

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

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

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

United States of America ex rel. Daniel Feldman,

Plaintiff-Appellee,

- v -

Wilfred van Gorp and Cornell University Medical College,

Defendants-Appellants.*

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

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

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

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

14 Affirmed.

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

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

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

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

1 SACK, Circuit Judge:

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

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

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

1 director of the funding institute as potential grant recipients.
2 "The role of the advisory council is not to second-guess the
3 scientific review of the IRG. Rather, [the council] reviews the
4 applications to ensure that they further the goals and interests
5 of the awarding institute. Thus, the IRG review and the
6 resulting high-priority score are keys to NIH funding." Id. at
7 1190, J.A. 1955-56.

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

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

1 Recipient institutions must also "immediately notify"
2 NIH of "developments that have a significant impact" on the
3 research program, including "problems, delays, or adverse
4 conditions which materially impair the ability to meet the
5 objectives of the award." Id. § 74.51(f). This notification
6 must also include a "statement of the action taken or
7 contemplated, and any assistance needed to resolve the
8 situation." Id.; see also Draft OIG Compliance Program Guidance
9 for Recipients of PHS Research Awards, 70 Fed. Reg. 71312-01,
10 71320 (Nov. 28, 2005) ("Prompt voluntary reporting will
11 demonstrate the institution's good faith and willingness to work
12 with governmental authorities to correct and remedy the problem.
13 In addition, reporting such conduct may be considered a
14 mitigating factor by the responsible law enforcement or
15 regulatory office").

16 Cornell's initial grant application at issue here
17 sought funding for a fellowship program entitled "Neuropsychology
18 of HIV/AIDS Fellowship." Van Gorp Grant Application at 1, J.A.
19 2254 (April 24, 1997) ("Grant Application"). The application
20 explained that the two-year fellowship would train as many as six
21 post-doctoral fellows at a time in "child and adult clinical and
22 research neuropsychology with a strong emphasis upon research
23 training with HIV/AIDS." Id. at 2, J.A. 2255. The training
24 program would, according to the application, build on the Cornell
25 faculty's extensive research into the neuropsychology of

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

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

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

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

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

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

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

10 In the renewal application for the second renewal year
11 (the third year overall), for example, Cornell and van Gorp wrote
12 that "[a]ll core and supporting faculty listed in our original
13 application are continuing. . . . There have been no alterations
14 in the courses or training program from that listed in the
15 original application, except for the addition of two [specified]
16 courses" 1999 Progress Report at 7, J.A. 2402 (January
17 19, 1999). The renewal application also explained that the
18 program had been relocated from Cornell's White Plains campus to
19 its New York City (Manhattan) campus in order to provide fellows
20 with "immediate access to subjects and patients who have
21 HIV/AIDS." Id. The renewal applications for the fourth and
22 fifth year stated that "[t]he core structure of our training
23 program has remained the same as in years past and to that
24 described in our initial application." 2000 Progress Report at
25 4, J.A. 2411 (January 24, 2000); 2001 Progress Report at 5, J.A.

1 2422 (January 22, 2001). The NIH approved each of these renewal
2 applications.

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

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

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

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

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

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

1 White Plains to Manhattan, the third-year renewal application
2 explained that "[f]ellows [would be] housed within a large,
3 medical/surgical setting with immediate access to subjects and
4 patients who have HIV/AIDS." 1999 Progress Report at 7, J.A.
5 2402.

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

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

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

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

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

3

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

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

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

1 the United States in the Grant Application and in the four
2 renewal applications. Feldman alleged that statements made in
3 these applications were false because the fellowship's
4 curriculum, resources, faculty members, and training differed
5 significantly from that described in the application, and in the
6 subsequent renewal applications representing that no changes had
7 been made to the program. The complaint was unsealed in April
8 2007, after the United States declined to intervene in this
9 action. See Cook County v. United States ex rel. Chandler, 538
10 U.S. 119, 122 (2003) ("The relator must inform the Department of
11 Justice of her intentions and keep the pleadings under seal for
12 60 days while the Government decides whether to intervene and do
13 its own litigating." (citing 31 U.S.C. § 3730(b)(2)-(c))).

14 On January 9, 2009, after discovery had been completed,
15 Cornell and van Gorp moved for summary judgment. On December 7,
16 2009, the district court denied the motion, concluding that there
17 were genuine issues of material fact as to whether the defendants
18 made false statements in both the initial grant application and
19 the renewal applications, and whether those statements were
20 material to the funding decisions. United States ex rel. Feldman
21 v. Van Gorp ("Feldman I"), 674 F. Supp. 2d 475, 482-83 (S.D.N.Y.
22 2009). The district court also concluded that the plaintiff need

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

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

7 On December 18, 2009, the defendants moved for
8 reconsideration of the summary judgment decision, arguing that
9 the district court had erred in failing to address the issue of
10 whether Feldman should be limited to statutory penalties because
11 he had not presented sufficient evidence of actual damages to the
12 United States. On May 3, 2010, the district court denied the
13 motion, explaining that although the damages to the United States
14 could not be calculated in the same way they would be in a
15 standard breach-of-contract action because no tangible benefit
16 had been received, the plaintiff would not be limited to
17 statutory damages. United States ex rel. Feldman v. Van Gorp
18 ("Feldman II"), No. 03 Civ. 8135, 2010 WL 1948592, at *1-*2, 2010
19 U.S. Dist. LEXIS 47039, at *4-*6 (S.D.N.Y. May 3, 2010). The
20 court said that the "'benefit of the bargain' to the government
21 is providing funds to recipients who best fit its specified
22 criteria and that this benefit is lost when funds are diverted to
23 less eligible recipients." Id. at *2, 2010 U.S. Dist. LEXIS
24 47039, at *4-*5. Therefore, "if the fact-finder concludes that
25 the government would not have awarded the grant absent the false

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

4 Before trial, Feldman submitted a motion in limine to
5 exclude evidence including that of NIH's inaction towards Cornell
6 and van Gorp in response to Feldman's complaints about the
7 fellowship program. On July 8, 2010, the district court granted
8 Feldman's motion to exclude that evidence. The court concluded
9 that the evidence of NIH's inaction was irrelevant and therefore
10 inadmissible under Rule 402 because "no discovery was conducted
11 concerning the standards [NIH used] to determine the existence of
12 misconduct and whether those standards are at all similar to the
13 elements of an FCA claim." United States ex rel. Feldman v. van
14 Gorp ("Feldman III"), No. 03 Civ. 8135, 2010 WL 2911606, at *3,
15 2010 U.S. Dist. LEXIS 73633, at *7 (S.D.N.Y. July 8, 2010).
16 Moreover, the court concluded, even if "marginally relevant," the
17 evidence would have been excluded pursuant to Rule 403 because of
18 the possibility that it would confuse or mislead the jury.⁴ Id.

