No. 20-2241

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, et al., *ex rel.* TRACY SCHUTTE and MICHAEL YARBERRY,
Plaintiffs-Appellants,

v.

SUPERVALU, INC., et al

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of Illinois
No. 3:11-CV-03290-RM-TSH
The Honorable Judge Richard Mills

BRIEF OF AMICUS CURIAE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2241

Short Caption: United States of America, et al. v. Supervalue Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☑ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Taxpayers Against Fraud Education Fund

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Whistleblower Law Collaborative, LLC, Behn & Wyetzner, Chtd.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Dan Hergott Date: 8 October, 2020

Attorney's Printed Name: Dan Hergott

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐ (Revised)

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N/A

Attorney's Signature: /s/ Michael I. Behn Date: 8 October, 2020

Attorney's Printed Name: Michael I. Behn

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ David W.S. Lieberman Date: 8 October, 2020

Attorney's Printed Name: David W.S. Lieberman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ Jacklyn DeMar Date: 8 October, 2020

Attorney's Printed Name: Jacklyn DeMar

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Taxpayers Against Fraud Education Fund ("TAFEF") states that it is a corporation organized under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company. TAFEF represents no parties in this matter and has no pecuniary interest in its outcome. However, TAFEF has an institutional interest in the effectiveness and correct interpretation of the federal False Claims Act.

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Pursuant to Federal Rule of Appellate Procedure 29, Taxpayers Against Fraud Education Fund ("TAFEF") submits this brief in support of Plaintiffs-Appellants Tracy Schutte and Michael Yarberry and reversal. All parties have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

TAFEF is a non-profit public interest organization dedicated to combating fraud against the Government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to educate the public and the legal community about the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and provided testimony to Congress about ways to improve the FCA. It regularly participates in litigation as *amicus curiae*. TAFEF is supported by *qui tam* relators and their counsel, by membership dues and fees, and by private donations. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.

[1] No party's counsel authored this brief in whole or in part. No person other than *amicus* and its counsel contributed any money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

In 1986 Congress amended the definition of "knowledge" in the FCA to encompass three separate standards of scienter: actual knowledge, deliberate ignorance, and reckless disregard. 31 U.S.C.A. § 3729(b)(1). Legislative history and subsequent judicial interpretation make clear that each of these standards reaches a different type of knowledge of a claim's falsity: (1) actual knowledge; (2) constructive knowledge, or a failure to make reasonable inquiries; and (3) reckless disregard or gross negligence plus. *See United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 513 F. Supp. 2d 866, 876 (S.D. Tex. 2007).

A reasonable interpretation of an ambiguous statute "does not foreclose a finding of scienter" when the "defendant actually knew or should have known that its conduct violated a regulation in light of any ambiguity at the time of the alleged violation." *United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017). And even then, the defendant may not ignore "red flags," such as agency guidance, that would put it on notice that its interpretation may be wrong, rather, a defendant must inquire as to the appropriate interpretation. *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1274-75 (D.C. Cir. 2010).

The Supreme Court's decision in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007) does not change this analysis. *Safeco* interpreted the term "willingly," which does not appear in the FCA. While several circuit courts subsequently found

that the *Safeco* analysis applies in the FCA context, none of them found that it wrote the actual knowledge and deliberate ignorance elements out of FCA's definition of knowledge. In those cases, including in *United States ex rel. Purcell v. MWI Corp.*, which the district court relied on here, the courts have attempted to extend *Safeco* to support the conclusion "that subjective intent—including bad faith—is irrelevant" to "reckless disregard" under the FCA. 807 F.3d 281, 289-90 (D.C. Cir. 2015); *see also, e.g., United States ex rel. Donegan v. Anesthesia Associates of Kansas City, PC*, 833 F.3d 874, 879-80 (8th Cir. 2016) (concluding that a defendant's reasonable interpretations "belies" a finding of scienter absent guidance warning it away).

However, the district court here ignored evidence of actual knowledge and deliberate ignorance, erroneously applying *Safeco* and subsequent cases applying *Safeco* to the FCA, in manner that would render the actual knowledge and deliberate ignorance standards for scienter enumerated in the FCA superfluous.

Further, the Supreme Court explained in *Halo Electronics., Inc. v. Pulse Electronics., Inc.*, that "nothing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted." 136 S. Ct. 1923 (2016).

