Case No. 20-2330

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.* DEBORAH SHELDON, *et al.*,
Plaintiff-Appellants,
v.
ALLERGAN SALES, LLC et al., *Defendants-Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Case No. 1:14-cv-02535-ELH
The Honorable Ellen L. Hollander, U.S. District Judge

BRIEF OF *AMICUS CURIAE* TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), 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 False Claims Act.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, TAFEF submits this brief in support of plaintiff-appellant Deborah Sheldon (Relator Sheldon) and for reversal of the lower court's order dismissing her Second Complaint. 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 the preparation or submission of this brief.

TAFEF is a non-profit public interest organization dedicated to combatting 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 has provided testimony to Congress about ways to improve the FCA.

TAFEF 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.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), TAFEF states that all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Congress did not define what makes a claim "false" or "fraudulent" under the False Claims Act (FCA). Lacking such a definition from Congress, the Supreme Court recently reaffirmed the principle that "false" or "fraudulent" under the FCA should comport with common law notions of fraud. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016). Under both common law and well-settled FCA case law, the terms "false" and "fraudulent" are read broadly, are distinct from the concepts of scienter, and courts should refrain from reading extra-textual requirements into this element of the FCA.

Congress did, however, define the element of scienter set forth in the FCA. In 1986, reacting to decades of inactivity under the FCA and rising levels of fraud against the government, Congress defined the requisite level of knowledge expansively, encompassing three independent mental states: actual knowledge, deliberate ignorance, and reckless disregard. 31 U.S.C. § 3721(b)(1). The legislative history and subsequent judicial interpretation make clear that each of these mental states is distinct with different and distinct means of proof.

This brief addresses two separate errors by the District Court. First, the court conflated the elements of falsity and scienter, adding extra-textual requirements to the element of falsity. Second, the court only assessed relator's allegations under one type of knowledge—reckless disregard. It thus failed to consider whether relator had

sufficiently alleged that defendants acted with actual knowledge or deliberate ignorance. This Court should reverse the District Court's decision dismissing relator's Amended Complaint and remand the case.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY ADDED EXTRA-TEXTUAL REQUIREMENTS TO ITS FALSITY ANALYSIS

A. Falsity Under the FCA is Read Broadly

The FCA, known colloquially as the Lincoln Law, was enacted in 1863 and "'was originally aimed at stopping the massive frauds perpetrated by large contractors during the Civil War.'" *Escobar*, 136 S. Ct. at 1996 (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)). "'[A] series of sensational congressional investigations' prompted hearing where witnesses 'painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.'" *Id.* (quoting *United States v. McNinch*, 356 U.S. 595, 599 (1958)). As the Supreme Court has repeatedly recognized, Congress intended the FCA to "reach all types of fraud, without qualification, that might result in financial loss to the Government." *See, e.g. United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). The FCA was substantially amended in 1986 to modernize it and make it a more robust tool for combatting fraud against the government.

Today, the FCA generally prohibits private parties from "knowingly" submitting "a false or fraudulent claim" for reimbursement. 31 U.S.C. § 3729(a)(1)(A). Congress, however, did not define what makes a claim 'false' or 'fraudulent.'" *See Escobar*, 136 S. Ct. at 1999. When Congress does not provide a definition of a word, courts look to the common-law. In the context of the FCA, the Supreme Court held that "common-law fraud has long encompassed . . . more than just claims containing express falsehoods." *Id*. Consequently, the Court favors a more expansive view of "false or fraudulent" and, consistent with common-law, has read those terms to encompass, claims which are based on a statement that is untrue, misleading, or tainted by misrepresentations of omission. *See id.* at 1999, 2001. Notably, in *Escobar*, the Supreme Court expressly cautioned against importing additional requirements into the FCA's falsity element. *See id.* at 2001 (holding that the FCA's broad reference to "false or fraudulent claims" is not limited to claims that involve "misrepresentations about express conditions of payment"). The FCA does not contain any extra-statutory falsity requirement—such as whether defendant's post hoc interpretation of a statute is "objectively" false. Whether a claim is "false or fraudulent," depends on whether the claim complies with the statutory, regulatory, or contractual requirements. *See id.*; *see also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785-86 (4th Cir. 1999); S. Rep. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 ("a false claim may

take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute or regulation").

