IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY ELLEN CURTO,

Plaintiff,

v.

THE CORPORATION FOR TRAVEL PROMOTION D/B/A BRAND USA,

Defendant.

Case No. 1:14-cv-1670-KBJ

HEARING REQUESTED

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF BRAND USA'S MOTION TO DISMISS

Dated: December 5, 2014

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INTRODUCTION

This case involves a dispute between Mary Ellen Curto and her former employer, Corporation for Travel Promotion ("Brand USA"). Although Ms. Curto's complaint purports to identify numerous, substantive violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"), she does not intend to prove any of those violations. Rather, she only intends to prove that she *reported* violations of the FCA and that, in response, Brand USA retaliated against her in violation of the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h), and the common law of the District of Columbia.[1]

Although Brand USA denies the allegations in the complaint, at this stage of the proceedings, this Court is, of course, bound to accept all well-pleaded factual allegations as true. Nevertheless, the allegations, as set forth in complaint, fail as a matter of law. Once this Court sets aside the complaint's conclusory allegations, labels, and legal conclusions as it must, and after it considers the documents, which are incorporated by reference into the complaint and those of which this Court may take judicial notice, the complaint fails to establish critical elements of Ms. Curto's claims. Accordingly, this Court should grant Brand USA's motion to dismiss.

BACKGROUND

This Background is derived from the factual allegations in the complaint, along with documents incorporated by reference into the complaint and materials of which this Court should take judicial notice under Federal Rule of Evidence 201. *See, e.g.*, *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007) (explaining that a court may consider on a motion

[1] Notably, Ms. Curto decided to file her 31 U.S.C. § 3730(h) claim publicly rather than under seal alongside a substantive FCA claim. It is certainly no coincidence that Ms. Curto filed her public suit at a time when Congress is considering whether to reauthorize Brand USA's funding.

to dismiss "facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." Quoting *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006)).

A. Brand USA

Brand USA was established by an Act of Congress, the Travel Promotion Act of 2009, to grow America's share of the global travel market and correct certain misperceptions about our nation's entry policies.[2] *See* United States Capitol Police Administrative Technical Corrections Act of 2009, Pub. L. No. 111-145, § 9(b)(1), 124 Stat. 49, 56 (2010) ("Travel Promotion Act of 2009") (codified at 22 U.S.C. § 2131(b)(1)); *see also* S. Rep. No. 111-25, at 2 (2009) (noting that the increase in "border security" following "September 11, 2001, . . . resulted in a significant decrease in the number of visitors to the United States") (*available at* https://www.congress.gov/111/crpt/srpt25/CRPT-111srpt25.pdf). Notwithstanding its statutory origin, Brand USA is a private, non-profit company organized under the laws of the District of Columbia. *See* 22 U.S.C. § 2131(b)(1) (declaring that Brand USA "shall not be an agency or establishment of the United States Government"); *accord* Compl. ¶ 9 [Dkt. No. 1].

Although Brand USA has a public mission—to promote foreign travel to the United States, help grow the tourism industry, and create American jobs—it is not a governmental entity. Indeed, Congress made the deliberate determination that Brand USA would exist as a private entity—a determination, which has certain legal consequences and, as addressed herein,

[2] Brand USA has been immensely successful in achieving its mission. According to the Department of Commerce, foreign travel and spending have increased every year since Brand USA came into existence. *See* National Travel and Tourism Office, U.S. Dep't of Commerce, *Fast Facts: United States Travel and Tourism Industry – 2013* (May 2014) (*available at* http://travel.trade.gov/outreachpages/download_data_table/Fast_Facts_2013.pdf). In 2013 alone, foreign travel contributed $180.7 billion to the American economy and helped support 1.3 million American jobs. *See id.* And according to the bipartisan findings of the House Committee on Energy and Commerce, "Brand USA's efforts attracted *1.1 million additional visitors* to the United States" in 2013 alone, and "Brand USA has achieved a marketing return on investment of *47:1*." H.R. Rep. No. 113-542, pt. 1, at 4 (2014) (emphasis added) (*available at* https://www.congress.gov/113/crpt/hrpt542/CRPT-113hrpt542-pt1.pdf).

relieves Brand USA of certain obligations and restrictions applicable to governmental entities. For example, because of Brand USA's unique status, the Government Accountability Office ("GAO") "found that Brand USA was not required to . . . adopt federal policies and procedures designed to facilitate program accountability and evaluation," including federal procurement regulations. GAO, *Brand USA Needs Plans for Measuring Performance and Updated Policy on Private Sector Contributions*, GAO Rep. No. 13-705, at 8 & n.11 (July 2013) (citing 2 C.F.R. § 215 *et seq.*) ("GAO Report") (Exh. A) (*available at* http://www.gao.gov/assets/660/656225 .pdf).[3] Moreover, the Travel Promotion Act "does not require Brand USA to follow federal procurement laws and does not prescribe specific procurement processes." Exh. A at 22-23.

Nevertheless, Brand USA has adopted internal company policies regulating, among other things, personnel, procurement, and contributions from private sources. As the GAO recognized, these policies are fully consistent with the Travel Promotion Act of 2009. Exh. A at 20 ("Brand USA has established policies for personnel, procurement, and in-kind contributions, which are consistent with the applicable [Travel Promotion Act] requirements.").

B. The Travel Promotion Act

In keeping with Brand USA's public purpose, the Travel Promotion Act dictates the company's basic objectives. Specifically, Congress charged Brand USA with:

1. promoting foreign travel to the United States "through the use of, but not limited to, all forms of advertising, outreach to trade shows, and other appropriate promotional activities";

[3] The GAO Report referenced above is specifically quoted by, and therefore incorporated by reference into, the Complaint. *See* Compl. ¶ 143. Although the Complaint claims that this report was issued in June 2013, rather than July, it is apparent that the Complaint is quoting from the July 2013 Report. *Compare* Compl. ¶ 143 (quoting a finding from a GAO Report, and suggesting that this finding related to Brand USA's noncompliance with federal procurement regulations), *with* GAO Rep. No. 13-705, *supra*, at 24 (including the same language quoted in the Complaint, but making plain that the GAO was referring to Brand USA's one-time noncompliance with "its"—*i.e.*, *the company's*—"procurement policy"). In any event, even if the Complaint did not incorporate the GAO Report by reference, it is a public document of which this Court is capable of taking judicial notice on a motion to dismiss under Federal Rule of Evidence 201.

2. providing useful information to foreigners about traveling to the United States;

3. countering misperceptions about the entry policies of the United States;

4. ensuring that foreign travelers are aware of the benefits of travel to all areas of the country, including those areas not traditionally visited by foreign travelers; and

5. prioritizing those countries and populations most likely to travel to the United States.

22 U.S.C. § 2131(b)(5)(A). To take advantage of private-sector expertise, Congress also dictated that the composition of Brand USA's Board of Directors shall include members of the travel industry from a variety of different sectors. *Id.* § 2131(b)(2)(A).

The Travel Promotion Act establishes the basic ways that Brand USA can finance its operations. As an initial matter, to minimize the burden on American taxpayers, Congress established a new Treasury fund, the "Travel Promotion Fund," *id.* § 2131(d)(1), which is comprised exclusively of money generated from a small fee imposed on certain foreign visitors under the Immigration and Nationality Act, 8 U.S.C. § 1187(h)(3)(B). Congress then provided from this fund an initial appropriation, not to exceed $10 million, to cover Brand USA's "initial expenses." 22 U.S.C. § 2131(d)(2)(A). Thereafter, Brand USA has two means of financing its ongoing operations. *First*, Brand USA may seek voluntary contributions—both money (cash contributions) and other goods and services (in-kind contributions)—from "non-Federal sources" (*i.e.*, private entities and persons). *Id.* § 2131(d)(3). Subject to certain, minimal restrictions discussed below, Brand USA is then eligible to receive federal matching funds, from the Travel Promotion Fund, based on the non-Federal contributions that it receives.[4] *Second*, Congress authorized Brand USA to impose an "annual assessment" on "United States members of the

[4] Fees collected in excess of the amount given to Brand USA are "used for deficit reduction purposes." S. Rep. No. 113-234, at 4 (2014) (*available at* https://www.congress.gov/113/crpt/srpt234/CRPT-113srpt234.pdf). According to the Congressional Budget Office, the reauthorization of the Fund through 2024 would result in a "net decrease in the deficit of $231 million." H.R. Rep. No. 113-542, pt. 1, *supra*, at 7.

international travel and tourism industry." *Id.* § 2131(f)(1). That said, this "assessment authority has never been used," and Brand USA has not opposed its elimination. *Markup of H.R. 4450, Travel Promotion, Enhancement and Modernization Act of 2014 by the Subcomm. on Commerce, Manufacturing and Trade of the H. on Energy and Commerce*, 105th Cong., Tr. 42:919, 43:922-23 (2014) (statement of Rep. Bilirakis) (*available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Transcript-TROL-Act-HR-4450-HR-4013-2014-7-10.pdf). Notably, Brand USA's source of federal funding, the Travel Promotion Fund, will sunset on September 30, 2015, unless reauthorized by Congress. 8 U.S.C. § 1187(h)(3)(B)(iii).[5]

