that Defendants knowingly made false statements in the Continuation Renewals for years 3, 4, and 5 and, thus, the Government did not get the "benefit of the bargain" because its conditions for funding were not satisfied. Longhi, 575 F.3d at 473; see also U.S. ex rel. Purcell v. MWI Corp., 520 F. Supp. 2d 158, 178-79 (D.C.

Cir. 2007).

The jury was exceedingly careful in parsing the Grant Application and each of the Continuation Renewals. It did not find liability on the Grant Application or the first Continuation Renewal. Rather, the jury only held van Gorp and Cornell liable for their knowing material misrepresentations in the Continuation Renewals for years 3, 4, and 5 as descriptions of the program and its reality diverged in many substantive respects. Accordingly, a new trial is not warranted.

CONCLUSION

For the foregoing reasons, Defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) or, alternatively, for a new trial pursuant to Fed. R. Civ. P. 59 is denied.

Dated: December 9, 2010
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.* DANIEL FELDMAN,

Plaintiff/Relator,

-against-

WILFRED VAN GORP & CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants.

03 Civ. 8135 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Relator Daniel Feldman ("Feldman" or "Relator") filed this action pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. against Dr. Wilfred van Gorp ("van Gorp") and Cornell University Medical College ("Cornell" and, together, "Defendants"). Following an eight-day trial, a jury returned a verdict in favor of Feldman on three of his five claims. Feldman now moves for an award of attorneys' fees pursuant to 31 U.S.C. § 3730(d)(2). For the following reasons, Feldman's motion is granted in part and denied in part.

BACKGROUND

Familiarity with this Court's prior opinions is presumed. See United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 5094402 (S.D.N.Y. Dec. 9, 2010); United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 2911606 (S.D.N.Y. July 8, 2010); United States ex rel. Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2010 WL 1948592 (S.D.N.Y. May 3, 2010); United States ex rel. Feldman v. Van Gorp, 674 F. Supp. 2d 475 (S.D.N.Y. 2009); Feldman v. Van Gorp, 03 Civ. 8135 (WHP), 2008 WL 5429871 (S.D.N.Y.

Dec. 19, 2008).

I. The Litigation

Feldman filed this qui tam action claiming that Defendants submitted false claims to obtain federal research funds administered by the National Institute of Health. Feldman alleged five distinct series of false claims: one arising out of the initial grant application, and four based on subsequent yearly renewal applications and progress reports. Feldman claimed that Defendants' representations in the application and progress reports differed materially from actual implementation of the grant. A jury returned a verdict in favor of Feldman on three of the five claims. This Court awarded damages in the amount of $887,714. That amount was considerably less than the $1,359,000 sought by Feldman.

II. Fees and Costs

Feldman's attorneys, Salmanson Goldshaw, seek fees totaling $726,711.25 and an additional $37,927.87 in costs. Feldman seeks reimbursement of $3,121.47 for expenses incurred as a result of the litigation. (Mot. for Attorneys' Fees, Costs and Expenses ("Mot.") 2; Relator's Supplemental Declaration in Support of Motion for Attorneys' Fees, Costs and Expenses ("Relator's Supp. Decl.") ¶ 1.) The attorneys' fee calculation was based on the following figures:

Legal Professional	Position	Hourly Rate	Hours	Fee
Michael J. Salmanson	Shareholder	$495.00	1138.30*	$563,458.50
Scott B. Goldshaw	Shareholder	$400.00	132.15*	$52,860.00
Michele M. Rovinsky	Associate	$250.00	33.70	$8,425.00
Katie R. Eyer	Associate	$275.00	140.10*	$38,527.50
Brian C. McGoldrick	Paralegal	$90.00	260.80	$23,472.00
Laura M. Zulick	Paralegal	$90.00	100.05	$9,004.50
Christopher Chancler	Paralegal	$90.00	99.50	$8,955.00
Delvita Reid	Paralegal	$90.00	28.00	$2,520.00
Subtotal				$707,222.50

(Mot. 8.) Although Salmanson Goldshaw is located in Philadelphia, the Shareholder and Paralegal hourly rates are based on the New York market, while those for the Associates are based on the Philadelphia market.

In addition, Salmanson Goldshaw seeks to recover fees for travel time at a 50% discounted rate, as follows:

Legal Professional	Position	Hourly Rate	Hours	Fee
Michael J. Salmanson	Shareholder	$247.50	60.50	$14,973.75
Scott B. Goldshaw	Shareholder	$200.00	12.00	$2,400.00
Michele M. Rovinsky	Associate	$125.00	6.00	$750.00
Katie R. Eyer	Associate	$137.50	6.00	$825.00
Brian C. McGoldrick	Paralegal	$45.00	12.00	$540.00
Subtotal				$19,488.75

(Mot. 13.) Most—though not all—of this time consisted of travel between New York and Philadelphia.

DISCUSSION

I. Legal Standard

31 U.S.C § 3730(d)(2) provides that "[i]f the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall . . . receive

* This figure represents the sum of hours requested in the initial Motion for Attorneys' Fees and subsequent Relator's Supplemental Petition.

an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2). The question of how much to award as attorneys' fees is left to the discretion of the district court. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183 (2d Cir. 1996). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). This figure is called the "presumptively reasonable fee" or "lodestar." See Grant v. Martinez, 973 F.2d 96, 99, 101 (2d Cir. 1992); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany, 522 F.3d 182, 186-90 (2d Cir. 2008). In determining a reasonable hourly rate, a district court must "bear in mind all of the case-specific variables . . . relevant to the reasonableness of attorneys' fees" including those set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).[1] Arbor Hill, 522 F.3d at 190.

Courts may not compensate counsel for hours that are "excessive, redundant, or otherwise unnecessary." Hensley, 461 U.S. at 434. The court can reduce a fee award "by specific amounts in response to specific objections." United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc., 601 F. Supp. 2d 45, 50 (D.D.C. 2009). However, "the Court can also reduce fees 'by a reasonable amount without providing an item-by-item accounting.'" Miller, 601 F. Supp. 2d at 50 (quoting Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 973 (D.C. Cir. 2004)). "Culling through the minutiae of the time records each time a fee petition is

[1] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717-19.

submitted . . . would be impossible 'lest [the Court] abdicate the remainder of its judicial responsibilities for an indefinite time period.'" Miller, 601 F. Supp. 2d at 50-51 (quoting Cobell v. Norton, 407 F. Supp. 2d 140, 166 (D.D.C. 2005)).

Defendants do not dispute the reasonableness of Feldman's proffered rates, and this Court finds them reasonable. Moreover, aside from the specific objections discussed below, Defendants do not dispute the reasonableness of the number of hours expended on this litigation. Thus, this Court begins its analysis with a presumptively reasonable fee of $726,711.25.

II. Attorneys' Fees

A. Travel Time

Defendants argue that because Feldman hired counsel from Philadelphia rather than New York, he should not be entitled to attorneys' fees for travel time. Under the "forum rule," "courts should generally use the hourly rates employed in the district in which the reviewing court sits in calculating the presumptively reasonable fee." Simmons v. N.Y. City Transit Auth., 575 F.3d 170, 174 (2d Cir. 2009). However, a corollary to this rule is that expenses and fees related to travel must be excluded from an award of attorneys' fees if "the hypothetical reasonable client who wishes to spend the least amount necessary to litigate the matter . . . would have retained local counsel."[2] Imbeault v. Rick's Cabaret Int'l, Inc., 08 Civ.

[2] Feldman cites cases in which an award of attorneys' fees included travel-related fees and expenses for out-of-state counsel. See, e.g., Scott v. Hand, 07 Civ. 0221 (TJM), 2010 WL 1507016 (N.D.N.Y. Apr. 15, 2010). However, the corollary rule excluding fees for travel time is more consistent with Simmons because it "promotes cost-consciousness, increases the probability that attorneys will receive no more than the relevant market would normally permit, and encourages litigants to litigate with their own pocketbooks in mind, instead of their opponents'." Simmons, 575 F.3d at 176. In any case, hours spent travelling by out-of-district attorneys are not hours "reasonably expended" where competent counsel is available within the district.

5458 (GEL), 2009 WL 2482134, at *8 (S.D.N.Y. Aug. 13, 2009). Here, there is no indication that qualified counsel was unavailable in New York, or that New York counsel was unlikely to achieve similar success. Thus, a hypothetical reasonable client would have chosen New York counsel in order to prevent unnecessary travel costs, and this Court will not award attorneys' fees for time spent travelling between Philadelphia and New York.

Unfortunately, that does not end the analysis. While Feldman's attorneys billed a total of $19,488.75 in travel time, not all of it related to travel between Philadelphia and New York. The following travel time of Salmanson is compensable: (1) travel to Potomac, MD to depose Defendants' expert, James Pike (3 hours); (2) travel to Columbus, OH to depose Defendants' expert/fact witness Robert Bornstein (3 hours); (3) travel to Washington D.C. for the deposition of Dr. Stoff (4 hours); and (4) travel to Baltimore, MD for the deposition of Dr. Kimes (4 hours). At a 50% billing discount for 14 hours, Salmanson is entitled to $3,465 in attorneys' fees for travel. In addition, because Rovinsky's and Eyer's rates are based on Philadelphia—not New York City—market rates, the "corollary" to the forum rule does not apply, and Feldman may recover the travel expenses associated with these attorneys in the amount of $1,575. Overall, Salmanson Goldshaw is entitled to $5,040 in attorneys' fees for travel time. Thus, the lodestar is reduced by $14,448.75.

Defendants also assert that Salmanson is not entitled to 15.50 hours for travel time included under four invoices for "professional services." However, Salmanson has affirmed that two of these entries did not incorporate travel time. (See Salmanson Supp. Decl. ¶ 4.) Salmanson cannot, on the other hand, verify whether the remaining two entries included travel time and concedes that an additional six hours of his time should constitute "travel time."

Accordingly, the lodestar is reduced by an additional $2,970.[3]

In sum, based on the above reductions in travel time hours, this Court reduces the presumptively reasonable fee by $17,418.75, to a total of $709,292.50.

B. Relator's Degree of Success

In determining whether partial success requires a downward adjustment of the presumptively reasonable fee, this Court conducts a two-step inquiry. "At step one of this analysis, the district court examines whether the plaintiff failed to succeed on any claims wholly unrelated to the claims on which the plaintiff succeeded. The hours spent on such unsuccessful claims should be excluded from the calculation." Grant, 973 F.2d at 101. "At step two, the district court determines whether there are any unsuccessful claims interrelated with the successful claims. If such unsuccessful claims exist, the court must determine whether the plaintiff's level of success warrants a reduction in the fee award." Grant, 973 F.2d at 101. If a plaintiff has obtained "excellent results," the attorney should be fully compensated. Grant, 973 F.2d at 101 (citing Hensley, 461 U.S. at 435). "A plaintiff's lack of success on some of his claims does not require the court to reduce the lodestar amount where the successful and the unsuccessful claims were interrelated and required essentially the same proof." Murphy v. Lynn, 188 F.3d 938, 952 (2d Cir. 1997). Moreover, where "the successful and unsuccessful claims are 'inextricably intertwined' and 'involve a common core of facts or [are] based on related legal theories,' it is not abuse of discretion for the court to award the entire fee." Reed, 95 F.3d at 1183.

Here, the successful and unsuccessful claims were interrelated. Although each of

[3] Feldman asserts that the lodestar should be reduced by $1,485 to account for 50% hourly billing rate for attorney travel time. However, because this travel was between Philadelphia and New York City, Feldman may not recover any fees for this time.

the five alleged false claims was discreet—occurring in separate applications and progress reports at yearly intervals—liability for each depended on that claim's relationship to the same common core of facts: the actual implementation of the program funded by the grant. These facts cannot be segregated neatly into the yearly intervals set by the application and progress reports. Rather, many of the program's shortcomings—such as the time spent on research and the time spent with HIV/AIDS patients—were alleged to continue throughout the course of the grant. Moreover, the legal theories on which each of the five false claims are based were not just related, but identical: violation of §§ 3729(a)(1), (a)(2), and (a)(7) of the FCA. Liability under each of these sections requires a showing that the defendant "(1) made a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." Mikes v. Strauss, 274 F.3d 687, 695 (2d Cir. 2001). Thus, work performed on the separate claims cannot be easily partitioned. Accordingly, the claims were not wholly unrelated, and this Court declines to subtract the unsuccessful claims from the lodestar calculation.

Defendants argue that a fee of over $700,000 is excessive because a reasonable litigant would not expend this sum in order to recover damages of $887,000. However, "a presumptively correct lodestar figure should not be reduced simply because a plaintiff received a low damage award," and the ratio of attorneys' fees to damages in this case is well within acceptable limits. See Grant, 973 F.3d at 99, 101-02 (upholding a fee award of $512,590 where the case settled for only $60,000). In addition, Defendants argue that the fee is excessive because the damage award fell short of the $1,359,000 Feldman sought. However, the awarded damages to Feldman are substantial and not a mere "technical victory." See Lunday v. City of Albany, 42 F.2d 131, 135 (2d Cir. 1994) (court did not abuse discretion awarding attorneys' fees

of $115,425, where plaintiff sought $7,130,000 but was awarded only $35,000).

Nevertheless, Feldman's success was not complete. "If . . . a plaintiff has achieved only partial or limited success, the [lodestar] may be an excessive amount . . . even where plaintiff's claims were interrelated." Hensley, 461 U.S. at 436. Given the substantial commonalities between the successful and unsuccessful claims, this Court declines to reduce the lodestar by the percentage of unsuccessful claims. However, the Court finds that a 15% reduction in the lodestar is appropriate. See Greenbaum v. Svenska Handelsbanken, N.Y., 998 F. Supp. 301, 307 (S.D.N.Y. 1998) (reducing the lodestar by 10% where the plaintiff prevailed on claims for sex discrimination and retaliation but failed on claims for sexual harassment and age discrimination). Accordingly, Feldman is entitled to $602,898.63 in attorneys' fees.

III. Costs

A. Travel Costs and Pro Hac Vice Motions

Descending to the granular level, Defendants next challenge travel costs incurred by Feldman's attorneys. "[A]wards of attorneys' fees . . . under fee-shifting statutes . . . normally include those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients." Reichman, 818 F.2d at 283; Betancourt v. Giuliani, 325 F. Supp. 2d 330, 335 (S.D.N.Y. 2004). Feldman seeks to recover a total of $8,988.51 in travel costs. However, for the same reasons that the Feldman is not entitled to attorneys' fees for travel time, he is not entitled to recover costs related to travel between Philadelphia and New York. Because competent counsel was available within the district, these travel costs were not reasonably incurred.

Accordingly, this Court subtracts $8,152.72 from the total costs.[4] Relator is also not entitled to costs related to delivery of boxes of exhibits and demonstratives from Philadelphia to New York City for trial, and then back to Philadelphia, in the amount of $2,675. Lastly, this Court subtracts costs related to Salmanson's pro hac vice motion, in the amount of $1,238 ($1,188 for preparation of the motion and $50 in costs for Certificates of Good Standing). In sum, this Court subtracts $12,065.72 in travel-related costs from Feldman's recoverable costs.

B. Copying Costs

Finally, descending even further to the microscopic level, Defendants challenge Feldman's photocopying costs. They argue that only certain photocopying and reproduction costs are "taxable" under 28 U.S.C § 1920 and that Feldman has provided insufficient detail for this Court to determine which of Relator's photocopying costs are taxable here. However, fee shifting statutes permit recovery of costs beyond those considered "taxable" under § 1920. Reichman v. Bonsignore, Briganti & Mazzotta P.C., 818 F.2d 278, 283 (2d Cir. 1987). This includes costs related to photocopying and reproduction. See, e.g., Betancourt, 325 F. Supp. 2d at 335-36. Moreover, Relator has submitted a detailed itemized accounting of its photocopying costs, which this Court finds sufficient to support an award of copying costs.

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[4] In making this determination, this Court finds that the Relator may be reimbursed for the following travel expenses, totaling $835.79: $140.19 for travel to the Kimes deposition; $126.60 for travel to the Pike deposition, $155.00 for travel to the Bornstein deposition; $137.00 for Eyer's travel to New York City on July 2, 2010 (this expense entry was $274 for travel for two people; this Court assumes for these purposes that one-half of this entry was for Eyer's travel expenses); $160 for Eyer's travel to New York City on July 7, 2010 (this expense entry was $320 for travel for two people; this Court again assumes that one-half of this entry was for Eyer's travel expenses); and $117 for Rovinsky's travel to New York City on February 6, 2008. Although the Relator's summary of travel hours (discussed above) indicates that additional travel expenses might be recoverable, these expenses cannot be determined with certainty from the expense reports submitted to this Court.

C. Feldman's Reasonable Expenses

The False Claims Act permits recovery of "reasonable expenses which the court finds to have been necessarily incurred." 31 U.S.C. § 3730(d)(2). This Court has reviewed Feldman's expenses and finds that they were reasonable and necessarily incurred. Accordingly, Feldman is entitled to compensation for $3,121.47 in expenses resulting from this litigation.

CONCLUSION

Motion practice over prevailing party fees is too often a time-consuming endeavor requiring counsel and the Court to sift through minutiae. And it is always ancillary to the main event—a merits determination of the lawsuit. This motion is no exception. While the fee application has been pruned, this Court cannot help but wonder whether everyone's time might have been better spent.

Relator Daniel Feldman's Motion for Attorneys' Fees, Costs and Expenses is granted in part and denied in part. Feldman's attorneys are awarded $602,898.63 in attorneys' fees and $25,862.15 in costs. Feldman is awarded his reasonable expenses in the amount of $3,121.47. The Clerk of Court is directed to terminate the motion pending at docket entries #146 and #164.

Dated: February 9, 2011
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

All Counsel of Record

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF CM/ECF SERVICE

I, Mariana Braylovskiy, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On April 8, 2011

deponent served the within: **Brief and Special Appendix for Defendants-Appellants Cornell University and Wilfred van Gorp**

upon:

SALMANSON GOLDSHAW, P.C.
Attorneys for Plaintiff-Appellee
Two Penn Center
1500 JFK Boulevard, Suite 1230
Philadelphia, Pennsylvania 19102
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via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on April 8, 2011

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2011

Job # 235387

ACKNOWLEDGMENT AND NOTICE OF APPEARANCE

Short Title: U.S.A. v. Van Gorp Docket No.: 11-0975

Lead Counsel of Record (name/firm) or Pro se Party (name): Michael J. Salmanson

Appearance for (party/designation): Daniel J. Feldman

DOCKET SHEET ACKNOWLEDGMENT/AMENDMENTS

Caption as indicated is:
(✓) Correct
( ) Incorrect. See attached caption page with corrections.

