[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 14-5210 & 14-5218

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA ex rel. Robert R. Purcell,

Plaintiff-Appellant,

v.

MWI CORPORATION,

Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE/CROSS-APPELLANT AND IN SUPPORT OF REVERSAL OF THE DECISIONS FINDING LIABILITY UNDER THE FALSE CLAIMS ACT

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March 2, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, the undersigned counsel certifies as follows:

1. PARTIES AND *AMICI*

Except for *amicus curiae* the National Association of Manufacturers ("NAM"), all parties, intervenors, and *amici* appearing before the District Court of the District of Columbia and in this Court are listed in the Principal Brief of Defendant-Appellee/Cross-Appellant MWI Corporation ("MWI").

2. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Principal Brief of Defendant-Appellee/Cross-Appellant MWI.

3. RELATED CASES

This case has not previously been before this Court. *Amicus curiae* counsel is not aware of any related case pending in this Court or in any other court.

4. STATUTES AND REGULATIONS

All of the pertinent statutes and regulations referenced in this brief are included in the Principal Brief of Defendant-Appellee/Cross-Appellant MWI.

/s/ Douglas W. Baruch
Douglas W. Baruch

CORPORATE DISCLOSURE AND CONSENT TO FILE STATEMENT

NAM is a non-profit trade association representing small and large manufacturers. NAM states that it has no parent corporation and no publicly held company has 10 percent or greater ownership in NAM.

Pursuant to D.C. Circuit Rule 29(b), counsel for *amicus curiae* NAM represents that all parties have consented to the filing of this brief.

NAM discloses that the Defendant-Appellee/Cross-Appellant MWI is one of approximately 14,000 members of NAM. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

NAM is aware of no other *amicus curiae* filing a brief in support of Defendant-Appellee/Cross-Appellant, and thus NAM has not included an explanation for separate briefing pursuant to D.C. Circuit Rule 29(d).

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES[1]

PAGE

CASES

[1] Authorities upon which *amicus curiae* NAM chiefly relies are marked with asterisks.

PAGE

PAGE

STATUTES

GLOSSARY

Ex-Im	Export-Import Bank of the United States
MWI	MWI Corporation, Inc.
FCA	False Claims Act
NAM	National Association of Manufacturers

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers ("NAM") is the largest association of manufacturers in the United States. Its membership includes approximately 14,000 small and large manufacturers, found in every industrial sector and in all fifty states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM advocates for sensible approaches to the law that help manufacturers compete in the global economy and create jobs across the United States.

This case is of direct interest to NAM and particularly to those among its membership who contract with the United States government, including through the provision of goods or services. These members are directly affected by interpretations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, that would impose liability on businesses based on ambiguous federal regulations or vague and undefined government contract terms. Through this brief, NAM expresses its concern that FCA enforcement based on unclear contract terms or regulations creates enormous liability traps for manufacturers selling products either to the United States or funded in whole or in part by the United States. NAM's interest is ensuring that its members are able to do business with the

government under clearly defined contract terms or regulations and without fear of facing costly FCA litigation and potential liability over ambiguous terms. NAM encourages the Court, in rendering its decision in this case, to ensure that government agencies draw bright lines for manufacturers and others to follow in their dealings with the government so that they can avoid the burden, expense, reputational damage, and other repercussions of defending against FCA claims based on an alleged failure to comply with ambiguous government direction.

SUMMARY OF THE ARGUMENT

This Court should reaffirm a well-established FCA principle: The FCA's severe sanctions cannot be imposed on contractors who employ reasonable interpretations of unclear or ambiguous contract terms or government regulations. The FCA is intended to protect the government's financial resources from fraudulent conduct. It is not meant to be a tool for resolving disputes between contractors and the government over the proper interpretation of unclear terms.

FCA defendants face not only the prospect of treble damages liability and statutory penalties of more than $1 million per violation, but also the risk of suspension and debarment, meaning that they can lose their ability to do any business with the government. These harsh consequences are not limited to some narrow sector of the business community. To the contrary, government contracting – or doing business with the government – permeates nearly every

facet of the American economy, as evidenced by the fact that FCA defendants in recent years have included manufacturers and suppliers, defense and civilian agency contractors, construction companies, importers and exporters, hospitals, universities, healthcare providers, energy producers, banks, and even professional athletes sponsored or funded in part by the U.S. Treasury.