Beyond these basic parameters governing Brand USA's mission and financing, the Travel Promotion Act grants Brand USA broad discretion "to accomplish the purposes set forth in [the Act]." 22 U.S.C. § 2131(b)(5)(B)(iii). Indeed, the Act imposes only eight basic, limited restrictions on the availability and use of federal matching funds:

1. The company shall exist as a private, non-profit company with no power to pay dividends, 22 U.S.C. § 2131(b)(4)(A), (B);

2. The company may not contribute to or otherwise support any political party or candidate for elective office, *id.* § 2131(b)(4)(C);

3. The company may not obligate or expend funds in excess of the total amount received by the company for that fiscal year from Federal and non-Federal sources, *id.* § 2131(d)(3)(D);

4. The board of directors of the company may not authorize the company to obligate or expend more than $25 million on "any advertising campaign, promotion, or related effort" unless each member of the board is given at least three days

[5] On July 22, 2014, the House of Representatives passed one such reauthorization bill—the Travel Promotion, Enhancement, and Modernization Act of 2014, H.R. 4450, 113th Cong. (2014) (*available at* https://www.congress.gov/113/bills/hr4450/BILLS-113hr4450pcs.pdf)—by a vote of 347 to 57 (with 28 representatives not voting). *See* Clerk, U.S. House of Reps., Final Vote Results for Roll Call 433, *available at* http://clerk.house.gov/evs/2014/roll433.xml. As of the submission of this motion, the House bill has been read twice and placed on the Senate Calendar, where it awaits legislative action. *See* Library of Congress, Bill Status, Major Actions, H.R. 4450, *available at* https://www.congress.gov/bill/113th-congress/house-bill/4450/actions.

advance notice of the vote, at least six of the eleven members vote, and a two-thirds majority approves the obligation or expenditure, *id.* § 2131(b)(7);

5. The company may only invest the funds that it receives in certain, defined investment vehicles, *id.* § 2131(f)(5);

6. The company may not receive more than $100 million in federal matching funds to cover operating expenses during any fiscal year, *id.* § 2131(d)(2)(B);

7. The company may rely on "the fair market value of goods and services (including advertising) contributed" to the company for the purposes of claiming matching funds (*i.e.*, in-kind contributions), but the total value of these non-cash contributions may not account for more than 80 percent of the value of the claims that Brand USA submits for matching purposes, *id.* § 2131(d)(3)(B); and

8. The company may not otherwise use federal matching funds for "any purpose inconsistent with" carrying out its objectives of promoting foreign travel, developing a budget for submission to the Secretary of Commerce, and preparing an annual report to Congress, *id.* § 2131(c)(4).

Thus, subject to certain defined limitations, Brand USA has the authority and discretion to take any "actions as may be necessary to accomplish the purposes set forth in [the Act]." *Id.* § 2131(b)(5)(B)(iii). In addition, Brand USA is vested with the power to "obtain grants from and make contracts with individuals and private companies, State, and Federal agencies, organizations, and institutions." *Id*. § 2131(b)(5)(B)(i). And the Act specifically contemplates that Brand USA will solicit and accept private-sector donations, *see id.* § 2131(d)(3), "including advertising," *id.* § 2131(d)(3)(B), and "promot[e] the United States of America to world travelers through the use of, but not limited to, all forms of advertising, outreach to trade shows, and other appropriate promotional activities," *id.* § 2131(b)(5)(A)(iii). The Act therefore specifically contemplates that Brand USA will enter into cooperative-advertising arrangements and contracts with private-sector donors.

Finally, although the Act imposes basic reporting and accountability requirements, none are linked to the receipt of federal matching funds. *Compare id*. § 2131(c) (requiring the company to (1) establish and submit to the Secretary of Commerce a list of "annual objectives"

and a "marketing plan"; (2) transmit a copy of the company budget for the forthcoming fiscal year to the Secretary and make it available to the public; and (3) provide an annual report to Congress), *with id.* § 2131(d) (providing for federal matching funds without imposing any reporting requirements). Moreover, the Act imposes no certification requirement on the company in order to receive federal funding. *See generally id.* § 2131. Instead, Congress left it to Brand USA, the Department of Commerce, and the Department of the Treasury to develop the procedures to be used for the submission and payment of claims for federal matching funds.

C. The Memorandum of Understanding Guiding the Claims Process

As the complaint acknowledges, following its incorporation, Brand USA entered into a Memorandum of Understanding ("MOU") with the Department of Commerce and the Department of the Treasury that outlines each party's relative responsibilities as they relate to the Travel Promotion Act and the associated Travel Promotion Fund. *See* Mem. of Understanding Among the U.S. Dep't of the Treasury, the U.S. Dep't of Commerce, and the Corp. for Travel Promotion (*available at* http://thebrandusa.com/~/media/Files/Key%20Dox/Signed%20MOU%20with%20Commerce%20and%20Treasury.pdf) (Exh. B); *see also* Compl. ¶¶ 30-31 (referring to the Memorandum of Understanding). Under the terms of the MOU, in making a request for federal matching funds, Brand USA is to provide the Departments of Commerce and the Treasury with "an accounting, certified by an officer of the Corporation and by an independent certified accounting firm, of the amounts received by the Corporation from non-Federal sources, including money and the fair market value of goods and services contributed to the Corporation." Exh. B at 2. For its part, the Department of Commerce then reviews Brand USA's request to determine "whether the accounting submitted by the Corporation of the

amounts received by the Corporation from non-Federal sources, including, but not limited to the fair market value of goods and services contributed to the Corporation, is valid for payment." *Id.*

Other than these basic parameters set forth in the MOU, the complaint identifies no other requirement for the submission of claims for federal matching funds. *See generally* Compl. For instance, the complaint cites no process—express or implied—requiring Brand USA to certify compliance with any statute, regulation, or rule in order to receive federal matching funds. *See id.* Critically, neither the Act nor the MOU prohibits the use of funds in support of the donors so long as such funds also support Brand USA's statutory mission as set forth in 22 U.S.C. § 2131(b)(5)(A).

D. Brand USA's Joint Advertising Campaigns

Given the statutory design of the Travel Promotion Act—including its express authorization for Brand USA to "obtain grants from and make contracts with . . . private companies" and "take such other actions as may be necessary to accomplish the purposes set forth in [the Act]," 22 U.S.C. § 2131(b)(5)(B)(i), (iii)—the fact that Brand USA enters into cooperative-advertising arrangements with private entities to promote foreign tourism is not only permitted, but is in fact an integral part of its congressional mandate. Indeed, the GAO has detailed many of these "cooperative advertising" endeavors:

> Brand USA has developed a number of programs that allow partners to work with the corporation to develop or contribute print, Internet, television, and billboard advertisements to promote travel to the United States. For example, Brand USA's partners, including travel publications and travel industry websites, have donated print, television, or Internet advertising space to Brand USA. Partners may also work with Brand USA through *joint media buying, e-mail campaigns, and trade and travel events*, among other promotional activities. . . . One of Brand USA's partnership programs coordinates media buying and overseas marketing by Brand USA and [destination marketing organizations ("DMO")] and other travel sector partners. Through this program, the partners provide *a cash contribution to Brand USA*, which it uses for media purchases and other advertising efforts to promote the United States *along with a specific U.S.*

> *destination or brand*. Along with using a partner's cash contribution, *Brand USA might provide an additional investment to help promote a specific destination supported by the partner*, allowing greater exposure for the destination than if the partner had independently funded its own media purchases. . . .
>
> International and domestic partners' donations of advertising space and their market expertise help support Brand USA's marketing and trade activities, according to Brand USA staff. In particular, state and local DMO partners' donations of *cooperative advertising*—that is, advertising with marketing objectives shared by Brand USA and one or more partners—help support Brand USA's efforts to promote U.S. destinations and extend the overseas presence of the campaign's advertisements. For example, the DMO Coastal South Carolina included *Brand USA's logo* on *its* billboard advertisements in London promoting travel to Charleston, South Carolina—a destination that might not be familiar to some British travelers—and Brand USA has worked with *Visit California* and Air New Zealand to develop advertisements that promote flights and *travel to California*.

Exh. A, GAO Rep. No. 13-705, *supra*, at 13-14 (emphasis added).

Brand USA's receipt and use of contributions from the travel industry is also contemplated and encouraged by the Act—even contributions in the form of cooperative advertising—which Brand USA then submits to the federal government in order to receive federal matching funds. The GAO Report explains that Brand USA actively worked with the Department of Commerce to revise the company's "in-kind contributions policy to include the valuation methodologies for estimating *Brand USA's portion* of the fair market value of in-kind contributions of *cooperative advertising* and for valuing contributions of trade show sponsorships." *Id.* at 26 n.34 (emphasis added). This agreed-upon methodology involves a formula that takes into account Brand USA's and the partner's overall prominence in any joint advertisement. *Id.*

E. The Complaint

The complaint attempts to assert two claims: (1) retaliation in violation of the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h), *see* Compl. ¶¶ 106-35; and (2) wrongful termination

in violation of the common law of the District of Columbia, *see id.* ¶¶ 136-53. Conspicuously, the complaint does not assert any claim on behalf of the United States for alleged substantive violations of the FCA. *See generally id.*; *see also* 31 U.S.C. § 3730(b), (c), (d) (authorizing private parties to bring claims on behalf of the federal government for frauds against the government, and allowing that party to share in any recovery). Ms. Curto is, therefore, not a relator; her claims are her own.

