US EX REL. CALILUNG v. ORMAT INDUSTRIES, LTD., Dist. Court, D. Nevada 2016

Highlighting **3:14-cv-00325-RCJ-VPC 2016**
United States District Court, D. Nevada.

April 1, **2016**.

ORDER

ROBERT C. JONES, District Judge.

This *qui tam* action, brought under the False Claims Act ("FCA"), arises from Ormat's allegedly fraudulent actions whereby they received approximately $136,800,000 in grant money from the United States pursuant to Section 1603 of the American Recovery and Reinvestment Act of 2009 ("ARRA"). Pending before the Court are Defendants' Motion for Summary Judgment (ECF No. 180), two Motions to Seal (ECF Nos. 181, 200), and Relators' Motion for Leave to File Surreply (ECF No. 209).

I. BACKGROUND

Relators initially named seven defendants in this lawsuit. On December 19, 2014, the parties stipulated to a voluntary dismissal without prejudice of Defendants Ormat Industries, Ltd. ("OIL") and First Israel Mezzanine Investors, Ltd. (ECF Nos. 105, 106). The remaining Defendants are Ormat Technologies, Inc. ("OTI"), Ormat Nevada, Inc. ("ONI"), ORNI 18, LLC ("ORNI"), Puna Geothermal Venture II, LP, and Puna Geothermal Venture, GP ("PGV") (collectively "Ormat").

Relators allege the following. OTI is a wholly-owned subsidiary of OIL and is a Delaware corporation with its principal place of business located in Reno, Nevada. (Am. Compl. ¶ 38, ECF No. 27). OTI owns and operates geothermal power plants around the globe, including plants in California, Nevada, and Hawaii. (*Id.* ¶ 39). ONI is a wholly-owned subsidiary of OTI and is a Delaware corporation also with its principal place of business in Reno, Nevada. (*Id.* ¶ 40). ONI constructs and operates geothermal power plants in the United States and internationally. (*Id.*). ONI constructed and operates the North Brawley Geothermal Power Plant in Imperial County, California ("the Brawley Plant"), and it also operates the Puna Geothermal Power Plant in Hawaii ("the Puna Complex"). (*Id.*). PGV is another wholly-owned subsidiary of OTI and is a Hawaii general partnership that assists in the management and operation of the Puna Complex. (*Id.* ¶¶ 43-44). Relators allege that ONI pays all costs related to the Puna power plant through PGV since ONI is not licensed to do business in Hawaii. (*Id.* ¶ 40). As with the other Ormat Defendants, ORNI is a wholly-owned subsidiary of OTI with its principal place of business in Reno, Nevada. Relators claim that ORNI was responsible for financing the Brawley Plant. (*Id.* ¶ 46).

Relators are former employees of OTI. Tina Calilung served as OTI's Asset Manager from November 2007 until June 2012. Her primary function was to manage the long-term power purchase agreements ("PPAs") for Ormat's operations within the United States. (*Id.* ¶ 23). Calilung also provided due diligence on project financing, developed and managed investor relations, and testified on Ormat's behalf before the Nevada Public Utilities Commission. (*Id.*). Calilung claims to have left OTI of "her own volition" in 2012, "in part due to the business practices which she felt were morally and ethically repugnant." (*Id.* ¶ 24). She claims to have voiced her opinions multiple times prior to leaving and alleges that she signed a waiver of employment-related claims and severance in July 2012. (*Id.*).

Jamie Kell was the Administrator for OTI's Business Development Department from January 2008 until September 2012. (*Id.* ¶ 27). In this role, she personally assisted the directors in charge of business development including OTI's Vice-President of Business Development and OTI's Manager of Public Policy. (*Id.*). Kell assisted her department with reviewing new geothermal projects, which involved contract negotiations with outside parties, pricing, PPA negotiations, and negotiations with public utility commissions. (*Id.* ¶ 28). Kell terminated her employment with OTI in September 2012. (*Id.* ¶ 29).

Both Calilung and Kell claim to have "direct, independent, and personal knowledge" of Ormat's alleged scheme to defraud the United States by submitting false information to the Secretary of the Treasury in order to obtain grants under Section 1603 of the ARRA. (*Id.* ¶ 57).