And, in many instances, the "government contracts" at issue are filled with dozens of pages of terms, incorporate directly or by reference hundreds of regulations, and require certifications of compliance with a host of agency-written, non-negotiable boilerplate. Most manufacturers, of course, are familiar with having to deal with federal, state, and local regulations, and complex and lengthy contract terms certainly are not unique to the government-contracting arena. But, the government, alone, has the FCA in its arsenal as a weapon to prevent and punish certain fraud in government contracting. That weapon should not be deployed in instances where the government has not clearly defined the term or regulation at issue and the alleged wrongdoer's interpretation of the term or regulation is reasonable. Indeed, enforcement of the doctrine of *contra proferentem*, which would apply in any typical contract dispute, is all the more important here where the stakes involve treble damages, penalties, and debarment.

For these reasons, the district court's decisions below finding MWI Corporation ("MWI") subject to liability under the FCA are unfair and

unwarranted. Moreover, these decisions are counterproductive in terms of protecting the government fisc. The district court's conclusion that a manufacturer's reasonable interpretation of a vague or ambiguous government contract term can subject the manufacturer to FCA liability will lead to more costs for the government, as responsible contractors – in an effort to mitigate the risk of FCA damages, penalties, and possible debarment – will have to scour each contract (and incorporated regulations) for ambiguous terms and seek written clarification from the agency as to the interpretation of each one. The cost of such an exercise necessarily will be reflected in the price of the goods and services sold, increasing the overall cost to the government.

Thus, for all the reasons described above, it is not surprising that courts across the country have rejected the imposition of liability when the alleged wrongdoing arises out of ambiguity. Indeed, courts have emphasized, repeatedly, that the FCA's severe damages and penalties regime is reserved for those instances in which the defendant had clear notice of the standards to which it was being held.

In these types of cases, courts have established principles with respect to two separate, but related (and sometimes overlapping), FCA elements. First, FCA "falsity" cannot be established where the violation at issue stems from an ambiguous term and the defendant's actions are consistent with a reasonable interpretation of that term. Second, a defendant cannot be found to have acted with

the requisite scienter of "knowingly" under the FCA if the defendant employed a reasonable interpretation of an ambiguous term. The FCA's requirement that the government prove both falsity and scienter properly curtails efforts to impose FCA liability on businesses that attempt to comply with ambiguous government-drafted contract terms and regulations.

These principles, properly applied in this case, should preclude FCA liability for MWI's reasonable interpretation of its certification that it had paid only "regular commissions," particularly where the Export-Import Bank of the United States ("Ex-Im") drafted this term and left it undefined, quantitatively or otherwise, leaving it to MWI to determine whether the commissions it had paid were "regular" or not. In these circumstances, both falsity and scienter are lacking.[1]

ARGUMENT

I. THE FALSE CLAIMS ACT IS NOT A TOOL FOR RESOLVING EVERYDAY DISPUTES OVER AMBIGUITY IN CONTRACTS, CERTIFICATIONS, OR REGULATIONS

The FCA was enacted to protect the government's financial resources from certain types of fraudulent conduct. The FCA was not intended to operate as "a

[1] The district court's decisions also raise constitutional due process concerns. *See Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000) (holding that where "the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished"); *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784–85 (2000) (finding the FCA punitive).

general 'enforcement device' for federal statutes, regulations, and contracts." *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010).

In addition, the FCA does not create liability for a contractor's breach of a contractual provision or for differing interpretations of an imprecise contract term. *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 373 (4th Cir. 2008) (reasoning that a false claims plaintiff cannot "shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the [FCA]"). Nor is the FCA "a vehicle to police technical compliance with complex federal regulations." *United States ex rel. Williams v. Renal Care Grp. Inc.*, 696 F.3d 518, 532 (6th Cir. 2012); *see United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA."); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1477 (9th Cir. 1996) (finding statute's "imprecise and discretionary language" creates only a "disputed legal issue," which does not constitute falsity under the FCA).