The common law has also long recognized that even a statement of opinion can be a false statement when the speaker does not himself actually hold that opinion, or when it falsely implies the existence of untrue facts. *See* RESTATEMENT (SECOND) OF TORTS § 525 & cmt. c (Am. Law Inst. 1977) (explaining that there can be fraudulent misstatements of opinion, and so "a statement that a . . . person . . . is of a particular opinion . . . is a misrepresentation if the person in question does not hold the opinion"); *id.* § 539 cmt. a (explaining that a statement taking the form of an opinion is often "reasonably understood as implying that there are facts that justify the opinion," and identifying as fraudulent "a statement that a bond is a good investment" when the speaker knows that the interest is in default and the issuer is in receivership). Indeed, the Supreme Court has recognized that an opinion can qualify as a "false statement" for purposes of liability under the securities laws. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1326-27 (2015).

Here, the District Court applied an objective falsity standard for which there is no textual basis in the FCA, and which disregards the Supreme Court's admonition in *Escobar* that courts should not impose additional limitations on falsity under the FCA. *See also United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730 (10th

Cir. 2008); *United States ex rel. Druding v. Care Alternatives*, 952 F.3d 89, 96 (3rd Cir. 2020).*United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 306 (3d Cir. 2011); *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1049 (9th Cir. 2012) ("FCA liability may be premised on false estimates"); *United States ex rel. Loughren v. Unum Grp.*, 613 F.3d 300, 310-12 (1st Cir. 2010) ("An opinion may qualify as a false statement for purposes of the FCA where the speaker knows facts which would preclude such an opinion"): *Harrison*, 176 F.3d at 792 (same). The District Court also attempted to evaluate whether the defendant's proffered view of the best price requirements was reasonable, which improperly attached a knowledge standard to the element of falsity. The potential for a reasonable but erroneous interpretation of a statute would go to scienter, not falsity—namely "whether the defendant actually knew or should have known that its conduct violated a regulation." *See United States ex rel. Phalp v. Lincare Holdings, Inc.*, 857 F.3d 1148, 1155 (11th Cir. 2017)

Conflating the two elements of the FCA ignores one of *Escobar's* key tenets: courts should address "concerns about fair notice and open-ended liability through strict enforcement of the [FCA's] materiality and scienter requirements," not by "'adopting a circumscribed view of what it means for a claim to be false or fraudulent.'" 136 S. Ct. at 2002 (quoting *United States v. Sci. Applications Int'l Corp. (SAIC II)*, 626 F.3d 1257, 1274-75 (D.C. Cir. 2010)). As the Ninth Circuit

explained, a defendant erroneously "relying a on good faith interpretation of a" government requirement will escape liability under the FCA "not because his or her interpretation was correct or 'reasonable' but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met." *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999).

B. Falsity and Scienter Are Separate Elements of FCA Liability

In the decision below, the District Court erred by reading extra-textual requirements into the falsity determination through conflation of the falsity and scienter requirements. *See* Op., Dkt. 86, at 33-34. In doing so, the District Court constructed a situation whereby a claim would not be "false" even if a court concluded it was in direct violation of a statute, as long as a defendant was able to fabricate a post hoc "reasonable" interpretation of the statute in question. Further, the FCA clearly denotes scienter as an element independent of falsity. "Combining the two elements into 'falsity' reads the scienter element out of the text of the statute." *Druding*, 952 F.3d at 96.

Neither the plain language of the FCA, the Supreme Court's views on falsity, nor the common-law understanding of fraud countenance this view. Rather, as the Ninth Circuit explained in *Parsons*, the regulations in question "while unquestionably technical and complex, are not discretionary. Their meaning is ultimately the subject of judicial interpretation, and it is [defendants] compliance

with these regulations, as interpreted by this court, that determines whether its [] practices resulted in a 'false claim' under" the FCA. 195 F.3d at 463. Defendants cannot escape liability simply because lawyers were able to concoct a "reasonable" interpretation of the statute when defendant was hauled into court. Were this Court to adopt such a standard, a defendant's fraud would be limited only by their attorney's ingenuity and result in an absurd situation wherein a government contractor who *intended* to violate the law would avoid liability because it was able to manufacture some after-the-fact statutory interpretation which it *knew* to be wrong. Restricting falsity in this way would severely undermine the FCA, rendering the government powerless to prosecute fraud in any case where some measure of judgment was involved, be it medical necessity, medical upcoding, mortgage underwriting, indirect cost accounting under federal contracting, customs classification, or any number of other situations implicating a complex statutory or regulatory scheme.