19 The case was tried to a jury for eight days in July
20 2010, resulting in a partial verdict for Feldman. The jury found
21 the defendants not liable for false statements in the Grant

⁴ The district court similarly excluded evidence of inaction on the part of the New York State Department of Education and the American Psychological Association, but the defendants do not challenge the exclusion of that evidence on appeal.

1 Application and the first renewal application, but found
2 liability based on the renewal applications for the third, fourth
3 and fifth years of the grant, i.e., the second, third and fourth
4 renewal years. On August 3, 2010, the district court awarded
5 actual damages in treble the amount NIH paid for the last three
6 renewal years of the grant -- the trebling being provided for in
7 the FCA, 31 U.S.C. § 3729(a)(1) -- totaling \$855,714. The
8 judgment also included statutory penalties of \$32,000, for a
9 total of \$887,714. The district court also awarded to the
10 plaintiff \$602,898.63 in attorney's fees, \$25,862.15 in costs,
11 and \$3,121.47 in expenses.

12 On August 25, 2010, the defendants filed a motion for
13 judgment as a matter of law under Rule 50(b), or in the
14 alternative, for a new trial pursuant to Rule 59. The defendants
15 argued that there was insufficient evidence from which the jury
16 could properly have concluded that the false statements at issue
17 were material to the NIH's decisions to renew the T32 grant, and
18 that the court should grant judgment as a matter of law, or that
19 such a conclusion was against the weight of the evidence and
20 warranted a new trial. The defendants also argued that the
21 district court erred in determining as a matter of law that
22 damages were equal to the entire grant amounts for the years in
23 which liability was found rather than submitting that question to
24 the jury.

1 The district court denied this motion on December 9,
2 2010. United States ex rel. Feldman v. van Gorp ("Feldman IV"),
3 No. 03 Civ. 8135, 2010 WL 5094402, at *5, 2010 U.S. Dist. LEXIS
4 130358, at *14-*15 (S.D.N.Y. Dec. 9, 2010). The court concluded
5 that Feldman had presented sufficient evidence for the jury to
6 conclude that the false statements were material to the NIH's
7 funding decisions, noting that NIH's guidelines and instructions
8 on the renewal applications unambiguously stated that it should
9 be notified of any changes made to the grant program. Id. at *2-
10 *5, 2010 U.S. Dist. LEXIS 130358, at *4-*14. The district court
11 also relied on its opinion in Feldman III to deny the motion for
12 a jury trial on damages. Id. at *5, 2010 U.S. Dist. LEXIS
13 130358, at *13-*15.

14 The defendants appeal.

15 **DISCUSSION**

16 The defendants contend that: (1) the district court
17 erred in its methodology for determining damages and in
18 determining the amount of those damages, as a matter of law; (2)
19 the jury did not have sufficient evidence from which to conclude
20 that the false statements at issue were material to the funding
21 decision; and (3) the district court erred in excluding evidence
22 of NIH's "inaction" in response to Feldman's complaint.

23 **I. Damages**

24 The False Claims Act prohibits a person from "knowingly
25 present[ing], or caus[ing] to be presented, [to an officer or

1 employee of the United States Government,] a false or fraudulent
2 claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A).

3 Liability under the Act also requires a showing of materiality.⁵

4 Under the Act as currently in force, "the term 'material' means
5 having a natural tendency to influence, or be capable of
6 influencing, the payment or receipt of money or property."

7 Id. § 3729(b)(4); see also Neder v. United States, 527 U.S. 1, 16
8 (1999) ("In general, a false statement is material if it has a
9 natural tendency to influence, or [is] capable of influencing,
10 the decision of the decisionmaking body to which it was
11 addressed." (brackets in original; internal quotation marks
12 omitted) (criminal fraud case)).

13 The FCA provides for damages equal to "3 times the
14 amount of damages which the Government sustains because of the
15 act of that person," in addition to a "civil penalty." 31 U.S.C.
16 § 3729(a)(1). The Act does not specify how damages are to be
17 calculated, but the Supreme Court has recognized that the purpose
18 of damages, even as multiplied, under the Act is to make the

⁵ In 2009, Congress amended the False Claims Act to add a specific requirement that to be actionable a false statement must be material. 31 U.S.C. § 3729(a)(1)(B). It purports to apply prospectively and therefore would not apply to this case. See Feldman I, 674 F. Supp. 2d at 480. Never prior to that enactment and absent its materiality provision did we explicitly require a showing of materiality in FCA cases, although six of the seven circuits to address the issue did. See id. (citing decisions). We need not decide here whether a showing of materiality was required because, assuming that it was, the requirement has been met, as we explain in Part II, below.

1 government "completely whole" for money taken from it by fraud.
2 United States ex. rel. Marcus v. Hess, 317 U.S. 537, 551-52
3 (1943), superseded by statute as recognized by United States ex
4 rel. Kirk v. Schindler Elevator Corp., 601 F.3d 94 (2d Cir. 2010)
5 ("We think the chief purpose of the statutes here [predecessors
6 of the current False Claims Act, providing for double rather than
7 treble damages] was to provide for restitution to the government
8 of money taken from it by fraud, and that the device of double
9 damages plus a specific sum was chosen to make sure that the
10 government would be made completely whole."). Because the
11 district court here determined that damages could be established
12 as a matter of law, we review that conclusion de novo. See
13 Bessemer Trust Co., N.A. v. Branin, 618 F.3d 76, 85 (2d Cir.
14 2010) (stating that where the district court has determined
15 damages, we review its application of legal principles de novo
16 and its factual findings for clear error).