1. Three Types of Alleged "Fraud"

According to Ms. Curto, various (often unnamed) individuals at Brand USA committed three types of conduct, each of which she labels a "fraud" against the government:

First, Ms. Curto claims that Brand USA was engaged in what she labels "a kickback scheme, whereby [Brand USA] would raise money [from non-Federal sources] with the promise that [these] travel-industry donors would receive large amounts of advertising paid by Federal funds." Compl. ¶ 37. Ms. Curto claims that Brand USA memorialized this "kickback scheme" through so-called "Marketing Partnership Agreements," in which Brand USA allegedly promised these non-federal sources that Brand USA would use some percentage of the federal matching funds it received for the specific benefit of that contributor. *See id.* Ms. Curto also claims that Brand USA never disclosed this arrangement to the Department of Commerce when it submitted its requests for federal matching funds. *Id.* ¶¶ 42, 51, 54.

Importantly, Ms. Curto never alleges that, at the time Brand USA entered into these purported agreements, it did not intend to use federal matching funds to promote travel to the United States. *See generally id.* Nor does she identify any provision in the Travel Promotion Act or MOU that prohibits the use of funding in the manner she labels as "kickbacks." Thus, Ms. Curto does not allege how these agreements, assuming that they existed, violated the Travel

Promotion Act's broad proclamation that Brand USA may take all steps that it deems necessary to "promot[e] the United States of America to world travelers through the use of, but not limited to, all forms of advertising, outreach to trade shows, and other appropriate promotional activities." 22 U.S.C. § 2131(d)(3); *see also id.* § 2131(b)(5)(B)(iii) (authorizing Brand USA to take any steps "necessary to accomplish" the Travel Promotion Act's broad objectives); *but cf.* Compl. ¶ 37 (concluding, without any explanation, that these agreements "violated the [Travel Promotion Act]"). What is more, the Department of Commerce was—and remains—fully aware that Brand USA engages in cooperative-advertising campaigns. *E.g.*, Exh. A, GAO Rep. No. 13-705, *supra*, at 13-14.

Nor does Ms. Curto explain what was false or fraudulent about these submissions. *See generally* Compl. At most, she alleges that the "Marketing Partnership Agreements" were not disclosed to the Department of Commerce. *Id.* ¶¶ 41, 51. But she does not allege that such a disclosure was required under the agreed-upon process set forth in the MOU. *See generally id.* Instead, she suggests that the arrangement was not accurately accounted for in Brand USA's "budget planning process." *Id.* ¶ 43. But again, she does not tie this alleged inaccuracy to the submission of a claim for federal matching funds. Instead, Ms. Curto alleges requirements that nowhere exist in the statute, and then claims that Brand USA failed to satisfy those requirements.

Second, Ms. Curto claims that Brand USA "knowingly exaggerated" to the Department of Commerce the value of the in-kind contributions that Brand USA received from non-Federal sources. *Id.* ¶ 56; *see also id.* ¶ 82. More specifically, she suggests that Brand USA intentionally overstated the value of digital images that the company received from IMAX. *Id.* ¶¶ 57-59. According to Ms. Curto, the Department of Commerce "rejected" Brand USA's initial submission because "the valuation was done in-house by IMAX itself," and when Brand USA

first received an appraisal from an outside source, J. Walter Thompson, the value of the film was assessed at "$1 million at most." *Id.* ¶ 58. Ms. Curto claims that, to support a higher appraised value, Brand USA obtained and submitted a second opinion from a "more flexible appraiser," who valued the film at "$30 million." *Id.* ¶ 59.

However, the actual documents that Ms. Curto references and thereby incorporates in her complaint contradict her own allegations. These documents establish that Brand USA followed the Department's approved process for valuing an in-kind contribution; it submitted invoices covering similar films, established a unit value, then extrapolated the total value of the contribution that it had received. *See* Exh. C (Initial IMAX Submission to the Department of Commerce).[6] Given the unique nature of the contribution, however, the Department of Commerce asked Brand USA to obtain an independent third-party appraisal.[7] Thereafter, Brand USA asked J. Walter Thompson to informally opine on the value of the film so that Brand USA could assure itself that the agreed-upon methodology was a reasonable approximation of the film's value. Ms. Curto's primary allegation to suggest impropriety in the other appraisal is that J. Walter Thompson's valuation was only $1 million, but the actual appraisal shows that allegation to be false. J. Walter Thompson reported that, under an acceptable methodology, the film was worth up to "$35,000,000" or more. *See* Exh. D (Internal Appraisal by J. Walter Thompson).[8] Brand USA did not ultimately submit this report to the Department of Commerce only because J. Walter Thompson served as Brand USA's advertising agency of record, and as a result, the appraisal would not have constituted an independent accounting under the MOU.

[6] Because the complaint refers to the initial "$30 million valuation of photos from IMAX" that Brand USA submitted, that initial submission has been incorporated by reference into the complaint. *See* Compl. ¶ 58.

[7] Ms. Curto alleges that the Department "rejected" Brand USA's initial submission. Compl. ¶ 58. That is not what happened, but it does not matter how the Department's request for a third-party appraisal is characterized.

[8] Again, because the complaint refers to the appraisal by J. Walter Thompson, that appraisal is incorporated by reference into the complaint. *See* Compl. ¶ 58.

Brand USA then hired a member of the Appraisers Association of America with experience appraising art and documentary film, including experience appraising non-cash donations to charitable organizations. Exh. E (Appraisal of A. Breus, Member of the Appraisers Ass'n of Am.).[9] This appraiser valued the film at roughly $37 million—in part, because Brand USA had been granted intellectual-property rights to the film superior to those recounted in the invoices that Brand USA had used to support its initial valuation. *See id*. Upon receiving this appraisal, the Department asked whether Brand USA wished to continue to claim an in-kind contribution value of only $30 million, in light of the $37 million appraisal it had just received. To be conservative, Brand USA maintained its initial request of roughly $30 million. Exh. F (E-mail from Y. La Penotiere, Brand USA, to J. Heizer, Dep't of Commerce, dated Sept. 30, 2013).[10] Ms. Curto's allegations therefore, are flatly contradicted by the documents and communications that she references in her complaint, and as explained below, those allegations must give way to the documents referenced in the complaint.

Moreover, even if J Walter Thompson's valuation was only $1 million, there are still critical allegations missing from Ms. Curto's complaint. Namely, she does not allege that Brand USA was not permitted to use the appraisal it ultimately submitted, nor does she allege that it was, in fact, false or fraudulent, but only that it was higher than another appraisal. In short, Ms. Curto has not alleged false or fraudulent conduct that would trigger FCA liability.

Finally, Ms. Curto claims that Brand USA was "not compliant with Federal hiring and procurement requirements," Compl. ¶ 69, which she alleges throughout her complaint, *id.* ¶¶ 2,

[9] By referring to the third-party appraisal that Brand USA submitted to the Department of Commerce, the complaint has fairly incorporated that appraisal by reference. *See* Compl. ¶ 59.

[10] The complaint refers to Brand USA's communication with the Department of Commerce whereby the company "resubmitted the donation" for $30 million and therefore fairly incorporates by reference Brand USA's communication with the Department of Commerce in which it reaffirmed its initial request of $30 million.

5, 68-71, 77, 122, 141, 143, 148-49, including as it relates to the so-called "kickback scheme," *id.* ¶ 39. She claims that this alleged noncompliance implicates the FCA, *id.* ¶¶ 121-22—though she never alleges how.

Critically, Ms. Curto never ties this alleged noncompliance to any claim for payment that was submitted to the federal government. *See generally id.* She does not allege, for example, that Brand USA certified that the company was in compliance with these regulations in order to receive matching funds for donations it received. *Compare id.* (discussing no requirement for certifying compliance), *with United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (explaining that a false certification claim "rests on a false representation of compliance with an applicable federal statute, federal regulation, or contractual term").

Moreover, even though Ms. Curto was the Vice President of Operations and was in charge of Brand USA's "Procurement Policies and Procedures," *id.* ¶¶ 14, 18, she nowhere acknowledges that the GAO previously "found"—during her tenure at the company—"that Brand USA was not required to . . . adopt federal policies and procedures designed to facilitate program accountability and evaluation," including the federal procurement regulations cited in her complaint. GAO Report, *supra*, at 8 & n.11 (July 2013) (citing 2 C.F.R. § 215 *et seq.*). In addition, the GAO explained in that same report that the Travel Promotion Act "does not require Brand USA to follow federal procurement laws and does not prescribe specific procurement processes," *id.* at 22-23.[11]

[11] Congress apparently shares in the view that Brand USA is not governed by federal procurement regulations. In the version of the reauthorization legislation that passed the House of Representatives, Congress would mandate that Brand USA maintain "a competitive procurement process"—a requirement that would be wholly unnecessary if Congress believed that Brand USA was governed by federal procurement regulations. *See* Travel Promotion, Enhancement, and Modernization Act of 2014, H.R. 4450, § 6, 113th Cong. (2014) (*available at* https://www.congress.gov/113/bills/hr4450/BILLS-113hr4450pcs.pdf).