A. Section 1603 of the ARRA

The ARRA was signed into law on February 17, 2009 for the purpose of preserving and creating jobs, as well as to "spur[] technological advances in science and health" and to "invest in . . . environmental protection, and other infrastructure that will provide long-term economic benefits." ARRA § 3(a), PL 111-5, 123 Stat. 115, 116. It sought to lay the groundwork for new green energy economies that would double the amount of renewable energy produced between 2009 and 2013. 2009 U.S.C.C.A.N. S6, 2009 WL 395189. To accomplish this goal, the ARRA temporarily provided for grants to be paid to persons engaged in developing renewable energy. *See* ARRA § 1603. The grants provided under Section 1603 of the ARRA were intended to replace the tax credits that would usually be offered to qualifying entities under Section 48 of the Internal Revenue Code of 1986 ("IRC"). *See* 26 U.S.C. § 48(d)(1) (stating that "[n]o credit shall be determined under this section . . . for the taxable year in which such grant [pursuant to Section 1603 of the ARRA] is made"). It was expected that the Section 1603 program would "fill the gap created by the diminished investor demand for tax credits."[1] Indeed, Section 1603 is titled "Grants for Specified Energy Property in Lieu of Tax Credits." ARRA § 1603. Entities that receive a grant for renewable energy cannot also seek an energy tax credit under the IRC. 26 U.S.C. § 48(d). The Secretary of the Department of the Treasury ("the Secretary") was tasked with administrating the Section 1603 program. ARRA § 1603(f).

To qualify for receiving grant money under Section 1603, certain conditions must be met. First, the

individual or entity applying for the grant must be eligible. *See* ARRA § 1603(g). Second, the property must be a "specified energy property." *Id.* § 1603(a). Under Section 1603, a specified energy property "consists of two broad categories of property—certain property that is part of a facility described in IRC [S]ection 45 (Qualified Facility Property) and certain other property described in IRC [S]ection 48."[2] Section 45 of the IRC includes a geothermal energy facility as a "qualified facility" if it uses geothermal energy to produce electricity. 26 U.S.C. § 45(d)(4). "Specified energy property," as used in Section 1603, further includes "geothermal property," as described in Section 48(a)(3)(A) of the IRC, and "geothermal heat pump property," as described in Section 48(a)(3)(A) of the IRC. The Secretary has explained that these encompass "[e]quipment used to produce, distribute, or use energy derived from a geothermal deposit. . . ."[3] Third, the qualified property must be "placed in service" in 2009, 2010, or 2011 (or construction must begin during one of those years). ARRA § 1603(a).[4]

If these three requirements are met, then the ARRA provides a reimbursement of 30 percent of the basis of the property. *Id.* § 1603(b)(2)(A).

> The basis of property is determined in accordance with the general rules for determining the basis of property for federal income tax purposes. Thus, the basis of property generally is its cost (IRC [S]ection 1012), unreduced by any other adjustment to basis, such as that for deprecation, and includes all items properly included by the taxpayer in the depreciable basis of the property, such as installation costs and the cost for freight incurred in the construction of the specified energy property. [5]

Section 1603 instructs that "the Secretary of the Treasury shall provide for the recapture of the appropriate percentage of the grant amount in such manner as the Secretary of the Treasury determines appropriate if the property is disposed of or otherwise ceases to be a specified energy property." *Id.* § 1603(f). Applicants under the Section 1603 program are also required to provide reports as the Secretary mandates.[6]

B. Ormat's Brawley Plant

Relators allege that Ormat received $130 million in Section 1603 grant money for the Brawley Plant that was obtained using false information. (Am. Compl. ¶¶ 150-51). Construction on the Brawley Plant began in February 2007, and the plant was expected to be operating by the end of 2008. (*Id.* ¶¶ 162-63). Based on these projections, ORNI entered into a PPA with Southern California Edison based on the representation that the plant would produce 50 MW of energy. (*Id.* ¶¶ 159-61). Relators claim that by December 2008, the Brawley Plant was operational and began generating revenue, and Ormat began to depreciate the plant for tax purposes as early as 2009. (*Id.* ¶¶ 164-67).

In June 2010, Relators claim that Ormat filed, through ORNI, its first application for a Section 1603 grant with the Treasury. (*Id.* ¶ 168). On August 17, 2010, the Treasury awarded ORNI a grant of $108,285,626. (*Id.* ¶ 169). Relators allege that Ormat secured this grant by misrepresenting two key

pieces of information to the Secretary. Relators believe that Ormat "falsely concocted a placed-in-service date for [the Brawley Plant] of January 15, 2010." (*Id.* ¶ 172). Relators allege that this date is inaccurate given that the Brawley Plant had been running since the end of 2008 and had generated approximately $2.5 million in revenue. (*Id.*). Relators further allege that the proper placed-in-service date is sometime in December 2008, which would disqualify the Brawley Plant from receiving grants under the ARRA's Section 1603 program. *See* ARRA § 1603(a) (requiring the placed-in-service date to be in 2009, 2010, or 2011). Relators claim that January 15, 2010 marked no special significance as to the energy output since at that time it was producing around 17 MW, "a level at which it had been for several months and would remain for many months more." (*Id.* ¶ 177). Relators also allege that Ormat artificially inflated and misrepresented the eligible basis of the Brawley Plant in order to qualify for a larger grant by purposefully delaying its Section 1603 application while incurring additional costs. (*Id.* ¶ 180).