17 The question of how damages should be measured in an
18 FCA case where "contracts entered into between the government and
19 the Defendants did not produce a tangible benefit to the
20 [government]," United States ex. rel. Longhi v. United States,
21 575 F.3d 458, 473 (5th Cir. 2009), is one of first impression in
22 this Court. The defendants argue both that the district court
23 erred in concluding that application of the standard benefit-of-
24 the-bargain calculation as a methodology for determining damages
25 was inappropriate in this case, and that it erred in deciding the

1 amount of damages as a matter of law based on the jury's verdict,
2 rather than allowing the jury to assess the amount of damages
3 due.

4 A. Proper Measure of Damages

5 In most FCA cases, damages are measured as they would
6 be in a run-of-the-mine breach-of-contract case -- using a
7 "benefit-of-the-bargain" calculation in which a determination is
8 made of the difference between the value that the government
9 received and the amount that it paid. See United States v.
10 Foster Wheeler Corp., 447 F.2d 100, 102 (2d Cir. 1971)
11 (collecting cases); cf. Terwilliger v. Terwilliger, 206 F.3d 240,
12 248 (2d Cir. 2000) ("[S]o far as possible, [New York contract]
13 law attempts to secure to the injured party the benefit of his
14 bargain, subject to the limitations that the injury -- whether it
15 be losses suffered or gains prevented -- was foreseeable, and
16 that the amount of damages claimed be measurable with a
17 reasonable degree of certainty and, of course, adequately
18 proven." (internal quotation marks omitted)). This method of
19 calculation is employed, for example, when the government has
20 paid for goods or services that return a tangible benefit to the
21 government.

22 There are generally two ways of determining damages in
23 such cases. First, if the non-conforming goods or services have
24 an ascertainable market value, then damages are measured
25 according to the "'difference between the market value of the

1 product [the government] received and retained and the market
2 value that the product would have had if it had been of the
3 specified quality.'" United States v. Science Application Int'l
4 Corp., 626 F.3d 1257, 1279 (D.C. Cir. 2010) (quoting United
5 States v. Bornstein, 423 U.S. 303, 316 n.13 (1976)) (alterations
6 omitted). If the non-conforming goods' or services' market value
7 is not ascertainable, then the fact-finder determines the amount
8 of damages by calculating the difference between "the amount the
9 government actually paid minus the value of the goods or services
10 the government received or used," as judged by the fact-finder.
11 Id.

12 The defendants contend that a "benefit-of-the-bargain"
13 calculation was appropriate in this case, and that the district
14 court erred by awarding the government the full amount of the
15 grant for the years for which the violations were found rather
16 than the difference between the value of the training promised
17 and that actually delivered. The plaintiff argues, to the
18 contrary, that a different measure of damages is appropriate in
19 cases such as this, where "the defendant fraudulently sought
20 payments for participating in programs designed to benefit third-
21 parties rather than the government itself" and the government
22 received nothing of tangible value from the defendant. Id.; see
23 also Longhi, 575 F.3d at 473 ("[W]here there is no tangible
24 benefit to the government and the intangible benefit is
25 impossible to calculate, it is appropriate to value damages in

1 the amount the government actually paid to the Defendants.").
2 This approach rests on the notion that the government receives
3 nothing of measurable value when the third-party to whom the
4 benefits of a governmental grant flow uses the grant for
5 activities other than those for which funding was approved. In
6 other words, when a third-party successfully uses a false claim
7 regarding how a grant will be used in order to obtain the grant,
8 the government has entirely lost its opportunity to award the
9 grant money to a recipient who would have used the money as the
10 government intended.

11 The plaintiff and the United States, as amicus curiae,
12 argue that this is such a case: The government received no
13 tangible benefit from the T32 grant -- students and others may
14 have, but not the government. The grant represented an attempt
15 to, but did not thereby, promote "child and adult clinical and
16 research neuropsychology with a strong emphasis upon research
17 training with HIV/AIDS." Grant Application at 2, J.A. 2255. The
18 plaintiff argues that the government is therefore entitled to
19 damages equal to the full amount of grants awarded to the
20 defendants based on their false statements.

21 We conclude that the measure of damages advocated by
22 the plaintiff and the United States is correct.

23 Although we have not addressed this question, several
24 of our sister circuits have done so in decisions that support the
25 conclusion we now reach. See Science Application, 626 F.3d at

1 1279 (D.C. Cir.); Longhi, 575 F.3d at 473 (5th Cir.); United
2 States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008) ("The
3 government offers a subsidy . . . with conditions. When the
4 conditions are not satisfied, nothing is due."); United States v.
5 Mackby, 339 F.3d 1013, 1018-19 (9th Cir. 2003) ("Had Mackby been
6 truthful, the government would have known that he was entitled to
7 nothing").⁶

8 The defendants point out, however, that other courts
9 have applied the "benefit-of-the-bargain" calculation in cases
10 they assert are similar to this one. They argue that because
11 "[t]he ultimate beneficiary of all government grants or contracts
12 is the public regardless of who receives the 'direct' benefit,"
13 the flow of benefits to a third-party should not be determinative
14 of the damages measure. Defs.' Reply Br. at 5.

⁶ District courts within this Circuit have also employed this methodology. See United States v. Karron, 750 F. Supp. 2d 480, 493 (S.D.N.Y. 2011), appeal filed, No. 11-1924 (concluding that the defendant was liable for the full amount of a government-funded research grant because he "cannot establish that the Government received any ascertainable benefit from its relationship with CASI. Even assuming that CASI in fact met various milestones and provided reports to the Government, such actions yielded no tangible benefit to the Government."); United States ex rel. Antidiscrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06 Civ. 2860, 2009 WL 1108517, at *3, 2009 U.S. Dist. LEXIS 35041, at *9 (S.D.N.Y. Apr. 24, 2009) ("Westchester has identified no tangible asset or structure it provided to the United States such that this theory would be applicable; it did not have a contract with the government to build any sort of facility for the government's use or to provide it with goods.").