When confronted with these types of situations, courts, including the Supreme Court, consistently have found that the FCA is not intended to address each and every compliance question – legal or contractual – that arises. *See, e.g.*, *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008)

(stating the FCA is not "an all-purpose antifraud statute"); *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001) (declining to make the FCA a "blunt instrument to enforce compliance"); *United States ex rel. Wilkins v. United Health Grp. Inc.*, 659 F.3d 295, 310 (3d Cir. 2011) ("[W]e question the wisdom of regarding every violation of a Medicare regulation as a basis for a qui tam suit."); *Steury*, 625 F.3d at 268; *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011) (finding non-compliance with industry standard, where industry standard is not a prerequisite to payment, is not actionable under the FCA); *United States ex rel. Hobbs v. MedQuest Assocs.*, 711 F.3d 707, 713, 717 (6th Cir. 2013) (finding that technical non-compliance with complex regulations "do not mandate the extraordinary remedies of the FCA").

II. THE FCA'S OBJECTIVE FALSITY REQUIREMENT CANNOT BE SATISFIED BY AMBIGUOUS AND UNDEFINED TERMS

To be false under the FCA, the defendant's statement, claim, or certification must be objectively false. *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 836 (7th Cir. 2011). In the absence of an unambiguous term or bright line rule, a court should not hold a defendant liable under the FCA. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999) ("fraud may only be found in expressions of fact which '(1) admit of being adjudged true or false in a way that (2) admit of empirical verification'") (citation omitted). Where the false claim is based purely on a dispute over multiple

possible interpretations of contractual or regulatory language, the claim is not actionable under the FCA. *Wilson*, 525 F.3d at 378 (stating that allegations of FCA violations must include "objective falsehoods" and "more than [a relator's] own interpretation of an imprecise contractual provision").

In this case, there is no dispute that the central term on which MWI's FCA liability rests is "regular commissions," nor is there any dispute that the term was drafted by Ex-Im as part of a mandatory certification without any accompanying definition or public guidance as to what that term meant. In fact, the district court acknowledged that the term is ambiguous and that Ex-Im never provided MWI with an interpretation of the term before MWI gave its certification. *United States ex rel. Purcell v. MWI Corp.*, 520 F. Supp. 2d 158, 175–76 (D.D.C. 2007). These findings, alone, should have been a red flag in any attempt to impose FCA liability.

Indeed, several circuit courts have rejected similar efforts to impose FCA liability based on alleged failures to comply with ambiguous terms. For example, the Fourth Circuit found that the term "sufficient maintenance" could not be the foundation for establishing objective falsity under the FCA. *Wilson*, 525 F.3d at 377. Similarly, the Ninth Circuit rejected a claim of falsity based on the term "prevailing wages," given that the agency had never set a prevailing wage. *United States ex rel. Local 342 Plumbers & Steamfitters v. Caputo Co.*, 321 F.3d 926, 933 (9th Cir. 2003); *see also United States ex rel. Gathings v. Bruno's, Inc.*, 54

F. Supp. 2d 1252, 1257 (M.D. Ala. 1999) (rejecting plaintiff's argument that "usual and customary" rates meant "equal to or lesser" when there was no agency guidance to suggest so).

It bears emphasis that Ex-Im could have mooted this entire dispute by clearly defining "regular commissions" – in the "industry standard" manner later advocated by the government in its suit – when contracting with MWI decades ago. Likewise, Ex-Im could have avoided this debate by requiring MWI to disclose *all* commissions and their amounts. As the drafter of the term, Ex-Im was in the unique, controlling position to define "regular commissions" as it wished, and the absence of any such direction should not be held against MWI. To the contrary, the doctrine of *contra proferentem* should prevent this type of *post hac* attempt by the Justice Department to ascribe meaning to an inherently ambiguous term – and to use the FCA to punish a contractor for failing to comply with that meaning. As the Federal Circuit recently made clear in an FCA case involving terms in a government contract:

> [W]hen the government drafts or selects the contract language this principle [of *contra proferentem*] is accorded 'considerable emphasis' because of the government's resources and stronger bargaining position in contract negotiations.

Chapman Law Firm, LPA v. United States, 103 Fed. Cl. 28, 41–43, 47 (2012) (citation omitted).