2. Ms. Curto's Alleged Reporting to Brand USA

Notwithstanding the fundamental misapprehensions throughout her complaint, Ms. Curto claims that she reported what she perceived to be "fraudulent conduct" to "[Brand USA] management and members of the Board of Directors," Compl. ¶ 4—though she is often vague and conclusory on the specifics, including what she reported and when, *e.g.*, *id.* ¶ 68 (proclaiming that Ms. Curto "reported many instances of improper conduct" over an eight month period); *id.* ¶ 88 (claiming that Ms. Curto reported to the Audit Committee "the fraudulent and otherwise non-compliant conduct described herein, in particular Mr. Thompson's improper award of contracts and executive level positions to personal friends"). At most, Ms. Curto alleges that she reported various concerns to Chris Thompson, the Chief Executive Officer and, during the initial period of Ms. Curto's employment, her direct supervisor, *id.* ¶ 71; Donald Richardson, the Chief Financial Officer and Ms. Curto's direct supervisor during the latter period of her employment, *id.* ¶¶ 74-75, 85; Caroline Beteta, the then-current Chair of the Board of Directors, and Matt Sabatini, Ms. Beteta's Board assistant, *id.* ¶¶ 48, 77, both individuals to whom Ms. Curto regularly reported in the ordinary course of her duties, *see id.* ¶ 18; Tom Klein, the Chair of the Audit Committee, *id.* ¶¶ 88, 99; *see also* Exhs. G, H; and Maureen Miller, Brand USA's acting Director of Human Resources, Compl. ¶ 83; *see also* Exh. I.[12] In addition, Ms. Curto alleges that, based on her prior reports, Mr. Klein directed her to speak with Brand USA's outside counsel. Compl. ¶¶ 96, 99.

But the actual letters that Ms. Curto references in the complaint in support of her claim—her letters to Ms. Miller and Mr. Klein, along with Mr. Klein's letter to Ms. Curto—establish that

[12] The letters from Mr. Klein to Ms. Curto (Exh. G), from Ms. Curto to Mr. Klein (Exh. H), and from Ms. Curto to Ms. Miller (Exh. I), were all specifically referenced and thereby incorporated into the complaint. *See* Compl. ¶¶ 83, 95-96. With respect to the Letter to Ms. Miller, there is no evidence that this letter was actually sent, but Brand USA has nevertheless attached the version of the letter that Ms. Curto claims to have sent.

Ms. Curto did not report any concerns that might be said to involve the submission of a knowingly false claim for payment to the federal government. Instead, the letters all relate to alleged noncompliance with company policies and procedures related to procurement and hiring. *See* Exhs. G, H, I. In fact, the letters are silent on the three theories of "fraud" that Ms. Curto now presses in her complaint.

3. The Alleged Retaliation and Damages

Ms. Curto alleges that, based on reporting these concerns, Brand USA's Chief Executive Officer and Chief Financial Officer retaliated against her, and that this retaliation culminated in her termination on October 3, 2013. *Id.* ¶¶ 77-105. She seeks an unspecified amount in damages covering back pay (including two times her back pay under the FCA), lost benefits, and front pay, along with other compensatory and punitive damages, and attorney's fees. *Id.* at 32-33. She does not seek reinstatement. *See id.*

STANDARDS GOVERNING A MOTION TO DISMISS

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes dismissal of a complaint that fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and

plausibility of 'entitlement to relief,'" and it, therefore, must be dismissed. *Id.* (quoting *Twombly*, 550 U.S. at 557).

There are three working principles that underlie the standard that governs a motion to dismiss. *First*, although "a court must accept as true all of the allegations contained in a complaint," that principle "is inapplicable" to "labels" and "legal conclusions." *Id.* Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). Instead, the plaintiff must plead enough *factual matter* to demonstrate "the 'grounds' of [her] 'entitlement to relief.'" *Twombly*, 550 U.S. at 555 (brackets omitted). That is, the plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 555 n.3 (quoting Fed. R. Civ. R. 8(a)(2)).

Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679. "Determining whether a complaint states a plausible claim [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (brackets in original) (quoting Fed. R. Civ. P. 8(a)(2)). A plaintiff may not "unlock the doors of discovery" absent such a showing. *Id.*; *see also Twombly*, 550 U.S. at 557-58 (A plaintiff must plead "something beyond the mere possibility" of unlawful conduct, "lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'").

Third, the United States Court of Appeals for the District of Columbia Circuit has repeatedly recognized that, on a motion to dismiss, a court may consider more than just the "facts

alleged in the complaint"; it also may consider "documents attached thereto or incorporated therein, and matters of which [the court] may take judicial notice." *E.g.*, *Abhe & Svoboda*, 508 F.3d at 1059 (quoting *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006)); *accord Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004). Thus, "where a document is referred to in the complaint and is central to the plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion [to dismiss] to one for summary judgment." *Marshall v. Honeywell Tech. Solutions, Inc.*, 536 F. Supp. 2d 59, 65 (D.D.C. 2008); *accord Kaempe*, 367 F.3d at 965 (holding that a court may consider documents that were "appended to [the] motion to dismiss," without converting that motion to one for summary judgment, because the documents were "referred to in the complaint and [were] integral to [the plaintiff's] claim"). This common-sense rule was designed to prevent a plaintiff from "escap[ing] the consequences of [her] own failure" to attach the document in question. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). And those consequences can be severe: "[W]hen the bare allegations of the complaint conflict with any exhibits or documents, whether attached or adopted by reference, the exhibits or documents prevail"—even on a motion to dismiss. *Davis v. World Sav. Bank, FSB*, 806 F. Supp. 2d 159, 172 (D.D.C. 2011); *accord Abcarian v. McDonald*, 617 F.3d 931, 933 (7th Cir. 2010) ("Where [a complaint's] allegations are contradicted by written exhibits that [the plaintiff] attached to his . . . complaint, . . . the exhibits trump the allegations."); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991) (noting that, "in the event of conflict between the bare allegations of the complaint and any exhibit attached [thereto], the exhibit prevails").[13]

[13] Although Rule 9(b) of the Federal Rules of Civil Procedure serves to "discourage[] the initiation of suits brought solely for their nuisance value, and [was meant to] safeguard[] potential defendants from frivolous accusations of moral turpitude," and although a retaliation claim is premised on underlying allegations of fraudulent conduct, the D.C. Circuit has held—unfortunately, without any analysis—that Rule 9(b)'s particularity requirement does not

ARGUMENT

Ms. Curto attempts to assert two claims against her former employer: (1) retaliation in violation of the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h), *see* Compl. ¶¶ 106-35; and (2) wrongful termination in violation of the common law of the District of Columbia, *see id.* ¶¶ 136-53. Neither of her claims, however, state a plausible claim for relief. Accordingly, her complaint should be dismissed.

I. MS. CURTO HAS FAILED TO STATE A CLAIM FOR RETALIATION IN VIOLATION OF THE FALSE CLAIMS ACT

There are two basic elements to an FCA retaliation claim under 31 U.S.C. § 3730(h): (1) "acts by the employee 'in furtherance of' a suit under § 3730—acts also known as 'protected activity' "; and (2) "retaliation by the employer against the employee 'because of' those acts." *U.S. ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1237 (D.C. Cir. 2012). Here, Ms. Curto fails to state a claim for retaliation because she fails to allege facts that she was investigating matters that could reasonably lead to a viable FCA case. As such, she has failed to allege that she was engaged in protected activity and her § 3730(h) claim must be dismissed.

Protected activity under the anti-retaliation provision of the FCA only pertains to false claims for payment submitted to the federal government and cannot be used to remedy an employee's complaints about other matters. As a result, the D.C. Circuit has held that, although an employee need not have developed a "'winning *qui tam* action before [s]he was retaliated against," her investigation or other actions must "'concern false or fraudulent claims'" for payment by the federal government. *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 67-68 (D.C. Cir. 2008) (quoting (quoting *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 739-

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apply to claims of retaliation under the False Claims Act. *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259-60 (D.C. Cir. 2004). The standards discussed above therefore do not incorporate the particularity requirements of Rule 9(b).

40 (D.C. Cir. 2004)). "Mere dissatisfaction with one's treatment on the job is not, of course, enough." *Yesudian*, 152 F.3d at 740. "Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations." *Id.* Instead, the employee must link that alleged non-compliance "to a false *representation* of compliance with [the] applicable federal statute, federal regulation, or contractual term" in support of a claim for payment submitted to the federal government. *Science Applications*, 626 F.3d at 1266 (emphasis added).

In addition, the D.C. Circuit has held that an employee must rely on more than her "subjective beliefs" to tie her conduct to the pursuit of a claim under the FCA; she must have an "*objectively reasonable basis* to believe that she was 'investigating matters that reasonably could lead' to a *viable* False Claims Act case." *Hoyte*, 518 F.3d at 68 (emphasis added) (quoting *Martin-Baker Aircraft*, 389 F.3d at 1260, and *Yesudian*, 153 F.3d at 740). Thus, as Judge Easterbrook explained: "What [the putative whistleblower] actually believed is irrelevant, for people believe the most fantastic things in perfect good faith; a kind heart but empty head is not enough. The right question is whether her belief had a reasonable objective basis . . . ." *Lang v. Nw. Univ.*, 472 F.3d 493, 495 (7th Cir. 2006) (quoted with approval by *Hoyte*, 518 F.3d at 68-69).