The District Court's apparent view that diverging "reasonable" interpretations of a statute would foreclose a finding of falsity fails to appreciate the distinction between the "falsity" of a claim and "knowing falsity," which is necessary for the imposition of FCA liability. The Tenth Circuit's recent decision in *Polukoff* is instructive. In an analogous situation to the District Court's decision here, the district court in *Polukoff* granted the defendants' motion to dismiss on the ground that

[o]pinions, medical judgments, and 'conclusions about which reasonable minds may differ cannot be false' for the purposes of an FCA claim." *United States ex rel. Polukoff v. St. Mark's Hosp.*, 2017 WL 237615, at *9 (D. Utah Jan. 19, 2017). The Tenth Circuit reversed, emphasizing that "[a] Medicare claim is false if it is not reimbursable, and a Medicare claim is not reimbursable if the services provided were not medically necessary." *Polukoff*, 895 F.3d at 742. In explaining that even claims premised on judgments about medical necessity may be false under the FCA, the Tenth Circuit stressed "that a doctor's certification to the government that a procedure is 'reasonable and necessary' is 'false' under the FCA if the procedure was not reasonable and necessary under the government's definition of the phrase." *Id*. at 743. As in *Polukoff*, reasonable minds may differ about the interpretation of a statutory requirement, but whether or not the claim is false depends on whether the defendants *actually* complied with the statute.

Were the approach endorsed by the district court 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 (describing settlements of cases involving procurement fraud, charging for medically unnecessary goods and services, grant fraud, and underwriting fraud). Many of these

areas involve some level of judgement and therefore provide creative attorneys various avenues to come up with supposedly *reasonable interpretations* after the fact. Government contractors who knew they were receiving money in violation of the government's rules could do so with impunity, provided they hired lawyers to devise multiple reasonable interpretations that were not, in fact, held by the contractor at the time the claim was submitted. *See 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 government would be left almost powerless to protect taxpayer funds while implementing efficient government programs.

Adopting the District Court's analysis would resurrect the very loophole the FCA amendments sought to close. As the Supreme Court recently explained, culpability is generally "measured against the knowledge of the actor at the time of the challenged conduct," and to allow a bad actor to "escape any comeuppance" based "solely on the strength of his attorney's ingenuity" would frustrate the purpose of remedial statutes. *See Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1933 (2016).

II. THE FALSE CLAIMS ACT'S SCIENTER REQUIREMENT IS DESIGNED TO ENCOMPASS THREE DISTINCT STATES OF MIND: ACTUAL KNOWLEDGE, RECKLESS DISREGARD, AND DELIBERATE IGNORANCE

The FCA is the federal government's primary tool to combat fraud and recover losses due to fraud in federal programs. Faced with diminishing recoveries, Congress amended the FCA in 1986 to reinvigorate the statute after years of dormancy. Recognizing a "severe" problem of fraud on the government, Congress determined that "only a coordinated effort of both the Government and its citizenry" could solve the problem. S. Rep. No. 99-345, at 1 (1986). Thus, Congress expanded and defined knowledge to encourage whistleblowers to bring forth claims against any entities submitting false claims to the government, regardless of specific intent to defraud the government. Specifically, Congress amended the definition of "knowingly" in the FCA to encompass three separate standards of scienter. A party acts "knowingly" when it: (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. § 3729(b)(1). The well-established history of these amendments and judicial opinions across the country confirm that this statutory language establishes three distinct states of mind, each of which is independently sufficient to support a finding of liability under the FCA. Conversely, to defeat liability, a defendant must establish that its actions met none of these three states of mind.

Consistent with this distinction, each of these three states of mind may be supported by a different set of facts and should be analyzed independently. Indeed, scienter may be alleged and proved under any of three standards of knowledge. Yet here, as explained in Section II.C. *infra*, the District Court assessed Plaintiff-Appellant's allegations under only the "reckless disregard" standard. In doing so, the court failed to determine whether the allegations in the Amended Complaint were sufficient to establish scienter under either the "actual knowledge" or "deliberate ignorance" standards, frustrating the goal of the 1986 amendments to ensure that the FCA captured both actual knowledge and ostrich-like behavior.