As the record reflects, with respect to the term "regular commissions," Ex-Im gave none of the possible direction discussed above, leaving the interpretation of "regular commissions" to MWI. What is improper and unfair here, as it would be if any other agency had done the same thing, is for the Justice Department to come along after the fact and say that the term "regular commissions" is so clear that it can support a finding of "falsity" under the FCA. Notably, in another FCA case that rested on a *post hoc* "industry standard" interpretation, the Fifth Circuit granted summary judgment for the defendant because the contract never clearly incorporated the standard advanced by the relator during litigation. *United States ex rel. Patton v. Shaw Servs.*, 418 Fed. App'x 366, 370–71 (5th Cir. 2011) (rejecting plaintiffs' request that the court reasonably "infer" that an industry standard was incorporated into a contract that was entirely silent as to any such standard); *see Chesbrough*, 655 F.3d at 468–69 (rejecting relator's FCA allegations when the relator could not point to anything that mentioned the purported objective industry-wide testing standards).

Where, as here, the agency did not announce its interpretation of the phrase at any time prior to litigation, this Court should not permit that undisclosed interpretation of an otherwise ambiguous term to serve as the basis for FCA liability. The chaos and uncertainty that would result from such an approach

would be far-reaching, and the fundamental unfairness of such an approach has been recognized by the Supreme Court:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

Especially in the fraud litigation context, a requirement that the terms at issue be clear or clearly defined is critical. Enforcement of such a requirement should lead the government to define those contract and regulatory terms that are truly material, and it would shelter manufacturers and other businesses – which reasonably attempt to comply with government requirements – from "hidden traps" that could subject them to debilitating damages, penalties, and other collateral consequences of FCA liability. *See Fry Commc'ns, Inc. v. United States*, 22 Cl. Ct. 497, 503 (1991) (finding *contra proferentem* properly "pushes the drafters toward improving contractual forms[,] and it saves contractors from hidden traps not of their own making") (quotation omitted) (alteration in original).

In short, where a contract or regulatory provision is subject to multiple reasonable interpretations and the defendant's action falls under one of those interpretations, that conduct cannot be "false" for FCA purposes. Thus, even if this Court were to determine that MWI's contemporaneous interpretation of

"regular commissions" is not the most reasonable interpretation (adopting the government's argument that "industry standard commission" is a more reasonable interpretation of that phrase) or that MWI's interpretation was erroneous, that would not be enough to impose FCA liability. *See, e.g.*, *United States ex rel. Norbeck v. Basin Elec. Power Coop.*, 248 F.3d 781, 792 (8th Cir. 2001) ("'The improper interpretation . . . of a contract,' however, 'does not constitute a false claim for payment.'") (quoting *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 329 (9th Cir. 1995)); *see also United States ex rel. Colucci v. Beth Israel Med. Ctr.*, 785 F. Supp. 2d 303, 314–17 (S.D.N.Y. 2011) (holding that defendants' claims were not factually false where, at worst, they "took advantage of the uncertainty in the regulations" to maximize reimbursements).

What is important here for manufacturers contracting with the government is that they not be subjected to FCA liability on the basis of reasonable interpretations of ambiguous contract terms or regulations.

III. THE SUPREME COURT AND THE D.C. CIRCUIT HAVE HELD THAT BUSINESSES CANNOT ACT WITH THE REQUISITE SCIENTER IN THE FACE OF AMBIGUITY

Under the FCA, the government must establish not only falsity, but also scienter. For purposes of the FCA, that means the government must prove that the defendant acted "knowingly," which can include acting in "reckless disregard" of truth or falsity. 31 U.S.C. § 3729(b)(1)(A)(iii). In scenarios where the alleged

FCA violation rests on an ambiguous contract term or regulation, and the defendant acts in accordance with its reasonable interpretation of the provision, there is no recklessness.