Consistent with the logic of the D.C. Circuit's decisions, this Court has held that an investigation into a "misuse of federal funds already dispursed to the defendant" cannot form the basis of a retaliation claim, because it falls short of establishing a nexus between the investigation and the submission of a false or fraudulent claim. *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 10 (D.D.C. 2010). Similarly, this Court has held that "disclosing wasteful procedures or practices does not amount to an investigation of false or fraudulent claims." *Frett*

v. Howard Univ., Civ. Case No. 13-551, 2014 WL 939499, at *8 (D.D.C. 2014) (ellipses omitted); *see also United States ex rel. Brown v. Aramark Corp.*, 591 F. Supp. 2d 68, 77 (D.D.C. 2008) (failure to comply with regulatory requirements, alone, is insufficient to support a retaliation claim); *Martin v. Arc of D.C.*, 541 F. Supp. 2d 77, 83-84 (D.D.C. 2008) (similar). This logic dooms Ms. Curto's retaliation claim.

A. Ms. Curto's Alleged Concerns Did Not Involve False or Fraudulent Claims for Payment Submitted to the Federal Government.

Ms. Curto's many labels and conclusions notwithstanding, her alleged concerns did not involve the submission of a false or fraudulent claim for payment to the federal government, and so any investigation or reporting related to these concerns do not amount to protected activity. As discussed above, Ms. Curto alleges that she reported three types of "fraud" (her label) against the federal government: (1) the so-called "kickback scheme" (again, her label); (2) the IMAX submission; and (3) alleged noncompliance with federal hiring and procurement regulations. *See supra* at 11-13, 15-16. Putting to one side for the moment her IMAX allegations, Ms. Curto's other assertions lack a reasonable connection to the submission of false or fraudulent claims for payment.

Ms. Curto claims that Brand USA was engaged in "a kickback scheme, whereby [the company] would raise money [from non-Federal sources] with the promise that [these] travel-industry donors would receive large amounts of advertising paid by Federal funds." Compl. ¶ 37. She also claims that Brand USA never disclosed these arrangements to the Department of Commerce when it submitted its requests for federal funds. *Id.* ¶¶ 42, 51, 54.

Critically, however, Ms. Curto never alleges that, at the time Brand USA entered into these arrangements, it did not intend to use the federal matching funds to promote travel to the United States. *See generally id.* And, by all indications, that is exactly what Brand USA did.

Moreover, Ms. Curto fails to identify any provision in the Travel Promotion Act or MOU that prohibits the obtainment or use of matching funding in the manner she alleges are "kickbacks." The Travel Promotion Act specifically empowers Brand USA to "obtain grants from and make contracts with individuals and private companies" to accomplish its goals." 22 U.S.C. § 2131(b)(5)(B)(i). Thus, Ms. Curto never explains how these arrangements, even if they existed, violated the Travel Promotion Act's broad proclamation that Brand USA may take all steps that it deems necessary to "promot[e] the United States of America to world travelers through the use of, but not limited to, all forms of advertising, outreach to trade shows, and other appropriate promotional activities." 22 U.S.C. § 2131(d)(3); *see also id.* § 2131(b)(5)(B)(iii) (authorizing Brand USA to take any steps "necessary to accomplish" the Travel Promotion Act's broad objectives); *but cf.* Compl. ¶ 37 (concluding, without any explanation, that these arrangements "violated the [Travel Promotion Act]"). Absent some allegation that, at the time that Brand USA submitted claims for payment to the Department of Commerce, it knowingly intended to violate some clear restriction on spending set forth within the Travel Promotion Act, Ms. Curto has not shown that her alleged concerns "'reasonably could lead' to a viable False Claims Act case." *Hoyte*, 518 F.3d at 69; *see also Boone*, 684 F. Supp. 2d at 10 (holding that "a misuse of federal funds already dispersed to the defendant" cannot form the basis of a retaliation claim).

Just as critically, Ms. Curto never alleges that there was anything else false or fraudulent about the underlying claims that were submitted to the federal government. *See generally* Compl. To be sure, she alleges that the arrangement was not disclosed to the Department of Commerce. *See id.* ¶¶ 41, 51, 54. But she does not allege that such a disclosure was required under the agreed-upon process set forth in the MOU. *See generally id.* And, in any event, she

never asserts this as the basis for her retaliation claim. Instead, Ms. Curto merely claims that the "kickback scheme" was not accurately accounted for in Brand USA's "budget planning process." *Id.* ¶ 43; *see also id.* ¶ 47 (claiming that the arrangements were not "properly reflected in [Brand USA's] accounting" statements); *id.* ¶ 48 (asserting that the arrangement "was not accurately reflected in [Brand USA's] accounting procedures"); *id.* ¶ 49 (claiming that Brand USA mis-categorized these arrangements "as 'Functional Expenses' in its accounting" statements). But again, she does not link this conduct to the submission of a false or fraudulent claim for federal funds. Under these circumstances, her self-labeled "kickback" allegations cannot form the basis of a retaliation claim.

Ms. Curto's procurement allegations are similarly wanting. As noted above, she claims that Brand USA was "not compliant with Federal hiring and procurement requirements," Compl. ¶ 69; *see also id.* ¶¶ 2, 5, 68-71, 77, 122, 141, 143, 148-49 (same), including as it relates to the so-called "kickback scheme," *id.* ¶ 39. But again, Ms. Curto never ties this alleged noncompliance to any claim for payment that was submitted to the federal government. *See generally id.* She does not allege, for example, that Brand USA certified that the company was in compliance with these regulations. Nor does she allege that Brand USA withheld information about noncompliance with a material contractual requirement. *Cf. Science Applications.*, 626 F.3d at 1266 (explaining that a false certification claim "rests on a false representation of compliance with an applicable federal statute, federal regulation, or contractual term" during the claims submission process); *Yesudian*, 153 F.3d at 740 (recognizing that "an employee's investigation of nothing more than [her] employer's non-compliance with federal or state regulations" does not amount to protected conduct under the False Claims Act); *Brown*, 591 F. Supp. 2d at 77 (similar); *Martin*, 541 F. Supp. 2d at 83-84 (similar). Thus, although Ms. Curto

asserts that this alleged noncompliance implicates the FCA, *see* Compl. ¶¶ 121-22, she never shows through factual allegations how this is so. Instead, her *ipse dixit* proclamation is precisely the sort of "legal conclusion" that is "not entitled to the presumption of truth." *Iqbal*, 556 U.S. at 680. It is therefore legally insufficient to support her claim.

Moreover, it was objectively unreasonable for Ms. Curto to believe that Brand USA was bound by federal procurement and hiring regulations. Her misapprehensions in this regard notwithstanding, during her tenure as Vice President of Operations, the GAO "found that Brand USA was not required to . . . adopt federal policies and procedures designed to facilitate program accountability and evaluation," and the GAO Report specifically mentions the federal procurement regulations cited in the complaint. Exh. A, GAO Report, *supra*, at 8 & n.11 (July 2013) (citing 2 C.F.R. § 215 *et seq.*). Thus, even if mere violations of these regulations could somehow support a claim of retaliation (they can't, *e.g.*, *Yesudian*, 153 F.3d at 740), Ms. Curto cannot demonstrate an objectively reasonable belief that those regulations were binding upon Brand USA. *Cf. Hoyte*, 518 F.3d at 69. In short, Ms. Curto's procurement allegations cannot form the basis of a viable FCA claim, and they therefore do not demonstrate that she engaged in protected conduct under the statute.

B. No Employee Who Was Aware of the IMAX Submission Could Have Reasonably Believed that It was False or Fraudulent.

That leaves only Ms. Curto's alleged concerns about the IMAX submission. As noted above, she asserts that Brand USA "knowingly exaggerated" to the Department of Commerce the value of the IMAX submission. Compl. ¶¶ 57-59. According to Ms. Curto, the Department "rejected" Brand USA's initial submission because "the valuation was done in-house by IMAX itself," *id.* ¶ 58; Brand USA then received an outside appraisal from J. Walter Thompson, but that appraisal came in at "$1 million at most," *id.*; and thereafter, Brand USA submitted a second

opinion from a "more flexible appraiser," who valued the film at "$30 million." *Id.* ¶ 59. Thus, Ms. Curto purports to relay first-hand information about the claims submission process for the IMAX contribution. *See id.* ¶¶ 57-59.

The very documents that Ms. Curto references in her complaint—Brand USA's initial submission, the J. Walter Thompson appraisal, the appraisal of Alan Breus, and Brand USA's resubmission—undercut Ms. Curto's allegations. *See* Exhs. C, D, E, F. Brand USA submitted an initial claim consistent with the protocols established by the Department of Commerce. *See* Exh. C. Thereafter, Brand USA received an informal opinion from J. Walter Thompson, appraising the contribution—*not* at "$1 million at most," as Ms. Curto alleges, Compl. ¶ 58—but at up to "$35,000,000" or more, Exh. D. Brand USA then solicited an appraisal from an independent appraiser with expertise in evaluating charitable contributions—an expert accredited by the Appraisers Association of America. *See* Exh. E. That appraiser assessed the value of the film at slightly more than $37 million, *see id.*, which was fully in line with the informal appraisal that Brand USA received from J. Walter Thompson, *see* Exh. D. Upon receiving the third-party appraisal, the Department asked whether Brand USA wished to continue to claim an in-kind contribution value of $30 million, in light of the $37 million appraisal it had just received. Exh. F. To be conservative, Brand USA maintained its initial request of roughly $30 million. *Id.*

Notwithstanding Ms. Curto's mistaken belief about the appraisal by J. Walter Thompson, these facts simply do not provide an objectively reasonable basis for believing a viable FCA claim was implicated by the IMAX submission. Ms. Curto's suggestion of impropriety rests on the allegation that J. Walter Thompson's appraisal of the film was only $1 million, but that is not the case. *Cf. Davis*, 806 F. Supp. 2d at 172 (explaining that where "the bare allegations of the complaint conflict with [the] exhibits [and] documents . . . adopted by reference, the exhibits

[and] documents prevail"); *accord Abcarian*, 617 F.3d at 933; *Fayetteville Investors*, 936 F.2d at 1465. And, irrespective of any difference in the amount of the appraisals, Ms. Curto fails to identify why Brand USA was not permitted to submit the appraisal it did, or allege that that appraisal contained false or fraudulent information. Indeed, if Brand USA was aggressively using the IMAX deal to reach its revenue goals, as Ms. Curto theorizes, *see* Compl. ¶ 101, it would not have left the additional $7 million that Commerce offered it on the table. *See* Exh. F (declining to seek $37 million even though it was supported by the appraisal that Brand USA had submitted).

