

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, : CIVIL ACTION
ex rel. THOMAS BROWN : :
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MERANT INC., et al. : NO. 99-6481

MEMORANDUM

Dalzell, J

March 29, 2002

Relator, Thomas Brown, has brought this qui tam action pursuant to the False Claims Act, 31 U.S.C. §§ 3729-32, alleging that Merant Inc. ("Merant") made false disclosures to the General Services Administration regarding the pricing of computer products and services to procure government contracts. Merant provides computer software, consulting, and training. Relator Brown was employed by Merant as a technical consultant until July of 1999; he brings this action pro se.

Before the Court are cross-motions for summary judgment. For the reasons below, we will grant Merant's motion and deny Brown's.¹

Background

A. False Claims Act

The False Claims Act (FCA)² was passed in 1863 in

¹ Brown has not identified the other defendants, "Does I to XX," named in the Second Amended Complaint.

² 31 U.S.C. §§ 2729-33.

response to rampant fraud by defense contractors in the Civil War and survives in amended form to this day. United States ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991). Its purpose is to "protect funds and property of the government from fraudulent claims." Rainwater v. United States, 356 U.S. 590, 592 (1958). The FCA imposes penalties against those who knowingly submit false claims for payment to the United States government. United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 738 (3d Cir. 1997).

The Attorney General, and in certain instances a private plaintiff, may institute an FCA action. 31 U.S.C. 2730. An action by a private person on behalf of the Government is known as a qui tam action.³ Under the FCA, "A private person with knowledge of fraud against the government, acting as a de facto 'attorney general,' can instigate litigation on the government's behalf against the parties responsible." Dunleavy, 123 F.3d at 738.

In addition to making out violation of the FCA, a qui tam plaintiff must satisfy a threshold jurisdictional standard, known as the "Public Disclosure Bar." The FCA provides:

No court shall have jurisdiction over an action under this section based upon the public

³ Qui tam takes its name from the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur," which means, "who sues on behalf of the King as well as for himself." Dunleavy, 123 F.3d at 738, n.6 (citing Black's Law Dictionary 1251 (6th ed. 1990)).

disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). Our Court of Appeals has extensively construed this jurisdictional exception. A qui tam action is 'based upon' a qualifying public disclosure "if the disclosure sets out either the allegations advanced in the qui tam action or all the essential elements of the qui tam action's claims." United States ex rel. Mistick v. Hous. Auth. of the City of Pittsburgh, 186 F.3d 376, 388 (3d Cir. 1999); Dunleavy, 123 F.3d at 740-41. The qui tam action need not be actually derived from the public disclosure, but must be "supported by" or "substantially similar to" the public disclosure, to be 'based upon' it and implicated by the Public Disclosure Bar. Mistick, 186 F.3d at 386, 388. If a qui tam action is based upon a public disclosure, a Court lacks jurisdiction to entertain it unless the plaintiff is an 'original source.' 31 U.S.C. § 3730(e)(4). To be an original source, the plaintiff must have direct and independent knowledge of the information on which the claim of fraud is based. Id. at § 3730(e)(4)(B); Stinson, 944 F.2d at 1160-61; Mistick, 186 F.3d at 388-89.

The FCA imposes liability in relevant part on any person who,

(1) knowingly presents, or causes

to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government[.]

31 U.S.C. § 3729(a)(1)-(2). To maintain a claim under subsection (a)(1), a plaintiff must show: (1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent. United States ex rel. Showell v. Phil. AFL-CIO Hosp. Ass'n, No. 98-1916, 2000 U.S. Dist. LEXIS 4960, at *15 (E.D.P.A. Apr. 18, 2000), aff'd, 275 F.3d 38 (3d Cir. Aug. 10, 2001). To make out a claim under subsection (a)(2), a plaintiff must show: (1) the defendant made, used, or caused to be made or used, a record or statement to get a claim against the United States paid or approved; (2) the record or statement and the claim were false or fraudulent; and (3) the defendant knew the record or statement and the claim were false or fraudulent. Id. at *15-16; United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co., No. 94-7316, 2000 U.S. Dist. LEXIS 12081, at *27 (E.D. Pa. Aug. 24, 2000).⁴