The Supreme Court addressed this very concept in the context of ambiguous regulations or provisions in a Fair Credit Reporting Act case. *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007). The *Safeco* Court held that, when a company's interpretation of an unclear statutory provision is reasonable, even if it is incorrect, the defendant's conduct is not in reckless disregard of the provision. *Safeco*, 551 U.S. at 68. The Supreme Court defined the reckless disregard standard as an objective one, which requires "an unjustifiably high" risk of harm that is either known or so obvious that it should have been known, meaning that a plaintiff has to show substantially more than just a careless interpretation by the defendant. *Id.* In that case, as in this one, there was "less-than-pellucid" language and a lack of authoritative guidance for the company to follow. *Id.* at 70. The Supreme Court summed up its rationale as follows:

> Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator. Congress could not have intended such a result for those who followed an interpretation that could reasonably have found support in the courts, whatever their subjective intent may have been.

Id. at 70 n.20.

This Court need not grapple with this principle for the first time here. It already has adopted and applied *Safeco*'s reasoning to the FCA. *See United States ex rel. K & R Ltd. P'ship v. Massachusetts Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008). In *K & R*, this Court confirmed that the mortgage note interest calculations in the certifications at issue were ambiguous. Then, applying the *Safeco* standard, this Court held that the relator failed to show that the defendant's interpretation was unreasonable and that the relator did not point to anything that "might have warned [the defendant] away from the view it took." *Id.* at 983 (citation omitted). Moreover, the Court made clear that the defendant was under no obligation to obtain a legal opinion or agency approval because the agency did not expressly require it. *Id.* at 983–84.

Since *Safeco* and *K & R*, other circuits have followed suit. For instance, the Third Circuit found a lack of scienter where contract language setting pay rates for highway inspectors was ambiguous. *U.S. Dep't of Transp. ex rel. Arnold v. CMC Eng'g*, 567 Fed. App'x 166, 170–71 (3d Cir. 2014) ("As a result of that ambiguity, there is no evidence from which a reasonable jury could find [defendant] 'knowingly' made a factually false claim or false certification, as defined under the FCA."). Similarly, in *United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, the Eighth Circuit summarily dismissed an FCA case because there was no contrary authoritative interpretation of the statute at issue, precluding any finding that the

defendants could "have acted with the knowledge that the FCA requires before liability can attach." 613 F.3d 1186, 1190 (8th Cir. 2010).

This case provides an opportunity for this Court to reiterate its holding in *K & R* that, absent an objectively unreasonable interpretation, a finding of ambiguity prevents the requisite FCA scienter finding. Such a holding would benefit the government contracting community by making clear to the government that it cannot use the FCA to impose liability where the contractor acted on a reasonable interpretation of an ambiguous contract term or regulation.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions below as to MWI's liability under the FCA.

Dated: March 2, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a), 29(c), AND 29(d)

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a) and 29(c) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(d) because it contains 3,518 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Douglas W. Baruch
Douglas W. Baruch

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause 8 paper copies of this brief to be filed with the Court within two business days.

The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Douglas W. Baruch
Douglas W. Baruch

ADDENDUM

ADDENDUM CONTENTS

UNITED STATES OF AMERICA, ex rel, JOHN PATTON, Plaintiff-Appellant v. SHAW SERVICES, L.L.C., Defendant-Appellee

No. 10-30376

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

418 Fed. Appx. 366*; *2011 U.S. App. LEXIS 5415

March 17, 2011, Filed

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of Louisiana. No. 2:08-CV-4325.
United States ex rel. Patton v. Shaw Servs., LLC, 2010 U.S. Dist. LEXIS 27433 (E.D. La., Mar. 23, 2010)

COUNSEL: For JOHN PATTON, Plaintiff - Appellant: John Courtney Wilson, Metairie, LA.

For SHAW SERVICES, L.L.C., Defendant - Appellee: Michael F. Weiner, Sandra S. Varnado, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Mandeville, LA; Erin E. Pelleteri, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., New Orleans, LA.

JUDGES: Before KING, DAVIS, and SOUTHWICK, Circuit Judges.

OPINION

[*367] PER CURIAM:*

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

John Patton brought a *qui tam* action against Shaw Services, L.L.C., alleging that the company submitted false or fraudulent claims to the federal government for payment in violation of the False Claims Act, and terminated his employment in retaliation for his complaints about the company's allegedly fraudulent practices. The district court granted summary judgment in favor of the employer on all of Patton's claims. We affirm the judgment of the district court.