Appellate Designation is:
(✓) Correct
( ) Incorrect. The following parties do not wish to participate in this appeal:
Parties: _____
( ) Incorrect. Please change the following parties' designations:
Party Correct Designation

Contact Information for Lead Counsel/Pro Se Party is:
(✓) Correct
( ) Incorrect or Incomplete, and should be amended as follows:

Name: Michael J. Salmanson
Firm: Salmanson Goldshaw, PC
Address: 2 Penn Center, Suite 1230, 1500 JFK Boulevard, Philadelphia, PA 19102
Telephone: 215-640-0593 Fax: 215-640-0596
Email: msalmans@salmangold.com

RELATED CASES

( ) This case has not been before this Court previously.
( ) This case has been before this Court previously. The short title, docket number, and citation are: _____

(✓) Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers, and citations are: I/S/A/ v/ Vam Gpr[. 10-3297

CERTIFICATION

I certify that (✓) I am admitted to practice in this Court and, if required by LR 46.1(a)(2), have renewed my admission on _____ OR that ( ) I applied for admission on _____ or renewal on _____. If the Court has not yet admitted me or approved my renewal, I have completed Addendum A.

Signature of Lead Counsel of Record: s/ Michael J. Salmanson
Type or Print Name: Michael J. Salmanson
OR
Signature of pro se litigant: _____
Type or Print Name: _____
( ) I am a pro se litigant who is not an attorney.
( ) I am an incarcerated pro se litigant.

Salmanson Goldshaw, P.C.

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April 19, 2011

BY ELECTRONIC FILING

Catherine O'Hagan Wolfe
Clerk of the Court
Untied States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Attn: Jennifer Thompson, Case Manager

re: U.S. ex rel. Feldman v. van Gorp and Cornell Univ.
Docket No. 10-3297-cv; 11-0975-cv

Dear Ms. Wolfe:

We are counsel for Relator-Appellee Daniel Feldman in the above-referenced appeals. Pursuant to Local Rule 31.2, I write to request the deadline for filing Mr. Feldman's response brief be set as of July 7, 2011, within 91 days after the filing of appellants' brief on April 8, 2011.

Thank you for your assistance.

Respectfully submitted,

Michael J. Salmanson

cc: Tracey Tiska, Esq. (by ECF)
Nina Beattie, Esq. (by ECF).
Rebecca Martin, Esq. (by electronic mail)

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of April , two thousand and eleven,

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United States of America, ex rel, Daniel Feldman,

Plaintiff - Appellee,
v.

Wilfred Van Gorp, Cornell University

Defendants - Appellants.

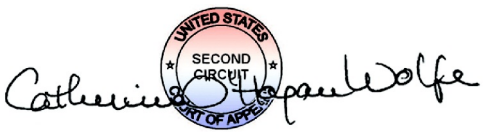
ORDER
Docket Number: 10-3297

APPELLEE has filed a scheduling notification pursuant to the Court's Local Rule 31.2, setting July 7, 2011 as the brief filing date.

The scheduling notification hereby is so ordered.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: July 12, 2011
Docket #: 10-3297 cv
Short Title: U.S.A v. Van Gorp

DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

NOTICE OF DEFECTIVE FILING

On July 7, 2011 the brief was submitted in the above referenced case.
The document does not comply with the FRAP or the Court's Local Rules for the following reason(s):

_____ Failure to submit acknowledgment and notice of appearance *(Local Rule 12.3)*
_____ Failure to file the Record on Appeal *(FRAP 10, 11)*
_____ Missing motion information statement *(T-1080 - Local Rule 27.1)*
_____ Missing supporting papers for motion (e.g, affidavit/affirmation/declaration) *(FRAP 27)*
_____ Insufficient number of copies *(Local Rules: 21.1, 27.1, 30.1, 31.1)*
_____ Improper proof of service *(FRAP 25)*
    _____ Missing proof of service
    _____ Served to an incorrect address
    _____ Incomplete service *(Anders v. California 386 U.S. 738 (1967))*
_____ Failure to submit document in digital format *(Local Rule 25.1)*
_____ Not Text-Searchable *(Local Rule 25.1, Interim Local Rules 25.2)*
_____ Failure to file appendix on CD-ROM *(Local Rule 25.1, Interim Local Rules 25.2)*
_____ Failure to file special appendix *(Local Rule 32.1)*
_____ Defective cover *(FRAP 32)*
    _____ Incorrect caption *(FRAP 32)*
    _____ Wrong color cover *(FRAP 32)*
    _____ Docket number font too small *(Local Rule 32.1)*
    ___x__ Incorrect pagination *(Local Rule 32.1)*
_____ Incorrect font *(FRAP 32)*
_____ Oversized filing *(FRAP 32)*
_____ Missing Amicus Curiae filing or motion *(Local Rule 29.1)*

_____ Untimely filing
_____ Incorrect Filing Event
_____ Other: _____

Please cure the defect(s) and resubmit the document, with the required copies if necessary, no later than July 14, 2011. The resubmitted documents, if compliant with FRAP and the Local Rules, will be deemed timely filed.

Failure to cure the defect(s) by the date set forth above will result in the document being stricken. An appellant's failure to cure a defective filing may result in the dismissal of the appeal.

Inquiries regarding this case may be directed to . (212) 857-8613

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 10-3297-cv(L), 11-0975-cv(CON) Caption [use short title] U.S.A. v. van Gorp

Motion for: Extension of Time

Set forth below precise, complete statement of relief sought:

Appellants seek a one-week extension of time to file their reply brief.

MOVING PARTY: Cornell University and Wilfred van Gorp **OPPOSING PARTY:** Daniel Feldman

☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Tracey A. Tiska **OPPOSING ATTORNEY:** Michael J. Salmanson

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: Southern District of New York (Hon. William H. Pauley, III)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: **Date:** July 15, 2011 Has service been effected? ☐ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

UNITED STATES COURT OF APPEALS
FOR THE SCOND CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* DANIEL FELDMAN, Plaintiff-Appellee, v. WILFRED VAN GORP and CORNELL UNIVERSITY, Defendants-Appellants.	Docket Nos. 10-3297-cv(L), 11-0975-cv(CON)

DECLARATION OF TRACEY A. TISKA IN SUPPORT OF
MOTION FOR EXTENSION OF TIME

TRACEY A. TISKA declares the following to be true under penalty of perjury:

1. I am a member of the law firm of Hogan Lovells US LLP, counsel for Defendant-Appellant Cornell University ("Cornell") in the above-captioned matter. I make this declaration in support of Cornell and Defendant-Appellant Wilfred van Gorp's (collectively, "Appellants") motion for a one-week extension of time to file their reply brief, to and including July 28, 2011.

2. Appellants make this request the day after the United States filed a brief as *amicus curiae* regarding one of the major matters at issue in this appeal – the correct measure of damages. Appellants were not aware that the United States planned to file an *amicus* brief until they received service of its Notice of Appearance as Amicus Counsel via the Court's ECF system yesterday evening at 7:23 p.m. (the brief followed at 7:29 p.m.).

3. Appellants make this request to ensure that they have adequate time to: (i) review the United States' *amicus* brief and the authorities cited therein; and (ii) formulate an appropriate response for inclusion in their reply brief.

4. Counsel for Plaintiff-Appellee Daniel Feldman has informed me that he does not oppose the requested extension.

Dated: New York, New York
July 15, 2011

Tracey A. Tiska

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORAL ARGUMENT STATEMENT (Local Rule 34.1(a))

TO REQUEST ORAL ARGUMENT, FILL OUT THIS FORM AND FILE IT WITH THE CLERK WITHIN 14 DAYS AFTER THE FILING OF THE LAST APPELLEE BRIEF. IF THIS FORM IS NOT TIMELY FILED, YOU WILL NOT BE PERMITTED TO ARGUE IN PERSON.

Short Title of Case: United States of America v van Gorp Docket No.: 10-3297-cv(L)11-0975con

Name of Party: Cornell University

Status of Party (e.g., appellant, cross-appellee, etc.): Defendant-Appellant

Check one of the three options below:

✓ I want oral argument.

_____ I want oral argument only if at least one other party does.

_____ I do not want oral argument.

An attorney whose preference depends on whether other attorneys will argue should consider conferring before requesting argument. After the appeal has been scheduled for oral argument, a motion by counsel to forgo oral argument, even on consent, may be denied.

If no party wants oral argument, the case will be decided on the basis of the written briefs. If you want oral argument, you must appear in Court on the date set by the Court for oral argument.

The Court may determine to decide a case without oral argument even if the parties request it.

If you want oral argument, state the name of the person who will argue:

Name: Tracey A. Tiska

(An attorney must be admitted to practice before the Court in accordance with Local Rule 46.1.)

If you want oral argument, list any dates (including religious holidays), that fall in the interval from 6 to 12 weeks after the due date of this form, that the person who will argue is not available to appear in Court:

August 24, 2011 through and including September, 14, 2011

ANYONE WHO WANTS TO ARGUE MUST UPDATE THE COURT IN WRITING OF ANY CHANGE IN AVAILABILITY. FAILURE TO DO SO MAY BE CONSIDERED BY THE COURT IN DECIDING MOTIONS FOR POSTPONEMENT OF THE ARGUMENT DATE SET BY THE COURT.

Filed by:

Print Name: Tracey A. Tiska Date: July 15, 2011

Signature: /s/ Tracey A. Tiska

(Revised September 2009)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORAL ARGUMENT STATEMENT (Local Rule 34.1(a))

TO REQUEST ORAL ARGUMENT, FILL OUT THIS FORM AND FILE IT WITH THE CLERK WITHIN 14 DAYS AFTER THE FILING OF THE LAST APPELLEE BRIEF. IF THIS FORM IS NOT TIMELY FILED, YOU WILL NOT BE PERMITTED TO ARGUE IN PERSON.

Short Title of Case: United States of America v van Gorp Docket No.: 10-3297-cv(L)11-0975con

Name of Party: Daniel J. Feldman

Status of Party (e.g., appellant, cross-appellee, etc.): Appellee/Relator

Check one of the three options below:

____ I want oral argument.

✓ I want oral argument only if at least one other party does.

____ I do not want oral argument.

An attorney whose preference depends on whether other attorneys will argue should consider conferring before requesting argument. After the appeal has been scheduled for oral argument, a motion by counsel to forgo oral argument, even on consent, may be denied.

If no party wants oral argument, the case will be decided on the basis of the written briefs. If you want oral argument, you must appear in Court on the date set by the Court for oral argument.

The Court may determine to decide a case without oral argument even if the parties request it.

If you want oral argument, state the name of the person who will argue:

Name: Michael J. Salmanson

(An attorney must be admitted to practice before the Court in accordance with Local Rule 46.1.)

If you want oral argument, list any dates (including religious holidays), that fall in the interval from 6 to 12 weeks after the due date of this form, that the person who will argue is not available to appear in Court:

Any Monday Afternoon (9/12, 9/19, 9/26, 10/3,)(I teach starting at 4:30 p.m. at Univ. of Pennsylvania Law School).

Afternoon of 28, September 29-30; afternoon of October 7 (religious holidays).

ANYONE WHO WANTS TO ARGUE MUST UPDATE THE COURT IN WRITING OF ANY CHANGE IN AVAILABILITY. FAILURE TO DO SO MAY BE CONSIDERED BY THE COURT IN DECIDING MOTIONS FOR POSTPONEMENT OF THE ARGUMENT DATE SET BY THE COURT.

Filed by:

Print Name: Michael J. Salmanson Date: 7/15/2011

Signature: /s/ Michael J. Salmanson

(Revised September 2009)

Salmanson Goldshaw, P.C.
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December 19, 2011

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

BY ECF

re: U.S. ex rel. Feldman v. Van Gorp et al.
Nos. 10-3297; 11-0975

Per my phone call with Ms. Rodriguez Friday afternoon, I am writing to confirm my availability the week of January 30, 2012.

In addition, I am writing to update my availability going forward. Except for February 8-10, I am available any day through March 23, 2012.

Respectfully,

Michael J. Salmanson

Michael J. Salmanson

cc: Tracey Tiska, Esq. (by ECF)
Nina Beattie, Esq. (by ECF)
Rebecca Martin, Esq. (by electronic mail).

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: January 03, 2012
Docket #: 10-3297cv
Short Title: U.S.A v. Van Gorp

DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY) DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

NOTICE OF HEARING DATE

Argument Date/Time: Monday, January 30, 2012 at 10:00am
Location: Daniel Patrick Moynihan U.S. Courthouse, 500 Pearl Street, New York, NY, 9th Floor Ceremonial Courtroom

Time Allotment: 8 minutes per side.

Counsel and non-incarcerated pro se litigants presenting oral argument must register with the courtroom deputy 30 minutes before argument.

A motion or stipulation to withdraw with or without prejudice must be filed within 3 business days of argument. The Court will consider the motion or stipulation at the time of argument, and counsel's appearance is required with counsel prepared to argue the merits of the case. If a stipulation to withdraw with prejudice is based on a final settlement of the case, the fully-executed settlement must be reported immediately to the Calendar Team, and a copy of it must be attached to the stipulation.

Inquiries regarding this case may be directed to 212-857-8595.

Counsel must file the completed form in accordance with Local Rule 25.1 or 25.2. Pro Se parties must submit the form in paper.

Name of the Attorney/Pro Se presenting argument:
Firm Name (if applicable):
Current Telephone Number:

The above named attorney represents:
( ) Appellant/Petitioner ( ) Appellee-Respondent ( ) Intervenor

Date: _____ Signature: _____

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: January 03, 2012
Docket #: 10−3297cv
Short Title: U.S.A v. Van Gorp

DC Docket #: 03−cv−8135
DC Court: SDNY (NEW YORK CITY) DC
Docket #: 03−cv−8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

NOTICE TO THE BAR

Offsite Video Argument. At this time the Court does not provide offsite video argument.

Recording of Argument. A CD of an argument may be purchased for $26 per CD by written request to the Clerk. The request should include the case name, the docket number and the date or oral argument. CDs will be delivered by first class mail unless the request instructs to hold for pick−up or requests Federal Express Service, in which case a Federal Express account number and envelope must be provided.

Court Reporters. Parties may arrange − at their own expense − for an official court reporter to transcribe argument from a copy of the hearing tape or to attend and transcribe the hearing directly. A party must first obtain written consent from opposing counsel − or move the Court for permission − to have the court reporter attend and transcribe the hearing and must provide the calendar clerk written notice, including the name, address and telephone number of the attending reporter and, if applicable, the reporting firm at least one week prior to the hearing date.

An original and three (3) copies of the transcript **must** be submitted to the Clerk for approval by the panel that heard the case; transcripts will not be officially filed until approved.

Interpreter Services for the Hearing Impaired. Counsel requiring sign interpreters or other hearing aids must submit a written notice to the Calendar Team at least one week before oral argument.

Inquiries regarding this case may be directed to .

Salmanson Goldshaw, P.C.

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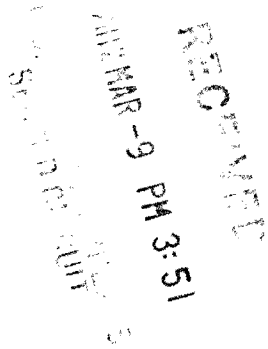
March 7, 2012

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for
The Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, N.Y. 10007



Re: U.S. ex rel Feldman v. Van Gorp., et al
No. 10-3297; DOA: 1/30/12

Dear Ms. Wolfe:

Enclosed please find our firm's check in the amount of $30.00 for a CD copy of the Oral Argument in the above captioned matter. As you may recall, we initially forwarded a check in the amount of $26.00 and were later advised that the amount was incorrect. We appreciate your forwarding the CD to us in spite of the error in the amount.

10:47
11:14

Respectfully,

Done
3/20/12
AG

Michael J. Salmanson

MJS/aep
Enclosure

AO 182

216969

DUPLICATE 2

RECEIPT FOR PAYMENT
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SECOND CIRCUIT
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10-3297 (L)
Feldman v. van Gorp et ano.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: January 30, 2012 Decided: September 5, 2012)

Docket Nos. 10-3297(Lead) 11-975 (Con)

United States of America ex rel. Daniel Feldman,

Plaintiff-Appellee,

- v -

Wilfred van Gorp and Cornell University Medical College,

Defendants-Appellants.*

Before: SACK, RAGGI, and CHIN, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (William H. Pauley III, Judge) denying the defendants' motion for judgment as a matter of law and their motion for a new trial following a jury verdict partially in favor of the plaintiff on his claims brought on behalf of the government pursuant to the False Claims Act, 31 U.S.C. § 3729 et seq., and awarding principally $855,714 in

* The clerk's office is respectfully directed to amend the official caption of this case as shown above.

treble actual damages. We conclude that: 1) where the government has provided funds for a specified good or service only to have defendant substitute a non-conforming good or service, a court may, upon a proper finding of False Claims Act liability, calculate damages to be the full amount of the grant payments made by the government after the material false statements were made; 2) there was sufficient evidence from which a reasonable jury could determine that the false statements at issue were material to the government's funding decision; and 3) the district court did not abuse its discretion in excluding evidence of inaction on the part of the National Institutes of Health in response to the plaintiff's complaint regarding the fellowship program in which he had been enrolled.

Affirmed.

Appearances: TRACEY A. TISKA, R. Brian Black, Eva L. Dietz, on the brief) Hogan Lovells US LLP, New York, New York, for Defendant-Appellant Cornell University.

Nina M. Beattie, Brune & Richard LLP, New York, New York, for Defendant-Appellant Wilfred van Gorp.

MICHAEL J. SALMANSON (Scott B. Goldshaw, on the brief) Salmanson Goldshaw, P.C., Philadelphia, Pennsylvania, for Plaintiff-Appellee.

Jean-David Barnea, Rebecca C. Martin, Sarah S. Normand, Assistant United States Attorneys, of counsel, for Preet Bharara, United States Attorney for the Southern District of New York, for Amicus Curiae, The United States of America.

SACK, Circuit Judge:

The defendants appeal from a judgment of the United States District Court for the Southern District of New York (William H. Pauley III, Judge) denying their motion for judgment as a matter of law and their motion for a new trial following a jury verdict partially in favor of the plaintiff on his claims regarding the misuse of a research training grant brought on behalf of the government pursuant to the False Claims Act, 31 U.S.C. § 3729 et seq., and awarding principally $855,714 in treble actual damages. We conclude that: 1) where the government has provided funds for a specified good or service only to have defendant substitute a non-conforming good or service, a court may, upon a proper finding of False Claims Act liability, calculate damages to be the full amount of the grant payments made by the government after the material false statements were made; 2) there was sufficient evidence from which a reasonable jury could determine that the false statements at issue were material to the government's funding decision; and 3) the district court did not abuse its discretion in excluding evidence of inaction on the part of the National Institutes of Health in response to the plaintiff's complaint regarding the fellowship program in which he had been enrolled.