⁴ District courts in our circuit are split as to whether actual damages, or financial loss to the Government, is an element of an FCA claim. Compare Showell, 2000 U.S. Dist. Court LEXIS 4960, at *15-16 (holding actual damages an element) with Atkinson, 2000

Relator Thomas Brown commenced this case on December 29, 1999, and after the Government ultimately declined to intervene and the complaint was unsealed, filed an amended complaint on April 11, 2001. Merant moved to dismiss the amended complaint, and finding it did not comport with the specific pleading requirement of Federal Rule of Civil Procedure 9(b), we dismissed the portion of the amended complaint alleging FCA fraud without prejudice. Order of July 2, 2001 (Doc. No. 16). On July 17, 2002, Brown filed his Second Amended Complaint, which describes the following fraudulent statements.

A. Second Amended Complaint

Briefly summarized, the Second Amended Complaint alleges that, as a prospective government contractor and in keeping with government regulation, Merant disclosed its commercial sales practices to the General Services Administration (GSA). 2d Am. Compl. at ¶ 17. The GSA used this information to

U.S. Dist. LEXIS 12081, at n.12 (holding actual damages not an element). We agree with Brown that actual damages is not an element. The Supreme Court declared of an earlier version of the FCA, "there is no requirement, statutory or judicial, that specific damages be shown." Rex Trailer Co. v. United States, 350 U.S. 148, 152 (1956). In its present incarnation, the FCA does not require proof of damages. It provides for civil penalties. 31 U.S.C. § 3729(a). Its definition of 'claim' and its recitation of actionable conduct under subsections (a)(1) and (a)(2) make clear that a person can be liable for submitting a false claim to the government for payment if the government approves the claim, even if the government has not yet paid out on the claim. Id. at § 3729(a)(1)-(2),(c).

compile a "Schedule Price List" based upon which government agencies and departments executed contracts with Merant and negotiated price terms. Id. at ¶¶ 19-21. Merant falsified the required disclosures. Id. at ¶¶ 18-21. Specifically, Merant omitted to disclose discounts it gave certain commercial customers, such as Mercedes Benz, GTE Data Services, and Ford Motor Company, id. at ¶¶ 10, 18; failed to reveal discounting procedures and price bundling processes, id. at ¶¶ 9, 18; and artificially limited the scope of its disclosures to exclude information on Canadian sales, id. at ¶¶ 11, 18. Merant's false disclosures tended to overstate its commercial prices. Since the GSA entered government contracts based upon the disclosures, the Government fraudulently was induced to enter into contracts with Merant with price terms in excess of Merant's commercial prices. Id. at p.1 & ¶¶ 18-21. See generally id. at p. 1.

B. Evidence

Brown has come forward with several items of evidence. He proffers internal company emails discussing what Brown refers to as the "Levesque discount"; a contract with the Army to provide computer training; and a GSA Audit of Merant's conduct surrounding a "MAS" (or multiple award schedule) contract.

Merant finance clerk Rena Levesque sent an email to other employees regarding discounting processes. In her email, dated August 20, 1998, she asked what the ramifications are when a customer is given a discount on a product. Pl.'s Mot. Summ.

J., Ex. 1. Levesque suggested that when a customer receives a discount on a software product, the standard Merant practice is to "charge back" the dollar amount of the discount on the product, by raising the price of any services the customer purchases with the product, so that the amount the client is charged is unaffected by the discount. Id. Clerical employee Dan Wong confirmed that such was the sales practice. Id., Ex. 2. Viewing the emails in the light most favorable to Brown, they suggest that Merant advertised discounts to clients where no real savings were available.