I. FACTS AND PROCEDURAL BACKGROUND

From May 27, 2008 through July [**2] 23, 2008, Shaw Services, L.L.C. ("Shaw") employed [*368] John Patton as a carpenter on a project at the Louisiana State Transportation Center. This project was funded in part by the federal government. Patton brought suit against Shaw under the False Claims Act ("FCA"), *31 U.S.C. §§ 3729-3733 (2006)*.[1] Patton alleged in Count 1 of his Complaint that Shaw received payment for allegedly substandard construction work by presenting false or fraudulent claims to the government or by making false records or statements (the "*§ 3729(a)* claims"). In Count 2 of his Complaint, Patton alleged that Shaw violated the FCA's whistleblower provision by creating a hostile work environment that culminated in his discharge because of his complaints to Shaw and to state and federal agencies about Shaw's construction methods and false claims (the

"retaliation claim").

1 The Government declined to intervene in the action.

In lieu of an answer, Shaw filed two dispositive motions. First, Shaw moved to dismiss, or in the alternative, for partial summary judgment on Patton's retaliation claim on the basis that Patton failed to establish that his supervisors were aware of, and terminated his employment because of, his complaints [**3] about Shaw's allegedly fraudulent practices. Shaw also moved to dismiss the *§ 3729(a)* claims for failure to plead fraud with particularity under *Federal Rule of Civil Procedure 9(b)*.

Because the parties presented materials outside the pleadings in connection with both motions, the district court treated the motions as motions for summary judgment under *Federal Rule of Civil Procedure 56*, in accordance with *Rule 12(d)*. *See FED. R. CIV. P. 12(d)* ("If, on a motion under *Rule 12(b)(6)* . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under *Rule 56*."). Because Shaw's motion on the *§ 3729(a)* claims had been presented solely as a motion to dismiss under *Rule 12(b)(6)*, the district court granted the parties fourteen days to submit supplemental material pertinent to that motion. After both parties submitted additional materials, the district court considered Shaw's motions together and granted summary judgment for Shaw on all of Patton's claims. Patton appeals.

II. DISCUSSION

We review summary judgment orders *de novo*, applying the same standards as the district court. *United States ex rel. Longhi v. United States, 575 F.3d 458, 465 (5th Cir. 2009)*. [**4] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(a)*. "Once the moving party has initially shown that there is an absence of evidence to support the non-moving party's cause, the non-movant must come forward with specific facts showing a genuine factual issue for trial." *United States ex rel. Farmer v. City of Houston, 523 F.3d 333, 337 (5th Cir. 2008)* (citation and internal quotation marks omitted). "This Court resolves any doubts and draws all reasonable inferences in favor of the nonmoving party." *Longhi, 575 F.3d at 465*.

A. Claims under *31 U.S.C. § 3729(a)*

"The FCA is the Government's primary litigation tool for recovering losses resulting from fraud." *United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010)* (citation and internal quotation marks omitted). The language of Patton's Complaint tracks the language of *31 U.S.C. §§ 3729(a)(1)* and *(2)*, as in effect when Patton filed his claim [*369] on September 8, 2008. An individual violates the FCA under these sections when he "knowingly presents . . . a false or fraudulent claim [**5] for payment," *§ 3729(a)(1)*, or "knowingly makes . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government," *§ 3729(a)(2)*.[2]

2 The 2009 amendments to the FCA replaced former sections *§ 3729(a)(1)* and *(2)* with new sections *§ 3729(a)(1)(A)* and *(B)*. Although the 2009 amendments generally apply only to conduct occurring on or after May 20, 2009, new provision *§ 3729(a)(1)(B)*, which replaced and amended *§ 3729(a)(2)*, applies retroactively to "all claims under the False Claims Act . . . that are pending on or after" June 7, 2008. *See* Fraud Enforcement & Recovery Act of 2009, Pub.L. 111-21, § 4(f)(1), 123 Stat. 1617, 1625 (2009). Because Patton filed suit on September 8, 2008, his complaint was "pending" after the effective date of new provision *§ 3729(a)(1)(B)*. *See Steury, 625 F.3d at 267 n.1* (applying *§ 3729(a)(1)(B)* to a complaint pending as of the effective date of the amendment).