BACKGROUND

In 1997, appellants Cornell University Medical College ("Cornell") and Dr. Wilfred van Gorp, a professor of psychiatry at Cornell, applied for funding from the Ruth L. Kirschstein National Research Service Award Institutional Research Training Grant program, also known as the "T32" grant program, of the National Institutes of Health ("NIH"). The T32 program funds pre- and post-doctoral training programs in biomedical, behavioral, and clinical research. T32 grants are meant to "help ensure that a diverse and highly trained workforce is available to assume leadership roles related to the Nation's biomedical and behavioral research agenda." NIH Guide, "NIH National Research Service Award Institutional Research Training Grants," at 1 (May 16, 1997), United States ex rel. Feldman v. Van Gorp, No. 10-3297, Joint Appendix ("J.A.") 2437 (2d Cir. Jan. 26, 2012) ("NIH Guide"). Positions funded through T32 grants may not be used for study leading to clinically-oriented degrees, "except when those studies are a part of a formal combined research degree program, such as the M.D./Ph.D." Id. at 2, J.A. 2438. Instead, funded programs must train their fellows "with the primary objective of developing or extending their research skills and knowledge in preparation for a research career." Id.

Institutions applying for T32 grants undergo a two-tiered review process. It begins with a review of the proposal

by a twenty-member "Initial Research Group" ("IRG"), also called a "peer review committee." IRG members are independent experts in scientific fields related to that of the grant application under review; they are not NIH employees. Each member scores applications based on his or her view of its scientific or technical merit guided by specified criteria, including, among other factors: the program director's and faculty's training records, as determined by the success of former trainees; the objective, design, and direction of the program; the caliber of the faculty; the institutional training environment, including the commitment of the institution to training and the resources available to trainees; and the institution's proposed plans for recruiting and selecting high-quality trainees. The scores are then averaged to arrive at an IRG "priority score." Testimony of Dr. Robert Bornstein at 1190-91, July 21, 2010 ("Bornstein Testimony"), J.A. 1955. This score is included with the IRG members' written comments in a summary statement, which is transmitted to the NIH.

The "second tier" of review is performed by the advisory council of the appropriate constituent organization of the NIH, in this case the National Institute of Mental Health ("NIMH"). The advisory council ranks the applications by priority score, and establishes a "pay line" at the point in the list of applications where there is no more funding available; only the applications above the "pay line" are recommended to the

director of the funding institute as potential grant recipients. "The role of the advisory council is not to second-guess the scientific review of the IRG. Rather, [the council] reviews the applications to ensure that they further the goals and interests of the awarding institute. Thus, the IRG review and the resulting high-priority score are keys to NIH funding." Id. at 1190, J.A. 1955-56.

Once an application has placed above the "pay line," the advisory council makes recommendations based on the scientific merit of the proposal, as judged by the IRG, and the relevance of the proposal to the awarding institute's programs and priorities. Funding is typically approved by the NIH for one year, and recipient institutions are eligible for up to four years of additional funding.

In order to renew a T32 grant, the recipient institution (in this case Cornell) must submit an annual renewal application and a progress report detailing the status of its project. In contrast with initial grant applications, renewal applications are reviewed solely by the NIH on a noncompetitive basis. The NIH considers the progress made under the grant and the grant's budget. By regulation, the annual progress report must contain a "comparison of actual accomplishments with the goals and objectives established for the period," and must specify "[r]easons why established goals were not met," if indeed they were not. 45 C.F.R. § 74.51(d)(1)-(2).

Recipient institutions must also "immediately notify" NIH of "developments that have a significant impact" on the research program, including "problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award." Id. § 74.51(f). This notification must also include a "statement of the action taken or contemplated, and any assistance needed to resolve the situation." Id.; see also Draft OIG Compliance Program Guidance for Recipients of PHS Research Awards, 70 Fed. Reg. 71312-01, 71320 (Nov. 28, 2005) ("Prompt voluntary reporting will demonstrate the institution's good faith and willingness to work with governmental authorities to correct and remedy the problem. In addition, reporting such conduct may be considered a mitigating factor by the responsible law enforcement or regulatory office . . . .").

Cornell's initial grant application at issue here sought funding for a fellowship program entitled "Neuropsychology of HIV/AIDS Fellowship." Van Gorp Grant Application at 1, J.A. 2254 (April 24, 1997) ("Grant Application"). The application explained that the two-year fellowship would train as many as six post-doctoral fellows at a time in "child and adult clinical and research neuropsychology with a strong emphasis upon research training with HIV/AIDS." Id. at 2, J.A. 2255. The training program would, according to the application, build on the Cornell faculty's extensive research into the neuropsychology of

HIV/AIDS, which included projects examining distress levels in HIV-AIDS patients during the course of their illness, the relationship between the neuropsychology of HIV/AIDS and patients' abilities to function at work or in school, and the possibility of using neuropsychological testing to predict whether AIDS patients will suffer from dementia. The application further explained that van Gorp would serve as the program director, and that he had a "long history of successful research, training and mentoring of students in HIV[] related work." Id. at 40, J.A. 2295.

The 123-page grant application outlined the fellowship's curriculum in detail. Fellows would be required to take "several formal, core didactic courses," and a number of elective courses. Id. at 45, J.A. 2300. In the first year of the fellowship, fellows would enroll in five core courses, some of which "have been designed specifically for the HIV Neuropsychology Fellowship." Id., J.A. 2300. These core courses would be supplemented by a "large number of courses, lectures, neuroscience educational programs, as well as other seminars in a variety of sub-speciality areas." Id. The curriculum for the second year, which included four core courses, would allow fellows to "develop more independent research skills and devote more time to their HIV research." Id. The fellows' progress under the grant would be monitored monthly by a formal training committee comprised of several faculty members, as "[o]ngoing

evaluation of the curriculum, trainees and faculty is an integral part of the training program." Id. at 48, J.A. 2303.

The Cornell grant application identified a list of fourteen faculty members who would serve as "Key Personnel," which the NIH defined as "individuals who contribute to the scientific development or execution of the project in a substantive way." NIH Grant Application Instructions at 26, J.A. 2612 (June 8, 1999). The application described in detail some of these research projects. It also asserted, "Our faculty has a solid track record in quality and productive research in brain-behavior issues, including research in HIV/AIDS-related research [sic]." Grant Application at 48, J.A. 2303. And the application identified additional institutions which would serve as clinical resources, including Cornell University, Memorial Sloan-Kettering Cancer Center, St. Vincent's Hospital, and Gay Men's Health Crisis Center.

In describing the fellowship program's commitment to research training, the grant application explained that "the majority of [the fellows'] clinical work will be with persons with HIV infection." Grant Application at 44, J.A. 2299. Fellows would "devote an average of 75% of their time to research and an average of 25% [of their] time to clinical work with persons with HIV/AIDS and other neuropsychiatric disorders." Id.

The IRG gave Cornell's grant application a high priority score, and the NIH subsequently approved funding for two

fellows for the fiscal year beginning September 30, 1997, with the possibility of additional funding for up to four additional years. Cornell submitted renewal applications in each of the following four years, from fiscal year 1999 (July 1, 1998, through June 30, 1999) to fiscal year 2002 (July 1, 2001, through June 30, 2002), all of which the NIH approved. In the accompanying annual progress reports, Cornell and van Gorp indicated that there had been no material alterations to the program as described in the original grant application.

In the renewal application for the second renewal year (the third year overall), for example, Cornell and van Gorp wrote that "[a]ll core and supporting faculty listed in our original application are continuing. . . . There have been no alterations in the courses or training program from that listed in the original application, except for the addition of two [specified] courses . . . ." 1999 Progress Report at 7, J.A. 2402 (January 19, 1999). The renewal application also explained that the program had been relocated from Cornell's White Plains campus to its New York City (Manhattan) campus in order to provide fellows with "immediate access to subjects and patients who have HIV/AIDS." Id. The renewal applications for the fourth and fifth year stated that "[t]he core structure of our training program has remained the same as in years past and to that described in our initial application." 2000 Progress Report at 4, J.A. 2411 (January 24, 2000); 2001 Progress Report at 5, J.A.

2422 (January 22, 2001). The NIH approved each of these renewal applications.

In September 1998, at about the time the first renewal-year began, Daniel Feldman, the plaintiff,[1] was selected by Cornell to participate in the fellowship program. He left the program in December 1999, before the completion of his two-year fellowship. Other fellows who participated in the program included Elizabeth Ryan, Clifford Smith, Kimberly Walton Louis, and Evan Drake. At trial, Feldman presented evidence that the actual fellowship deviated in many ways from that described in the Grant Application, and that Cornell and van Gorp failed to inform NIH of these deviations.

Testimony presented at trial indicated that some of the faculty members identified as "Key Personnel" in the initial application did not in fact contribute in any substantive way to the fellowship program. Van Gorp acknowledged that the contributions to the program of two of these faculty members, Dr. Tatsuyki Kakuma and Dr. Michael Giordano, were considerably limited, if not entirely eliminated, by the fact that the two doctors were not in physical proximity to the fellows during the grant period. Many fellows, according to their testimony, had little or no interaction with the remaining key personnel, and

[1] Because this suit is being brought by Feldman on behalf of the United States, Feldman is technically the "plaintiff-relator." See infra, note **[3]**. We nonetheless refer to him simply as the "plaintiff."

were unaware that these faculty members were or were supposed to be available as resources. In addition, according to this testimony, fellows were largely unaware of research opportunities at medical centers other than Cornell.

There was also testimony in the district court to the effect that Cornell and van Gorp failed to notify NIH that the curriculum outlined in the initial grant application was never implemented. Several core courses identified in the application were not regularly conducted for fellows, and fellows were not informed that these courses were a required component of the program. Moreover, according to this testimony, fellows were never evaluated or supervised by the training committee referred to in the Grant Application.

Feldman also presented evidence that the research and clinical training described in the initial grant application differed significantly from the actual training received. NIH rules provide that fellows in a T32 program "must devote their time to the proposed research training and must confine clinical duties to those that are an integral part of the research training experience." NIH Guide at 3, J.A. 2439; T32 Training Grant Announcement at 9, J.A. 2568 (June 16, 2006). And, in accordance with these requirements, the grant application stated that "the majority of [the fellows'] clinical work will be with persons with HIV infection." Grant Application at 44, J.A. 2299. Further, in explaining the training program's relocation from

White Plains to Manhattan, the third-year renewal application explained that "[f]ellows [would be] housed within a large, medical/surgical setting with immediate access to subjects and patients who have HIV/AIDS." 1999 Progress Report at 7, J.A. 2402.

But, as the plaintiff summarizes the trial testimony, out of the 165 clinical cases that the fellows saw during their fellowship, only three involved HIV-positive patients.[2] Pl.'s Br. at 22. Several fellows testified that much of the research that they performed under the grant program had no relation to HIV or AIDS at all. For example, Clifford Smith testified that the research projects he worked on under the T32 grant were primarily related to epilepsy and aging, and did not involve an HIV population. Out of the eight research projects that Evan Drake worked on during his fellowship, he said, only one focused specifically on HIV. Feldman similarly told the court that he worked on only one HIV-focused project during his time as a fellow.

In July 2001, after he had left the program, Feldman submitted a letter to the NIH complaining about the program's focus on clinical work rather than research, and the fellows'

[2] The parties stipulated that of Ryan's 32 clinical patients, two were HIV positive; of Smith's 35 clinical patients, none were HIV positive; of Louis's 23 patients, none were HIV positive; of Drake's 48 patients, none were HIV positive; and of Feldman's 27 patients, one was HIV positive.

limited access to HIV-positive patients. In March 2002, he submitted another letter to the NIH, again complaining that the fellowship program deviated from its description in the initial grant application. In response, the NIH asked Cornell to conduct an investigation of the complaint, which Cornell completed in June 2003. Cornell then sent Feldman a letter informing him that the investigation uncovered no wrongdoing.

On October 14, 2003, Feldman filed a qui tam complaint pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq.,[3] alleging that Cornell and van Gorp made false claims to

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[3] In a qui tam action, a private plaintiff, known as a relator, brings suit on behalf of the Government to recover a remedy for a harm done to the Government. See United States ex rel. Eisenstein v. City of New York, [556 U.S. 928, 932] (2009) (describing qui tam actions under the False Claims Act, 31 U.S.C. § 3729 et seq.); see also Black's Law Dictionary 1282 (8th ed. 2004) (defining "qui tam action" as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive"). Qui tam plaintiffs, even if not personally injured by a defendant's conduct, possess constitutional standing to assert claims on behalf of the Government as its effective assignees. There is, however, no common law right to bring a qui tam action; rather, a particular statute must authorize a private party to do so.

Woods v. Empire Health Choice, Inc., 574 F.3d 92, 97-98 (2d Cir. 2009) (footnote and some citations omitted; second brackets in original).

Where the United States has elected not to proceed with the action, as here, the relator is entitled personally to recover

the United States in the Grant Application and in the four renewal applications. Feldman alleged that statements made in these applications were false because the fellowship's curriculum, resources, faculty members, and training differed significantly from that described in the application, and in the subsequent renewal applications representing that no changes had been made to the program. The complaint was unsealed in April 2007, after the United States declined to intervene in this action. See Cook County v. United States ex rel. Chandler, 538 U.S. 119, 122 (2003) ("The relator must inform the Department of Justice of her intentions and keep the pleadings under seal for 60 days while the Government decides whether to intervene and do its own litigating." (citing 31 U.S.C. § 3730(b)(2)-(c))).

On January 9, 2009, after discovery had been completed, Cornell and van Gorp moved for summary judgment. On December 7, 2009, the district court denied the motion, concluding that there were genuine issues of material fact as to whether the defendants made false statements in both the initial grant application and the renewal applications, and whether those statements were material to the funding decisions. United States ex rel. Feldman v. Van Gorp ("Feldman I"), 674 F. Supp. 2d 475, 482-83 (S.D.N.Y. 2009). The district court also concluded that the plaintiff need

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between 25 and 30 percent of the proceeds of the action or settlement, plus reasonable attorney's fees. See 31 U.S.C. § 3730(d)(2).

not establish actual damages to the government as an element of an FCA claim because that statute's provision of civil penalties for false and fraudulent claims allowed courts to "find a violation even in the absence of proof of damages to the United States." Id. at 481. The court did not address, however, whether Feldman's recovery would be limited to statutory damages.

On December 18, 2009, the defendants moved for reconsideration of the summary judgment decision, arguing that the district court had erred in failing to address the issue of whether Feldman should be limited to statutory penalties because he had not presented sufficient evidence of actual damages to the United States. On May 3, 2010, the district court denied the motion, explaining that although the damages to the United States could not be calculated in the same way they would be in a standard breach-of-contract action because no tangible benefit had been received, the plaintiff would not be limited to statutory damages. United States ex rel. Feldman v. Van Gorp ("Feldman II"), No. 03 Civ. 8135, 2010 WL 1948592, at *1-*2, 2010 U.S. Dist. LEXIS 47039, at *4-*6 (S.D.N.Y. May 3, 2010). The court said that the "'benefit of the bargain' to the government is providing funds to recipients who best fit its specified criteria and that this benefit is lost when funds are diverted to less eligible recipients." Id. at *2, 2010 U.S. Dist. LEXIS 47039, at *4-*5. Therefore, "if the fact-finder concludes that the government would not have awarded the grant absent the false

claims, it may properly conclude that the measure of damages is the total amount the government paid." Id., 2010 U.S. Dist. LEXIS 47039, at *6.

Before trial, Feldman submitted a motion in limine to exclude evidence including that of NIH's inaction towards Cornell and van Gorp in response to Feldman's complaints about the fellowship program. On July 8, 2010, the district court granted Feldman's motion to exclude that evidence. The court concluded that the evidence of NIH's inaction was irrelevant and therefore inadmissible under Rule 402 because "no discovery was conducted concerning the standards [NIH used] to determine the existence of misconduct and whether those standards are at all similar to the elements of an FCA claim." United States ex rel. Feldman v. van Gorp ("Feldman III"), No. 03 Civ. 8135, 2010 WL 2911606, at *3, 2010 U.S. Dist. LEXIS 73633, at *7 (S.D.N.Y. July 8, 2010). Moreover, the court concluded, even if "marginally relevant," the evidence would have been excluded pursuant to Rule 403 because of the possibility that it would confuse or mislead the jury.[4] Id.

The case was tried to a jury for eight days in July 2010, resulting in a partial verdict for Feldman. The jury found the defendants not liable for false statements in the Grant

[4] The district court similarly excluded evidence of inaction on the part of the New York State Department of Education and the American Psychological Association, but the defendants do not challenge the exclusion of that evidence on appeal.

Application and the first renewal application, but found liability based on the renewal applications for the third, fourth and fifth years of the grant, i.e., the second, third and fourth renewal years. On August 3, 2010, the district court awarded actual damages in treble the amount NIH paid for the last three renewal years of the grant –- the trebling being provided for in the FCA, 31 U.S.C. § 3729(a)(1) -- totaling $855,714. The judgment also included statutory penalties of $32,000, for a total of $887,714. The district court also awarded to the plaintiff $602,898.63 in attorney's fees, $25,862.15 in costs, and $3,121.47 in expenses.

On August 25, 2010, the defendants filed a motion for judgment as a matter of law under Rule 50(b), or in the alternative, for a new trial pursuant to Rule 59. The defendants argued that there was insufficient evidence from which the jury could properly have concluded that the false statements at issue were material to the NIH's decisions to renew the T32 grant, and that the court should grant judgment as a matter of law, or that such a conclusion was against the weight of the evidence and warranted a new trial. The defendants also argued that the district court erred in determining as a matter of law that damages were equal to the entire grant amounts for the years in which liability was found rather than submitting that question to the jury.

The district court denied this motion on December 9, 2010. United States ex rel. Feldman v. van Gorp ("Feldman IV"), No. 03 Civ. 8135, 2010 WL 5094402, at *5, 2010 U.S. Dist. LEXIS 130358, at *14-*15 (S.D.N.Y. Dec. 9, 2010). The court concluded that Feldman had presented sufficient evidence for the jury to conclude that the false statements were material to the NIH's funding decisions, noting that NIH's guidelines and instructions on the renewal applications unambiguously stated that it should be notified of any changes made to the grant program. Id. at *2-*5, 2010 U.S. Dist. LEXIS 130358, at *4-*14. The district court also relied on its opinion in Feldman III to deny the motion for a jury trial on damages. Id. at *5, 2010 U.S. Dist. LEXIS 130358, at *13-*15.

The defendants appeal.

DISCUSSION

The defendants contend that: (1) the district court erred in its methodology for determining damages and in determining the amount of those damages, as a matter of law; (2) the jury did not have sufficient evidence from which to conclude that the false statements at issue were material to the funding decision; and (3) the district court erred in excluding evidence of NIH's "inaction" in response to Feldman's complaint.