Under the appropriate interpretation of the FCA's knowledge standard, the district court's analysis suffers from at least two key errors. First, rather than

undertake an inquiry into Defendants' contemporaneous state of mind as required by law, the court erroneously concluded that "subjective intent is 'irrelevant'" and "for the conduct to be 'knowingly' or 'recklessly' illegal, therefore, an authoritative interpretation must exist stating that it is." [SA at 20]. This appears to have led the district court to ignore evidence that Defendants had "actual knowledge" that the claims they were submitting were false and that they deliberately avoided discussing the issue with Pharmacy Benefit Managers ("PBMs") out of fear of the consequences. Second, the district court rejected numerous regulations and contracts that should have warned Defendants away from their interpretation of Usual and Customary ("U&C") pricing rules, because it erroneously concluded that the authorities were not "binding."

ARGUMENT

I. KNOWLEDGE UNDER THE FCA

Prior to 1986, the FCA did not define the term "knowingly." As a result, some courts interpreted the term as imposing a requirement for actual knowledge or specific intent to defraud. *See, e.g., United States v. Ekelman & Associates, Inc.*, 532 F.2d 545, 548, (6th Cir. 1976); *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972); *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970). Others, noting that the purpose of the FCA is fundamentally remedial, concluded that the FCA's knowledge requirement could be met through a finding of recklessness or

extreme carelessness. *See, e.g., United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 60 (8th Cir. 1973).

In amending the FCA, Congress reviewed these decisions and concluded that "in judicial districts observing an 'actual knowledge' standard, the Government is unable to hold responsible those corporate officers who insulate themselves from knowledge of false claims submitted by lower-level subordinates." *See* S. Rep. 99-345 at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272 (citing *U.S. v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972)). Congress described this behavior as "ostrich-like." *Id.* It concluded that the actual knowledge standard "is inappropriate in a civil remedy and presently prohibits the filing of many civil actions to recover taxpayer funds lost to fraud." *Id.* Congress therefore amended the definition of "knowledge" in the FCA, to define precisely "what type of 'constructive knowledge,' if any, is rightfully culpable." S. Rep. 99-345 at 20, *reprinted in* 1986 U.S.C.C.A.N. at 5285.

Accordingly, the 1986 amendments to the FCA enumerated three standards that suffice to establish knowledge. As amended, the statute defines "knowing" and "knowingly" as a person who:

> (i) has ***actual knowledge*** of the information;
> (ii) acts in ***deliberate ignorance*** of the truth or falsity of the information; or
> (iii) acts in ***reckless disregard*** of the truth or falsity of the information.

31 U.S.C.A. § 3729(b)(1)(A) (emphasis added).

The statute also expressly provides that "no proof of specific intent to defraud" is required. 31 U.S.C. §3729(b)(1)(B). The legislative history of the amendments makes clear that Congress intended these additional definitions to expand the reach of knowledge under the FCA:

> to reach what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted. While the Committee intends that at least some inquiry be made, the inquiry need only be 'reasonable and prudent under the circumstances', which clearly recognizes a limited duty to inquire as opposed to a burdensome obligation. The phrase strikes a balance which was accurately described by the Department of Justice as 'designed to assure the skeptical both that mere negligence could not be punished by an overzealous agency and that artful defense counsel could not urge that the statute actually require some form of intent as an essential ingredient of proof.'

S. Rep. 99-345 at 20, *reprinted in* 1986 U.S.C.C.A.N. at 5285; *see also id.* at 7 ("The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence. But the Committee does believe the civil FCA should recognize that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate."); H. Rep. 99-660 at 20-21 (1986) ("It is intended that persons who ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act.).

While the draft language discussed in the committee reports differs modestly from the final statute, courts have interpreted it to impose a limited duty to make reasonable inquiries to clarify any perceived ambiguities. *See, e.g.*, *Sci. Applications Int'l Corp.*, 626 F.3d at 1274-75 (noting that Congress intended scienter to impose a limited duty to inquire and imposed liability when a defendant deliberately avoided learning the truth). As this Court has explained, scienter includes "actual knowledge," "deliberate ignorance," or "reckless disregard" to the possibility that the submitted claim was false. *United States v. King Vassel*, 728 F.3d 707, 712 (7th Cir. 2013). Of these three standards, "reckless disregard" "is the most capacious" and has been variously described as meaning "gross negligence," an extreme form of ordinary negligence, or failure to make such inquiry as would be reasonable and prudent under the circumstances. *Id.* (noting that "all are apt and useful descriptions of the concept of reckless disregard").