A. Congress Amended the FCA in 1986 to Reach Both Objective and Subjective Mental States

Prior to 1986, the FCA did not define the term "knowingly." As a result, some courts interpreted the term to impose a requirement of 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, 1007 (5th Cir. 1972); *United States v. Mead*, 426 F.2d 118, 122 (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) (citing *Aerodex*, 469 F.2d at 1003). Congress described such corporate behavior as "ostrich-like," and 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." *Id*. at 20, *reprinted in* 1986 U.S.C.C.A.N. at 5285. It added "deliberate ignorance" and "reckless disregard" to the definition of "knowingly" and expressly provided that no specific intent to defraud is required. 31 U.S.C. § 3729(b)(1986), codified as presently amended at 31 U.S.C. § 3729(b)(1). Accordingly, Congress reinforced the principle that the FCA was designed to capture all types of fraud against the government, and fraudsters could not escape liability simply by hiding their head in the sand.

The legislative history of the amendments makes clear that Congress intended 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 21, *reprinted in* 1986 U.S.C.C.A.N. at 5285; *see also id*. at 7 ("[t]he 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 (June 26, 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."). As Congress recognized, the FCA is first and foremost a fraud statute, and while it was not intended to punish good-faith mistakes, bad actors cannot escape liability by creating a house of cards designed to insulate themselves from liability while reaping a fraudulent windfall from the public fisc.

The legislative history also confirms that Congress did not intend to capture ordinary negligence but did intend to provide a remedy for conduct that was grossly negligent, deliberate, or intentional. During the 1986 drafting process, the Senate

Judiciary Committee at one point replaced the "reckless disregard" language with "gross negligence." *See* S. Rep. No. 99-345, at 20. After some debate, the original language was restored on the Senate floor, but as part of this debate, Senator Grassley explained Congress's intent that the adoption of the reckless disregard standard:

> is only to assure that mere negligence, mistake, and inadvertence are not actionable under the False Claims Act. In doing so, we reconfirm our belief that reckless disregard and gross negligence define essentially the same conduct and that under this act, reckless disregard does not require any proof of an intentional, deliberate, or willful act.

132 Cong. Rec. S11244 (daily ed. Aug. 11, 1986). Indeed, as the Supreme Court recently cautioned in *Escobar*, courts should not use policy-based concerns about excessive liability to import additional, atextual requirements into the FCA. *See* 136 S. Ct. at 2001 (holding that the FCA's broad reference to "false or fraudulent claims" is not limited to claims that involve "misrepresentations about express conditions of payment").

Similarly, under the "deliberate ignorance" standard, courts interpret the FCA to impose a limited duty to make reasonable inquiries to clarify any perceived ambiguities. *See*, *e.g.*, *SAIC II*, 626 F.3d at 1274-75 (noting that Congress intended to impose a limited duty to inquire and imposed liability when a defendant deliberately avoided learning the truth); *United States v. Taber Extrusions, LP*, 341 F.3d 843, 846 n.2 (8th Cir. 2003) (noting that if the defendant established that it had

"no actual knowledge of what the government's progress payment regulations required, whether [the defendant] as a second-tier supplier had a duty to inquire is clearly an issue for the ultimate fact-finder."); *Godecke ex rel. United States v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1211 (9th Cir. 2019) (The "deliberate ignorance standard can capture 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.").

Where a defendant knows it is violating the law or acts in deliberate ignorance of whether it is violating the law, the defendant's subjective state of mind at the time of the conduct is highly relevant to the question of "knowledge" under the FCA. This is precisely the reason the FCA encourages insiders with evidence that the defendant actually knew, or was deliberately ignoring, that the claims it was submitting were false to come forward.

B. Each of the FCA's Three Distinct Mental States Must Be Analyzed Independently

Consistent with the text and history of the FCA, courts have recognized that the statute reaches three distinct mental states, any one of which can support a finding of scienter. That conclusion is consistent with the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988).