Sometime in 2012, Relators claim that Ormat applied for a second Section 1603 grant based on an expansion of the Brawley Plant, which the Treasury granted in June 2013 in the amount of $14.67 million. (*Id.* ¶ 189-90). Relators allege that the grant must have been based on false information since OIL itself only valued the expansion at $23 million and the Brawley Plant was operating at less than 27 MW, which fails to demonstrate that production had appreciably increased. (*Id.* ¶ 191). Relators also claim that Ormat has failed to update, amend, or notify the Treasury, as required by the Terms and Conditions of the Section 1603 program,[7] of the change in the Brawley Plant's value based on its inability to reach the projected energy outputs. (*Id.* ¶ 212). Despite the Brawley Plant's alleged steady depreciation, Relators claim that Ormat is delaying the write downs so it can avoid terminating the failing project in order to escape the five-year grant recapture period provided by the Secretary.[8] (*Id.* ¶ 242).

C. Ormat's Puna Complex

Relators also allege that Ormat improperly sought and received Section 1603 grant money for an expansion to its plant in Puna, Hawaii. There are two energy producing geothermal plants at the Puna Complex. The first power plant ("the 30-MW plant") was placed in service by its original owner in 1993. (*Id.* ¶ 252). Ormat acquired the 30-MW plant in 2004 after which it sold the 30-WM plant to a third party who then leased the plant back to Ormat. (*Id.* ¶ 253). Relators note that the 30-MW plant is clearly unqualified for any Section 1603 grants as it was placed in service well before 2009. (*Id.* ¶ 254). Although the 30-MW plant was advertised as generating 30 MW of electricity, Relators claim that it actually produced no more than 17 MW and that this inhibited production was causing Ormat's revenues to decline by $1 million per month. Due to this loss, Relators allege that Ormat planned to drill a new production well, known as "KS-14," in order to boost the plant's productivity. (*Id.* ¶¶ 257-59). However, under the leaseback agreement that governed the Puna Complex, Ormat was required to receive investor approval prior to drilling KS-14. KS-14 successfully added about 14 MW of net capacity. (*Id.* ¶ 264).

Ormat added an 8 MW expansion ("the Expansion") to the Puna plant in late 2011. (*Id.* ¶ 265). The

Expansion was substantially completed by December 2010, but Ormat was still waiting on the Hawaii Public Utilities Commission to approve a PPA at that time. (*Id.* ¶ 271). Relators allege that in an effort to qualify for a Section 1603 grant, Ormat began producing energy for free so that it could claim December 2011 as the placed-in-service date for the Expansion. (*Id.* ¶ 272). In November 2011, Cathy Tsaniff, Ormat's Tax Manager, began drafting PGV's application for a Section 1603 grant for the Expansion project. (*Id.* ¶ 273). In that application, Tsaniff cited December 2011 as the placed-in-service date so that the Expansion would fall within the Section 1603 program's requirements. (*Id.* ¶ 274).

Relator Calilung participated in drafting the Section 1603 grant application for the Expansion. As part of that process she spoke with a Paul Spielman, Ormat's Manager of Operations Support for Resources, who confirmed that the Expansion was designed to generate electricity by utilizing the 30-MW plant's byproduct and that the Expansion depended upon the original plant's byproduct to operate. (*Id.* ¶ 276-77). Relators allege that Ormat misrepresented the Expansion's true status in its Section 1603 application because it claimed that the Expansion was a stand-alone new Geothermal Property. (*Id.* ¶ 278).

Relators further allege that Ormat knowingly misrepresented the eligible basis for the Expansion in order to obtain additional Section 1603 funds. (*Id.* ¶ 279). Relators claim that Tsaniff initially allocated the cost of the KS-14 well pro rata between the 30-MW plant and the Expansion, but that she was later instructed to allocate the full cost of KS-14 to the Expansion in order to increase the cost basis. (*Id.* ¶ 280). Relator Kell claims that she and Tsaniff discussed the legality of submitting a Section 1603 application that intentionally excluded relevant facts and included material false information. (*Id.* ¶ 281). Relator Kell alleges that Tsaniff acknowledged the information was incorrect, but told Kell that OTI's CEO, Dita Bronicki, made the changes herself. (*Id.*). On April 14, 2012, PGV was awarded a Section 1603 cash grant of $13,821,143, which corresponded to Ormat's stated eligible basis of $46,070,477. This reported eligible basis, Relators allege, includes the full amount of drilling and connecting the KS-14 well, which Relators allege cost Ormat approximately $12.5 million. (*Id.* ¶ 283).