The FCA's definition of knowledge does not preclude a finding that a party acted knowingly where a regulatory scheme is alleged to be "ambiguous." Moreover, even in the face of such an ambiguity, a court must determine that the defendants' proffered interpretation was the interpretation that the Defendant held at the time and is not a post-hoc rationalization. *See United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999).

Indeed, "[a] court must determine whether the defendant actually knew or should have known that its conduct violated a regulation in light of any ambiguity at the time of the alleged violation." *Phalp*, 857 F.3d at 1155. And even then, the defendant may not ignore "red flags," such as agency guidance, that would put it on notice that its interpretation may be wrong, rather, a defendant must inquire as to the appropriate interpretation. *Sci. Applications Int'l Corp.*, 626 F.3d at 1274-75.

II. SAFECO AND ITS PROGENY HAVE NO BEARING ON THE MEANING OF "KNOWINGLY" UNDER THE FCA, WHICH EXPRESSLY DEFINES THAT TERM

The Supreme Court's decision in *Safeco*, 551 U.S. at 47 interpreted the term "willfully" as used in the Fair Credit Reporting Act (FCRA), which that statute did not define. *Id.* at 56-57, 70. In *Safeco*, the Court determined that "willfully" encompassed "reckless disregard," and acknowledged that its interpretation of the standard was imposed in part because there was "no indication that Congress had something different in mind." *Id.* at 68. The Court concluded that the defendant, interpreting a relatively recent statute that had undergone sparse analysis, relied on a reasonable, albeit erroneous, interpretation of the statute and had not acted recklessly. *Id.* at 57, 68, 70.

Unlike the FCRA, the FCA does not use the term "willfully." Moreover, the FCA expressly defines the term "knowingly," *see supra*, and the extensive

legislative history and judicial interpretation of the FCA's scienter requirements explains Congress's purpose in adopting that precise definition.

Thus, *Safeco's* determination of the meaning of "willfulness" under the FCRA has no bearing on the interpretation of "knowledge" under the FCA. To the extent that *Safeco* has any relevance, it can only be with reference to the FCA's "reckless disregard" standard and not the FCA's separate categories of "knowingly," namely, "actual knowledge" and "deliberate ignorance." *Safeco's* conclusion, that a defendant is not reckless if it relies on a reasonable, but erroneous, interpretation of an ambiguous statute, comports with the standard interpretation of "reckless disregard" under the FCA. *See*, *e.g.*, *Parsons*, 195 F.3d at 464. But, where a defendant has actual knowledge that it is violating the law or acts in "deliberate ignorance" of the law, *Safeco's* interpretation of reckless disregard under the FCRA can shed no light on whether the defendant's conduct constitutes a "knowing" violation of the FCA.

Following the *Safeco* decision, although some courts have extended *Safeco* to the FCA to support the conclusion "that subjective intent—including bad faith—is irrelevant" to analyzing "reckless disregard" under the FCA, *see*, *e.g.*, *Purcell*, 807 F.3d at 289-90, those courts have not held that *Safeco* writes the other scienter categories – "actual knowledge" and "deliberate ignorance" – out of the FCA. The FCA extends to actual knowledge of violations of the law and makes express that

no specific intent to defraud is required. 31 U.S.C. §3729(b)(1)(B). Moreover, such an interpretation would undermine the FCA by permitting a defendant who submitted claims while knowing them to be false to escape FCA liability by later crafting a post-hoc rationalization for its actions. *Compare Parsons*, 195 F.3d at 463 n.3 (noting potential problem created by embracing a "reasonable interpretation" standard of falsity in that "[a] defendant could submit a claim, knowing it is false or at least with reckless disregard as to falsity, thus meeting the intent element, but nevertheless avoid liability by successfully arguing that its claim reflected a "reasonable interpretation" of the requirements.").

The district court's interpretation would undermine the intent of Congress in passing the 1986 amendments. Congress implemented the 1986 amendments in order to reinvigorate the FCA after decades of dormancy. Recognizing a "severe" problem of fraud on the Government, Congress determined that "only a coordinated effort of both the Government and the citizenry" could solve the problem. S. Rep. No. 99-345, at 1 (1986). Congress expanded and specifically defined knowledge in order to encourage whistleblowers to bring forth claims against any entities submitting false claims to the government, regardless of specific intent to defraud the government. The district court's interpretation would not only immunize a broad swath of fraudulent behavior, it would essentially turn Congress's intent on its head.