Brown does not claim that the Levesque procedure of offsetting any discount on the price of software by an increase in the price of training or consulting, bought with the software, has ever been applied to a Government customer. Rather, Brown claims Merant failed to include mention of the Levesque discount in its commercial sales practice disclosures to the GSA; as support, he points to a comprehensive document Merant submitted to the GSA, entitled "Commercial Practices Chart," that appears to make no mention of the Levesque discount process. Pl.'s Mot. Summ. J., Ex. 10.

Brown next presents documentation of a contract between Merant and the United States Army to perform training on 'AAI' software during the summer of 1998. No discount is provided for these training services. Id., Ex. 14-15. Brown juxtaposes this to a multiple award schedule (MAS) contract between Merant and

the GSA, in which Merant agreed to provide products and services at specified rates to government agencies and departments. Id., Ex. 5. The MAS contract contains a 10% discount on training courses. The MAS contract runs from March 26, 1999 to March 25, 2004 and only covers "Training Courses, Under FSC Group 70," with "Special Item Number (SIN) 132-50."

Last, Brown comes forward with a GSA audit which he obtained through a Freedom of Information Act (FOIA) request. Pl.'s Mot. Summ. J., Ex. 5 [hereinafter "GSA Audit"]. The GSA audited Merant's performance in connection with the MAS contract referenced supra. The audit examined Merant's commercial sales practice disclosures to the GSA. The audit, however, identified no false statements. Rather, the audit report concluded, "The Commercial Sales Practice (CSP) information submitted by Merant and used by GSA contracting officials for negotiating the contract was generally current, accurate, and complete." Id. at 8. The GSA Audit also encompassed Merant's post-execution behavior - its compliance with the MAS contract, and its reporting of sales made to the Government under the MAS contract. The audit revealed deficiencies in these areas. Merant charged the Government more than the prices negotiated under the MAS contract. These overcharges totalled \$183,047. The Government requested, and Merant paid, reimbursement to the Government for these contract violations. The audit also concluded that Merant inaccurately reported sales to the Government under the MAS

contract.

Analysis⁵

We begin with defendant's challenge to our jurisdiction, an antecedent question we must first address. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). Defendants refer to the Public Disclosure Bar. As discussed, the Public Disclosure Bar, § 3730(e)(4), divests the Court of jurisdiction over any action under the FCA that is based upon a public disclosure. The GSA Audit that Brown presents as

⁵ Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment we view the facts, and the inferences to be made from them, in the light most favorable to the party opposing the motion for summary judgment. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995).

The moving party bears the burden of proving that no genuine issue of material fact is in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (emphasis omitted) (quoting Fed. R. Civ. P. 56(e)). The nonmoving party must present "more than a mere scintilla of evidence." Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989). At bottom, he must come forward with enough evidence to enable a reasonable jury to find in his favor at trial. Id.; Groman, 47 F.3d at 633.

Cross-motions for summary judgment must be considered separately. United States ex rel. Showell v. Phil. AFL-CIO Hosp. Ass'n, No. 98-1916, 2000 Dist. LEXIS 4960, at *3-4 (E.D. Pa. Apr. 18, 2000), aff'd, 275 F.3d 38 (Aug. 8, 2001). "Both motions must be denied if the court finds that there is a genuine issue of material fact. But if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2720, at 336-37 (1998).

evidence qualifies as a public disclosure. See Mistick, 186 F.3d at 383 ("[T]he disclosure of information in response to a FOIA request is a 'public disclosure.'"); 31 § 3730(e)(4)(A) (enumerating 'administrative' 'reports' and 'investigations' as public disclosures covered by the Public Disclosure Bar). If Brown's action is based upon the GSA Audit, we must dismiss it for lack of jurisdiction.

Merant skirts the critical issue of whether this action is based upon the GSA Audit. Instead, Merant argues that if any claim is based upon the GSA Audit, we must dismiss that claim for lack of jurisdiction. Def.'s Mot. Summ. J. at 17-18.