Under the circumstances, no employee who was aware of the contents of the IMAX submission could reasonably believe that they were false or fraudulent. And Ms. Curto portrays herself as a corporate insider fully aware of the submission's contents. *See* Compl. ¶¶ 57-59. Thus, Ms. Curto's IMAX allegations, supplemented by the actual documents that she refers to in the complaint and that formed the basis of the submission process, fail to demonstrate the sort of objectively reasonable belief required to support a claim of protected conduct under the False Claims Act.

* * * * *

At bottom, Ms. Curto has failed to nudge her complaint to the point of plausible. Instead, based on her allegations—not her labels and conclusions—and the documents incorporated into the complaint, the only plausible inference is that Brand USA did not deem any of Ms. Curto's reported concerns "actionable," Compl. ¶ 95, and that she was terminated for reasons unrelated to the FCA, *see id.* ¶ 105. *Cf.* 31 U.S.C. § 3730(h)(1) (requiring a former employee to show that she was terminated "because" she engaged in protected conduct under the Act). Accordingly,

her retaliation claim should be dismissed because she was not engaging in protected conduct under the FCA.[14]

II. MS. CURTO HAS FAILED TO STATE A CLAIM FOR WRONGFUL TERMINATION UNDER THE COMMON LAW OF THE DISTRICT OF COLUMBIA.

Ms. Curto's common-law claim for wrongful termination meets a similar fate. As a general matter, "an employer may discharge and, impliedly, demote, an at-will employee at any time and for any reason, or for no reason at all." *Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 627 (D.C. 1997). That said, the common law of the District of Columbia recognizes a "narrow public policy exception to the employment-at-will doctrine." *Carl*, 702 A.2d at 159.

Under this common-law exception, an at-will employee can bring an action for wrongful termination if she can demonstrate that "she was discharged in retaliation *for* attempting" to ensure compliance with the law or otherwise refusing to violate the law on her employer's behalf. *Libertore*, 718 A.2d at 1072 (emphasis added); *see also Adams*, 597 A.2d at 34. Thus, like the FCA, a common-law claim for wrongful discharge requires protected conduct (*e.g.*, reporting a violation of the law) and but-for causation (*e.g.*, retaliation "for" reporting that violation of the law).

There are, however, two important limitations on this common-law exception. *First*, such a claim is not available where the legislature has "addressed the issue itself, . . . creating a specific, statutory cause of action to enforce it." *Carter v. District of Columbia*, 980 A.2d 1217, 1226 (D.C. 2009). *Second*, the common law only recognizes a claim where an employee

[14] Although Brand USA does not wish to publicly air what is largely a private matter, if required to do so, Brand USA will prove that Ms. Curto's employment was terminated for several reasons totally unrelated to her alleged protected activity, including serious concerns about the bid-rigging of a contract referenced in her allegations, Compl.¶ 79.

"*reasonably* believes" that there is a violation of a "law, rule, or regulation." *Id.* (emphasis added). Ms. Curto's common-law claim fails to satisfy either limitation.

A. The Common Law of the District of Columbia Does Not Permit Ms. Curto to Pursue a Wrongful Termination Claim Based on Alleged Violations of the False Claims Act.

To the extent that Ms. Curto's common-law claim is based on her allegations of protected conduct under the False Claims Act—*i.e.*, her conclusory allegations that she was investigating and reporting the submission of allegedly false and fraudulent claims to the federal government—her claim does not fit within the public-policy exception to the at-will-employment doctrine. "The D.C. Court of Appeals has made clear that the public-policy exception does not apply where the very statute creating the relied-upon public policy already contains a specific and significant remedy for the party aggrieved by its violation." *United States ex rel. Hood v. Satory Global, Inc.*, 946 F. Supp. 2d 69, 88-89 (D.D.C. 2013) (internal quotation marks and citation omitted); *Elemary v. Phillip Holzmann, A.G.*, 533 F. Supp. 2d 116, 136 (similar); *see also Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 254-55 (D.C. Cir. 2008) (affirming dismissal of a wrongful-discharge claim because the employee had an anti-retaliation remedy under the Energy Reorganization Act). Here, because the False Claims Act already contains an anti-retaliation provision, a claim for common-law wrongful termination is not available to Ms. Curto irrespective of the merits of her claim. *See Hood*, 946 F. Supp. 2d at 88-89. Or, put more bluntly, the "alternative remedy in the FCA *extinguishes* [Ms. Curto's] common law claim as a matter of law." *Id.* at 89 (emphasis added) (internal quotation marks and citation omitted); *see also Elemary*, 533 F. Supp. 2d at 136 ("Because th[e] remedy [under 31 U.S.C. § 3730(h)] lies open to her, [plaintiff] may not invoke the public policy exception to the at-will employment doctrine."). Thus, to the extent that Ms. Curto is attempting to rely on protected conduct under

the False Claims Act, she cannot rely on that same conduct to support a claim for wrongful termination under the common law of the District of Columbia.

B. Ms. Curto Has Alleged No Other Actionable Conduct Under the Common Law of the District of Columbia, Only Alleged Violations of Company Policies.

Apparently sensitized to the limitation discussed above, Ms. Curto appears to base her common-law claim largely on her allegations that Brand USA repeatedly violated federal procurement and hiring regulations. *See* Compl. ¶¶ 136-53. And yet, that basis is just as meritless, because Ms. Curto could not have *reasonably* believed that those regulations applied to Brand USA, and she therefore could not reasonably believe that she was reporting alleged violations of any "law, rule, or regulation" that was binding upon the company. *Carter*, 980 A.2d at 1226.

During Ms. Curto's tenure at the company, the GAO "found that Brand USA was not required to . . . adopt federal policies and procedures designed to facilitate program accountability and evaluation," including the federal procurement and hiring regulations cited in her complaint. GAO Report, *supra*, at 8 & n.11 (July 2013) (citing 2 C.F.R. § 215 *et seq.*). Because Ms. Curto alleges that her responsibilities covered procurement, *see* Compl. ¶ 18, she should have been keenly aware of this report's conclusion. Indeed, she specifically references the report in her complaint, albeit in a disingenuous way—implying that the GAO faulted Brand USA for not abiding by federal procurement regulations, *see id.* ¶ 143, when, in fact, the GAO was referring to Brand USA's one-time noncompliance with "its" (*i.e.*, *the company's*) "procurement policy," GAO Rep. No. 13-705, *supra*, at 24. Ms. Curto, therefore, should have known that Brand USA is not governed by the federal procurement and hiring regulations that she repeatedly references in her complaint.

As such, it would have been objectively unreasonable for Ms. Curto to believe that she was investigating violations of federal regulations. *Cf. Hoyte*, 518 F.3d at 68. Properly understood, her alleged concerns related to purported violations of *company policies*—and nothing more. Because such policies do not amount to a "law, rule, or regulation," *Carter*, 980 A.2d at 1226, Ms. Curto has failed to allege facts that establish that she engaged in any form of protected conduct under the common law. Her claim for wrongful termination therefore fails as a matter of law.

III. MS. CURTO HAS FAILED TO STATE A CLAIM OR PLEAD FACTS THAT CAN SUPPORT HER REQUEST FOR PUNITIVE DAMAGES.

Finally, even if Ms. Curto has pled sufficient facts to support her claims for retaliation under the False Claims Act and wrongful termination under the common law, she cannot sustain her request for punitive damages under either theory. *But see* Compl. ¶¶ 135, 153 (seeking punitive damages under both theories). In short, punitive damages are unavailable as a matter of law, and this request should therefore be stricken from her complaint.

There can be no real question that the False Claims Act creates a comprehensive set of remedies for retaliation, and it is clear that punitive damages are not among those remedies. The specific relief under the statute is limited to reinstatement, twice the amount of back pay, interest on back pay, and compensation for "special damages," along with litigation costs and reasonable attorneys' fees. 31 U.S.C. § 3730(h)(2). Importantly, punitive damages are not among those remedies. The Supreme Court has explained that where Congress creates a comprehensive legislative scheme, a strong presumption exists that any remedies excluded under that scheme were omitted deliberately and are, therefore, not available to plaintiffs. *Nw. Airlines v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981). The D.C. Circuit has applied this reasoning to other statutes, giving "'appropriate judicial deference' to Congress's judgment on

the matter, [and] treating the comprehensive scheme as a special factor that precludes the creation" of a remedy not otherwise specified under the statute. *Davis v. Billington*, 681 F.3d 377, 383-84 (D.C. Cir. 2012) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988)).