As explained, Congress amended the FCA to reach intentional wrongdoing as well as "ostrich-like" behavior and to create a limited duty to inquire when seeking government money. Eliminating inquiry into subjective intent would not only eliminate this duty, it would actually incentivize government contractors to avoid inquiry into ambiguous rules, knowing they could later fabricate "reasonable" interpretations designed to justify their behavior and enhance their ability to later argue that a reasonable interpretation supports a finding that they lacked scienter.

The Supreme Court subsequently made this clear in *Halo Electronics*, 136 S. Ct. 1923, which addressed enhanced damages under the Patent Act for "willful" conduct, explaining that *Safeco* did not hold that in judging intent, courts should look to "facts that the defendant neither knew nor had reason to know at the time he acted." *Id*. at 1933. Rather, the Court explained, culpability is generally "measured against the knowledge of the actor at the time of the challenged conduct." *Id.* *Halo Electronics* emphasized that a contrary rule would allow a party to suppose his conduct was arguably defensible without reason, but nevertheless "escape any comeuppance" based "solely on the strength of his attorney's ingenuity" in justifying conduct after the fact. *Id*.

In the context of the FCA, the Eleventh Circuit has explained that interpreting the FCA's knowledge standard to permit post-hoc rationalizations

effectively does away with the duty to inquire imposed by the deliberate ignorance standard. *Phalp*, 857 F.3d at 1155. As the court observed in *Phalp*, "under the district court's legal interpretation, a defendant could avoid liability by relying on a 'reasonable' interpretation of an ambiguous regulation manufactured post hoc, despite having actual knowledge of a different authoritative interpretation. However, scienter is not determined by the ambiguity of a regulation and can exist even if a defendant's interpretation is reasonable."

These decisions make clear that neither *Safeco* nor its progeny overturns the clear statutory language, extensive history, or deep judicial interpretation of the FCA's knowledge requirement.

III. THE DISTRICT COURT ERRONEOUSLY APPLIED THE FCA'S KNOWLEDGE STANDARD

While the Plaintiffs-Relators' brief addresses a number of issues with the district court's opinion. *Amicus* focuses on two conclusions that it believes erroneously interpret the appropriate knowledge standard.

A. The FCA Requires Inquiry into Defendant's Actual Knowledge

As Plaintiffs-Relators explain in their brief at II.B, the Defendants seemed to rely solely on justifications for Defendants' actions that were "manufactured post hoc," rather than on the actual knowledge of the Defendants at the time of the conduct. For example, the 2004 HHS/OIG Medicare Part A memo apparently relied on by the district court, [Doc 323 at 11], appears to be a document not

contemporaneously relied on by Defendants, but by Defense counsel in litigating the case. *See* Appellants Br. at 48. Likewise, the district court appears to have relied on court decisions issued after the fraudulent conduct, of which the Defendants' could not have been aware at the time of their conduct, to conclude that Defendants' interpretation was reasonable. [SA[2] at 20-21]. As explained above, such post-hoc justifications, untethered from the knowledge of the defendant at the time of the conduct, are insufficient to defeat knowledge under the FCA.

However, rather than undertake an inquiry into Defendants' contemporaneous state of mind as required by law, the district court erroneously concluded that "subjective intent is 'irrelevant'" and "for the conduct to be 'knowingly' or 'recklessly' illegal, therefore, an authoritative interpretation must exist stating that it is." [SA at 20]. This appears to have led the court to ignore evidence that Defendants had "actual knowledge" that the claims they were submitting were false as to the U&C price. For example, Plaintiffs-Relators identified documents indicating that Defendants knew that "no matter how we packaged the situation" PBMs would consider a $4 price for generics to be "our usual and customary price . . . .", and that U&C price was "inclusive of all

[2] SA References are to the Short Appendix of Plaintiffs-Appellants Tracy Shutte and Michael Yarberry.

applicable discounts" including but not limited to "competitor's matched price." *See* Appellants Br. at 66-68.

Similarly, the district court appears to have ignored evidence that Defendants, in contravention of their obligation to make reasonable inquiries as to the governing rules, took steps to avoid discussing the issue with PBMs out of fear of the consequences. *See id.* at 69-70. For example, Defendants' executives determined that they were "concerned about any response where we acknowledge doing it," and ultimately decided that "[w]e should not respond unless we know what [PBMs] are going to do with this information." *Id.* Likewise, the district court appears to have ignored evidence that Defendants purposefully took a "stealthy" approach to price matching so as not to "affect the integrity of our U&C price." *Id.* at 10. Such evidence could enable a reasonable jury to conclude that Defendants engaged in ostrich-like behavior that satisfied the "knowing" requirement of the FCA, and should have precluded summary judgment.