D. Ormat's Alleged Violation of the FCA

Relators claim that these facts demonstrate Ormat violated the FCA by reporting false or misleading information or by omitting material information in its various Section 1603 grant applications to the Treasury. Specifically, Relators contend that Ormat (1) misrepresented the put-in-service date for the Brawley Plant; (2) inflated the eligible basis of the Brawley Plant by intentionally driving up costs; (3) misrepresented the viability of the Brawley Plant in order to qualify for additional Section 1603 funds; (4) falsely represented the Puna Expansion as a stand-alone facility; and (5) fraudulently allocated the full cost of the KS-14 production well to the Expansion rather than representing that an ineligible property was the real beneficiary of the expense. Relators also allege that Ormat violated the Terms and Conditions of the Section 1603 program by submitting false or fraudulent annual reports for the Brawley Plant in order to prevent the recapture or disallowance of the Section 1603 funds already obtained. (*Id.* ¶

316).

Relators argue that these misrepresentations and omissions were made to the Treasury in violation of the FCA. The FCA, 31 U.S.C. § 3729(a), imposes liability on all those who submit false or fraudulent claims for payment to the United States Government. *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 820 (9th Cir. 2005). The *qui tam* provisions of the FCA allow private parties aware of fraud against the Government to sue on behalf of the Government with the incentive that such parties may share in up to 30 percent of the recovery. 31 U.S.C. §§ 3730(b)(1), 3730(d)(2); *Campbell*, 421 F.3d at 820. The private party, referred to as the "relator," files the complaint alleging a violation of the FCA under seal. 31 U.S.C. § 3730(b)(2). The complaint remains under seal for at least sixty days and is served on the defendant only after the court so orders. *Id.* During this time, the Government elects whether to intervene or not, and notifies the court accordingly. *Id.* If the Government does not choose to intervene, then the private party who initiated the lawsuit has the right to conduct the action. *Id.* § 3730(c)(3); *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992).

Relators include five counts of FCA violations arising from Ormat's alleged conducted. The first count alleges that Ormat and its agents knowingly presented false records or statements material to their fraudulent claims for Section 1603 funds in violation of 31 U.S.C. § 3729(a)(1)(A). The second count alleges that Ormat knowingly made and used a false record to perpetuate the fraud in violation of 31 U.S.C. § 3729(a)(1)(B). The third count alleges that Ormat is in possession of Section 1603 funds that should rightfully be returned to the Treasury, a violation of 31 U.S.C. § 3729(a)(1)(D). The fourth count alleges that Ormat has knowingly made false records or statements to the Treasury in order to avoid its obligation to transmit improperly received Section 1603 funds back to the Government, a violation of 31 U.S.C. Section 3729(a)(1)(G). Finally, the fifth count alleges that Ormat and its agents have conspired to defraud the Government by falsely obtaining $136,791,964 in Section 1603 grant money.

This case was originally filed under seal in the Southern District of California. The case remained under seal while the Government decided whether to intervene. Once the Government elected not to intervene (*see* ECF No. 11), the relevant documents were unsealed and service was completed. Ormat moved to transfer the case to this District, which the court granted. Prior to transfer, however, Relators submitted the Amended Complaint. In a motion to dismiss, Ormat asked the Court to dismiss all of Relators' claims based on several grounds. The Court granted the motion in part and denied it in part. (*See* ECF No. 122). Following the Court's order, these allegations remain: (1) Ormat misrepresented the put-in-service date for the Brawley Plant; (2) Ormat falsely represented the Puna Expansion as a stand-alone facility; and (3) Ormat fraudulently allocated the full cost of the KS-14 production well to the Expansion rather than representing that an ineligible property was the real beneficiary of the expense. Ormat now moves for summary judgment on the remaining allegations.