I. Damages

The False Claims Act prohibits a person from "knowingly present[ing], or caus[ing] to be presented, [to an officer or

employee of the United States Government,] a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). Liability under the Act also requires a showing of materiality.[5] Under the Act as currently in force, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." Id. § 3729(b)(4); see also Neder v. United States, 527 U.S. 1, 16 (1999) ("In general, a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." (brackets in original; internal quotation marks omitted) (criminal fraud case)).

The FCA provides for damages equal to "3 times the amount of damages which the Government sustains because of the act of that person," in addition to a "civil penalty." 31 U.S.C. § 3729(a)(1). The Act does not specify how damages are to be calculated, but the Supreme Court has recognized that the purpose of damages, even as multiplied, under the Act is to make the

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[5] In 2009, Congress amended the False Claims Act to add a specific requirement that to be actionable a false statement must be material. 31 U.S.C. § 3729(a)(1)(B). It purports to apply prospectively and therefore would not apply to this case. See Feldman I, 674 F. Supp. 2d at 480. Never prior to that enactment and absent its materiality provision did we explicitly require a showing of materiality in FCA cases, although six of the seven circuits to address the issue did. See id. (citing decisions). We need not decide here whether a showing of materiality was required because, assuming that it was, the requirement has been met, as we explain in Part II, below.

government "completely whole" for money taken from it by fraud. United States ex. rel. Marcus v. Hess, 317 U.S. 537, 551-52 (1943), superseded by statute as recognized by United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94 (2d Cir. 2010) ("We think the chief purpose of the statutes here [predecessors of the current False Claims Act, providing for double rather than treble damages] was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."). Because the district court here determined that damages could be established as a matter of law, we review that conclusion de novo. See Bessemer Trust Co., N.A. v. Branin, 618 F.3d 76, 85 (2d Cir. 2010) (stating that where the district court has determined damages, we review its application of legal principles de novo and its factual findings for clear error).

The question of how damages should be measured in an FCA case where "contracts entered into between the government and the Defendants did not produce a tangible benefit to the [government]," United States ex. rel. Longhi v. United States, 575 F.3d 458, 473 (5th Cir. 2009), is one of first impression in this Court. The defendants argue both that the district court erred in concluding that application of the standard benefit-of-the-bargain calculation as a methodology for determining damages was inappropriate in this case, and that it erred in deciding the

amount of damages as a matter of law based on the jury's verdict, rather than allowing the jury to assess the amount of damages due.

A. Proper Measure of Damages

In most FCA cases, damages are measured as they would be in a run-of-the-mine breach-of-contract case –- using a "benefit-of-the-bargain" calculation in which a determination is made of the difference between the value that the government received and the amount that it paid. See United States v. Foster Wheeler Corp., 447 F.2d 100, 102 (2d Cir. 1971) (collecting cases); cf. Terwilliger v. Terwilliger, 206 F.3d 240, 248 (2d Cir. 2000) ("[S]o far as possible, [New York contract] law attempts to secure to the injured party the benefit of his bargain, subject to the limitations that the injury -- whether it be losses suffered or gains prevented -- was foreseeable, and that the amount of damages claimed be measurable with a reasonable degree of certainty and, of course, adequately proven." (internal quotation marks omitted)). This method of calculation is employed, for example, when the government has paid for goods or services that return a tangible benefit to the government.

There are generally two ways of determining damages in such cases. First, if the non-conforming goods or services have an ascertainable market value, then damages are measured according to the "'difference between the market value of the

product [the government] received and retained and the market value that the product would have had if it had been of the specified quality.'" United States v. Science Application Int'l Corp., 626 F.3d 1257, 1279 (D.C. Cir. 2010) (quoting United States v. Bornstein, 423 U.S. 303, 316 n.13 (1976)) (alterations omitted). If the non-conforming goods' or services' market value is not ascertainable, then the fact-finder determines the amount of damages by calculating the difference between "the amount the government actually paid minus the value of the goods or services the government received or used," as judged by the fact-finder. Id.

The defendants contend that a "benefit-of-the-bargain" calculation was appropriate in this case, and that the district court erred by awarding the government the full amount of the grant for the years for which the violations were found rather than the difference between the value of the training promised and that actually delivered. The plaintiff argues, to the contrary, that a different measure of damages is appropriate in cases such as this, where "the defendant fraudulently sought payments for participating in programs designed to benefit third-parties rather than the government itself" and the government received nothing of tangible value from the defendant. Id.; see also Longhi, 575 F.3d at 473 ("[W]here there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in

the amount the government actually paid to the Defendants."). This approach rests on the notion that the government receives nothing of measurable value when the third-party to whom the benefits of a governmental grant flow uses the grant for activities other than those for which funding was approved. In other words, when a third-party successfully uses a false claim regarding how a grant will be used in order to obtain the grant, the government has entirely lost its opportunity to award the grant money to a recipient who would have used the money as the government intended.

The plaintiff and the United States, as amicus curiae, argue that this is such a case: The government received no tangible benefit from the T32 grant -- students and others may have, but not the government. The grant represented an attempt to, but did not thereby, promote "child and adult clinical and research neuropsychology with a strong emphasis upon research training with HIV/AIDS." Grant Application at 2, J.A. 2255. The plaintiff argues that the government is therefore entitled to damages equal to the full amount of grants awarded to the defendants based on their false statements.

We conclude that the measure of damages advocated by the plaintiff and the United States is correct.

Although we have not addressed this question, several of our sister circuits have done so in decisions that support the conclusion we now reach. See Science Application, 626 F.3d at

1279 (D.C. Cir.); Longhi, 575 F.3d at 473 (5th Cir.); United States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008) ("The government offers a subsidy . . . with conditions. When the conditions are not satisfied, nothing is due."); United States v. Mackby, 339 F.3d 1013, 1018-19 (9th Cir. 2003) ("Had Mackby been truthful, the government would have known that he was entitled to nothing . . . .").[6]

The defendants point out, however, that other courts have applied the "benefit-of-the-bargain" calculation in cases they assert are similar to this one. They argue that because "[t]he ultimate beneficiary of all government grants or contracts is the public regardless of who receives the 'direct' benefit," the flow of benefits to a third-party should not be determinative of the damages measure. Defs.' Reply Br. at 5.

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[6] District courts within this Circuit have also employed this methodology. See United States v. Karron, 750 F. Supp. 2d 480, 493 (S.D.N.Y. 2011), appeal filed, No. 11-1924 (concluding that the defendant was liable for the full amount of a government-funded research grant because he "cannot establish that the Government received any ascertainable benefit from its relationship with CASI. Even assuming that CASI in fact met various milestones and provided reports to the Government, such actions yielded no tangible benefit to the Government."); United States ex rel. Antidiscrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06 Civ. 2860, 2009 WL 1108517, at *3, 2009 U.S. Dist. LEXIS 35041, at *9 (S.D.N.Y. Apr. 24, 2009) ("Westchester has identified no tangible asset or structure it provided to the United States such that this theory would be applicable; it did not have a contract with the government to build any sort of facility for the government's use or to provide it with goods.").

In support of this theory, the defendants cite United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977). There, the Third Circuit applied a benefit-of-the-bargain calculation in an FCA case involving the defendants' fraudulent statements to the Federal Housing Administration regarding the condition of various residential properties. Relying on these representations, the agency insured mortgages on several properties, and the agency was required to pay these mortgages when the purchasers defaulted. Id. at 349.

The government argued that its damages were the total amount of the mortgage debt it had assumed, insisting that "had [the defendant] not furnished the false certification, it would not have insured the mortgage[s] and therefore would not have been called upon to make any payment." Id. at 351.

The Third Circuit rejected this argument.

> The government's actual damage was the decrease in worth of the security that was certified as being available, measured by the difference in value between the houses as falsely represented, and as they actually were. Since the government was given security which was less than what it was represented to be, the damages are essentially similar to those sustained when a defective article is purchased in a fraudulent transaction. In those instances, decisional law sets the damages as the difference in cost between that contracted for and that received.

Id.

Similarly, in Coleman v. Hernandez, 490 F. Supp. 2d 278 (D. Conn. 2007), a case involving the so-called "Housing Choice Voucher Program" or "Section 8," under which the government provides housing subsidies to qualifying individuals, the district court declined to award the plaintiff the full amount that the government paid to subsidize her rent, even though her landlord had allegedly made false statements to the government by overcharging the plaintiff for rent. Id. at 280-83. The Coleman court acknowledged that in other FCA cases, courts had awarded damages equal to the full amount of the government's payment. Id. at 281-82. But the court decided that in the case before it, the awardable damages were equal to the difference between the market rent, and the amount that the landlord charged the government including the additional, improper payments it had received, i.e., the amount of the overcharge. Id. at 282. The government was then made whole, receiving the full benefit of its bargain –- trebled by statute.

The defendants also look to Medicaid and Medicare FCA cases for support. They contend that adopting the plaintiff's theory of damages, all such cases would result in damages equal to the full amount the government paid in reimbursements to physicians because "the direct benefit always goes to patients." Defs.' Reply Br. at 5.

This is not, however, the methodology generally employed by courts evaluating FCA claims based on Medicaid or

Medicare fraud. In United States ex. rel. Tyson v. Amerigroup Illinois, Inc., 488 F. Supp. 2d 719 (N.D. Ill. 2007), the court awarded damages based on the difference between the amount of Medicare payments that the defendant should have received, and the amount that it had actually charged the government. Id. at 739. Similarly, in United States ex. rel. Doe v. DeGregorio, 510 F. Supp. 2d 877 (M.D. Fla. 2007), the court also held that damages were the "the amount of money the government paid out by reason of the false claims over and above what it would have paid out if the claims had not been false." Id. at 890.

In short, in each of the cases cited by the defendants, the government paid for a contracted service with a tangible benefit -- whether it be medical care, security on mortgages, or subsidized housing -- but paid too much. The government in these cases got what it bargained for, but it did not get all that it bargained for. Thus, courts treated the difference between what the government bargained for and what it actually received as the measure of damages. Here, by contrast, the government bargained for something qualitatively, but not quantifiably, different from what it received.

This approach comports with the one we discussed in making a sentencing calculation of loss in United States v. Canova, 412 F.3d 331, 352 (2005) (rejecting argument that abbreviated medical tests performed by the defendant were as clinically sound as full tests required by Medicare so that the

government sustained no loss). There, we explained that it was not a court's task to second-guess a victim's judgment as to the necessity of specifications demanded and paid for. See id. ("Whether the testing time on a pacemaker, the number of rivets on an airplane wing, or the coats of paint on a refurbished building is a matter of necessity or whim, the fact remains that the victim has been induced to pay for something that it wanted and was promised but did not get, thereby incurring some measure of pecuniary 'loss.'") To be sure, Canova recognized that "a victim's loss in a substitute goods or services case" does not "necessarily equal[] the full contract price paid." Id. at 353. But this was not because a defendant had the right to an offset for the value of the substituted good or service. Rather, the proper focus of any loss calculation was on "the 'reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose,' plus the 'reasonably foreseeable cost of rectifying the actual or potential disruption to [the victim's] operations caused by the product substitution." Id. (quoting U.S.S.G. § 2f1.1, cmt n.8(c)). Canova emphasized that a court calculating loss cannot simply "rewrit[e] the parties' contract to excise specifications paid for but not received and, thereby, conclud[e] that the victim sustained no [or a reduced] loss." Id.

Canova's reasoning supports the challenged loss calculation. As a result of the fraudulent renewals, the government was paying for a program that was not at all as specified. By contrast to the Medicare cases cited by defendants, the government did not receive less than it bargained for; it did not get the "neuropsychology with a strong emphasis upon research training with HIV/AIDS" program it bargained for at all. Further, nothing in the record indicates that it could now secure such a program at any lesser cost. We therefore conclude that the appropriate measure of damages in this case is the full amount the government paid based on materially false statements.

B. Fraudulent Inducement

The defendants acknowledge that courts have applied the plaintiff's theory of damages in cases including Mackby, Rogan, and Longhi, but argue that those cases are distinguishable from this one because the defendants in each of those cases obtained funds through fraudulent inducement -- and that any such theory would fail here because no liability was found with respect to the Grant Application. "In a fraudulent inducement case, [it is] the false statements [that] allow the defendant to obtain the funding in the first place." Defs.' Reply Br. at 9.

According to the defendants, because a defendant in a fraudulent inducement case would not be eligible for any funding received after the initial false claim, a court in such a case could properly conclude that the defendant is liable for the

entire amount that the government paid. But "[h]ere, the jury expressly found that the initial Application contained no false statements, and there was no false certification ever at issue." Id. The defendants argue that Mackby, Rogan, and Longhi therefore do not support the damages theory employed by the district court.

We see no principled distinction, however, between fraudulently inducing payment initially, thereby requiring all payments produced from that initial fraud to be returned to the government (trebled and with certain fees and costs added as provided by statute), and requiring payments based on false statements to be returned to the government when those false statements were made after an initial contractual relationship based on truthful statements had been established. Although it may be true that under a fraudulent inducement theory, "subsequent claims for payment made under the contract [that] were not literally false, [because] they derived from the original fraudulent misrepresentation, [are also] . . . actionable false claims," Longhi, 575 F.3d at 468 (second brackets in original; internal quotation marks omitted), this proposition simply speaks to the time period for which FCA liability may be found. It does not suggest that without fraudulent inducement, no subsequent false statements can result in FCA liability.

If the government made payment based on a false statement, then that is enough for liability in an FCA case, regardless of whether that false statement comes at the beginning of a contractual relationship or later. The only difference would be that liability begins when the false statement is made and relied upon, rather than at the beginning of the contractual relationship, as it would be in a fraudulent inducement case. Here, the jury found that materially false statements had been made by the defendants in years 3, 4, and 5 of the grant, and the court properly awarded damages based on that finding.

C. Damages as a Matter of Law

The defendants argue that the calculation of damages should have been decided as a question of fact by a jury, not as a matter of law by the district court. Indeed, in FCA cases, the jury ordinarily does determine the amount of damages to be imposed upon the defendant. See Chandler, 538 U.S. at 132. We conclude, however, that here, where the question is not the benefit of the bargain between the plaintiff and the defendants, and the amount of each payment for which liability has been assessed is not in dispute, no further finding of fact as to the amount of the damages was necessary.

As the government correctly observes in its amicus brief, awarding damages in this manner is not novel. And often, the amount of damages in such cases has been determined as a matter of law in the course of the court's grant of summary

judgment to the plaintiff. See, e.g., Longhi, 575 F.3d at 461 (affirming summary judgment and damages award); United States v. TDC Mgmt. Corp., 288 F.3d 421, 428 (D.C. Cir. 2002) (agreeing that the district court could properly decide the damages award where the government received no benefit from the transaction).

United States ex rel. Antidiscrimination Center of Metro New York, Inc. v. Westchester County, No. 06 Civ. 2860, 2009 WL 1108517, 2009 U.S. Dist. LEXIS 35041 (S.D.N.Y. Apr. 24, 2009), is illustrative. There the federal government paid approximately $52 million as part of a federal grant to Westchester County for the purposes of housing and community development. Id. at *2-*4, 2009 U.S. Dist. LEXIS 35041, at *5-*11. The grant required the county to certify that it would "conduct an analysis of impediments . . . to fair housing choice, including those impediments imposed by racial discrimination and segregation, to take appropriate actions to overcome the effects of any identified impediments, and to maintain records reflecting the analysis and actions." Id. at *1, 2009 U.S. Dist. LEXIS 35041, at *2-*3. The court granted summary judgment for the plaintiff after finding that Westchester County had not conducted the analysis as promised. The court agreed with the plaintiff's contention that damages should be the full amount the government paid, and rejected the county's argument that the damages question should be submitted to the jury. There, as here, "the United States did not get what it paid for," and there was no

role for the jury because "Westchester's damages cannot be reduced by reference to the alleged 'benefit' it provided to HUD." Id. at *3, 2009 U.S. Dist. LEXIS 35041, at *9.

We conclude that in the case before us, inasmuch as the damages equal the full amount that the government paid and that amount is not in dispute, they were properly determined by the district court as a matter of law.

D. Sufficiency of the Evidence

Finally, the defendants contend that the plaintiff did not submit sufficient evidence to the jury to establish by a preponderance of the evidence that the government suffered damages equal to the full amount of the T32 grant. The defendants argue that "to prove that the amount of damages was the entire amount of the grant, a relator would be required to prove that the government received no value -- at all -- through the grant work it funded." Defs.' Br. at 37.

The defendants support this contention by citing benefit-of-the-bargain cases. The defendants' argument is therefore unavailing. Unlike a benefit-of-the-bargain case, no specific amount of damages must be proved because, as we have explained at length, damages in this case equal the entire amount of the grant that was lost as a result of the fraud.

II. Materiality

The defendants assert that the false statements to the government that are at issue were not material to the

transactions in question. The district court therefore erred, they say, in denying the defendants' motion for judgment as a matter of law and for a new trial.[7]

We conclude that the jury had sufficient evidence from which to conclude, as it did, that the defendants' false statements materially influenced NIH's decisions to renew the T32 grant.

A motion for a new trial will ordinarily be granted "so long as the district court determines that, in its independent judgment, the jury has reached a seriously erroneous result or [its] verdict is a miscarriage of justice." Nimely v. City of New York, 414 F.3d 381, 392 (2d Cir. 2005) (internal quotation marks omitted). We review the district court's denial of a motion for a new trial for abuse of discretion. Id.

A motion for judgment as a matter of law may be granted only "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). "A court evaluating such a motion cannot assess the weight of conflicting evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury." Black v. Finantra Capital, Inc., 418 F.3d

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[7] For the reasons referred to in note **[5]**, supra, we assume that materiality is required by the pre-2009 version of the FCA, although we need not decide that issue on this appeal.

203, 209 (2d Cir. 2005) (internal quotation marks omitted). Because such a judgment is made as a matter of law, we review it de novo. We must "consider the evidence in the light most favorable to the party against whom the motion was made and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence." Id. at 208-09 (internal quotation marks omitted).

The district court concluded that the plaintiff had "presented significant documentary evidence to support a finding of materiality." Feldman IV, 2010 WL 5094402, at *2, 2010 U.S. Dist. LEXIS 130358, at *5.

First, the parties stipulated that in order for a grantee to receive additional funding after the initial grant year, the "grantee must submit a noncompetitive renewal application . . . includ[ing] a progress report which NIH expects will provide information about the trainees['] activities during the previous funding period." Id. Second, the renewal instructions for the T32 grant contain a statement explaining that "'Progress Reports provide information to awarding component staff that is essential in the assessment of changes in scope or research objectives . . . from those actually funded. They are also an important information source for the awarding component staff in preparing annual reports, in planning programs, and in communicating scientific accomplishments to the public and to Congress.'" Id., 2010 U.S. Dist. LEXIS 130358, at *6 (quoting

NIH Grant Continuation Instructions at 7, J.A. 2462). Third, the renewal instructions direct grantees to "highlight progress in implementation and developments or changes that have occurred. Note any difficulties encountered by the program. Describe changes in the program for the next budget period, including changes in training faculty and significant changes in available space and/or facilities." Id. (internal quotation marks and brackets omitted). The instructions also ask for "'information describing which, if any, faculty and/or mentors have left the program.'" Id. at *3, 2010 U.S. Dist. LEXIS 130358, at *6-*7 (quoting T32 Program Announcement PA-06-648 at 22, J.A. 2581 (June 16, 2006)).