The Public Disclosure Bar is notorious for its lack of clarity. See Mistick, 186 F.3d at 387-88 ("Section 3730(e)(4)(A) does not reflect careful drafting or precise use of language.... The inescapable conclusion is that the qui tam provision does not reflect careful drafting."); James B. Helmer, Jr., et al., False Claims Act: Whistleblower Litigation (2d ed. 1999) § 5.5, at 166 ("We doubt that anyone will suggest that the public disclosure/original source provisions have been a great success."). Nevertheless, it is clear that for the Public Disclosure Bar to eliminate jurisdiction, the "action," not the claim, must be based upon the public disclosure. 31 U.S.C. § 3730(e)(4)(A); Mistick, 186 F.3d at 388-89. The question here is whether Brown's action is based upon the GSA Audit.

As the Court of Appeals has construed section

3730(e)(4)(A), Brown's action is based upon the GSA Audit if the GSA Audit contains (a) the allegations of the qui tam action or (b) all the essential elements of the qui tam action's claims. Mistick, 186 F.3d at 388; Dunleavy, 123 F.3d at 740-41. To be based upon the audit, Brown's action need not have been actually derived from the audit. Rather, the action must be "supported by" or "substantially similar" to the audit. Mistick, 186 F.3d at 386, 388. Brown's allegation, see supra Background Part B (describing facts alleged in Second Amended Complaint), is that Merant employed various artifices to falsify its commercial sales practice disclosures. The GSA Audit does not make the same allegation. In fact, it concludes that Merant's commercial sales practice disclosures were "generally current, accurate, and complete." GSA Audit, at 1. Nor does it detail transactions from which the essential elements of the FCA violation alleged can be inferred. Mistick, 186 F.3d at 385; Dunleavy, 123 F.3d at 740-41. The GSA Audit does not report any inaccuracies in Merant's commercial practice disclosures. Thus, Brown's action is not based upon the GSA Audit, and we are not deprived of jurisdiction. As we will show infra, however, insofar as Brown attempts to rely on the audit to prove that Merant may have made false statements to the Government when performing under the MAS contract, such evidence is beyond the scope of this action as it does not relate to any allegation made in the Second Amended Complaint.

Turning to the evidence and whether it presents a genuine issue of material fact, we find that the documents Brown proffers neither separately, nor somehow considered in the aggregate, enable a trier of fact to find in Brown's favor. The "Levesque discount" is not a discount. Rather, it is a process Merant uses when a commercial customer who is offered a discount on a product also buys a service.

Brown does not offer any testimonial evidence to aid us in interpreting the Levesque email. Brown himself lends no such insight, since he worked at Merant as a technical consultant, not in billing or sales. As far as we can tell, the series of informal intra-company email that Brown labels as conveying the "Levesque discount" suggest that whenever Merant purported to give a discount on a product (i.e., computer software) to a customer intending to buy a product and a service (i.e. computer training), Merant increased the price of the service by the same amount as it discounted the product, so that the total price the customer was charged was not reduced by the discount. The customer obtained a discount, but enjoyed no savings.

Brown does not contend this billing/sales practice was used on the Government. Rather, he claims that it was not disclosed to the GSA in Merant's disclosures of its commercial sales practices. Even if it were the case that Merant did not divulge to the GSA its commercial sales practice of concomitantly increasing the charge for services every time it extended a

discount on product, it does not necessarily follow that Merant violated the FCA. Under the FCA, section 3729(a)(2), a statement is only actionable if both the statement and the claim which the Government paid or approved because of the statement are false or fraudulent. Even if Merant failed to inform the Government of the Levesque billing process there is no reason to conclude that the Government entered into a false or fraudulent contract, or accepted false or fraudulent charges. Customers were charged exactly the amounts they agreed to pay. As Brown acknowledges, "The total dollar amount of a purchase order is unchanged by the Levesque discount." Pl.'s Mot. Summ. J. at 3. So long as Merant disclosed to the GSA the prices it charged commercial customers - - and Brown presents no evidence that it did not -- its failure to reveal the Levesque billing process would not induce the Government to enter into or approve any false contract or claim. In short, Brown demonstrates no connection between Merant's failure to disclose the Levesque billing process and any contract or claim for payment between Merant and the Government.