Nor can Ms. Curto seek punitive damages in connection with her wrongful termination claim under the common law of the District of Columbia. As noted above, because this common-law claim serves as a "narrow" exception to the at-will employment doctrine, *Carl*, 702 A.2d at 159, the D.C. Court of Appeals has been reluctant to expand the cause of action far beyond the remedies afforded by the legislature. Indeed, the Court of Appeals has expressly held that, where the legislature has spoken in the precise area, the courts should refrain from using the common-law to supplement those remedies. *See Carter*, 980 A.2d at 1225-26.

That reluctance to go beyond the remedies afforded by the legislature is dispositive here. Although the D.C. Court of Appeals has not yet decided whether the common-law exception can support a claim for punitive damages, calling the issue "not an easy one to resolve," *Adams*, 597 A.2d at 35 n.10, there are two key indicators that strongly suggest that, when firmly confronted with this issue, the D.C. Court of Appeals will hold that punitive damages are not available. As an initial matter, the Court of Appeals does "not favor punitive damages," *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 593 (D.C. 1985), establishing a general reluctance to expand the availability of these damages. More important still, because a common-law claim represents a court-made exception to the at-will employment doctrine, the D.C. Court of Appeals has been careful to defer to legislative judgment in areas where the legislature has "addressed the issue itself." *Carter*, 980 A.2d at 1225-26 (dismissing cause of action for wrongful termination where a municipal statute already provided a remedy); *accord Mpoy v. Fenty*, 870 F. Supp. 2d 173, 185 (D.D.C. 2012). Here, in searching for guidance, the Court of Appeals will likely deem

it dispositive that the City Council has declined to make punitive damages available under similar, statutory causes of action. *See* D.C. Code § 2-381.04 (D.C. False Claims Act) (providing specific remedies, none of which include punitive damages); *see also* D.C. Code § 1–615.54 (D.C. Whistleblower Protection Act) (providing specific remedies, none of which include punitive damages). Thus, it is highly unlikely that the Court of Appeals would create an end-run around a legislative policy that consistently denies punitive damages to current or former employees who report actionable employer misconduct. *Cf. Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 944 (D.C. Cir. 1991) (holding that, where a state's highest court has not resolved an issue of state law, a federal court's task is "to determine how the highest court of the state would decide" that issue).[15]

Simply put, because punitive damages are not available under other, comparable claims for wrongful discharge under D.C. law, they are not available here either. Ms. Curto's request for such relief should be dismissed.

[15] To be sure, the D.C. Court of Appeals has described the common-law exception as an intentional tort, entitling a plaintiff to seek "the full range of remedies" in such an action, *Adams*, 597 A.2d at 33-34, and a judge of this Court predicted that the D.C. Court of Appeals would ultimately hold that punitive damages are available for wrongful termination claims, reasoning that other intentional torts allow for punitive damages. *See Owens v. Nat'l Med. Care, Inc.*, 337 F. Supp. 2d 131, 143-44 (D.D.C. 2004) (Walton, J.). Respectfully, however, if the answer was truly as simple as concluding that punitive damages should be available because a wrongful termination claim was described as an intentional tort, the D.C. Court of Appeals would not have characterized the issue as "not an easy one to resolve." *Adams*, 597 at 35 n.10. Moreover, the decision in *Owens* failed to account for the fact that punitive damages are not available under similar, statutory causes of action, nor did *Owens* take into account the general reluctance of the Court of Appeals to expand this "narrow" common-law exception to the at-will employment doctrine, which distinguishes such a claim from other intentional torts. *Owens*, 337 F. Supp. 2d at 143-45 (failing to consider these issues). For these reasons, *Owens* did not accurately forecast the likely conclusion of the D.C. Court of Appeals on this issue, and the decision in *Owens* is, of course, not binding upon this Court. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 (2011) ("'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'").

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint for failure to state a claim upon which relief can be granted.

Dated: December 5, 2014

Respectfully submitted,

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STATUTORY ADDENDUM

The Travel Promotion Act of 2009 – 22 U.S.C. § 2131

(a) Short title

This section may be cited as the "Travel Promotion Act of 2009".

(b) The Corporation for Travel Promotion

(1) Establishment

The Corporation for Travel Promotion is established as a nonprofit corporation. The Corporation shall not be an agency or establishment of the United States Government. The Corporation shall be subject to the provisions of the District of Columbia Nonprofit Corporation Act (D.C. Code, section 29–1001 et seq.), to the extent that such provisions are consistent with this subsection, and shall have the powers conferred upon a nonprofit corporation by that Act to carry out its purposes and activities.

(2) Board of directors

(A) In general

The Corporation shall have a board of directors of 11 members with knowledge of international travel promotion and marketing, broadly representing various regions of the United States, who are United States citizens. Members of the board shall be appointed by the Secretary of Commerce (after consultation with the Secretary of Homeland Security and the Secretary of State), as follows:

(i) 1 shall have appropriate expertise and experience in the hotel accommodations sector;

(ii) 1 shall have appropriate expertise and experience in the restaurant sector;

(iii) 1 shall have appropriate expertise and experience in the small business or retail sector or in associations representing that sector;

(iv) 1 shall have appropriate expertise and experience in the travel distribution services sector;

(v) 1 shall have appropriate expertise and experience in the attractions or recreations sector;

(vi) 1 shall have appropriate expertise and experience as officials of a city convention and visitors' bureau;

(vii) 2 shall have appropriate expertise and experience as officials of a State tourism office;

(viii) 1 shall have appropriate expertise and experience in the passenger air sector;

(ix) 1 shall have appropriate expertise and experience in immigration law and policy, including visa requirements and United States entry procedures; and

(x) 1 shall have appropriate expertise in the intercity passenger railroad business.

(B) Incorporation

The members of the initial board of directors shall serve as incorporators and shall take whatever actions are necessary to establish the Corporation under the District of Columbia Nonprofit Corporation Act (D.C. Code, section 29–301.01 et seq.).

(C) Term of office

The term of office of each member of the board appointed by the Secretary shall be 3 years, except that, of the members first appointed—

(i) 3 shall be appointed for terms of 1 year;

(ii) 4 shall be appointed for terms of 2 years; and

(iii) 4 shall be appointed for terms of 3 years.

(D) Removal for cause

The Secretary of Commerce may remove any member of the board for good cause.

(E) Vacancies

Any vacancy in the board shall not affect its power, but shall be filled in the manner required by this subsection. Any member whose term has expired may serve until the member's successor has taken office, or until the end of the calendar year in which the member's term has expired, whichever is earlier. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall be appointed for the remainder of the predecessor's term. No member of the board shall be eligible to serve more than 2 consecutive full 3-year terms.

(F) Election of Chairman and Vice Chairman

Members of the board shall annually elect one of the members to be Chairman and elect 1 or 2 of the members as Vice Chairman or Vice Chairmen.

(G) Status as Federal employees

Notwithstanding any provision of law to the contrary, no member of the board may be considered to be a Federal employee of the United States by virtue of his or her service as a member of the board.

(H) Compensation; expenses

No member shall receive any compensation from the Federal government for serving on the Board. Each member of the Board shall be paid actual travel expenses and per diem in lieu of subsistence expenses when away from his or her usual place of residence, in accordance with section 5703 of title 5.

(3) Officers and employees

(A) In general

The Corporation shall have an executive director and such other officers as may be named and appointed by the board for terms and at rates of compensation fixed by the board. No individual other than a citizen of the United States may be an officer of the Corporation. The Corporation may hire and fix the compensation of such employees as may be necessary to carry out its purposes. No officer or employee of the Corporation may receive any salary or other compensation (except for compensation for services on boards of directors of other organizations that do not receive funds from the Corporation, on committees of such boards, and in similar activities for such organizations) from any sources other than the Corporation for services rendered during the period of his or her employment by the Corporation. Service by any officer on boards of directors of other organizations, on committees of such boards, and in similar activities for such organizations shall be subject to annual advance approval by the board and subject to the provisions of the Corporation's Statement of Ethical Conduct. All officers and employees shall serve at the pleasure of the board.

(B) Nonpolitical nature of appointment

No political test or qualification shall be used in selecting, appointing, promoting, or taking other personnel actions with respect to officers, agents, or employees of the Corporation.

(4) Nonprofit and nonpolitical nature of Corporation

(A) Stock

The Corporation shall have no power to issue any shares of stock, or to declare or pay any dividends.

(B) Profit

No part of the income or assets of the Corporation shall inure to the benefit of any director, officer, employee, or any other individual except as salary or reasonable compensation for services.

(C) Politics

The Corporation may not contribute to or otherwise support any political party or candidate for elective public office.

(D) Sense of Congress regarding lobbying activities

It is the sense of Congress that the Corporation should not engage in lobbying activities (as defined in section 1602 (7) of title 2[)].