1 In support of this theory, the defendants cite United
2 States v. Hibbs, 568 F.2d 347 (3d Cir. 1977). There, the Third
3 Circuit applied a benefit-of-the-bargain calculation in an FCA
4 case involving the defendants' fraudulent statements to the
5 Federal Housing Administration regarding the condition of various
6 residential properties. Relying on these representations, the
7 agency insured mortgages on several properties, and the agency
8 was required to pay these mortgages when the purchasers
9 defaulted. Id. at 349.

10 The government argued that its damages were the total
11 amount of the mortgage debt it had assumed, insisting that "had
12 [the defendant] not furnished the false certification, it would
13 not have insured the mortgage[s] and therefore would not have
14 been called upon to make any payment." Id. at 351.

15 The Third Circuit rejected this argument.

16 The government's actual damage was the
17 decrease in worth of the security that was
18 certified as being available, measured by the
19 difference in value between the houses as
20 falsely represented, and as they actually
21 were. Since the government was given
22 security which was less than what it was
23 represented to be, the damages are
24 essentially similar to those sustained when a
25 defective article is purchased in a
26 fraudulent transaction. In those instances,
27 decisional law sets the damages as the
28 difference in cost between that contracted
29 for and that received.

30 Id.

1 Similarly, in Coleman v. Hernandez, 490 F. Supp. 2d 278
2 (D. Conn. 2007), a case involving the so-called "Housing Choice
3 Voucher Program" or "Section 8," under which the government
4 provides housing subsidies to qualifying individuals, the
5 district court declined to award the plaintiff the full amount
6 that the government paid to subsidize her rent, even though her
7 landlord had allegedly made false statements to the government by
8 overcharging the plaintiff for rent. Id. at 280-83. The Coleman
9 court acknowledged that in other FCA cases, courts had awarded
10 damages equal to the full amount of the government's payment.
11 Id. at 281-82. But the court decided that in the case before it,
12 the awardable damages were equal to the difference between the
13 market rent, and the amount that the landlord charged the
14 government including the additional, improper payments it had
15 received, i.e., the amount of the overcharge. Id. at 282. The
16 government was then made whole, receiving the full benefit of its
17 bargain -- trebled by statute.

18 The defendants also look to Medicaid and Medicare FCA
19 cases for support. They contend that adopting the plaintiff's
20 theory of damages, all such cases would result in damages equal
21 to the full amount the government paid in reimbursements to
22 physicians because "the direct benefit always goes to patients."
23 Defs.' Reply Br. at 5.

24 This is not, however, the methodology generally
25 employed by courts evaluating FCA claims based on Medicaid or

1 Medicare fraud. In United States ex. rel. Tyson v. Amerigroup
2 Illinois, Inc., 488 F. Supp. 2d 719 (N.D. Ill. 2007), the court
3 awarded damages based on the difference between the amount of
4 Medicare payments that the defendant should have received, and
5 the amount that it had actually charged the government. Id. at
6 739. Similarly, in United States ex. rel. Doe v. DeGregorio, 510
7 F. Supp. 2d 877 (M.D. Fla. 2007), the court also held that
8 damages were the "the amount of money the government paid out by
9 reason of the false claims over and above what it would have paid
10 out if the claims had not been false." Id. at 890.

11 In short, in each of the cases cited by the
12 defendants, the government paid for a contracted service with a
13 tangible benefit -- whether it be medical care, security on
14 mortgages, or subsidized housing -- but paid too much. The
15 government in these cases got what it bargained for, but it did
16 not get all that it bargained for. Thus, courts treated the
17 difference between what the government bargained for and what it
18 actually received as the measure of damages. Here, by contrast,
19 the government bargained for something qualitatively, but not
20 quantifiably, different from what it received.

21 This approach comports with the one we discussed in
22 making a sentencing calculation of loss in United States v.
23 Canova, 412 F.3d 331, 352 (2005) (rejecting argument that
24 abbreviated medical tests performed by the defendant were as
25 clinically sound as full tests required by Medicare so that the

1 government sustained no loss). There, we explained that it was
2 not a court's task to second-guess a victim's judgment as to the
3 necessity of specifications demanded and paid for. See id.
4 ("Whether the testing time on a pacemaker, the number of rivets
5 on an airplane wing, or the coats of paint on a refurbished
6 building is a matter of necessity or whim, the fact remains that
7 the victim has been induced to pay for something that it wanted
8 and was promised but did not get, thereby incurring some measure
9 of pecuniary 'loss.'") To be sure, Canova recognized that "a
10 victim's loss in a substitute goods or services case" does not
11 "necessarily equal[] the full contract price paid." Id. at 353.
12 But this was not because a defendant had the right to an offset
13 for the value of the substituted good or service. Rather, the
14 proper focus of any loss calculation was on "the 'reasonably
15 foreseeable costs of making substitute transactions and handling
16 or disposing of the product delivered or retrofitting the product
17 so that it can be used for its intended purpose,' plus the
18 'reasonably foreseeable cost of rectifying the actual or
19 potential disruption to [the victim's] operations caused by the
20 product substitution." Id. (quoting U.S.S.G. § 2f1.1, cmt
21 n.8(c)). Canova emphasized that a court calculating loss cannot
22 simply "rewrit[e] the parties' contract to excise specifications
23 paid for but not received and, thereby, conclud[e] that the
24 victim sustained no [or a reduced] loss." Id.

1 Canova's reasoning supports the challenged loss
2 calculation. As a result of the fraudulent renewals, the
3 government was paying for a program that was not at all as
4 specified. By contrast to the Medicare cases cited by
5 defendants, the government did not receive less than it bargained
6 for; it did not get the "neuropsychology with a strong emphasis
7 upon research training with HIV/AIDS" program it bargained for at
8 all. Further, nothing in the record indicates that it could now
9 secure such a program at any lesser cost. We therefore conclude
10 that the appropriate measure of damages in this case is the full
11 amount the government paid based on materially false statements.