II. LEGAL STANDARDS

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.*

III. DISCUSSION

A. Motion for Leave to File Surreply

As an initial matter, the Court must address whether Relators should be granted leave to file a surreply. Local Rule 7-2 allows for litigants to file a motion, a response, and a reply. *See* LR 7-2(a)-(c). It does not provide for a surreply. However, the Court may grant leave to a party to file a surreply if new matters are raised for the first time in the reply to which a party would otherwise be unable to respond. *See* Spartalian v. Citibank, N.A., No. 2:12-cv-00742-MMD-PAL, 2013 WL 593350, at *2 (D. Nev. Feb. 13, 2013). Relators ask the Court to grant them leave to file a surreply because "Ormat raises new arguments not previously raised," "has erroneously argued for applications of law and precedent," and has "mischaracterized much of the law" in its reply to Relators' response. (Mot. 2-3). The Court disagrees. Relators do not identify any specific argument in Ormat's reply that is "new," requires an additional response, or which it could not have addressed in its response. Further, an alleged misapplication or mischaracterization of the law alone surely cannot be a sufficient basis for a surreply; otherwise, litigants would constantly seek to have the last word in brief filing by claiming the other side presented the law in an unfavorable manner. The Court denies the motion.

B. Motion for Summary Judgment

Ormat moves the Court to grant summary judgment in its favor on Relators' Brawley placed-in-service claim, arguing the FCA's public disclosure provision bars it. Ormat also argues that the Court should enforce settlement agreements in which Relators released all their FCA claims.

1. Public Disclosure Bar: Brawley Placed-in-Service Claim

The FCA includes bars to certain actions brought by *qui tam* relators, one of which is the public disclosure bar. 31 U.S.C. § 3730(e)(4)(A). The bar is designed to preclude "*qui tam* suits when the relevant information has already entered the public domain through certain channels." Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 285 (2010). The bar is set forth as follows:

> The court shall dismiss an action or claim under [the FCA], unless opposed by the Government, if

> substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed [1] in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; [2] in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or [3] from the news media, unless the action is brought by the Attorney General or the person brining the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). Thus, the public disclosure bar requires a two-step inquiry. First, the court determines whether there has been a prior public disclosure of the allegations or transactions underlying the *qui tam* suit through one of the sources enumerated in the statute. *U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009); *see also Malhotra v. Steinberg*, 770 F.3d 853, 858 (9th Cir. 2014). If there has been a public disclosure, the court must then inquire whether the relator is an "original source" within the meaning of Section 3730(e)(4)(B). *Meyer*, 565 F.3d at 1199. The statute defines "original source" as:

> [A]n individual who either [1] prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

31 U.S.C. § 3730(e)(4)(B).

Ormat argues that Relators' Brawley placed-in-service claim is barred because the information relevant to Relators' claim was publicly available before Relators filed their initial complaint in February 2013. According to Ormat, Relators' claim is based on a number of SEC filings and reports published by the U.S. Energy Information Administration ("EIA"). In a prior order, the Court held that the SEC filings qualify as public disclosures under the FCA. (*See* Order, 28, ECF No. 122). The Court also held, however, that the information disclosed in the SEC filings is not substantially similar to Relators' allegations regarding the Brawley plant's placed-in-service date. (*Id.* at 29). As the Court stated:

> Regardless of the date that Ormat reported to the Secretary and that appears in the SEC filings, Relators claim that the January 15, 2010 date is false and misleading. Thus, the fact that the 2007 and 2009 Form 10-Ks make it clear that Ormat considered the Brawley plant substantially complete in December 2008 and that it was producing energy from that point on does not mean that Relators claims are barred. That information would not necessarily lead the Government to the conclusion that this placed-in-service date was chosen with the intent to defraud the United States. The additional information available to the public likewise does not indicate that January 15, 2010 was not the actual date the Brawley plant was placed in service.

(*Id.*). Although the Court could have stopped at the first step, it also discussed whether Relators are an original source within the meaning of the FCA to "further clarif[y] the Court's position on the issue." (*Id.* at

33). The Court concluded that Relators allege two pieces of information that do not appear in the publicly disclosed documents: (1) that the Brawley Plant was synced into the power grid before January 15, 2010; and (2) that the plant began selling electricity as early as December 2008 and earned $2.5 million in revenues over the year prior to the January 2010 date. (*Id.*).