(5) Duties and powers

(A) In general

The Corporation shall develop and execute a plan—

(i) to provide useful information to foreign tourists, business people, students, scholars, scientists, and others interested in traveling to the United States, including the distribution of material provided by the Federal government concerning entry requirements, required documentation, fees, processes, and information concerning declared public health emergencies, to prospective travelers, travel agents, tour operators, meeting planners, foreign governments, travel media and other international stakeholders;

(ii) to identify, counter, and correct misperceptions regarding United States entry policies around the world;

(iii) to maximize the economic and diplomatic benefits of travel to the United States by promoting the United States of America to world travelers through the use of, but not limited to, all forms of advertising, outreach to trade shows, and other appropriate promotional activities;

(iv) to ensure that international travel benefits all States and the District of Columbia and to identify opportunities and strategies to promote tourism to rural and urban areas equally, including areas not traditionally visited by international travelers; and

(v) to give priority to the Corporation's efforts with respect to countries and populations most likely to travel to the United States.

(B) Specific powers

In order to carry out the purposes of this subsection, the Corporation may—

(i) obtain grants from and make contracts with individuals and private companies, State, and Federal agencies, organizations, and institutions;

(ii) hire or accept the voluntary services of consultants, experts, advisory boards, and panels to aid the Corporation in carrying out its purposes; and

(iii) take such other actions as may be necessary to accomplish the purposes set forth in this subsection.

(C) Public outreach and information

The Corporation shall develop and maintain a publicly accessible website.

(6) Open meetings

Meetings of the board of directors of the Corporation, including any committee of the board, shall be open to the public. The board may, by majority vote, close any such meeting only for the time necessary to preserve the confidentiality of commercial or financial information that is privileged or confidential, to discuss personnel matters, or to discuss legal matters affecting the Corporation, including pending or potential litigation.

(7) Major campaigns

The board may not authorize the Corporation to obligate or expend more than $25,000,000 on any advertising campaign, promotion, or related effort unless—

(A) the obligation or expenditure is approved by an affirmative vote of at least 2/3 of the members of the board present at the meeting;

(B) at least 6 members of the board are present at the meeting at which it is approved; and

(C) each member of the board has been given at least 3 days advance notice of the meeting at which the vote is to be taken and the matters to be voted upon at that meeting.

(8) Fiscal accountability

(A) Fiscal year

The Corporation shall establish as its fiscal year the 12-month period beginning on October 1.

(B) Budget

The Corporation shall adopt a budget for each fiscal year.

(C) Annual audits

The Corporation shall engage an independent accounting firm to conduct an annual financial audit of the Corporation's operations and shall publish the results of the audit. The Comptroller General of the United States may review any audit of a financial statement conducted under this paragraph by an independent accounting firm and may audit the Corporation's operations at the discretion of the Comptroller General. The Comptroller General and the Congress shall have full and complete access to the books and records of the Corporation.

(D) Program audits

Not later than 2 years after March 4, 2010, the Comptroller General shall conduct a review of the programmatic activities of the Corporation for Travel Promotion. This report shall be provided to appropriate congressional committees.

(c) Accountability measures

(1) Objectives

The Board shall establish annual objectives for the Corporation for each fiscal year subject to approval by the Secretary of Commerce (after consultation with the Secretary of Homeland Security and the Secretary of State). The Corporation shall establish a marketing plan for each fiscal year not less than 60 days before the beginning of that year and provide a copy of the plan, and any revisions thereof, to the Secretary.

(2) Budget

The board shall transmit a copy of the Corporation's budget for the forthcoming fiscal year to the Secretary not less than 60 days before the beginning of each fiscal year, together with an explanation of any expenditure provided for by the budget in excess of $5,000,000 for the fiscal year. The Corporation shall make a copy of the budget and the explanation available to the public and shall provide public access to the budget and explanation on the Corporation's website.

(3) Annual report to Congress

The Corporation shall submit an annual report for the preceding fiscal year to the Secretary of Commerce for transmittal to the Congress on or before the 15th day of May of each year. The report shall include—

(A) a comprehensive and detailed report of the Corporation's operations, activities, financial condition, and accomplishments under this section;

(B) a comprehensive and detailed inventory of amounts obligated or expended by the Corporation during the preceding fiscal year;

(C) a detailed description of each in-kind contribution, its fair market value, the individual or organization responsible for contributing, its specific use, and a justification for its use within the context of the Corporation's mission;

(D) an objective and quantifiable measurement of its progress, on an objective-by-objective basis, in meeting the objectives established by the board;

(E) an explanation of the reason for any failure to achieve an objective established by the board and any revisions or alterations to the Corporation's objectives under paragraph (1);

(F) a comprehensive and detailed report of the Corporation's operations and activities to promote tourism in rural and urban areas; and

(G) such recommendations as the Corporation deems appropriate.

(4) Limitation on use of funds

Amounts deposited in the Fund may not be used for any purpose inconsistent with carrying out the objectives, budget, and report described in this subsection.

(d) Matching public and private funding

(1) Establishment of Travel Promotion Fund

There is hereby established in the Treasury a fund which shall be known as the Travel Promotion Fund.

(2) Funding

(A) Start-up expenses

The Secretary of the Treasury shall make available to the Corporation such sums as may be necessary, but not to exceed $10,000,000, from amounts deposited in the general fund of the Treasury from fees under section 1187 (h)(3)(B)(i)(I) of title 8 to cover the Corporation's initial expenses and activities under this section. Transfers shall be made at least monthly, immediately following the collection of fees under section 1187 (h)(3)(B)(i)(I) of title 8, on the basis of estimates by the Secretary, and proper adjustments shall be made in amounts subsequently transferred to the extent prior estimates were in excess or less than the amounts required to be transferred.

(B) Subsequent years

For each of fiscal years 2012 through 2015, from amounts deposited in the general fund of the Treasury during the preceding fiscal year from fees under section 1187 (h)(3)(B)(i)(I) of title 8, the Secretary of the Treasury shall transfer not more than $100,000,000 to the Fund, which shall be made available to the

Corporation, subject to paragraph (3) of this subsection, to carry out its functions under this section. Transfers shall be made at least quarterly on the basis of estimates by the Secretary, and proper adjustments shall be made in amounts subsequently transferred to the extent prior estimates were in excess or less than the amounts required to be transferred.

(3) Matching requirement

(A) In general

No amounts may be made available to the Corporation under this subsection after fiscal year 2011, except to the extent that—

(i) for fiscal year 2012, the Corporation provides matching amounts from non-Federal sources equal in the aggregate to 50 percent or more of the amount transferred to the Fund under paragraph (2); and

(ii) for any fiscal year after fiscal year 2012, the Corporation provides matching amounts from non-Federal sources equal in the aggregate to 100 percent of the amount transferred to the Fund under paragraph (2) for the fiscal year.

(B) Goods and services

For the purpose of determining the amount received from non-Federal sources by the Corporation, other than money—

(i) the fair market value of goods and services (including advertising) contributed to the Corporation for use under this section may be included in the determination; but

(ii) the fair market value of such goods and services may not account for more than 80 percent of the matching requirement under subparagraph (A) for the Corporation in any fiscal year.

(C) Right of refusal

The Corporation may decline to accept any contribution in-kind that it determines to be inappropriate, not useful, or commercially worthless.

(D) Limitation

The Corporation may not obligate or expend funds in excess of the total amount received by the Corporation for a fiscal year from Federal and non-Federal sources.

(4) Carryforward

(A) Federal funds

Amounts transferred to the Fund under paragraph (2)(B) shall remain available until expended.

(B) Matching funds

Any amount received by the Corporation from non-Federal sources in fiscal year 2011, 2012, 2013, 2014, or 2015 that cannot be used to meet the matching requirement under paragraph (3)(A) for the fiscal year in which amount was collected may be carried forward and treated as having been received in the succeeding fiscal year for purposes of meeting the matching requirement of paragraph (3)(A) in such succeeding fiscal year.

(e) Omitted

(f) Assessment authority

(1) In general

Except as otherwise provided in this subsection, the Corporation may impose an annual assessment on United States members of the international travel and tourism industry (other than those described in subsection (b)(2)(A)(iii) or (H)) represented on the Board in proportion to their share of the aggregate international travel and tourism revenue of the industry. The Corporation shall be responsible for verifying, implementing, and collecting the assessment authorized by this subsection.

(2) Initial assessment limited

The Corporation may establish the initial assessment after March 4, 2010, at no greater, in the aggregate, than $20,000,000.

(3) Referenda

(A) In general

The Corporation may not impose an annual assessment unless—

(i) the Corporation submits the proposed annual assessment to members of the industry in a referendum; and

(ii) the assessment is approved by a majority of those voting in the referendum.

(B) Procedural requirements

In conducting a referendum under this paragraph, the Corporation shall—

(i) provide written or electronic notice not less than 60 days before the date of the referendum;

(ii) describe the proposed assessment or increase and explain the reasons for the referendum in the notice; and

(iii) determine the results of the referendum on the basis of weighted voting apportioned according to each business entity's relative share of the aggregate annual United States international travel and tourism revenue for the industry per business entity, treating all related entities as a single entity.

(4) Collection

(A) In general

The Corporation shall establish a means of collecting the assessment that it finds to be efficient and effective. The Corporation may establish a late payment charge and rate of interest to be imposed on any person who fails to remit or pay to the Corporation any amount assessed by the Corporation under this section.

(B) Enforcement

The Corporation may bring suit in Federal court to compel compliance with an assessment levied by the Corporation under this section.

(5) Investment of funds

Pending disbursement pursuant to a program, plan, or project, the Corporation may invest funds collected through assessments, and any other funds received by the Corporation, only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(g) , (h) Omitted