12 B. Fraudulent Inducement

13 The defendants acknowledge that courts have applied the
14 plaintiff's theory of damages in cases including Mackby, Rogan,
15 and Longhi, but argue that those cases are distinguishable from
16 this one because the defendants in each of those cases obtained
17 funds through fraudulent inducement -- and that any such theory
18 would fail here because no liability was found with respect to
19 the Grant Application. "In a fraudulent inducement case, [it is]
20 the false statements [that] allow the defendant to obtain the
21 funding in the first place." Defs.' Reply Br. at 9.

22 According to the defendants, because a defendant in a
23 fraudulent inducement case would not be eligible for any funding
24 received after the initial false claim, a court in such a case
25 could properly conclude that the defendant is liable for the

1 entire amount that the government paid. But "[h]ere, the jury
2 expressly found that the initial Application contained no false
3 statements, and there was no false certification ever at issue."

4 Id. The defendants argue that Mackby, Rogan, and Longhi
5 therefore do not support the damages theory employed by the
6 district court.

7 We see no principled distinction, however, between
8 fraudulently inducing payment initially, thereby requiring all
9 payments produced from that initial fraud to be returned to the
10 government (trebled and with certain fees and costs added as
11 provided by statute), and requiring payments based on false
12 statements to be returned to the government when those false
13 statements were made after an initial contractual relationship
14 based on truthful statements had been established. Although it
15 may be true that under a fraudulent inducement theory,
16 "subsequent claims for payment made under the contract [that]
17 were not literally false, [because] they derived from the
18 original fraudulent misrepresentation, [are also] . . .
19 actionable false claims," Longhi, 575 F.3d at 468 (second
20 brackets in original; internal quotation marks omitted), this
21 proposition simply speaks to the time period for which FCA
22 liability may be found. It does not suggest that without
23 fraudulent inducement, no subsequent false statements can result
24 in FCA liability.

1 If the government made payment based on a false
2 statement, then that is enough for liability in an FCA case,
3 regardless of whether that false statement comes at the beginning
4 of a contractual relationship or later. The only difference
5 would be that liability begins when the false statement is made
6 and relied upon, rather than at the beginning of the contractual
7 relationship, as it would be in a fraudulent inducement case.
8 Here, the jury found that materially false statements had been
9 made by the defendants in years 3, 4, and 5 of the grant, and the
10 court properly awarded damages based on that finding.

11 C. Damages as a Matter of Law

12 The defendants argue that the calculation of damages
13 should have been decided as a question of fact by a jury, not as
14 a matter of law by the district court. Indeed, in FCA cases, the
15 jury ordinarily does determine the amount of damages to be
16 imposed upon the defendant. See Chandler, 538 U.S. at 132. We
17 conclude, however, that here, where the question is not the
18 benefit of the bargain between the plaintiff and the defendants,
19 and the amount of each payment for which liability has been
20 assessed is not in dispute, no further finding of fact as to the
21 amount of the damages was necessary.

22 As the government correctly observes in its amicus
23 brief, awarding damages in this manner is not novel. And often,
24 the amount of damages in such cases has been determined as a
25 matter of law in the course of the court's grant of summary

1 judgment to the plaintiff. See, e.g., Longhi, 575 F.3d at 461
2 (affirming summary judgment and damages award); United States v.
3 TDC Mgmt. Corp., 288 F.3d 421, 428 (D.C. Cir. 2002) (agreeing
4 that the district court could properly decide the damages award
5 where the government received no benefit from the transaction).

6 United States ex rel. Antidiscrimination Center of
7 Metro New York, Inc. v. Westchester County, No. 06 Civ. 2860,
8 2009 WL 1108517, 2009 U.S. Dist. LEXIS 35041 (S.D.N.Y. Apr. 24,
9 2009), is illustrative. There the federal government paid
10 approximately \$52 million as part of a federal grant to
11 Westchester County for the purposes of housing and community
12 development. Id. at *2-*4, 2009 U.S. Dist. LEXIS 35041, at *5-
13 *11. The grant required the county to certify that it would
14 "conduct an analysis of impediments . . . to fair housing choice,
15 including those impediments imposed by racial discrimination and
16 segregation, to take appropriate actions to overcome the effects
17 of any identified impediments, and to maintain records reflecting
18 the analysis and actions." Id. at *1, 2009 U.S. Dist. LEXIS
19 35041, at *2-*3. The court granted summary judgment for the
20 plaintiff after finding that Westchester County had not conducted
21 the analysis as promised. The court agreed with the plaintiff's
22 contention that damages should be the full amount the government
23 paid, and rejected the county's argument that the damages
24 question should be submitted to the jury. There, as here, "the
25 United States did not get what it paid for," and there was no

1 role for the jury because "Westchester's damages cannot be
2 reduced by reference to the alleged 'benefit' it provided to
3 HUD." Id. at *3, 2009 U.S. Dist. LEXIS 35041, at *9.

4 We conclude that in the case before us, inasmuch as the
5 damages equal the full amount that the government paid and that
6 amount is not in dispute, they were properly determined by the
7 district court as a matter of law.

8 D. Sufficiency of the Evidence

9 Finally, the defendants contend that the plaintiff did
10 not submit sufficient evidence to the jury to establish by a
11 preponderance of the evidence that the government suffered
12 damages equal to the full amount of the T32 grant. The
13 defendants argue that "to prove that the amount of damages was
14 the entire amount of the grant, a relator would be required to
15 prove that the government received no value -- at all -- through
16 the grant work it funded." Defs.' Br. at 37.

17 The defendants support this contention by citing
18 benefit-of-the-bargain cases. The defendants' argument is
19 therefore unavailing. Unlike a benefit-of-the-bargain case, no
20 specific amount of damages must be proved because, as we have
21 explained at length, damages in this case equal the entire amount
22 of the grant that was lost as a result of the fraud.