In Ormat's motion for summary judgment, it presents evidence showing these two pieces of information were publicly available in reports by the EIA. They argue that because this information was publicly available before Relators' claim, the claim is barred. To begin, the Court finds that the EIA reports are federal reports that qualify as public disclosures under the statute. Ormat submitted to the EIA two forms —Form EIA-860 and Form EIA-923—which show the Brawley Plant was synced into the power grid in December 2008, (Interconnection Report 2009, 2, ECF No. 180-12), and that the plant sold 595 MW of electricity in 2008, (Non-Utility Report 2008, 2, ECF No. 180-14), and 31,529 MW in 2009, (Non-Utility Report 2009, 2, ECF No. 180-15). Although this data is not as easy to access as the SEC filings, it is accessible and readily available to the public.[9] EIA representatives have confirmed that the data was published by 2010. (Correspondence, ECF No. 180-16).[10]

Even though the EIA reports qualify as public disclosures, Ormat mistakenly focuses on the Court's analysis of whether Relators are an original source. Although Ormat has shown that the two pieces of information involved in the Court's original source analysis are available in public reports, they have presented no evidence to show that Relators' allegation that Ormat knowingly defrauded the United States was publicly available. "The public disclosure of `mere information' relating to the claims is insufficient to trigger a jurisdictional bar to a False Claims suit; the `material elements of the allegedly fraudulent transaction' must be disclosed." *U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 919 (9th Cir. 2006) (internal quotations omitted) (quoting *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000)).

One material element of a claim under the FCA is that a person "*knowingly* presents . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A) (emphasis added). As the Court pointed out in its prior order, the information provided at that time "would not necessarily lead the Government to the conclusion that this placed-in-service date was chosen with the intent to defraud the United States." (Order, 29, ECF No. 122). Although the information Ormat has now established as publicly available might allow one to infer that Ormat falsely reported the placed-in-service date, Relators allege that "Ormat has admitted that it deliberately delayed submitting its § 1603 application and intentionally post-dated its placed-in-service date." (Am. Compl. ¶ 179). They also claim that due to their employment with Ormat they have personal knowledge that Ormat executives knowingly and intentionally inserted false information into its § 1603 applications. (*See* Am. Compl. ¶¶ 25, 30-31; First Decl. of Tina G. Calilung, ¶¶ 9-12, 29, ECF No. 199-5; Decl. of Jamie D. Kell, ¶ 3, ECF No. 199-6). Ormat has presented no evidence to show that these allegations, or the facts underlying them, are publicly available. By proving their allegations regarding Ormat's knowledge, Relators can establish a material element of their claim; without that element, however, the public pieces of information scattered

among various federal websites prove only the existence of certain facts, not that Ormat knowingly made a false claim.

Moreover, Relators make other allegations related to the placed-in-service claim that Ormat has not shown are publicly available. Relators allege that the Brawley Plant was in daily operation by December 2008, (Am. Compl. ¶ 177; Second Decl. of Tina G. Calilung, ¶ 30, ECF No. 199-5), and that "Ormat has been depreciating the North Brawley Plant for tax purposes since at least 2009," (Am. Compl. ¶ 178). They also claim that Ormat's process for determining the in-service date of the plant contradicts the process Ormat has used in other § 1603 grant applications. (First. Decl. of Tina G. Calilung, ¶ 37). Ormat also has not presented evidence to show that these allegations, or the facts underlying them, were available to the public. As a result, the Court still finds that the publicly disclosed information is not substantially similar to Relators' allegations regarding the Brawley Plant's placed-in-service date, and, thus, the public disclosure bar does not apply. Finally, Relators ask the Court in the alternative to defer its decision under Federal Rule of Civil Procedure 56(D). Their request is moot.

2. Release of Claims

Ormat argues Relators each entered a settlement agreement by which they agreed to release Ormat of Relators' FCA claims. Relators each signed settlement agreements containing language that waives all legal claims against Defendants. Section 4.1 of Calilung's settlement agreement contains the following language:

> Employee hereby generally waives, releases and forever discharges the Company, its parent company, and any or all divisions, subsidiaries, and their officers, directors, agents, employees, affiliates and successors and insurers (hereinafter collectively "the Releasees"), of and from any and all claims, causes of action, damages or costs of any type Employee may have, prior to the date Employee signs this Agreement, against the Releasees arising out of or relating to Employee's employment with Company, or Employee's separation of employment . . .

(Settlement Agreement, 3, ECF No. 180-24). Although this clause addresses only claims arising out of employment, Section 4.3 states the following:

> Employee further understands and agrees that the waiver and release set forth in Section 4.1 and 4.2 applies to any and all claims, liabilities and causes of action, or every nature, kind and description, whether known or unknown, in law, equity or otherwise, which have arisen, or occurred or existed at any time prior to Employee's signing of this Agreement, including, without limitation, any and all claims, liabilities and causes of action arising out of or relating to Employee's employment with the Company or the cessation of that employment.

(*Id.* at 4). This section clearly bars any type of legal claim, not just claims arising out of Calilung's employment, by including but not limiting the section to claims arising out of her employment. The

agreement also covers the remaining claims in this case because the events giving rise to the claims occurred from 2008 to 2011, before Calilung signed the settlement agreement in July 2012.