The district court rejected the defendants' argument that the jury was required to accept Dr. Robert Bornstein's unrebutted testimony on the issue of materiality. Id., 2010 U.S. Dist. LEXIS 130358, at *7. Bornstein was a member of the IRG that reviewed the defendants' initial grant application. At trial, he testified as to the factors he considered material to his analysis of a grant application. He asserted that although he reviewed the application, he did not expect that every faculty member identified in the initial grant application would be involved with the fellowship program. He also testified that he did not expect the fellowship program to follow the exact curriculum outlined in the initial application. The defendants

argued that this testimony established that not all false statements in the renewal applications were material.

The district court rejected this argument because Bornstein never reviewed the renewal applications, nor did he have an independent recollection of reviewing the initial grant application. Id., 2010 U.S. Dist. LEXIS 130358, at *7-*8. The court also concluded that "[t]he absence of testimony by a government official supporting a finding of materiality does not mean that the jury was required to accept Bornstein's testimony." Id., 2010 U.S. Dist. LEXIS 130358, at *7. "[T]he jury was well within its bounds to credit NIH's unambiguous guidelines and instructions over Bornstein's conclusory testimony that little in the Grant Application really would have mattered to him had he remembered reviewing it at all." Id., 2010 U.S. Dist. LEXIS 130358, at *8.

On appeal, the defendants do not dispute that the renewal applications contained NIH's instructions and guidelines. They contend instead that "none of these statements, taken individually or together, establish what information was material to NIH's funding decisions on renewals," Defs.' Br. at 47, "the Renewal Instructions and the Program Announcement are silent as to what information matters to NIH for purposes of its funding decision." Id. at 52. The defendants argue in substance that there is no evidence from which the jury could have decided that

the statements it found to be false materially influenced NIH's decision to renew the T32 grant.[8]

This argument, however, misapprehends the focus of the materiality analysis. In Rogan, the defendant hospital admitted patients through illegal referrals in violation of the Anti-Kickback Act, 42 U.S.C. § 1320a-7b. 517 F.3d at 452. Because of the violation, the defendant was ineligible to receive Medicare payments. The defendant did not deny that it had violated the Act, but instead argued that its failure to disclose information regarding the illegal referrals was immaterial to the government's decision to approve the hospital's Medicare claims, because materiality could only be established if a government

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[8] The defendants also argue, however, that the district court erred in interpreting NIH's guidelines as "unambiguous" -- in other words, that to the extent the plaintiff did point to evidence of materiality, that evidence was insufficient to support a jury verdict. Defs. Br. at 52. The defendants note that the renewal application's instructions do not specify what information needs to be included in a progress report, only that the report should include "difficulties" with or "changes" to a grant program. Id. at 53. The instructions do not explicitly state that grantees must report all changes. Because the NIH guidelines are "necessarily ambiguous," defendants argue that the court cannot rely upon these guidelines as a "legal standard for materiality." Id.

But the district court never relied on these guidelines, nor instructed the jury to rely on these guidelines, as a "standard for materiality." The guidelines served instead as evidence that the jury was permitted to rely upon in evaluating what was material to the government in its monitoring of grants. Therefore, we agree with the district court that they provided sufficient evidence from which the jury could reach a conclusion as to materiality. To the extent that these guidelines are ambiguous, it was the jury's function to resolve any disputes about their meaning.

employee involved in the decision making process testified that the government would have terminated payments. Id.

The court rejected this view of materiality, explaining that a "statement or omission is 'capable of influencing' a decision even if those who make the decision are negligent and fail to appreciate the statement's significance." Id. As the court stated, "[t]he question is not remotely whether [the applicant] was sure to be caught . . . but whether the omission could have influenced the agency's decision." Id.

In short, even if a program officer does not subjectively consider a statement to be material, it can be found to be material from an objective standpoint because it is "capable of influencing" the program officer. Id. As the plaintiff in this case argues, materiality is "determined not by what a program officer at NIH declares material, but rather [is] based on the agency's own rules and regulations." Pl.'s Br. at 48.

The Rogan court discussed the purpose of laws prohibiting fraud:

> Another way to see this is to recognize that laws against fraud protect the gullible and the careless -- perhaps especially the gullible and the careless -- and could not serve that function if proof of materiality depended on establishing that the recipient of the statement would have protected his own interests. The United States is entitled to guard the public fisc against schemes designed to take advantage of overworked, harried, or inattentive disbursing officers;

> the False Claims Act does this by insisting that persons who send bills to the Treasury tell the truth.

517 F.3d at 452 (citation omitted).

We agree with the plaintiff that the test for materiality is an objective one. It does not require evidence that a program officer relied upon the specific falsehoods proven to have been false in each case in order for them to be material. The fact-finder must determine only whether the proven falsehoods have a "natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4).

To decide otherwise –- that materiality must be established in each case based on the testimony of a decisionmaker –- would subvert the remedial purpose of the FCA. The resolution of each case would depend on whether such a decisionmaker could be identified and located, and whether that particular person would have treated the claims as material, regardless of whether they were one of several individuals charged with evaluating the claims at issue.

The defendants' contention would also render the language of the statute superfluous. If no one other than an actual decisionmaker could determine whether a statement had a "natural tendency to influence" payment, the statute could have provided that a statement is "material" if it actually influenced a decision maker who was aware of the statement.

Our conclusion finds support in other areas of the law. In TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976), for example, the Supreme Court addressed the meaning of "materiality" in the context of a suit brought under the federal securities laws. The Court determined that a fact is "material" if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Id. at 448.

> As an abstract proposition, the most desirable role for a court in a suit of this sort . . . would perhaps be to determine whether in fact the proposal would have been favored by the shareholders and consummated in the absence of any misstatement or omission. But as we [have] recognized . . . such matters are not subject to determination with certainty. Doubts as to the critical nature of information misstated or omitted will be commonplace. And particularly in view of the prophylactic purpose of the Rule and the fact that the content of the proxy statement is within management's control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect.
>
> Id.

The same reasoning applies here. Like the securities laws at issue in TSC Industries, this objective approach ensures that the FCA serves as a robust prophylactic against fraud by putting the question of materiality to the jury, rather than attempting to trace it back to the state of mind of the decisionmaker.

In Bustamante v. First Federal Savings & Loan Association of San Antonio, 619 F.2d 360 (5th Cir. 1980), the

plaintiffs alleged that the defendants violated the Truth-in-Lending Act in a loan transaction. The court noted that

> when a security interest [with an exception not relevant here] is acquired in real property which is the residence of the person to whom credit is extended, the borrower has a right of rescission within three business days of either consummation of the transaction or "the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later . . . ."

Id. at 362. Here again, the court applied an objective rather than a subjective materiality standard. "[T]o apply a subjective standard to the test for materiality would misperceive the remedial purpose of the Act." Id. at 364. The court concluded that if materiality could be established by a subjective determination of whether or not particular information would affect a credit shopper's decision to utilize the credit, unsophisticated or uneducated consumers would not be sufficiently protected. Id.

Having concluded that the test of materiality in the case before us is objective -- asking what would have influenced the judgment of a reasonable reviewing official -- rather than subjective -- asking whether it influenced the judgment of a reviewer of a proposal in the case at hand -- we agree with the district court that a reasonable jury could have found the defendants' statements to be material to the renewal decisions in the third, fourth, and fifth years of the grant. Based on the

stipulations regarding criteria relevant to funding and the testimony at trial, the jury had an ample basis for understanding the grant process based upon which it could determine whether statements that were made or omitted concerning changes to curriculum, personnel and clinical opportunities in the renewal applications had a "natural tendency" to influence NIH's funding decisions. The instructions regarding the grant application and renewal process provided the jury with a clear understanding of what information the NIH considers in evaluating progress reports, such as changes or developments to the program.

The defendants did not inform NIH that not all faculty members identified in the initial grant were "key personnel" in the program. The defendants also failed to inform NIH that several of the core courses listed in the proposed curriculum were never implemented, and that fellows were never evaluated by a training committee. NIH was not informed that the fellows did not have access to research and clinical resources described in the initial grant application. NIH was also not aware that the fellows had very limited access to HIV positive patients in their research. In addition, many of the fellows spent much of their time working on projects unrelated to HIV, such as research into aging and epilepsy, which was not reported to the NIH. We conclude that these facts were more than sufficient to allow a reasonable jury to conclude that had the facts been disclosed they would have had a natural tendency to influence, or would

have been capable of influencing, the decision to renew the grant and pay money to the defendants pursuant to it.

We therefore also conclude that the district court did not abuse its discretion in denying the motion for a new trial -- the jury's verdict was not "seriously erroneous" or "a miscarriage of justice." Nimely, 414 F.3d at 392 (internal quotation marks omitted).

III. Exclusion of Evidence Demonstrating NIH's Inaction

The defendants argue that the district court abused its discretion by excluding evidence of NIH's alleged failure to take remedial action in response to the plaintiff's complaints, and that a new trial is therefore warranted. We review a district court's decision to exclude evidence for abuse of discretion. Schering Corp. v. Pfizer Inc., 189 F.3d 218, 224 (2d Cir. 1999). "We [also] review a district court's denial of a motion for a new trial for abuse of discretion." United States v. Brunshtein, 344 F.3d 91, 101 (2d Cir. 2003), cert. denied, 543 U.S. 823 (2004).

The defendants contend that they should have been permitted to elicit evidence of NIH's relative inaction in response to complaints because it is relevant as to whether or not their statements in the renewal applications were false and material. Feldman told NIH about the defendants' fraudulent claims and, according to the defendants, the agency saw no validity to the complaints as evidenced by its failure to take

action beyond asking Cornell itself to investigate the complaints. The defendants argue that they should have been able to present this evidence to the jury in an effort to persuade it that the statements had not misled the agency. If this evidence was presented, they say, the plaintiff "could then have put on any rebuttal evidence about why the jury should find the statements were false and material despite NIH's lack of reaction when presented with those allegations." Defs.' Br. at 61.

Federal Rule of Evidence 402, provides, inter alia, that "[i]rrelevant evidence is not admissible." The district court reasoned that the evidence in question was irrelevant because the NIH's failure to act in response to Feldman's complaints did not speak to the seriousness of those complaints or the likelihood that false claims had been made. The jury did not have before it the standard that NIH used to determine whether or not action was warranted in response to a funding complaint. "[N]o discovery was conducted concerning the standards these agencies employ to determine the existence of misconduct and whether those standards are at all similar to the elements of an FCA claim." Feldman III, 2010 WL 2911606, at *3, 2010 U.S. Dist. LEXIS 73633, at *7. "Specifically, as to [the plaintiff's] deposition testimony on the NIH decision, [he] does not, and indeed cannot, speak to the standards NIH used to judge the merits of his claims." Id. Without evidence as to what the standards of the agency were for beginning an investigation, the

jury could not determine whether the complaints made by Feldman should have instigated one.[9] Id., 2010 U.S. Dist. LEXIS 73633, at *7-*8.

The defendants further argue that to the extent that the district court excluded evidence of NIH's inaction pursuant to Rule 403, it did so in error. While ultimately we would be inclined to agree with the district court, we need go no further in our analysis because the evidence was properly excluded under

---

[9] The defendants point to United States v. Southland Management Corp., 326 F.3d 669 (5th Cir. 2003) (en banc), where the court considered the relevance of the course of conduct between a landlord receiving Section 8 funds and HUD. The court concluded that the communication between HUD and the landlord demonstrated that "HUD was willing to work with the Owners" on remedying maintenance problems, and that "HUD seemed to recognize that the property's noncompliance was at least partially explained by a lack of funds and nearby criminal activity." Id. at 677. Based in part on this pattern of honest and open communication, the court concluded that there could be no FCA liability. Unlike in Southland Management, there is no indication here that the defendants communicated compliance issues to the government or sought its help in addressing them. Where the government acts in response to potential false claims, its activity may reveal something about its understanding as to whether those claims were deliberately false or the result of extrinsic factors, as in Southland Management. But where, as here, there is no evidence of government action, nothing relevant can be ascertained without knowing for which of many possible reasons it did not act.

The defendants also cite United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993), in which we stated that "government knowledge may be relevant to a defendant's liability." Id. at 1157. Indeed it "may be," but is not here where the significance of the knowledge and the responsibilities of the recipients have not been established.

Rule 402 in any event. This conclusion was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: September 05, 2012
Docket #: 10-3297cv
Short Title: U.S.A v. Van Gorp

DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY) DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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DC Judge: Pauley

NOTICE OF DECISION

The court has issued a decision in the above-entitled case. It is available on the Court's website http://www.ca2.uscourts.gov.

Judgment was entered on September 5, 2012 will later issue in accordance with FRAP 41.

If pursuant to FRAP Rule 39 (c) you are required to file an itemized and verified bill of costs you must do so, with proof of service, within 14 days after entry of judgment. The form, with instructions, is also available on Court's website.

Inquiries regarding this case may be directed to 212-857-8523

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: September 05, 2012
Docket #: 10-3297cv
Short Title: U.S.A v. Van Gorp

DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY) DC Docket #: 03-cv-8135
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

NOTICE OF CASE MANAGER CHANGE

The case manager assigned to this matter has been changed.

Inquiries regarding this case may be directed to 212-857-8523.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of September, two thousand twelve.

Before: ROBERT D. SACK,
REENA RAGGI,
DENNY CHIN,
Circuit Judges.

UNITED STATES OF AMERICA ex rel.
DANIEL FELDMAN,

Plaintiff-Appellee,

v.

WILFRED VAN GORP and CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants-Appellants.

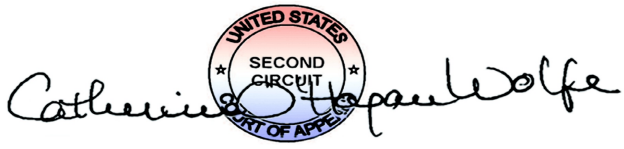
JUDGMENT
Docket Nos.: 10-3297 (L)
11-975 (Con)

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED in accordance with the opinion of this court.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court



10-3297-CV(L), 11-0975-CV (CON)

IN THE UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. DANIEL FELDMAN,

Plaintiff-Appellee,

- v. -

WILFRED VAN GORP AND CORNELL UNIVERSITY,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF RELATOR
DANIEL J. FELDMAN FOR SUPPLEMENTAL ATTORNEYS FEES
AND COSTS**

Michael J. Salmanson
Scott B. Goldshaw
Salmanson Goldshaw, P.C.
Two Penn Center, Suite 1230
1500 JFK Boulevard
Philadelphia, PA 19102
215-640-0593

NOW COMES Relator, Daniel J. Feldman, and hereby moves ths Court for a supplemental award of attorneys fees and costs pursuant to the fee-shifting provision of the False Claims Act, 31 U.S.C. Section 3730(d)(2). In Support thereof, Relator avers as follows:

1. Plaintiff as a prevailing party relator, is entitled to an award of reasonable attorneys' fees and costs under the False Claims Act, 31 U.S.C. Section 3730(d)(2).

2. After prevailing at trial, the relator had previously filed a petition and supplemental petition for fees and costs with the District Court; and

3. By a Memorandum & Order entered February 9, 2011 the District Court granted the petitions in part, and denied them in part, awarding Feldman's attorneys $602,898.63 in attorneys' fees and $25,862.15 in costs, and Dr. Feldman expenses in the amount of $3,121.47 (the Original Fee Award); and

4. By an opinion Dated September 5, 2012, this Court affirmed the judgment of the District Court.

5. The parties have agreed that, based on this Court's affirmance, Relator is entitled to an additional award of reasonable fees and costs based on work performed subsequent to the submission of his requests for fees and costs at the District Court level; and

6. The parties desire not to engage in the further expenses in resolving

any disputes over the additional fees and costs to which Relator would be entitled;

7. By stipulation appended hereto, the parties agreed that:

a. Plaintiff/Relator Daniel Feldman is entitled to an additional award of $107,172.00 in fees and $1,044.20 in additional costs.

b. As a result, the judgment should be amended to provide the following award of total fees and costs to Relator:

$ 710,070.63 fees
$ 26,906.35 costs
$ 3,121.47 direct expenses to relator

together with any applicable post-judgment interest on the Original Fee Award to which Relator is entitled as a matter of law.

Respectfully submitted,

Michael J. Salmanson
Salmanson Goldshaw, P.C.
2 Penn Center, Suite 1230
1500 JFK Boulevard
Philadelphia, PA 19102
(215) 640-0594

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing motion by virtue of filing with the Court's ECF system upon counsel for defendants as follows:

Tracey Tiska,
Counsel for Defendant Cornell University Medical College

Nina Beattie
Counsel for Defendant Wilfred van Gorp

Michael J. Salmonson

September 18, 2012

10-3297-CV(L), 11-0975-CV (CON)

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. DANIEL FELDMAN,

Plaintiff-Appellee,

- v. -

WILFRED VAN GORP AND CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants-Appellants

STIPULATION OF THE PARTIES RE: ADDITIONAL AWARD OF ATTORNEYS' FEES AND COSTS TO RELATOR DANIEL FELDMAN

Now come the parties, Relator Daniel Feldman and Defendants Wilfred van Gorp and Cornell University Medical College, by and through counsel, and hereby stipulate as follows:

WHEREAS plaintiff as a prevailing party relator, is entitled to an award of reasonable attorneys' fees and costs under the False Claims Act, 31 U.S.C. Section

3730(d)(2); and

WHEREAS after prevailing at trial, the relator had previously filed a petition and supplemental petition for fees and costs with the District Court; and

WHEREAS by a Memorandum & Order entered February 9, 2011 the District Court granted the petitions in part, and denied them in part, awarding Feldman's attorneys $602,898.63 in attorneys' fees and $25,862.15 in costs, and Dr. Feldman expenses in the amount of $3,121.47 (the Original Fee Award); and

WHEREAS by an opinion Dated September 5, 2012, this Court affirmed the judgment of the District Court; and

WHEREAS the parties have agreed that, based on this Court's affirmance, Relator is entitled to an additional award of reasonable fees and costs based on work performed subsequent to the submission of his requests for fees and costs at the District Court level; and

WHEREAS the parties desire not to engage in the further expenses in resolving any disputes over the additional fees and costs to which Relator would be entitled;

THEREFORE, the parties hereby stipulate as follows:

1. Plaintiff/Relator Daniel Feldman is entitled to an additional award of $107,172.00 in fees and $1,044.20 in additional costs.