23 II. Materiality

24 The defendants assert that the false statements to the
25 government that are at issue were not material to the

1 transactions in question. The district court therefore erred,
2 they say, in denying the defendants' motion for judgment as a
3 matter of law and for a new trial.⁷

4 We conclude that the jury had sufficient evidence from
5 which to conclude, as it did, that the defendants' false
6 statements materially influenced NIH's decisions to renew the T32
7 grant.

8 A motion for a new trial will ordinarily be granted "so
9 long as the district court determines that, in its independent
10 judgment, the jury has reached a seriously erroneous result or
11 [its] verdict is a miscarriage of justice." Nimely v. City of
12 New York, 414 F.3d 381, 392 (2d Cir. 2005) (internal quotation
13 marks omitted). We review the district court's denial of a
14 motion for a new trial for abuse of discretion. Id.

15 A motion for judgment as a matter of law may be granted
16 only "[i]f a party has been fully heard on an issue during a jury
17 trial and the court finds that a reasonable jury would not have a
18 legally sufficient evidentiary basis to find for the party on
19 that issue." Fed. R. Civ. P. 50(a)(1). "A court evaluating such
20 a motion cannot assess the weight of conflicting evidence, pass
21 on the credibility of witnesses, or substitute its judgment for
22 that of the jury." Black v. Finantra Capital, Inc., 418 F.3d

⁷ For the reasons referred to in note [5], supra, we assume that materiality is required by the pre-2009 version of the FCA, although we need not decide that issue on this appeal.

203, 209 (2d Cir. 2005) (internal quotation marks omitted).
Because such a judgment is made as a matter of law, we review it
de novo. We must "consider the evidence in the light most
favorable to the party against whom the motion was made and . . .
give that party the benefit of all reasonable inferences that the
jury might have drawn in his favor from the evidence." Id. at
208-09 (internal quotation marks omitted).

The district court concluded that the plaintiff had
"presented significant documentary evidence to support a finding
of materiality." Feldman IV, 2010 WL 5094402, at *2, 2010 U.S.
Dist. LEXIS 130358, at *5.

First, the parties stipulated that in order for a
grantee to receive additional funding after the initial grant
year, the "grantee must submit a noncompetitive renewal
application . . . includ[ing] a progress report which NIH expects
will provide information about the trainees['] activities during
the previous funding period." Id. Second, the renewal
instructions for the T32 grant contain a statement explaining
that "'Progress Reports provide information to awarding component
staff that is essential in the assessment of changes in scope or
research objectives . . . from those actually funded. They are
also an important information source for the awarding component
staff in preparing annual reports, in planning programs, and in
communicating scientific accomplishments to the public and to
Congress.'" Id., 2010 U.S. Dist. LEXIS 130358, at *6 (quoting

1 NIH Grant Continuation Instructions at 7, J.A. 2462). Third, the
2 renewal instructions direct grantees to "highlight progress in
3 implementation and developments or changes that have occurred.
4 Note any difficulties encountered by the program. Describe
5 changes in the program for the next budget period, including
6 changes in training faculty and significant changes in available
7 space and/or facilities." Id. (internal quotation marks and
8 brackets omitted). The instructions also ask for "'information
9 describing which, if any, faculty and/or mentors have left the
10 program.'" Id. at *3, 2010 U.S. Dist. LEXIS 130358, at *6-*7
11 (quoting T32 Program Announcement PA-06-648 at 22, J.A. 2581
12 (June 16, 2006)).

13 The district court rejected the defendants' argument
14 that the jury was required to accept Dr. Robert Bornstein's
15 un rebutted testimony on the issue of materiality. Id., 2010 U.S.
16 Dist. LEXIS 130358, at *7. Bornstein was a member of the IRG
17 that reviewed the defendants' initial grant application. At
18 trial, he testified as to the factors he considered material to
19 his analysis of a grant application. He asserted that although
20 he reviewed the application, he did not expect that every faculty
21 member identified in the initial grant application would be
22 involved with the fellowship program. He also testified that he
23 did not expect the fellowship program to follow the exact
24 curriculum outlined in the initial application. The defendants

1 argued that this testimony established that not all false
2 statements in the renewal applications were material.

3 The district court rejected this argument because
4 Bornstein never reviewed the renewal applications, nor did he
5 have an independent recollection of reviewing the initial grant
6 application. Id., 2010 U.S. Dist. LEXIS 130358, at *7-*8. The
7 court also concluded that "[t]he absence of testimony by a
8 government official supporting a finding of materiality does not
9 mean that the jury was required to accept Bornstein's testimony."
10 Id., 2010 U.S. Dist. LEXIS 130358, at *7. "[T]he jury was well
11 within its bounds to credit NIH's unambiguous guidelines and
12 instructions over Bornstein's conclusory testimony that little in
13 the Grant Application really would have mattered to him had he
14 remembered reviewing it at all." Id., 2010 U.S. Dist. LEXIS
15 130358, at *8.

16 On appeal, the defendants do not dispute that the
17 renewal applications contained NIH's instructions and guidelines.
18 They contend instead that "none of these statements, taken
19 individually or together, establish what information was material
20 to NIH's funding decisions on renewals," Defs.' Br. at 47, "the
21 Renewal Instructions and the Program Announcement are silent as
22 to what information matters to NIH for purposes of its funding
23 decision." Id. at 52. The defendants argue in substance that
24 there is no evidence from which the jury could have decided that

1 the statements it found to be false materially influenced NIH's
2 decision to renew the T32 grant.⁸

3 This argument, however, misapprehends the focus of the
4 materiality analysis. In Rogan, the defendant hospital admitted
5 patients through illegal referrals in violation of the Anti-
6 Kickback Act, 42 U.S.C. § 1320a-7b. 517 F.3d at 452. Because of
7 the violation, the defendant was ineligible to receive Medicare
8 payments. The defendant did not deny that it had violated the
9 Act, but instead argued that its failure to disclose information
10 regarding the illegal referrals was immaterial to the
11 government's decision to approve the hospital's Medicare claims,
12 because materiality could only be established if a government

⁸ The defendants also argue, however, that the district court erred in interpreting NIH's guidelines as "unambiguous" -- in other words, that to the extent the plaintiff did point to evidence of materiality, that evidence was insufficient to support a jury verdict. Defs. Br. at 52. The defendants note that the renewal application's instructions do not specify what information needs to be included in a progress report, only that the report should include "difficulties" with or "changes" to a grant program. Id. at 53. The instructions do not explicitly state that grantees must report all changes. Because the NIH guidelines are "necessarily ambiguous," defendants argue that the court cannot rely upon these guidelines as a "legal standard for materiality." Id.