> Section 2.1 of Relator Kell's settlement agreement contains similar language:

> Employee . . . agrees to fully release . . . Company and all of its affiliates . . . from all known or unknown, revealed and concealed, contingent and non-contingent claims, actions, causes of action, and suits for damages at law or in equity, of any and every kind, nature, and character whatsoever, that Employee has now, has ever had, or may have in the future against the Releasees, filed or otherwise, including, but not limited to [list of causes of action] or any other claim Employee may now or hereafter acquire by reason of any loss or damage suffered by Employee as a result of any fact or facts in any way related to the Charge, Employee's previous employment relationship with Company, the resignation or termination of Employee's employment relationship with Company, or any other matter or event arising prior to the execution of this Agreement by Employee.

(Settlement Agreement, 5-6, ECF No. 180-25). Section 2.2 adds the following:

> Employee promises and agrees on behalf of herself and her heirs and representatives that she will never file, initiate, or cause to be filed or initiated, at any time after the execution of this Agreement, any claim, charge, suit, complaint, action, or cause of action, in any state or federal court or before any state or federal administrative agency, against Company or the Releasees identified in Section 2.1. Further, Employee shall not participate, assist, or cooperate in any suit, action, or proceeding against or regarding the Releasees, or any of them, unless compelled to do so by law.

(*Id.* at 6-7). These sections also clearly bar any type of legal claim Kell might bring against Ormat.

Relators argue that even if the settlement agreements preclude them from bringing FCA claims, two cases—*United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995) and *U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997)—allow their claims to proceed. In *Green,* the Ninth Circuit held that "prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." *Green*, 59 F.3d at 969. In holding that the release was not enforceable to bar a *qui tam* claim, the court noted, "It is critical to observe . . . that the government only learned of the allegations of fraud and conducted its investigation *because of the filing of the qui tam complaint.*" *Id.* at 966. The court based its reasoning on the "central purpose of the *qui tam* provisions of the FCA [which] is to set up incentives to supplement government enforcement of the Act by encouraging insiders privy to a fraud on the government to blow the whistle on the crime." *Id.* at 963 (internal quotations and citations omitted).

In *Hall,* the Ninth Circuit chose not to apply *Green* in enforcing a release because "[t]he federal government was aware of Hall's allegations regarding false certifications," *Hall*, 104 F.3d at 233, after Hall had filed a complaint with the Nuclear Regulatory Commission and a state court action alleging fraud against his employer. *Id.* at 231-32. The court held that the federal concerns implicated in *Green*

did not apply in *Hall* because "[t]he federal government was aware of Hall's allegations regarding false certifications" and "because the federal government had already investigated the allegations prior to the settlement." *Id.* at 233. Ormat argues that according to *Hall* settlement agreements releasing FCA claims should be enforced simply "when the government is on notice of the facts underlying the fraud allegations before the FCA claims are released." (Mot., 10). Ormat suggests that public disclosure of the facts through documents submitted to the Government is sufficient to put the Government on notice. Relators argue *Hall* requires more than just notice of the facts involved. The Court agrees with Relators.

Nothing in *Green* or *Hall* suggests that mere public disclosure of the facts underlying allegations of fraud is sufficient to make a release of FCA claims enforceable. Indeed, *Green* and *Hall* refer repeatedly to the federal government's awareness of a relator's *allegations* of fraud, *see Green* 59 F.3d at 965-67; *Hall,* 104 F.3d at 233, not to awareness of *facts* from which the Government might possibly infer fraud. In *Green,* the critical factor was that the Government knew nothing about the fraud allegations until the relator filed a *qui tam* complaint, whereas in *Hall* the relator's filing of two separate complaints alerted the Government to his allegations. The primary question is whether the Government was aware of the relator's *allegations* before the relator signed a release; otherwise, an insider privy to fraud would be discouraged from blowing the whistle when some, or all, of the facts underlying the fraud are publicly available, even though the Government might not connect the facts or have any suspicion that fraud has occurred. Such a result would contravene the central purpose of the *qui tam* provisions of the FCA to encourage insiders to blow the whistle. *See Green,* 59 F.3d at 963.

On the other hand, Relators' argument goes too far in the other direction. They argue that the Government must actually investigate the fraud. This interpretation of *Hall* is misplaced. *Hall* does not require the Government to actively investigate the allegations of fraud; it must only be aware of allegations that could give it cause to initiate an investigation. Of course, the Government's actual investigation based on allegations of fraud, or based on a set of facts that gives rise to an inference of fraud which the Government has pieced together on its own, is strong evidence that a release of FCA claims should be enforced.