2. As a result, the judgment should be amended to provide the following award of total fees and costs to Relator:

$ 710,070.63 fees
$ 26,906.35 costs
$ 3,121.47 direct expenses to relator

together with any applicable post-judgment interest on the Original Fee Award to which Relator is entitled as a matter of law.

Michael J. Salmanson
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Counsel for Cornell University Medical College

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 10-3297; 11-0975

Caption [use short title]

U.S. ex rel. Feldman v. van Gorp et al.

Motion for: Attorneys' fees and Costs

Set forth below precise, complete statement of relief sought:

Plaintiff/Relator seeks a supplemental award of attorneys' fees and costs in the amount of $107,172.00 in fees and $1,044.20 in costs.

MOVING PARTY: Daniel Feldman

Opposing Party: Wilfred Van Gorp
Cornell Univ. Med. College

☒ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☒ Appellee/Respondent

MOVING ATTORNEY: Michael J. Salmanson

Salmanson Goldshaw, PC
2 Penn Center, Suite 1230
1500 JFK Boulevard
Philadelphia, PA 19102
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msalmans@salmangold.com

OPPOSING ATTORNEY :

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Nina Beattie
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NY, NY 10004
212-668-1900

Nbeattie@bruneandrichard.com

Court-Judge/Agency appealed from: Southern District of New York; Hon. William Pauley

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes ☐ No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Opposing counsel's position on motion:

☒ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☒ No ☐ Don't Know

Is oral argument on motion requested? Yes ☐ No ☒ (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes ☒ No ☐ If yes, enter date: JANUARY 30, 2012

Signature of Moving Attorney:

Michael J. Palmer **Date:** 9/18/2012 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date:_____ By:_____

Form T-1080 (rev. 7-12)

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of September, two thousand twelve.

Before: ROBERT D. SACK,
REENA RAGGI,
DENNY CHIN,
Circuit Judges.

UNITED STATES OF AMERICA ex rel.
DANIEL FELDMAN,

Plaintiff-Appellee,

v.

WILFRED VAN GORP and CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants-Appellants.

JUDGMENT
Docket Nos.: 10-3297 (L)
11-975 (Con)

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED in accordance with the opinion of this court.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 09/26/2012

10-3297 (L)
Feldman v. van Gorp et ano.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: January 30, 2012 Decided: September 5, 2012)

Docket Nos. 10-3297(Lead) 11-975 (Con)

United States of America ex rel. Daniel Feldman,

Plaintiff-Appellee,

- v -

Wilfred van Gorp and Cornell University Medical College,

Defendants-Appellants.*

Before: SACK, RAGGI, and CHIN, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (William H. Pauley III, Judge) denying the defendants' motion for judgment as a matter of law and their motion for a new trial following a jury verdict partially in favor of the plaintiff on his claims brought on behalf of the government pursuant to the False Claims Act, 31 U.S.C. § 3729 et seq., and awarding principally $855,714 in

* The clerk's office is respectfully directed to amend the official caption of this case as shown above.

treble actual damages. We conclude that: 1) where the government has provided funds for a specified good or service only to have defendant substitute a non-conforming good or service, a court may, upon a proper finding of False Claims Act liability, calculate damages to be the full amount of the grant payments made by the government after the material false statements were made; 2) there was sufficient evidence from which a reasonable jury could determine that the false statements at issue were material to the government's funding decision; and 3) the district court did not abuse its discretion in excluding evidence of inaction on the part of the National Institutes of Health in response to the plaintiff's complaint regarding the fellowship program in which he had been enrolled.

Affirmed.

Appearances: TRACEY A. TISKA, R. Brian Black, Eva L. Dietz, on the brief) Hogan Lovells US LLP, New York, New York, for Defendant-Appellant Cornell University.

Nina M. Beattie, Brune & Richard LLP, New York, New York, for Defendant-Appellant Wilfred van Gorp.

MICHAEL J. SALMANSON (Scott B. Goldshaw, on the brief) Salmanson Goldshaw, P.C., Philadelphia, Pennsylvania, for Plaintiff-Appellee.

Jean-David Barnea, Rebecca C. Martin, Sarah S. Normand, Assistant United States Attorneys, of counsel, for Preet Bharara, United States Attorney for the Southern District of New York, for Amicus Curiae, The United States of America.

SACK, Circuit Judge:

The defendants appeal from a judgment of the United States District Court for the Southern District of New York (William H. Pauley III, Judge) denying their motion for judgment as a matter of law and their motion for a new trial following a jury verdict partially in favor of the plaintiff on his claims regarding the misuse of a research training grant brought on behalf of the government pursuant to the False Claims Act, 31 U.S.C. § 3729 et seq., and awarding principally $855,714 in treble actual damages. We conclude that: 1) where the government has provided funds for a specified good or service only to have defendant substitute a non-conforming good or service, a court may, upon a proper finding of False Claims Act liability, calculate damages to be the full amount of the grant payments made by the government after the material false statements were made; 2) there was sufficient evidence from which a reasonable jury could determine that the false statements at issue were material to the government's funding decision; and 3) the district court did not abuse its discretion in excluding evidence of inaction on the part of the National Institutes of Health in response to the plaintiff's complaint regarding the fellowship program in which he had been enrolled.

BACKGROUND

In 1997, appellants Cornell University Medical College ("Cornell") and Dr. Wilfred van Gorp, a professor of psychiatry at Cornell, applied for funding from the Ruth L. Kirschstein National Research Service Award Institutional Research Training Grant program, also known as the "T32" grant program, of the National Institutes of Health ("NIH"). The T32 program funds pre- and post-doctoral training programs in biomedical, behavioral, and clinical research. T32 grants are meant to "help ensure that a diverse and highly trained workforce is available to assume leadership roles related to the Nation's biomedical and behavioral research agenda." NIH Guide, "NIH National Research Service Award Institutional Research Training Grants," at 1 (May 16, 1997), United States ex rel. Feldman v. Van Gorp, No. 10-3297, Joint Appendix ("J.A.") 2437 (2d Cir. Jan. 26, 2012) ("NIH Guide"). Positions funded through T32 grants may not be used for study leading to clinically-oriented degrees, "except when those studies are a part of a formal combined research degree program, such as the M.D./Ph.D." Id. at 2, J.A. 2438. Instead, funded programs must train their fellows "with the primary objective of developing or extending their research skills and knowledge in preparation for a research career." Id.

Institutions applying for T32 grants undergo a two-tiered review process. It begins with a review of the proposal

by a twenty-member "Initial Research Group" ("IRG"), also called a "peer review committee." IRG members are independent experts in scientific fields related to that of the grant application under review; they are not NIH employees. Each member scores applications based on his or her view of its scientific or technical merit guided by specified criteria, including, among other factors: the program director's and faculty's training records, as determined by the success of former trainees; the objective, design, and direction of the program; the caliber of the faculty; the institutional training environment, including the commitment of the institution to training and the resources available to trainees; and the institution's proposed plans for recruiting and selecting high-quality trainees. The scores are then averaged to arrive at an IRG "priority score." Testimony of Dr. Robert Bornstein at 1190-91, July 21, 2010 ("Bornstein Testimony"), J.A. 1955. This score is included with the IRG members' written comments in a summary statement, which is transmitted to the NIH.

The "second tier" of review is performed by the advisory council of the appropriate constituent organization of the NIH, in this case the National Institute of Mental Health ("NIMH"). The advisory council ranks the applications by priority score, and establishes a "pay line" at the point in the list of applications where there is no more funding available; only the applications above the "pay line" are recommended to the

director of the funding institute as potential grant recipients. "The role of the advisory council is not to second-guess the scientific review of the IRG. Rather, [the council] reviews the applications to ensure that they further the goals and interests of the awarding institute. Thus, the IRG review and the resulting high-priority score are keys to NIH funding." Id. at 1190, J.A. 1955-56.

Once an application has placed above the "pay line," the advisory council makes recommendations based on the scientific merit of the proposal, as judged by the IRG, and the relevance of the proposal to the awarding institute's programs and priorities. Funding is typically approved by the NIH for one year, and recipient institutions are eligible for up to four years of additional funding.

In order to renew a T32 grant, the recipient institution (in this case Cornell) must submit an annual renewal application and a progress report detailing the status of its project. In contrast with initial grant applications, renewal applications are reviewed solely by the NIH on a noncompetitive basis. The NIH considers the progress made under the grant and the grant's budget. By regulation, the annual progress report must contain a "comparison of actual accomplishments with the goals and objectives established for the period," and must specify "[r]easons why established goals were not met," if indeed they were not. 45 C.F.R. § 74.51(d)(1)-(2).

Recipient institutions must also "immediately notify" NIH of "developments that have a significant impact" on the research program, including "problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award." Id. § 74.51(f). This notification must also include a "statement of the action taken or contemplated, and any assistance needed to resolve the situation." Id.; see also Draft OIG Compliance Program Guidance for Recipients of PHS Research Awards, 70 Fed. Reg. 71312-01, 71320 (Nov. 28, 2005) ("Prompt voluntary reporting will demonstrate the institution's good faith and willingness to work with governmental authorities to correct and remedy the problem. In addition, reporting such conduct may be considered a mitigating factor by the responsible law enforcement or regulatory office . . . .").

Cornell's initial grant application at issue here sought funding for a fellowship program entitled "Neuropsychology of HIV/AIDS Fellowship." Van Gorp Grant Application at 1, J.A. 2254 (April 24, 1997) ("Grant Application"). The application explained that the two-year fellowship would train as many as six post-doctoral fellows at a time in "child and adult clinical and research neuropsychology with a strong emphasis upon research training with HIV/AIDS." Id. at 2, J.A. 2255. The training program would, according to the application, build on the Cornell faculty's extensive research into the neuropsychology of

HIV/AIDS, which included projects examining distress levels in HIV-AIDS patients during the course of their illness, the relationship between the neuropsychology of HIV/AIDS and patients' abilities to function at work or in school, and the possibility of using neuropsychological testing to predict whether AIDS patients will suffer from dementia. The application further explained that van Gorp would serve as the program director, and that he had a "long history of successful research, training and mentoring of students in HIV[] related work." Id. at 40, J.A. 2295.

The 123-page grant application outlined the fellowship's curriculum in detail. Fellows would be required to take "several formal, core didactic courses," and a number of elective courses. Id. at 45, J.A. 2300. In the first year of the fellowship, fellows would enroll in five core courses, some of which "have been designed specifically for the HIV Neuropsychology Fellowship." Id., J.A. 2300. These core courses would be supplemented by a "large number of courses, lectures, neuroscience educational programs, as well as other seminars in a variety of sub-speciality areas." Id. The curriculum for the second year, which included four core courses, would allow fellows to "develop more independent research skills and devote more time to their HIV research." Id. The fellows' progress under the grant would be monitored monthly by a formal training committee comprised of several faculty members, as "[o]ngoing

evaluation of the curriculum, trainees and faculty is an integral part of the training program." Id. at 48, J.A. 2303.

The Cornell grant application identified a list of fourteen faculty members who would serve as "Key Personnel," which the NIH defined as "individuals who contribute to the scientific development or execution of the project in a substantive way." NIH Grant Application Instructions at 26, J.A. 2612 (June 8, 1999). The application described in detail some of these research projects. It also asserted, "Our faculty has a solid track record in quality and productive research in brain-behavior issues, including research in HIV/AIDS-related research [sic]." Grant Application at 48, J.A. 2303. And the application identified additional institutions which would serve as clinical resources, including Cornell University, Memorial Sloan-Kettering Cancer Center, St. Vincent's Hospital, and Gay Men's Health Crisis Center.

In describing the fellowship program's commitment to research training, the grant application explained that "the majority of [the fellows'] clinical work will be with persons with HIV infection." Grant Application at 44, J.A. 2299. Fellows would "devote an average of 75% of their time to research and an average of 25% [of their] time to clinical work with persons with HIV/AIDS and other neuropsychiatric disorders." Id.

The IRG gave Cornell's grant application a high priority score, and the NIH subsequently approved funding for two

fellows for the fiscal year beginning September 30, 1997, with the possibility of additional funding for up to four additional years. Cornell submitted renewal applications in each of the following four years, from fiscal year 1999 (July 1, 1998, through June 30, 1999) to fiscal year 2002 (July 1, 2001, through June 30, 2002), all of which the NIH approved. In the accompanying annual progress reports, Cornell and van Gorp indicated that there had been no material alterations to the program as described in the original grant application.

In the renewal application for the second renewal year (the third year overall), for example, Cornell and van Gorp wrote that "[a]ll core and supporting faculty listed in our original application are continuing. . . . There have been no alterations in the courses or training program from that listed in the original application, except for the addition of two [specified] courses . . . ." 1999 Progress Report at 7, J.A. 2402 (January 19, 1999). The renewal application also explained that the program had been relocated from Cornell's White Plains campus to its New York City (Manhattan) campus in order to provide fellows with "immediate access to subjects and patients who have HIV/AIDS." Id. The renewal applications for the fourth and fifth year stated that "[t]he core structure of our training program has remained the same as in years past and to that described in our initial application." 2000 Progress Report at 4, J.A. 2411 (January 24, 2000); 2001 Progress Report at 5, J.A.

2422 (January 22, 2001). The NIH approved each of these renewal applications.

In September 1998, at about the time the first renewal-year began, Daniel Feldman, the plaintiff,[1] was selected by Cornell to participate in the fellowship program. He left the program in December 1999, before the completion of his two-year fellowship. Other fellows who participated in the program included Elizabeth Ryan, Clifford Smith, Kimberly Walton Louis, and Evan Drake. At trial, Feldman presented evidence that the actual fellowship deviated in many ways from that described in the Grant Application, and that Cornell and van Gorp failed to inform NIH of these deviations.

Testimony presented at trial indicated that some of the faculty members identified as "Key Personnel" in the initial application did not in fact contribute in any substantive way to the fellowship program. Van Gorp acknowledged that the contributions to the program of two of these faculty members, Dr. Tatsuyki Kakuma and Dr. Michael Giordano, were considerably limited, if not entirely eliminated, by the fact that the two doctors were not in physical proximity to the fellows during the grant period. Many fellows, according to their testimony, had little or no interaction with the remaining key personnel, and

[1] Because this suit is being brought by Feldman on behalf of the United States, Feldman is technically the "plaintiff-relator." See infra, note **[3]**. We nonetheless refer to him simply as the "plaintiff."

were unaware that these faculty members were or were supposed to be available as resources. In addition, according to this testimony, fellows were largely unaware of research opportunities at medical centers other than Cornell.

There was also testimony in the district court to the effect that Cornell and van Gorp failed to notify NIH that the curriculum outlined in the initial grant application was never implemented. Several core courses identified in the application were not regularly conducted for fellows, and fellows were not informed that these courses were a required component of the program. Moreover, according to this testimony, fellows were never evaluated or supervised by the training committee referred to in the Grant Application.

Feldman also presented evidence that the research and clinical training described in the initial grant application differed significantly from the actual training received. NIH rules provide that fellows in a T32 program "must devote their time to the proposed research training and must confine clinical duties to those that are an integral part of the research training experience." NIH Guide at 3, J.A. 2439; T32 Training Grant Announcement at 9, J.A. 2568 (June 16, 2006). And, in accordance with these requirements, the grant application stated that "the majority of [the fellows'] clinical work will be with persons with HIV infection." Grant Application at 44, J.A. 2299. Further, in explaining the training program's relocation from

White Plains to Manhattan, the third-year renewal application explained that "[f]ellows [would be] housed within a large, medical/surgical setting with immediate access to subjects and patients who have HIV/AIDS." 1999 Progress Report at 7, J.A. 2402.

But, as the plaintiff summarizes the trial testimony, out of the 165 clinical cases that the fellows saw during their fellowship, only three involved HIV-positive patients.[2] Pl.'s Br. at 22. Several fellows testified that much of the research that they performed under the grant program had no relation to HIV or AIDS at all. For example, Clifford Smith testified that the research projects he worked on under the T32 grant were primarily related to epilepsy and aging, and did not involve an HIV population. Out of the eight research projects that Evan Drake worked on during his fellowship, he said, only one focused specifically on HIV. Feldman similarly told the court that he worked on only one HIV-focused project during his time as a fellow.

In July 2001, after he had left the program, Feldman submitted a letter to the NIH complaining about the program's focus on clinical work rather than research, and the fellows'

[2] The parties stipulated that of Ryan's 32 clinical patients, two were HIV positive; of Smith's 35 clinical patients, none were HIV positive; of Louis's 23 patients, none were HIV positive; of Drake's 48 patients, none were HIV positive; and of Feldman's 27 patients, one was HIV positive.

limited access to HIV-positive patients. In March 2002, he submitted another letter to the NIH, again complaining that the fellowship program deviated from its description in the initial grant application. In response, the NIH asked Cornell to conduct an investigation of the complaint, which Cornell completed in June 2003. Cornell then sent Feldman a letter informing him that the investigation uncovered no wrongdoing.

On October 14, 2003, Feldman filed a qui tam complaint pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq.,[3] alleging that Cornell and van Gorp made false claims to

[3] In a qui tam action, a private plaintiff, known as a relator, brings suit on behalf of the Government to recover a remedy for a harm done to the Government. See United States ex rel. Eisenstein v. City of New York, [556 U.S. 928, 932] (2009) (describing qui tam actions under the False Claims Act, 31 U.S.C. § 3729 et seq.); see also Black's Law Dictionary 1282 (8th ed. 2004) (defining "qui tam action" as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive"). Qui tam plaintiffs, even if not personally injured by a defendant's conduct, possess constitutional standing to assert claims on behalf of the Government as its effective assignees. There is, however, no common law right to bring a qui tam action; rather, a particular statute must authorize a private party to do so.

Woods v. Empire Health Choice, Inc., 574 F.3d 92, 97-98 (2d Cir. 2009) (footnote and some citations omitted; second brackets in original).

Where the United States has elected not to proceed with the action, as here, the relator is entitled personally to recover

the United States in the Grant Application and in the four renewal applications. Feldman alleged that statements made in these applications were false because the fellowship's curriculum, resources, faculty members, and training differed significantly from that described in the application, and in the subsequent renewal applications representing that no changes had been made to the program. The complaint was unsealed in April 2007, after the United States declined to intervene in this action. See Cook County v. United States ex rel. Chandler, 538 U.S. 119, 122 (2003) ("The relator must inform the Department of Justice of her intentions and keep the pleadings under seal for 60 days while the Government decides whether to intervene and do its own litigating." (citing 31 U.S.C. § 3730(b)(2)-(c))).