If the approach the district court took were to prevail, it would undermine the FCA, which seeks to redress fraud in a vast array of government programs. *See Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019,* [*https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019*](https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019) (describing settlements of cases involving procurement fraud, charging for medically unnecessary goods and

services, and grant fraud). Government contractors who had the actual intent to submit false or fraudulent claims for payment could do so with impunity, provided they hired lawyers to come up with after the fact justifications to argue that they did not act "knowingly." This would resurrect the very loophole the FCA amendments sought to close.

B. Authoritative Guidance Need Not Be "Binding"

The district court also rejected numerous regulations and contracts that should have warned Defendants away from their erroneous interpretation of U&C pricing rules, because it apparently concluded that they were not "binding." [SA at 19, 30]. *Safeco* itself did not purport to require that guidance be "binding" to warn a defendant away from an erroneous interpretation, rather it spoke of "authoritative guidance." 551 U.S. at 70. Indeed, it is logically inconsistent to speak of "binding guidance" that would "warn" defendants. If an interpretation is binding, then it provides the governing rule, not guidance, and does not warn defendants. It sets the rules.

In any event, whatever the role that "binding" guidance might play under *Safeco*'s reckless disregard standard, it has no application to the FCA. As explained, *supra*, the statute's deliberate ignorance standard was chosen precisely to "recognize that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." S. Rep. 99-

345 (1986) at 20, *reprinted in* 1986 U.S.C.C.A.N. at 5285. Likewise, Congress "intended that persons who ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim should be held liable under the Act." H. Rep. 99-660 at 20-21 (1986). The "limited inquiry" and reaction to "red flags" duties imposed under the deliberate ignorance standard would not turn on whether the guidance was "binding." So long as the guidance was reasonably authoritative, a defendant who ignores it, remains deliberately indifferent to the truth or falsity of its claims. *See Sci. Applications Int'l Corp.*, 626 F.3d at 1274-75; *see also, e.g., Donegan,* 833 F.3d at 878 (Medicare agency memorandum); *United States ex rel. Streck v. Bristol-Myers Squibb Co.*, 370 F. Supp. 3d 491, 497 (E.D. Pa. 2019) (proposed CMS rule, CMS Manufacturer Releases, and an HHS report).

Here, the district court's focus on finding guidance that was "binding" led it to ignore several examples of authoritative guidance that qualified as "red flags" regarding Defendants interpretation of U&C rules. The most notable of these was the CMS Memorandum describing the "Lower Cash Price Policy" later incorporated into CMS Medicare Prescription Drug Benefit Manual. *See* Appellants Br. at 55-56. This Court relied on the same language in the same document in interpreting the meaning of U&C in *U.S. ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632 (7th Cir. 2016), cert. denied, 137 S. Ct. 627 (2017). That alone

suggests the manual is sufficient to at least raise "red flags" for a program participant.[3]

The purpose of the deliberate ignorance definition of "knowledge" under the FCA, is to ensure that a government contractor not avoid "red flags" that their claims may be false. As the Department of Justice has recognized, agency guidance may provide evidence of a party's awareness of, and deliberate ignorance to, a requirement. Justice Manual §1-20.201. In this case, a reasonable jury could conclude that obvious red flags in the form of CMS guidance sufficed to warn Defendants away.

CONCLUSION

For the reasons set forth herein, this Court should set aside the district court's order granting Defendants' summary judgment motions.

[3] Moreover, As Plaintiffs-Relators note, governing regulations and contracts ***do*** make the CMS instructions binding on participating pharmacies. *See* Appellants Br. at 56, & Addendum B, SA 37.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that: (i) this *amici* brief complies with the type-volume limitation prescribed by Federal Rules of Appellate Procedure 29(a)(5) because it contains 3,804 words, excluding the parts of the *amici* brief exempted by Federal Rule of Appellate Procedure 32(f); and (ii) this *amici* brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this *amici* brief has been prepared using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2020, I electronically filed the foregoing Brief *Amici Curiae* of Current and Former Co-Chairs and Vice-Chairs of the Bipartisan Congressional Native American Caucus in Support of Plaintiffs-Appellants using the CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: October 7, 2020

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