Brown's next proffer -- evidence that Merant provided training to the United States Army in the summer of 1998 at no discount -- is equally unavailing. Brown seizes upon this training because Merant agreed in a GSA MAS contract to provide certain training to the Government at a 10% discount. The MAS contract is effective from March 26, 1999 until March 25, 2004; a previous MAS contract was effective from April 1, 1997 until

March 31, 1998. Since the training occurred in the summer of 1998, when no MAS contract was in effect, it does not implicate a MAS contract. Furthermore, the MAS contracts only cover specific training. For instance, the five-year MAS contract embraces training under 'Special Item Number (SIN) 132-50' and 'FSC Group 70'. The parties do not identify what these denominations mean, so it is impossible for a fact finder to tell whether the training provided to the United States Army - training in 'AAI' software - would fall within the scope of a training discount under any MAS contract. Lastly, the Government and Merant negotiated the Army training at issue. Pl.'s Mot. Summ. J., at 6, Ex. 15 (contract); Def.'s Mem. L. Supp. Mot. Summ. J., Ex. F at 26 (testimony about approval by government contract officer). Inasmuch as it departs from the MAS contract, it is sanctioned by separate agreement between the parties.

Brown comes forward with the GSA audit report, which does not, at all, substantiate the allegations in this action of false and fraudulent commercial practice disclosures. To the contrary, the GSA Audit opines after an investigation that "[t]he Commercial Sales Practice (CSP) information submitted by Merant and used by GSA contracting officials for negotiating the contract was generally current, accurate, and complete." GSA Audit at 8.

The GSA Audit does reveal deficiencies in Merant's compliance with MAS contract GS-35F-032JJ. Merant reportedly

overcharged the Government, billing in excess of MAS contract prices, and inaccurately reported sales under the MAS contract for the purpose of the Industrial Funding Fee. Such misbehavior is beyond the scope of this action as it was not pleaded in the Second Amended Complaint or any previous pleading. United States ex rel. Brown v. IBM, NO. 94-3940, 1996 WL 515237, at *2 (E.D. Pa. Aug. 28, 1996); see 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2725, at 419 (stating that on summary judgment "a fact is material if it tends to resolve any of the issues that have been properly raised by the parties."); cf. Seville Indus. Mach. v. Southmost Mach., 742 F.2d 786, 791 (noting that "Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct").

In his response to defendant's motion for summary judgment, Brown maintains that the GSA Audit's finding of faulty compliance with the MAS contract is probative evidence that Merant falsified its commercial sales practice disclosures. Brown states that:

The Defendant's for purposes of their argument have separated the GSA audit into two logical entities[,] the CSP [commercial sales practice] audit and Post-award-issues audit. The individual pieces are then attacked as if it was a separate audit. If a boy throws a stone which causes an avalanche and the avalanche kills a person. By separating the sequence of events one could argue that the avalanche killed the person and the boy is innocent. A similar error

in logic runs throughout the defense argument. All the pieces of the Audit have a synergy that must be considered together.

Pl.'s Mem. L. in Opp. to Def.'s Mot. Summ. J., at 4. One could speculate that Merant overcharged the Government because it deliberately disregarded the price terms in the MAS contract; that the price terms were the product of false commercial practice disclosures which understated commercial prices to lowball the government. Such a theory, however, is on this record pure speculation, not a basis to deny a defendant summary judgment. Williams, 891 F.2d at 460. The GSA Audit cannot be construed to support the claims of fraud made in the Second Amended Complaint. The only fair reading of the GSA Audit that is consistent with the "synergy" of which Brown speaks -- between defendant's possible misconduct in performing under the MAS contract and its claimed misconduct in procuring the MAS contract -- presupposes that Merant understated commercial prices, when the complaint alleges that Merant overstated commercial prices. The GSA Audit investigates the origins of Merant's noncompliance with the MAS contract, and does not attribute its commercial sales practice disclosures to be a factor. GSA Audit, at 8-9. Most importantly, the GSA Audit affirmatively deems Merant's commercial sales practice disclosures "generally current, accurate, and complete."