On January 9, 2009, after discovery had been completed, Cornell and van Gorp moved for summary judgment. On December 7, 2009, the district court denied the motion, concluding that there were genuine issues of material fact as to whether the defendants made false statements in both the initial grant application and the renewal applications, and whether those statements were material to the funding decisions. United States ex rel. Feldman v. Van Gorp ("Feldman I"), 674 F. Supp. 2d 475, 482-83 (S.D.N.Y. 2009). The district court also concluded that the plaintiff need

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between 25 and 30 percent of the proceeds of the action or settlement, plus reasonable attorney's fees. See 31 U.S.C. § 3730(d)(2).

not establish actual damages to the government as an element of an FCA claim because that statute's provision of civil penalties for false and fraudulent claims allowed courts to "find a violation even in the absence of proof of damages to the United States." Id. at 481. The court did not address, however, whether Feldman's recovery would be limited to statutory damages.

On December 18, 2009, the defendants moved for reconsideration of the summary judgment decision, arguing that the district court had erred in failing to address the issue of whether Feldman should be limited to statutory penalties because he had not presented sufficient evidence of actual damages to the United States. On May 3, 2010, the district court denied the motion, explaining that although the damages to the United States could not be calculated in the same way they would be in a standard breach-of-contract action because no tangible benefit had been received, the plaintiff would not be limited to statutory damages. United States ex rel. Feldman v. Van Gorp ("Feldman II"), No. 03 Civ. 8135, 2010 WL 1948592, at *1-*2, 2010 U.S. Dist. LEXIS 47039, at *4-*6 (S.D.N.Y. May 3, 2010). The court said that the "'benefit of the bargain' to the government is providing funds to recipients who best fit its specified criteria and that this benefit is lost when funds are diverted to less eligible recipients." Id. at *2, 2010 U.S. Dist. LEXIS 47039, at *4-*5. Therefore, "if the fact-finder concludes that the government would not have awarded the grant absent the false

claims, it may properly conclude that the measure of damages is the total amount the government paid." Id., 2010 U.S. Dist. LEXIS 47039, at *6.

Before trial, Feldman submitted a motion in limine to exclude evidence including that of NIH's inaction towards Cornell and van Gorp in response to Feldman's complaints about the fellowship program. On July 8, 2010, the district court granted Feldman's motion to exclude that evidence. The court concluded that the evidence of NIH's inaction was irrelevant and therefore inadmissible under Rule 402 because "no discovery was conducted concerning the standards [NIH used] to determine the existence of misconduct and whether those standards are at all similar to the elements of an FCA claim." United States ex rel. Feldman v. van Gorp ("Feldman III"), No. 03 Civ. 8135, 2010 WL 2911606, at *3, 2010 U.S. Dist. LEXIS 73633, at *7 (S.D.N.Y. July 8, 2010). Moreover, the court concluded, even if "marginally relevant," the evidence would have been excluded pursuant to Rule 403 because of the possibility that it would confuse or mislead the jury.[4] Id.

The case was tried to a jury for eight days in July 2010, resulting in a partial verdict for Feldman. The jury found the defendants not liable for false statements in the Grant

[4] The district court similarly excluded evidence of inaction on the part of the New York State Department of Education and the American Psychological Association, but the defendants do not challenge the exclusion of that evidence on appeal.

Application and the first renewal application, but found liability based on the renewal applications for the third, fourth and fifth years of the grant, i.e., the second, third and fourth renewal years. On August 3, 2010, the district court awarded actual damages in treble the amount NIH paid for the last three renewal years of the grant –- the trebling being provided for in the FCA, 31 U.S.C. § 3729(a)(1) -- totaling $855,714. The judgment also included statutory penalties of $32,000, for a total of $887,714. The district court also awarded to the plaintiff $602,898.63 in attorney's fees, $25,862.15 in costs, and $3,121.47 in expenses.

On August 25, 2010, the defendants filed a motion for judgment as a matter of law under Rule 50(b), or in the alternative, for a new trial pursuant to Rule 59. The defendants argued that there was insufficient evidence from which the jury could properly have concluded that the false statements at issue were material to the NIH's decisions to renew the T32 grant, and that the court should grant judgment as a matter of law, or that such a conclusion was against the weight of the evidence and warranted a new trial. The defendants also argued that the district court erred in determining as a matter of law that damages were equal to the entire grant amounts for the years in which liability was found rather than submitting that question to the jury.

The district court denied this motion on December 9, 2010. United States ex rel. Feldman v. van Gorp ("Feldman IV"), No. 03 Civ. 8135, 2010 WL 5094402, at *5, 2010 U.S. Dist. LEXIS 130358, at *14-*15 (S.D.N.Y. Dec. 9, 2010). The court concluded that Feldman had presented sufficient evidence for the jury to conclude that the false statements were material to the NIH's funding decisions, noting that NIH's guidelines and instructions on the renewal applications unambiguously stated that it should be notified of any changes made to the grant program. Id. at *2-*5, 2010 U.S. Dist. LEXIS 130358, at *4-*14. The district court also relied on its opinion in Feldman III to deny the motion for a jury trial on damages. Id. at *5, 2010 U.S. Dist. LEXIS 130358, at *13-*15.

The defendants appeal.

DISCUSSION

The defendants contend that: (1) the district court erred in its methodology for determining damages and in determining the amount of those damages, as a matter of law; (2) the jury did not have sufficient evidence from which to conclude that the false statements at issue were material to the funding decision; and (3) the district court erred in excluding evidence of NIH's "inaction" in response to Feldman's complaint.

I. Damages

The False Claims Act prohibits a person from "knowingly present[ing], or caus[ing] to be presented, [to an officer or

employee of the United States Government,] a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). Liability under the Act also requires a showing of materiality.[5] Under the Act as currently in force, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." Id. § 3729(b)(4); see also Neder v. United States, 527 U.S. 1, 16 (1999) ("In general, a false statement is material if it has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." (brackets in original; internal quotation marks omitted) (criminal fraud case)).

The FCA provides for damages equal to "3 times the amount of damages which the Government sustains because of the act of that person," in addition to a "civil penalty." 31 U.S.C. § 3729(a)(1). The Act does not specify how damages are to be calculated, but the Supreme Court has recognized that the purpose of damages, even as multiplied, under the Act is to make the

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[5] In 2009, Congress amended the False Claims Act to add a specific requirement that to be actionable a false statement must be material. 31 U.S.C. § 3729(a)(1)(B). It purports to apply prospectively and therefore would not apply to this case. See Feldman I, 674 F. Supp. 2d at 480. Never prior to that enactment and absent its materiality provision did we explicitly require a showing of materiality in FCA cases, although six of the seven circuits to address the issue did. See id. (citing decisions). We need not decide here whether a showing of materiality was required because, assuming that it was, the requirement has been met, as we explain in Part II, below.

government "completely whole" for money taken from it by fraud. United States ex. rel. Marcus v. Hess, 317 U.S. 537, 551-52 (1943), superseded by statute as recognized by United States ex rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94 (2d Cir. 2010) ("We think the chief purpose of the statutes here [predecessors of the current False Claims Act, providing for double rather than treble damages] was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."). Because the district court here determined that damages could be established as a matter of law, we review that conclusion de novo. See Bessemer Trust Co., N.A. v. Branin, 618 F.3d 76, 85 (2d Cir. 2010) (stating that where the district court has determined damages, we review its application of legal principles de novo and its factual findings for clear error).

The question of how damages should be measured in an FCA case where "contracts entered into between the government and the Defendants did not produce a tangible benefit to the [government]," United States ex. rel. Longhi v. United States, 575 F.3d 458, 473 (5th Cir. 2009), is one of first impression in this Court. The defendants argue both that the district court erred in concluding that application of the standard benefit-of-the-bargain calculation as a methodology for determining damages was inappropriate in this case, and that it erred in deciding the

amount of damages as a matter of law based on the jury's verdict, rather than allowing the jury to assess the amount of damages due.

A. Proper Measure of Damages

In most FCA cases, damages are measured as they would be in a run-of-the-mine breach-of-contract case –- using a "benefit-of-the-bargain" calculation in which a determination is made of the difference between the value that the government received and the amount that it paid. See United States v. Foster Wheeler Corp., 447 F.2d 100, 102 (2d Cir. 1971) (collecting cases); cf. Terwilliger v. Terwilliger, 206 F.3d 240, 248 (2d Cir. 2000) ("[S]o far as possible, [New York contract] law attempts to secure to the injured party the benefit of his bargain, subject to the limitations that the injury -- whether it be losses suffered or gains prevented -- was foreseeable, and that the amount of damages claimed be measurable with a reasonable degree of certainty and, of course, adequately proven." (internal quotation marks omitted)). This method of calculation is employed, for example, when the government has paid for goods or services that return a tangible benefit to the government.

There are generally two ways of determining damages in such cases. First, if the non-conforming goods or services have an ascertainable market value, then damages are measured according to the "'difference between the market value of the

product [the government] received and retained and the market value that the product would have had if it had been of the specified quality.'" United States v. Science Application Int'l Corp., 626 F.3d 1257, 1279 (D.C. Cir. 2010) (quoting United States v. Bornstein, 423 U.S. 303, 316 n.13 (1976)) (alterations omitted). If the non-conforming goods' or services' market value is not ascertainable, then the fact-finder determines the amount of damages by calculating the difference between "the amount the government actually paid minus the value of the goods or services the government received or used," as judged by the fact-finder. Id.

The defendants contend that a "benefit-of-the-bargain" calculation was appropriate in this case, and that the district court erred by awarding the government the full amount of the grant for the years for which the violations were found rather than the difference between the value of the training promised and that actually delivered. The plaintiff argues, to the contrary, that a different measure of damages is appropriate in cases such as this, where "the defendant fraudulently sought payments for participating in programs designed to benefit third-parties rather than the government itself" and the government received nothing of tangible value from the defendant. Id.; see also Longhi, 575 F.3d at 473 ("[W]here there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in

the amount the government actually paid to the Defendants."). This approach rests on the notion that the government receives nothing of measurable value when the third-party to whom the benefits of a governmental grant flow uses the grant for activities other than those for which funding was approved. In other words, when a third-party successfully uses a false claim regarding how a grant will be used in order to obtain the grant, the government has entirely lost its opportunity to award the grant money to a recipient who would have used the money as the government intended.

The plaintiff and the United States, as amicus curiae, argue that this is such a case: The government received no tangible benefit from the T32 grant -- students and others may have, but not the government. The grant represented an attempt to, but did not thereby, promote "child and adult clinical and research neuropsychology with a strong emphasis upon research training with HIV/AIDS." Grant Application at 2, J.A. 2255. The plaintiff argues that the government is therefore entitled to damages equal to the full amount of grants awarded to the defendants based on their false statements.

We conclude that the measure of damages advocated by the plaintiff and the United States is correct.

Although we have not addressed this question, several of our sister circuits have done so in decisions that support the conclusion we now reach. See Science Application, 626 F.3d at

1279 (D.C. Cir.); Longhi, 575 F.3d at 473 (5th Cir.); United States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008) ("The government offers a subsidy . . . with conditions. When the conditions are not satisfied, nothing is due."); United States v. Mackby, 339 F.3d 1013, 1018-19 (9th Cir. 2003) ("Had Mackby been truthful, the government would have known that he was entitled to nothing . . . .").[6]

The defendants point out, however, that other courts have applied the "benefit-of-the-bargain" calculation in cases they assert are similar to this one. They argue that because "[t]he ultimate beneficiary of all government grants or contracts is the public regardless of who receives the 'direct' benefit," the flow of benefits to a third-party should not be determinative of the damages measure. Defs.' Reply Br. at 5.

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[6] District courts within this Circuit have also employed this methodology. See United States v. Karron, 750 F. Supp. 2d 480, 493 (S.D.N.Y. 2011), appeal filed, No. 11-1924 (concluding that the defendant was liable for the full amount of a government-funded research grant because he "cannot establish that the Government received any ascertainable benefit from its relationship with CASI. Even assuming that CASI in fact met various milestones and provided reports to the Government, such actions yielded no tangible benefit to the Government."); United States ex rel. Antidiscrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06 Civ. 2860, 2009 WL 1108517, at *3, 2009 U.S. Dist. LEXIS 35041, at *9 (S.D.N.Y. Apr. 24, 2009) ("Westchester has identified no tangible asset or structure it provided to the United States such that this theory would be applicable; it did not have a contract with the government to build any sort of facility for the government's use or to provide it with goods.").

In support of this theory, the defendants cite United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977). There, the Third Circuit applied a benefit-of-the-bargain calculation in an FCA case involving the defendants' fraudulent statements to the Federal Housing Administration regarding the condition of various residential properties. Relying on these representations, the agency insured mortgages on several properties, and the agency was required to pay these mortgages when the purchasers defaulted. Id. at 349.

The government argued that its damages were the total amount of the mortgage debt it had assumed, insisting that "had [the defendant] not furnished the false certification, it would not have insured the mortgage[s] and therefore would not have been called upon to make any payment." Id. at 351.

The Third Circuit rejected this argument.

> The government's actual damage was the decrease in worth of the security that was certified as being available, measured by the difference in value between the houses as falsely represented, and as they actually were. Since the government was given security which was less than what it was represented to be, the damages are essentially similar to those sustained when a defective article is purchased in a fraudulent transaction. In those instances, decisional law sets the damages as the difference in cost between that contracted for and that received.

Id.

Similarly, in Coleman v. Hernandez, 490 F. Supp. 2d 278 (D. Conn. 2007), a case involving the so-called "Housing Choice Voucher Program" or "Section 8," under which the government provides housing subsidies to qualifying individuals, the district court declined to award the plaintiff the full amount that the government paid to subsidize her rent, even though her landlord had allegedly made false statements to the government by overcharging the plaintiff for rent. Id. at 280-83. The Coleman court acknowledged that in other FCA cases, courts had awarded damages equal to the full amount of the government's payment. Id. at 281-82. But the court decided that in the case before it, the awardable damages were equal to the difference between the market rent, and the amount that the landlord charged the government including the additional, improper payments it had received, i.e., the amount of the overcharge. Id. at 282. The government was then made whole, receiving the full benefit of its bargain –- trebled by statute.

The defendants also look to Medicaid and Medicare FCA cases for support. They contend that adopting the plaintiff's theory of damages, all such cases would result in damages equal to the full amount the government paid in reimbursements to physicians because "the direct benefit always goes to patients." Defs.' Reply Br. at 5.

This is not, however, the methodology generally employed by courts evaluating FCA claims based on Medicaid or

Medicare fraud. In United States ex. rel. Tyson v. Amerigroup Illinois, Inc., 488 F. Supp. 2d 719 (N.D. Ill. 2007), the court awarded damages based on the difference between the amount of Medicare payments that the defendant should have received, and the amount that it had actually charged the government. Id. at 739. Similarly, in United States ex. rel. Doe v. DeGregorio, 510 F. Supp. 2d 877 (M.D. Fla. 2007), the court also held that damages were the "the amount of money the government paid out by reason of the false claims over and above what it would have paid out if the claims had not been false." Id. at 890.

In short, in each of the cases cited by the defendants, the government paid for a contracted service with a tangible benefit -- whether it be medical care, security on mortgages, or subsidized housing -- but paid too much. The government in these cases got what it bargained for, but it did not get all that it bargained for. Thus, courts treated the difference between what the government bargained for and what it actually received as the measure of damages. Here, by contrast, the government bargained for something qualitatively, but not quantifiably, different from what it received.

This approach comports with the one we discussed in making a sentencing calculation of loss in United States v. Canova, 412 F.3d 331, 352 (2005) (rejecting argument that abbreviated medical tests performed by the defendant were as clinically sound as full tests required by Medicare so that the

government sustained no loss). There, we explained that it was not a court's task to second-guess a victim's judgment as to the necessity of specifications demanded and paid for. See id. ("Whether the testing time on a pacemaker, the number of rivets on an airplane wing, or the coats of paint on a refurbished building is a matter of necessity or whim, the fact remains that the victim has been induced to pay for something that it wanted and was promised but did not get, thereby incurring some measure of pecuniary 'loss.'") To be sure, Canova recognized that "a victim's loss in a substitute goods or services case" does not "necessarily equal[] the full contract price paid." Id. at 353. But this was not because a defendant had the right to an offset for the value of the substituted good or service. Rather, the proper focus of any loss calculation was on "the 'reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose,' plus the 'reasonably foreseeable cost of rectifying the actual or potential disruption to [the victim's] operations caused by the product substitution." Id. (quoting U.S.S.G. § 2f1.1, cmt n.8(c)). Canova emphasized that a court calculating loss cannot simply "rewrit[e] the parties' contract to excise specifications paid for but not received and, thereby, conclud[e] that the victim sustained no [or a reduced] loss." Id.

Canova's reasoning supports the challenged loss calculation. As a result of the fraudulent renewals, the government was paying for a program that was not at all as specified. By contrast to the Medicare cases cited by defendants, the government did not receive less than it bargained for; it did not get the "neuropsychology with a strong emphasis upon research training with HIV/AIDS" program it bargained for at all. Further, nothing in the record indicates that it could now secure such a program at any lesser cost. We therefore conclude that the appropriate measure of damages in this case is the full amount the government paid based on materially false statements.

B. Fraudulent Inducement

The defendants acknowledge that courts have applied the plaintiff's theory of damages in cases including Mackby, Rogan, and Longhi, but argue that those cases are distinguishable from this one because the defendants in each of those cases obtained funds through fraudulent inducement -- and that any such theory would fail here because no liability was found with respect to the Grant Application. "In a fraudulent inducement case, [it is] the false statements [that] allow the defendant to obtain the funding in the first place." Defs.' Reply Br. at 9.

According to the defendants, because a defendant in a fraudulent inducement case would not be eligible for any funding received after the initial false claim, a court in such a case could properly conclude that the defendant is liable for the

entire amount that the government paid. But "[h]ere, the jury expressly found that the initial Application contained no false statements, and there was no false certification ever at issue." Id. The defendants argue that Mackby, Rogan, and Longhi therefore do not support the damages theory employed by the district court.

We see no principled distinction, however, between fraudulently inducing payment initially, thereby requiring all payments produced from that initial fraud to be returned to the government (trebled and with certain fees and costs added as provided by statute), and requiring payments based on false statements to be returned to the government when those false statements were made after an initial contractual relationship based on truthful statements had been established. Although it may be true that under a fraudulent inducement theory, "subsequent claims for payment made under the contract [that] were not literally false, [because] they derived from the original fraudulent misrepresentation, [are also] . . . actionable false claims," Longhi, 575 F.3d at 468 (second brackets in original; internal quotation marks omitted), this proposition simply speaks to the time period for which FCA liability may be found. It does not suggest that without fraudulent inducement, no subsequent false statements can result in FCA liability.

If the government made payment based on a false statement, then that is enough for liability in an FCA case, regardless of whether that false statement comes at the beginning of a contractual relationship or later. The only difference would be that liability begins when the false statement is made and relied upon, rather than at the beginning of the contractual relationship, as it would be in a fraudulent inducement case. Here, the jury found that materially false statements had been made by the defendants in years 3, 4, and 5 of the grant, and the court properly awarded damages based on that finding.