Here, Defendants ask the Court to enforce the releases primarily because the Government was aware of the facts underlying the allegations through public disclosure. They point to the reports and grant applications Ormat filed with federal agencies. The information in these reports might cause the Government to suspect fraudulent activity if it pieced together the facts from various reports filed among various federal agencies over a period of several years. But Ormat presents no evidence to show the Government suspected fraud or initiated an investigation after piecing together the facts. Ormat also does not show the Government was aware of Relators' specific allegations of fraud against Ormat.

Ormat points the Court to a response Ormat provided to the Treasury after the Treasury requested "a detailed discussion on production vs. nameplate capacity and the basis for verifying that the property has been placed in service." (Letter to Treasury, 4, ECF No. 180-21). In Ormat's response, it reviewed the process and timeline for placing the Brawley Plant in service, explained why the plant was not

producing at 50 MW capacity, and reiterated that it was placed in service on January 15, 2010. (*See id.* at 4-6). It also informed the Treasury that the plant's turbines were synchronized to the grid in December 2008, and that the plant began initial operation on October 1, 2009. (*Id.* at 4). The Treasury's letter does not show the Government was aware of Relators' allegations, and Ormat's response to it would not necessarily cause the Government to suspect fraud. Indeed, the letter also represents that Ormat "treat[ed] the Project as in service for both tax and book purposes as of January 2010" and that by that date it was "operating on a continuous daily basis." (Letter to Treasury, 6). This assertion contradicts Relators' allegations that Ormat had been depreciating the plant for tax purposes since at least 2009 and that it was operating the plant on a daily basis and generating revenues before 2010. (Am. Compl., ¶¶ 172-174). Furthermore, even with the letter, the information available to the Government in public reports did not include many of the facts underlying Relators' allegations, as detailed above. Thus, the information available would not likely have alerted the Government to fraudulent activity.

No evidence shows the Government was aware of Relators' allegations of fraud. Enforcing the settlements in this case would contravene the central purpose of the FCA's *qui tam* provision by preventing Relators from pursuing allegations of which the Government was likely not aware before Relators signed the releases. Hence, although Relators agreed not to bring any legal claims against Ormat, the FCA compels the Court to permit Relators' remaining claims to proceed.

Because neither the FCA's public disclosure provision nor Relators' settlement agreements bar Relators' claims against Ormat, the Court denies Ormat's motion for summary judgment.

C. Motions to Seal

Both Relators' and Defendants ask the Court for leave to file under seal documents containing provisions of Relators' settlement agreements (ECF Nos. 181, 200). The Court grants the motion.

CONCLUSION

IT IS HEREBY ORDERED that Ormat's Motion for Summary Judgment (ECF No. 180) is DENIED.

IT IS FURTHER ORDERED that the Motions to Seal (ECF Nos. 181, 200) are GRANTED.

IT IS FURTHER ORDERED that Relators' Motion for Leave to File a Surreply (ECF No. 209) is DENIED.

IT IS SO ORDERED.

[1] U.S. Dep't of the Treasury, *Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009 Program Guidance* 2 (Apr. 2011), *available at* http://www.treasury.gov/initiatives/recovery/Documents/GUIDANCE.pdf [hereinafter *Program Guidance*].

[2] *Program Guidance* at 12.

[3] *Id.* at 15.

[4] The Section 1603 program was temporary and was set to terminate in October 2011. ARRA § 1603(j). However, that date was extended to October 2012 by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. PL 111-312, 124 Stat. 3296, 3312.

[5] *Program Guidance* at 16.

[6] *Id.* at 21.

[7] U.S. Dep't of the Treasury, *Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009: Terms and Conditions* 2, *available at* http://www.treasury.gov/initiatives/recovery/Documents/energy-terms-and-conditions.pdf [hereinafter *Terms and Conditions*]. To receive a Section 1603 grant, the applicant must agree to and sign the Terms and Conditions established by the Secretary. *See Program Guidance* at 3.

[8] *Terms and Conditions* at 2.

[9] The Court was able to locate the reports on the EIA website within five minutes of beginning a search.

[10] An EIA representative confirmed that the EIA-860 data for 2008 and 2009 were published in 2010. He also confirmed that the EIA-923 data for 2009 was published in December 2010 and said it "seems reasonable" that the 2008 data was published in March 2010. (*Id.*). Although the representative did not know for certain when the 2008 data was published, it does seem "reasonable" that if the 2009 data was published in December 2010, then the 2008 data was published before that time based on the Agency's publishing practices. Relators have not produced any evidence to cause the Court to question this conclusion.