Brown has not sought leave to amend his complaint to include claims alleging Merant's noncompliance with the MAS

contract culled from the GSA Audit. We here note that granting him such leave would be in any event inappropriate at this late stage of the proceeding. Federal Rule of Civil Procedure 15(a) provides, in relevant part, that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). "Prejudice to the non-moving party is the touchstone for the denial of an amendment." Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993) (quotations omitted). "In the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." Id.

This case has been pending over two years. Brown has filed three complaints. A fourth complaint, when the litigation is at the summary judgment stage, would prejudice Merant by forcing it to defend another claim of fraud not within the Second Amended Complaint and embark anew on voluminous discovery.⁶

⁶ See 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487, at 623 (2d ed. 1990) ("[I]f the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new

True, as the Court of Appeals recognized in a slightly different context (the particular pleading requirement of fraud under Rule 9(b)), courts should be careful not to allow "sophisticated defrauders to successfully conceal the details of their fraud." In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1418. It is one thing for a plaintiff to believe a defendant did something wrong but not have sufficient facts to know the precise manner the defendant accomplished the wrong and all the suitable legal theories. It is quite another for a plaintiff to fix upon a defendant, and when one allegation does not pan out to try another. In the former case, an amended pleading after discovery may well be in the interest of justice, Fed. R. Civ. P. 15(a); in the latter, it is not. To allow Brown to amend his Second Amended Complaint to allege a transaction not anticipated in that complaint, but that surfaced during discovery, would essentially deny Merant summary judgment because the evidence proves no allegation against it but might show something else. We will not allow Brown to make his complaint into a moving target.

We recognize the potentially serious nature of some of the GSA's findings, but the Government has demanded reimbursement from Merant for the overpayment, and Merant has paid it. To authorize a fourth complaint predicated entirely on the findings in the GSA Audit would invite exactly the type of "parasitic"

preparation, the court may deem it prejudicial.").

litigation the Public Disclosure Bar was enacted to prevent. Stinson, 944 D.2d at 1154; James B. Helmer, Jr., et al., False Claims Act: Whistleblower Litigation § 5-5(b), at 170 (2d ed. 1999). Indeed, after we have granted summary judgment on all counts in the Second Amended Complaint, the 'action,' as delimited by the hypothesized third amended complaint, would be 'based upon' the GSA Audit and would be beyond our jurisdiction under the Public Disclosure Bar. Granting leave to file such a complaint would therefore be futile.

Because there is no genuine issue of material fact and Merant is entitled to judgment as a matter of law, we will grant Merant's motion for summary judgment, and deny Brown's.⁷ An Order to this effect follows.

⁷ The Second Amended Complaint also asserts a claim of retaliatory discharge. 2d Am. Compl. at ¶ 33. Brown has withdrawn that claim. Def.'s Mem. L. in Supp. Mot. Summ. J. at 1.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION
ex rel THOMAS BROWN :
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MERANT INC., et al. : NO. 99-6481

ORDER

AND NOW, this 29th day of March, 2002, upon consideration of defendant Merant's motion for summary judgment and relator Brown's response thereto, and Brown's motion for summary judgment and Merant's response thereto, in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Merant's motion for summary judgment (docket entry number 21) is GRANTED;
2. Brown's motion for summary judgment (docket entry number 24) is DENIED;
3. JUDGMENT IS ENTERED in favor of defendant Merant Inc. and against relator Thomas Brown; and
4. The Clerk shall CLOSE this case statistically.

BY THE COURT:

Stewart Dalzell, J.