The Supreme Court itself has recognized that different forms of evidence establish "knowledge" under the separate FCA standards of "actual knowledge" and "reckless disregard." *Escobar*, 136 S. Ct. at 2001-02. In *Escobar*, the Court discussed the means by which the government can establish that a defendant has knowledge that the claims at issue were material. *Id.* It explained, using the hypothetical of a defendant supplying inoperative guns to the government, that if the "defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has 'actual knowledge'" of the materiality of its false claims. *Id.* The Court contrasted this with the type of proof establishing "reckless disregard" or "deliberate ignorance" explaining that "because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to 'deliberate ignorance' or 'reckless disregard' of the 'truth or falsity of the information' even if the Government did not spell this out." *Id.* Indeed, the Court located this distinction between "actual" knowledge" and "reckless disregard" in the common law understanding of materiality. *Id.* at 2002-03 (noting that in tort law and in contract law a matter is material if (1) a reasonable person would attach importance, or (2) the defendant knows or has reason to know the recipient of the representation attaches importance).

Similarly, the D.C. Circuit in *United States v. Krizek* rejected the argument that "reckless disregard" should be interpreted as willful blindness because then,

"section (b)(3) would be redundant since section (b)(2) already covers such conduct." 111 F.3d 934, 942 (D.C. Cir. 1997). A Texas District Court was even more explicit:

> The statute expressly reaches three types of knowledge. The first type encompasses actual knowledge. The second type. . . contemplates "constructive knowledge" or "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." . . . The last type of knowledge has been described as "gross negligence plus."

United States ex rel. Longhi v. Lithium Power Techs., Inc., 513 F. Supp. 2d 866, 875-76 (S.D. Tex. 2007) (internal citations omitted); *see also Crane Helicopter Ser., Inc. v. United States*, 45 Fed. Cl. 410, 433 n.26 (1999) ("Many Circuit Courts of Appeal recognize that the plain language of the knowledge requirement does not require "specific intent" but instead incorporates the intent standards of "actual knowledge," "deliberate ignorance" and "reckless disregard.").

The decision below does not recognize that the three mental states should be evaluated independently, but rather treats the knowledge inquiry as an ordered, step-by-step analysis, where if a relator failed to allege reckless disregard, the court need not assess actual knowledge or deliberate ignorance. The inquiry should instead be viewed as three independents paths, each of which may lead to FCA liability. In limiting its analysis to reckless disregard, the court ignored Congress' plain intent in

the 1986 amendments, to ensure that the FCA encompassed three distinct mental states.

C. A Relator May Establish Knowledge Based on Any One of the Three Knowledge Standards

The District Court opted to evaluate scienter under only reckless disregard which it described as "'the loosest standard of knowledge.'" *See* Op. at 33. Yet nothing in the plain language of the FCA or relevant case law would suggest that analyzing allegations under the reckless disregard standard would obviate the need to assess whether relator had sufficiently alleged scienter under either of the other two standards of knowledge. Indeed, the District Court has it backwards: should relator properly allege *one* theory of knowledge, she need not allege the others. *See e.g.*, *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 608 (4th Cir. 2009); *United States v. Cooper*, 962 F.2d 339, 341 (4th Cir. 1992) (Courts are bound "to interpret a statute written in the disjunctive as setting out separate and distinct alternatives."). Here, the District Court failed to address relator's allegations that defendant acted with actual knowledge (*see* Compl., Dkt. 16, at 42-43, ¶ 69; p. 44, ¶ 71) and deliberate ignorance (*see id.* p. 80, ¶ 120). Accordingly, the District Court erred when it failed to analyze the full breadth of relator's scienter allegations, transforming reckless disregard into a threshold hurdle a relator must overcome rather than one of three independent paths to pleading knowledge under the FCA.

1. Allegations of Actual Knowledge Satisfy the Scienter Requirement Regardless of Whether the Reckless Disregard is Alleged

The District Court made no effort to determine whether Defendant was actually aware that it's conduct was fraudulent, despite the plain allegations in relator's complaint. This is because the court, misinterpreting the disparate ideas of knowledge under the FCA, tacitly concluded that because reckless disregard is the "loosest standard of knowledge," it need not consider whether the defendant *actually knew* it was committing fraud. Indeed, the District Court erred by wholly ignoring allegations related to the actual knowledge standard.