But the district court never relied on these guidelines, nor instructed the jury to rely on these guidelines, as a "standard for materiality." The guidelines served instead as evidence that the jury was permitted to rely upon in evaluating what was material to the government in its monitoring of grants. Therefore, we agree with the district court that they provided sufficient evidence from which the jury could reach a conclusion as to materiality. To the extent that these guidelines are ambiguous, it was the jury's function to resolve any disputes about their meaning.

1 employee involved in the decision making process testified that
2 the government would have terminated payments. Id.

3 The court rejected this view of materiality, explaining
4 that a "statement or omission is 'capable of influencing' a
5 decision even if those who make the decision are negligent and
6 fail to appreciate the statement's significance." Id. As the
7 court stated, "[t]he question is not remotely whether [the
8 applicant] was sure to be caught . . . but whether the omission
9 could have influenced the agency's decision." Id.

10 In short, even if a program officer does not
11 subjectively consider a statement to be material, it can be found
12 to be material from an objective standpoint because it is
13 "capable of influencing" the program officer. Id. As the
14 plaintiff in this case argues, materiality is "determined not by
15 what a program officer at NIH declares material, but rather [is]
16 based on the agency's own rules and regulations." Pl.'s Br. at
17 48.

18 The Rogan court discussed the purpose of laws
19 prohibiting fraud:

20 Another way to see this is to recognize that
21 laws against fraud protect the gullible and
22 the careless -- perhaps especially the
23 gullible and the careless -- and could not
24 serve that function if proof of materiality
25 depended on establishing that the recipient
26 of the statement would have protected his own
27 interests. The United States is entitled to
28 guard the public fisc against schemes
29 designed to take advantage of overworked,
30 harried, or inattentive disbursing officers;

1 the False Claims Act does this by insisting
2 that persons who send bills to the Treasury
3 tell the truth.

4 517 F.3d at 452 (citation omitted).

5 We agree with the plaintiff that the test for
6 materiality is an objective one. It does not require evidence
7 that a program officer relied upon the specific falsehoods proven
8 to have been false in each case in order for them to be material.
9 The fact-finder must determine only whether the proven falsehoods
10 have a "natural tendency to influence, or be capable of
11 influencing, the payment or receipt of money or property." 31
12 U.S.C. § 3729(b)(4).

13 To decide otherwise -- that materiality must be
14 established in each case based on the testimony of a
15 decisionmaker -- would subvert the remedial purpose of the FCA.
16 The resolution of each case would depend on whether such a
17 decisionmaker could be identified and located, and whether that
18 particular person would have treated the claims as material,
19 regardless of whether they were one of several individuals
20 charged with evaluating the claims at issue.

21 The defendants' contention would also render the
22 language of the statute superfluous. If no one other than an
23 actual decisionmaker could determine whether a statement had a
24 "natural tendency to influence" payment, the statute could have
25 provided that a statement is "material" if it actually influenced
26 a decision maker who was aware of the statement.

1 Our conclusion finds support in other areas of the law.
2 In TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976), for
3 example, the Supreme Court addressed the meaning of "materiality"
4 in the context of a suit brought under the federal securities
5 laws. The Court determined that a fact is "material" if there is
6 a "substantial likelihood that a reasonable shareholder would
7 consider it important in deciding how to vote." Id. at 448.

8 As an abstract proposition, the most
9 desirable role for a court in a suit of this
10 sort . . . would perhaps be to determine
11 whether in fact the proposal would have been
12 favored by the shareholders and consummated
13 in the absence of any misstatement or
14 omission. But as we [have] recognized . . .
15 such matters are not subject to determination
16 with certainty. Doubts as to the critical
17 nature of information misstated or omitted
18 will be commonplace. And particularly in
19 view of the prophylactic purpose of the Rule
20 and the fact that the content of the proxy
21 statement is within management's control, it
22 is appropriate that these doubts be resolved
23 in favor of those the statute is designed to
24 protect.

25 Id.

26 The same reasoning applies here. Like the securities
27 laws at issue in TSC Industries, this objective approach ensures
28 that the FCA serves as a robust prophylactic against fraud by
29 putting the question of materiality to the jury, rather than
30 attempting to trace it back to the state of mind of the
31 decisionmaker.

32 In Bustamante v. First Federal Savings & Loan
33 Association of San Antonio, 619 F.2d 360 (5th Cir. 1980), the

1 plaintiffs alleged that the defendants violated the Truth-in-
2 Lending Act in a loan transaction. The court noted that

3 when a security interest [with an exception
4 not relevant here] is acquired in real
5 property which is the residence of the person
6 to whom credit is extended, the borrower has
7 a right of rescission within three business
8 days of either consummation of the
9 transaction or "the delivery of the
10 disclosures required under this section and
11 all other material disclosures required under
12 this part, whichever is later"

13 Id. at 362. Here again, the court applied an objective rather
14 than a subjective materiality standard. "[T]o apply a subjective
15 standard to the test for materiality would misperceive the
16 remedial purpose of the Act." Id. at 364. The court concluded
17 that if materiality could be established by a subjective
18 determination of whether or not particular information would
19 affect a credit shopper's decision to utilize the credit,
20 unsophisticated or uneducated consumers would not be sufficiently
21 protected. Id.