C. Damages as a Matter of Law

The defendants argue that the calculation of damages should have been decided as a question of fact by a jury, not as a matter of law by the district court. Indeed, in FCA cases, the jury ordinarily does determine the amount of damages to be imposed upon the defendant. See Chandler, 538 U.S. at 132. We conclude, however, that here, where the question is not the benefit of the bargain between the plaintiff and the defendants, and the amount of each payment for which liability has been assessed is not in dispute, no further finding of fact as to the amount of the damages was necessary.

As the government correctly observes in its amicus brief, awarding damages in this manner is not novel. And often, the amount of damages in such cases has been determined as a matter of law in the course of the court's grant of summary

judgment to the plaintiff. See, e.g., Longhi, 575 F.3d at 461 (affirming summary judgment and damages award); United States v. TDC Mgmt. Corp., 288 F.3d 421, 428 (D.C. Cir. 2002) (agreeing that the district court could properly decide the damages award where the government received no benefit from the transaction).

United States ex rel. Antidiscrimination Center of Metro New York, Inc. v. Westchester County, No. 06 Civ. 2860, 2009 WL 1108517, 2009 U.S. Dist. LEXIS 35041 (S.D.N.Y. Apr. 24, 2009), is illustrative. There the federal government paid approximately $52 million as part of a federal grant to Westchester County for the purposes of housing and community development. Id. at *2-*4, 2009 U.S. Dist. LEXIS 35041, at *5-*11. The grant required the county to certify that it would "conduct an analysis of impediments . . . to fair housing choice, including those impediments imposed by racial discrimination and segregation, to take appropriate actions to overcome the effects of any identified impediments, and to maintain records reflecting the analysis and actions." Id. at *1, 2009 U.S. Dist. LEXIS 35041, at *2-*3. The court granted summary judgment for the plaintiff after finding that Westchester County had not conducted the analysis as promised. The court agreed with the plaintiff's contention that damages should be the full amount the government paid, and rejected the county's argument that the damages question should be submitted to the jury. There, as here, "the United States did not get what it paid for," and there was no

role for the jury because "Westchester's damages cannot be reduced by reference to the alleged 'benefit' it provided to HUD." Id. at *3, 2009 U.S. Dist. LEXIS 35041, at *9.

We conclude that in the case before us, inasmuch as the damages equal the full amount that the government paid and that amount is not in dispute, they were properly determined by the district court as a matter of law.

D. Sufficiency of the Evidence

Finally, the defendants contend that the plaintiff did not submit sufficient evidence to the jury to establish by a preponderance of the evidence that the government suffered damages equal to the full amount of the T32 grant. The defendants argue that "to prove that the amount of damages was the entire amount of the grant, a relator would be required to prove that the government received no value -- at all -- through the grant work it funded." Defs.' Br. at 37.

The defendants support this contention by citing benefit-of-the-bargain cases. The defendants' argument is therefore unavailing. Unlike a benefit-of-the-bargain case, no specific amount of damages must be proved because, as we have explained at length, damages in this case equal the entire amount of the grant that was lost as a result of the fraud.

II. Materiality

The defendants assert that the false statements to the government that are at issue were not material to the

transactions in question. The district court therefore erred, they say, in denying the defendants' motion for judgment as a matter of law and for a new trial.[7]

We conclude that the jury had sufficient evidence from which to conclude, as it did, that the defendants' false statements materially influenced NIH's decisions to renew the T32 grant.

A motion for a new trial will ordinarily be granted "so long as the district court determines that, in its independent judgment, the jury has reached a seriously erroneous result or [its] verdict is a miscarriage of justice." Nimely v. City of New York, 414 F.3d 381, 392 (2d Cir. 2005) (internal quotation marks omitted). We review the district court's denial of a motion for a new trial for abuse of discretion. Id.

A motion for judgment as a matter of law may be granted only "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). "A court evaluating such a motion cannot assess the weight of conflicting evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury." Black v. Finantra Capital, Inc., 418 F.3d

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[7] For the reasons referred to in note **[5]**, supra, we assume that materiality is required by the pre-2009 version of the FCA, although we need not decide that issue on this appeal.

203, 209 (2d Cir. 2005) (internal quotation marks omitted). Because such a judgment is made as a matter of law, we review it de novo. We must "consider the evidence in the light most favorable to the party against whom the motion was made and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence." Id. at 208-09 (internal quotation marks omitted).

The district court concluded that the plaintiff had "presented significant documentary evidence to support a finding of materiality." Feldman IV, 2010 WL 5094402, at *2, 2010 U.S. Dist. LEXIS 130358, at *5.

First, the parties stipulated that in order for a grantee to receive additional funding after the initial grant year, the "grantee must submit a noncompetitive renewal application . . . includ[ing] a progress report which NIH expects will provide information about the trainees['] activities during the previous funding period." Id. Second, the renewal instructions for the T32 grant contain a statement explaining that "'Progress Reports provide information to awarding component staff that is essential in the assessment of changes in scope or research objectives . . . from those actually funded. They are also an important information source for the awarding component staff in preparing annual reports, in planning programs, and in communicating scientific accomplishments to the public and to Congress.'" Id., 2010 U.S. Dist. LEXIS 130358, at *6 (quoting

NIH Grant Continuation Instructions at 7, J.A. 2462). Third, the renewal instructions direct grantees to "highlight progress in implementation and developments or changes that have occurred. Note any difficulties encountered by the program. Describe changes in the program for the next budget period, including changes in training faculty and significant changes in available space and/or facilities." Id. (internal quotation marks and brackets omitted). The instructions also ask for "'information describing which, if any, faculty and/or mentors have left the program.'" Id. at *3, 2010 U.S. Dist. LEXIS 130358, at *6-*7 (quoting T32 Program Announcement PA-06-648 at 22, J.A. 2581 (June 16, 2006)).

The district court rejected the defendants' argument that the jury was required to accept Dr. Robert Bornstein's unrebutted testimony on the issue of materiality. Id., 2010 U.S. Dist. LEXIS 130358, at *7. Bornstein was a member of the IRG that reviewed the defendants' initial grant application. At trial, he testified as to the factors he considered material to his analysis of a grant application. He asserted that although he reviewed the application, he did not expect that every faculty member identified in the initial grant application would be involved with the fellowship program. He also testified that he did not expect the fellowship program to follow the exact curriculum outlined in the initial application. The defendants

argued that this testimony established that not all false statements in the renewal applications were material.

The district court rejected this argument because Bornstein never reviewed the renewal applications, nor did he have an independent recollection of reviewing the initial grant application. Id., 2010 U.S. Dist. LEXIS 130358, at *7-*8. The court also concluded that "[t]he absence of testimony by a government official supporting a finding of materiality does not mean that the jury was required to accept Bornstein's testimony." Id., 2010 U.S. Dist. LEXIS 130358, at *7. "[T]he jury was well within its bounds to credit NIH's unambiguous guidelines and instructions over Bornstein's conclusory testimony that little in the Grant Application really would have mattered to him had he remembered reviewing it at all." Id., 2010 U.S. Dist. LEXIS 130358, at *8.

On appeal, the defendants do not dispute that the renewal applications contained NIH's instructions and guidelines. They contend instead that "none of these statements, taken individually or together, establish what information was material to NIH's funding decisions on renewals," Defs.' Br. at 47, "the Renewal Instructions and the Program Announcement are silent as to what information matters to NIH for purposes of its funding decision." Id. at 52. The defendants argue in substance that there is no evidence from which the jury could have decided that

the statements it found to be false materially influenced NIH's decision to renew the T32 grant.[8]

This argument, however, misapprehends the focus of the materiality analysis. In Rogan, the defendant hospital admitted patients through illegal referrals in violation of the Anti-Kickback Act, 42 U.S.C. § 1320a-7b. 517 F.3d at 452. Because of the violation, the defendant was ineligible to receive Medicare payments. The defendant did not deny that it had violated the Act, but instead argued that its failure to disclose information regarding the illegal referrals was immaterial to the government's decision to approve the hospital's Medicare claims, because materiality could only be established if a government

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[8] The defendants also argue, however, that the district court erred in interpreting NIH's guidelines as "unambiguous" -- in other words, that to the extent the plaintiff did point to evidence of materiality, that evidence was insufficient to support a jury verdict. Defs. Br. at 52. The defendants note that the renewal application's instructions do not specify what information needs to be included in a progress report, only that the report should include "difficulties" with or "changes" to a grant program. Id. at 53. The instructions do not explicitly state that grantees must report all changes. Because the NIH guidelines are "necessarily ambiguous," defendants argue that the court cannot rely upon these guidelines as a "legal standard for materiality." Id.

But the district court never relied on these guidelines, nor instructed the jury to rely on these guidelines, as a "standard for materiality." The guidelines served instead as evidence that the jury was permitted to rely upon in evaluating what was material to the government in its monitoring of grants. Therefore, we agree with the district court that they provided sufficient evidence from which the jury could reach a conclusion as to materiality. To the extent that these guidelines are ambiguous, it was the jury's function to resolve any disputes about their meaning.

employee involved in the decision making process testified that the government would have terminated payments. Id.

The court rejected this view of materiality, explaining that a "statement or omission is 'capable of influencing' a decision even if those who make the decision are negligent and fail to appreciate the statement's significance." Id. As the court stated, "[t]he question is not remotely whether [the applicant] was sure to be caught . . . but whether the omission could have influenced the agency's decision." Id.

In short, even if a program officer does not subjectively consider a statement to be material, it can be found to be material from an objective standpoint because it is "capable of influencing" the program officer. Id. As the plaintiff in this case argues, materiality is "determined not by what a program officer at NIH declares material, but rather [is] based on the agency's own rules and regulations." Pl.'s Br. at 48.

The Rogan court discussed the purpose of laws prohibiting fraud:

> Another way to see this is to recognize that laws against fraud protect the gullible and the careless -- perhaps especially the gullible and the careless -- and could not serve that function if proof of materiality depended on establishing that the recipient of the statement would have protected his own interests. The United States is entitled to guard the public fisc against schemes designed to take advantage of overworked, harried, or inattentive disbursing officers;

> the False Claims Act does this by insisting that persons who send bills to the Treasury tell the truth.

517 F.3d at 452 (citation omitted).

We agree with the plaintiff that the test for materiality is an objective one. It does not require evidence that a program officer relied upon the specific falsehoods proven to have been false in each case in order for them to be material. The fact-finder must determine only whether the proven falsehoods have a "natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4).

To decide otherwise –- that materiality must be established in each case based on the testimony of a decisionmaker –- would subvert the remedial purpose of the FCA. The resolution of each case would depend on whether such a decisionmaker could be identified and located, and whether that particular person would have treated the claims as material, regardless of whether they were one of several individuals charged with evaluating the claims at issue.

The defendants' contention would also render the language of the statute superfluous. If no one other than an actual decisionmaker could determine whether a statement had a "natural tendency to influence" payment, the statute could have provided that a statement is "material" if it actually influenced a decision maker who was aware of the statement.

Our conclusion finds support in other areas of the law. In TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976), for example, the Supreme Court addressed the meaning of "materiality" in the context of a suit brought under the federal securities laws. The Court determined that a fact is "material" if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Id. at 448.

> As an abstract proposition, the most desirable role for a court in a suit of this sort . . . would perhaps be to determine whether in fact the proposal would have been favored by the shareholders and consummated in the absence of any misstatement or omission. But as we [have] recognized . . . such matters are not subject to determination with certainty. Doubts as to the critical nature of information misstated or omitted will be commonplace. And particularly in view of the prophylactic purpose of the Rule and the fact that the content of the proxy statement is within management's control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect.
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> Id.

The same reasoning applies here. Like the securities laws at issue in TSC Industries, this objective approach ensures that the FCA serves as a robust prophylactic against fraud by putting the question of materiality to the jury, rather than attempting to trace it back to the state of mind of the decisionmaker.

In Bustamante v. First Federal Savings & Loan Association of San Antonio, 619 F.2d 360 (5th Cir. 1980), the

plaintiffs alleged that the defendants violated the Truth-in-Lending Act in a loan transaction. The court noted that

> when a security interest [with an exception not relevant here] is acquired in real property which is the residence of the person to whom credit is extended, the borrower has a right of rescission within three business days of either consummation of the transaction or "the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later . . . ."

Id. at 362. Here again, the court applied an objective rather than a subjective materiality standard. "[T]o apply a subjective standard to the test for materiality would misperceive the remedial purpose of the Act." Id. at 364. The court concluded that if materiality could be established by a subjective determination of whether or not particular information would affect a credit shopper's decision to utilize the credit, unsophisticated or uneducated consumers would not be sufficiently protected. Id.

Having concluded that the test of materiality in the case before us is objective -- asking what would have influenced the judgment of a reasonable reviewing official -- rather than subjective -- asking whether it influenced the judgment of a reviewer of a proposal in the case at hand -- we agree with the district court that a reasonable jury could have found the defendants' statements to be material to the renewal decisions in the third, fourth, and fifth years of the grant. Based on the

stipulations regarding criteria relevant to funding and the testimony at trial, the jury had an ample basis for understanding the grant process based upon which it could determine whether statements that were made or omitted concerning changes to curriculum, personnel and clinical opportunities in the renewal applications had a "natural tendency" to influence NIH's funding decisions. The instructions regarding the grant application and renewal process provided the jury with a clear understanding of what information the NIH considers in evaluating progress reports, such as changes or developments to the program.

The defendants did not inform NIH that not all faculty members identified in the initial grant were "key personnel" in the program. The defendants also failed to inform NIH that several of the core courses listed in the proposed curriculum were never implemented, and that fellows were never evaluated by a training committee. NIH was not informed that the fellows did not have access to research and clinical resources described in the initial grant application. NIH was also not aware that the fellows had very limited access to HIV positive patients in their research. In addition, many of the fellows spent much of their time working on projects unrelated to HIV, such as research into aging and epilepsy, which was not reported to the NIH. We conclude that these facts were more than sufficient to allow a reasonable jury to conclude that had the facts been disclosed they would have had a natural tendency to influence, or would

have been capable of influencing, the decision to renew the grant and pay money to the defendants pursuant to it.

We therefore also conclude that the district court did not abuse its discretion in denying the motion for a new trial -- the jury's verdict was not "seriously erroneous" or "a miscarriage of justice." Nimely, 414 F.3d at 392 (internal quotation marks omitted).

III. Exclusion of Evidence Demonstrating NIH's Inaction

The defendants argue that the district court abused its discretion by excluding evidence of NIH's alleged failure to take remedial action in response to the plaintiff's complaints, and that a new trial is therefore warranted. We review a district court's decision to exclude evidence for abuse of discretion. Schering Corp. v. Pfizer Inc., 189 F.3d 218, 224 (2d Cir. 1999). "We [also] review a district court's denial of a motion for a new trial for abuse of discretion." United States v. Brunshtein, 344 F.3d 91, 101 (2d Cir. 2003), cert. denied, 543 U.S. 823 (2004).

The defendants contend that they should have been permitted to elicit evidence of NIH's relative inaction in response to complaints because it is relevant as to whether or not their statements in the renewal applications were false and material. Feldman told NIH about the defendants' fraudulent claims and, according to the defendants, the agency saw no validity to the complaints as evidenced by its failure to take

action beyond asking Cornell itself to investigate the complaints. The defendants argue that they should have been able to present this evidence to the jury in an effort to persuade it that the statements had not misled the agency. If this evidence was presented, they say, the plaintiff "could then have put on any rebuttal evidence about why the jury should find the statements were false and material despite NIH's lack of reaction when presented with those allegations." Defs.' Br. at 61.

Federal Rule of Evidence 402, provides, inter alia, that "[i]rrelevant evidence is not admissible." The district court reasoned that the evidence in question was irrelevant because the NIH's failure to act in response to Feldman's complaints did not speak to the seriousness of those complaints or the likelihood that false claims had been made. The jury did not have before it the standard that NIH used to determine whether or not action was warranted in response to a funding complaint. "[N]o discovery was conducted concerning the standards these agencies employ to determine the existence of misconduct and whether those standards are at all similar to the elements of an FCA claim." Feldman III, 2010 WL 2911606, at *3, 2010 U.S. Dist. LEXIS 73633, at *7. "Specifically, as to [the plaintiff's] deposition testimony on the NIH decision, [he] does not, and indeed cannot, speak to the standards NIH used to judge the merits of his claims." Id. Without evidence as to what the standards of the agency were for beginning an investigation, the

jury could not determine whether the complaints made by Feldman should have instigated one.[9] Id., 2010 U.S. Dist. LEXIS 73633, at *7-*8.

The defendants further argue that to the extent that the district court excluded evidence of NIH's inaction pursuant to Rule 403, it did so in error. While ultimately we would be inclined to agree with the district court, we need go no further in our analysis because the evidence was properly excluded under

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[9] The defendants point to United States v. Southland Management Corp., 326 F.3d 669 (5th Cir. 2003) (en banc), where the court considered the relevance of the course of conduct between a landlord receiving Section 8 funds and HUD. The court concluded that the communication between HUD and the landlord demonstrated that "HUD was willing to work with the Owners" on remedying maintenance problems, and that "HUD seemed to recognize that the property's noncompliance was at least partially explained by a lack of funds and nearby criminal activity." Id. at 677. Based in part on this pattern of honest and open communication, the court concluded that there could be no FCA liability. Unlike in Southland Management, there is no indication here that the defendants communicated compliance issues to the government or sought its help in addressing them. Where the government acts in response to potential false claims, its activity may reveal something about its understanding as to whether those claims were deliberately false or the result of extrinsic factors, as in Southland Management. But where, as here, there is no evidence of government action, nothing relevant can be ascertained without knowing for which of many possible reasons it did not act.

The defendants also cite United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993), in which we stated that "government knowledge may be relevant to a defendant's liability." Id. at 1157. Indeed it "may be," but is not here where the significance of the knowledge and the responsibilities of the recipients have not been established.

Rule 402 in any event. This conclusion was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of October, two thousand twelve.

Before: ROBERT D. SACK,
REENA RAGGI,
DENNY CHIN,
Circuit Judges.

UNITED STATES OF AMERICA ex rel.
DANIEL FELDMAN,

Plaintiff-Appellee,

v.

WILFRED VAN GORP and CORNELL UNIVERSITY MEDICAL COLLEGE,

Defendants-Appellants.

AMENDED JUDGMENT
Docket Nos.: 10-3297 (L)
11-975 (Con)

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED in accordance with the opinion of this court. Plaintiff/Relator Daniel Feldman is entitled to an additional award of $107,172.00 in attorneys' fees and $1,044.20 in costs, supplementing the Original Fee Award granted by the District Court.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

MANDATE

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For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 10/17/2012