In fact, as the Eleventh Circuit recognized in *Lincare Holdings*, a relator may allege that a defendant acted with actual knowledge even though it may not have acted with a reckless disregard for the truth or falsity of its statements. *See* 857 F.3d at 1155. As the United States District Court for the District of Columbia explained in *United States v. Sci. Applications Int'l Corp (SAIC I)*, actual knowledge targets a defendant's "subjective knowledge." 555 F. Supp. 2d 40, 54 (D.D.C. 2008). In that case, the court found that the government had established a triable issue of fact with respect to the defendant's knowledge because it "presented evidence suggesting that there was at least one SAIC employee who knew that SAIC was bidding for the NRC Contracts despite having [prohibited organizational conflicts of interest]." *Id.* at 56; *see also, e.g.*, *United States v. Advance Tool Co*, 902 F. Supp. 1011, 1016 (W.D.

Mo. 1995) (scienter established because the defendant "presented invoices to GSA for payment which [the defendant] knew at the time of presentation were false").

Actual knowledge can also be established through circumstantial evidence, such as a defendant's attempts to avoid revealing the truth to the government. As the Fifth Circuit explained in *Aerodex*, the defendants "could easily have requested permission from the Navy to deliver the substitute parts or, at least, could have disclosed to the Navy the manner in which they thought they could comply with the contract. The failure to do so indicates nothing less than an intention to deceive." 469 F.2d at 1008.

Thus, under the "actual knowledge" prong, a district court may only consider a reasonable interpretation of the law if it were contemporaneously held by the defendant. A court cannot ignore evidence that suggests a defendant actually recognized its own actions were in violation of the law. *See id.* However, the District Court erroneously limited its analysis to whether or not defendants' *post hoc* interpretation of the Medicaid Drug Rebate Statute, 42 U.S.C. § 1396r-8 *et seq*, was "reasonable." In doing so, the court improperly made evidence of defendant's subjective knowledge irrelevant to the scienter inquiry.

2. Authoritative Guidance is Relevant to the Deliberate Ignorance Standard

As explained *supra*, the FCA'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. 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). Yet here, the District Court viewed the myriad forms of government guidance as a matter of "explicit" statutory construction rather than evaluating whether defendants acted in deliberate ignorance of the truth or falsity of their interpretation of the Rebate Statute. Indeed, under the FCA, defendants were *obligated* to make a limited inquiry into the applicable requirements.

For example, in a case involving the proper calculation of prevailing wage, the Ninth Circuit rejected the defendant's assertion that it believed it was properly interpreting the rules. *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Const. Co.*, 183 F.3d 1088, 1094–95 (9th Cir. 1999). As the court explained, the defendant, Roen, "could have sought clarification," but instead "without making any effort to obtain such clarification," certified its rates as complying with prevailing wage. *Id*. This failure to make reasonable inquiry, the court found, "suggests that Roen's certification may well have risen at least to the level of 'deliberate ignorance' or 'reckless disregard.'" *Id.*

The duties to perform a "limited inquiry" and not ignore "red flags" imposed under the deliberate ignorance standard do not turn on whether guidance is "explicit." *See* Op. at 40. 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 SAIC II*., 626 F.3d at 1274-75; *see also, e.g., United States ex rel. Donegan v. Anesthesia Assoc.*, 833 F.3d 874, 878 (8th Cir. 2016) (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). Terms in a contract may also put defendants on notice. *See United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 824 (7th Cir. 2011) ("a mere breach of contract does not give rise to liability under the False Claims Act," but "if the breaching party falsely claims to be in compliance with the contract to obtain payment . . . there may an actionable false claim.").

Here, the District Court identified numerous ways in which the Defendant may have been warned that it was violating the Rebate Statute, but analyzed those in terms of whether they precluded Defendant's *post hoc*, supposedly "reasonable" interpretation of the statute. This flows from the Court's flawed falsity analysis. *See supra* at I.B. Rather, the scienter analysis should look at the defendant's state of mind at the time of the fraud. The District Court should have determined whether, in the face of all those various sources of authoritative guidance, Defendant buried

its head in the sand and acted in deliberate ignorance of the proper interpretation of the statute. This the District Court failed to do.

The purpose of the deliberate ignorance definition of "knowledge" under the FCA, is to ensure that a government contractor does not ignore "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. Here, the District Court erred by failing to analyze the Defendant's knowledge under the deliberate ignorance standard and allowed the Defendant to avoid liability by its ostrich-like behavior of ignoring the various ways in which it had been warned away from its offending conduct.

CONCLUSION

This Court should reverse the District Court's judgment and remand this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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