22 Having concluded that the test of materiality in the
23 case before us is objective -- asking what would have influenced
24 the judgment of a reasonable reviewing official -- rather than
25 subjective -- asking whether it influenced the judgment of a
26 reviewer of a proposal in the case at hand -- we agree with the
27 district court that a reasonable jury could have found the
28 defendants' statements to be material to the renewal decisions in
29 the third, fourth, and fifth years of the grant. Based on the

1 stipulations regarding criteria relevant to funding and the
2 testimony at trial, the jury had an ample basis for understanding
3 the grant process based upon which it could determine whether
4 statements that were made or omitted concerning changes to
5 curriculum, personnel and clinical opportunities in the renewal
6 applications had a "natural tendency" to influence NIH's funding
7 decisions. The instructions regarding the grant application and
8 renewal process provided the jury with a clear understanding of
9 what information the NIH considers in evaluating progress
10 reports, such as changes or developments to the program.

11 The defendants did not inform NIH that not all faculty
12 members identified in the initial grant were "key personnel" in
13 the program. The defendants also failed to inform NIH that
14 several of the core courses listed in the proposed curriculum
15 were never implemented, and that fellows were never evaluated by
16 a training committee. NIH was not informed that the fellows did
17 not have access to research and clinical resources described in
18 the initial grant application. NIH was also not aware that the
19 fellows had very limited access to HIV positive patients in their
20 research. In addition, many of the fellows spent much of their
21 time working on projects unrelated to HIV, such as research into
22 aging and epilepsy, which was not reported to the NIH. We
23 conclude that these facts were more than sufficient to allow a
24 reasonable jury to conclude that had the facts been disclosed
25 they would have had a natural tendency to influence, or would

1 have been capable of influencing, the decision to renew the grant
2 and pay money to the defendants pursuant to it.

3 We therefore also conclude that the district court did
4 not abuse its discretion in denying the motion for a new trial --
5 the jury's verdict was not "seriously erroneous" or "a
6 miscarriage of justice." Nimely, 414 F.3d at 392 (internal
7 quotation marks omitted).

8 III. Exclusion of Evidence
9 Demonstrating NIH's Inaction

10 The defendants argue that the district court abused its
11 discretion by excluding evidence of NIH's alleged failure to take
12 remedial action in response to the plaintiff's complaints, and
13 that a new trial is therefore warranted. We review a district
14 court's decision to exclude evidence for abuse of discretion.
15 Schering Corp. v. Pfizer Inc., 189 F.3d 218, 224 (2d Cir. 1999).
16 "We [also] review a district court's denial of a motion for a new
17 trial for abuse of discretion." United States v. Brunshtein, 344
18 F.3d 91, 101 (2d Cir. 2003), cert. denied, 543 U.S. 823 (2004).

19 The defendants contend that they should have been
20 permitted to elicit evidence of NIH's relative inaction in
21 response to complaints because it is relevant as to whether or
22 not their statements in the renewal applications were false and
23 material. Feldman told NIH about the defendants' fraudulent
24 claims and, according to the defendants, the agency saw no
25 validity to the complaints as evidenced by its failure to take

1 action beyond asking Cornell itself to investigate the
2 complaints. The defendants argue that they should have been able
3 to present this evidence to the jury in an effort to persuade it
4 that the statements had not misled the agency. If this evidence
5 was presented, they say, the plaintiff "could then have put on
6 any rebuttal evidence about why the jury should find the
7 statements were false and material despite NIH's lack of reaction
8 when presented with those allegations." Defs.' Br. at 61.

9 Federal Rule of Evidence 402, provides, inter alia,
10 that "[i]rrelevant evidence is not admissible." The district
11 court reasoned that the evidence in question was irrelevant
12 because the NIH's failure to act in response to Feldman's
13 complaints did not speak to the seriousness of those complaints
14 or the likelihood that false claims had been made. The jury did
15 not have before it the standard that NIH used to determine
16 whether or not action was warranted in response to a funding
17 complaint. "[N]o discovery was conducted concerning the
18 standards these agencies employ to determine the existence of
19 misconduct and whether those standards are at all similar to the
20 elements of an FCA claim." Feldman III, 2010 WL 2911606, at *3,
21 2010 U.S. Dist. LEXIS 73633, at *7. "Specifically, as to [the
22 plaintiff's] deposition testimony on the NIH decision, [he] does
23 not, and indeed cannot, speak to the standards NIH used to judge
24 the merits of his claims." Id. Without evidence as to what the
25 standards of the agency were for beginning an investigation, the

1 jury could not determine whether the complaints made by Feldman
2 should have instigated one.⁹ Id., 2010 U.S. Dist. LEXIS 73633,
3 at *7-*8.

4 The defendants further argue that to the extent that
5 the district court excluded evidence of NIH's inaction pursuant
6 to Rule 403, it did so in error. While ultimately we would be
7 inclined to agree with the district court, we need go no further
8 in our analysis because the evidence was properly excluded under

⁹ The defendants point to United States v. Southland Management Corp., 326 F.3d 669 (5th Cir. 2003) (en banc), where the court considered the relevance of the course of conduct between a landlord receiving Section 8 funds and HUD. The court concluded that the communication between HUD and the landlord demonstrated that "HUD was willing to work with the Owners" on remedying maintenance problems, and that "HUD seemed to recognize that the property's noncompliance was at least partially explained by a lack of funds and nearby criminal activity." Id. at 677. Based in part on this pattern of honest and open communication, the court concluded that there could be no FCA liability. Unlike in Southland Management, there is no indication here that the defendants communicated compliance issues to the government or sought its help in addressing them. Where the government acts in response to potential false claims, its activity may reveal something about its understanding as to whether those claims were deliberately false or the result of extrinsic factors, as in Southland Management. But where, as here, there is no evidence of government action, nothing relevant can be ascertained without knowing for which of many possible reasons it did not act.

The defendants also cite United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993), in which we stated that "government knowledge may be relevant to a defendant's liability." Id. at 1157. Indeed it "may be," but is not here where the significance of the knowledge and the responsibilities of the recipients have not been established.

1 Rule 402 in any event. This conclusion was not an abuse of
2 discretion.

3 **CONCLUSION**

4 For the foregoing reasons, we affirm the judgment of
5 the district court.