The amended provision imposes liability on any person who "knowingly makes . . . a false record or statement material to a false or fraudulent claim." *§ 3729(a)(1)(B)*. Any substantive difference between the prior and amended provision is irrelevant here because, as discussed [**6] below, Patton has not adduced *any* evidence of a false record or statement so as to create a genuine dispute about Shaw's liability under either version of the statute.

The FCA is a fraud prevention statute, and "not a general enforcement device for federal statutes, regulations and contracts." *Steury, 625 F.3d at 268* (internal quotation marks omitted). The FCA does not

create liability for a contractor's breach of a contractual provision or regulation "unless, as a result of such acts, the [contractor] knowingly asks the Government to pay amounts it does not owe." *United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375, 381 (5th Cir. 2003)*. Accordingly, to prove a violation of the FCA, a plaintiff must establish "(1) . . . a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *Longhi, 575 F.3d at 467* (internal quotation marks omitted) (adopting the test stated in *United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 376 (4th Cir. 2008))*. "[T]he statute attaches [**7] liability, not to the underlying fraudulent activity . . . but to the 'claim for payment.'" *Id.* (internal quotation marks omitted) (quoting *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999))*.

Patton alleged in his Complaint that Shaw committed fraud "at or in connection with construction to less than contract specifications and/or applicable building codes at the Louisiana State Transportation Center." Patton identified "fraudulent" construction mistakes concerning the rebar and concrete work on the project,[3] which allegedly rendered Shaw's claims for payment false or fraudulent within the meaning of the FCA. To create a genuine issue of fact for trial, Patton submitted excerpts from various industry treatises, textbooks, and manufacturers' catalogs, averring that Shaw's construction methods deviated from the standards set forth in these materials. Patton supported his contentions with an affidavit from Ladd Ehlinger, a practicing [*370] architect and expert witness, who testified generally about the harms resulting from the construction defects that Patton alleged in his Complaint. He also produced a declaration in which he alleges that his Shaw supervisors admitted [**8] on various unspecified occasions to the construction mistakes alleged in his Complaint.

> 3 The alleged construction mistakes in Patton's Complaint include Shaw's failure to use rebar "chairs," improper removal of rebar, inadequate doweling for intersecting walls, improper application of a "form release agent" to the rebar, and improper splicing of horizontal rebar, all of which allegedly affected the integrity or load-bearing strength of the structure and created potentially serious safety risks.

The district court found that Patton failed to show how Shaw violated any provision of its contract or any applicable building code by employing the construction methods outlined in Patton's Complaint and described in his briefing. The district court rejected Patton's argument that Shaw's construction work was "defective" and improper because it was not performed in accordance with the standards set forth in the authorities Patton produced to the court. The district court found that none of the materials Patton submitted were referenced in or incorporated into Shaw's contract, and therefore, any failure to conform to the standards set forth in those materials was irrelevant to determining whether [**9] Shaw violated its obligations under the contract. Furthermore, the district court noted that Shaw produced evidence that a third-party architectural firm retained by the state inspected Shaw's work weekly and drafted field reports, none of which indicated that Shaw's work was not in compliance with the contract or otherwise improper in the ways Patton contends. Because Patton failed to demonstrate that the allegedly defective work violated the contract, the district court found Patton's *§ 3729(a)* claims to be without merit.

Patton concedes on appeal that he cannot show that the standards set forth in the materials he submitted to the district court are incorporated into the contract. He urges, however, that he should be accorded the "reasonable inference" that they are incorporated because the construction methods set forth in those materials represent standard industry practice, and that we should likewise infer that any violation of standard industry practice, as set forth in these materials, represents a violation of the contract.[4] Patton also contends that his summary judgment evidence sufficed to raise a triable issue of fact as to whether Shaw complied with particular provisions [**10] of the contract. We need not delve into the disputed provisions of the contract, however, because even if Patton created a genuine dispute as to whether Shaw complied with the contract specifications in all particulars, Patton has nonetheless failed to put forth any evidence to support the other elements of his claims so as to establish that Shaw's conduct constituted a violation of the FCA.

> 4 We do not address Patton's argument, raised for the first time on appeal, that the construction standards that he alleged Shaw violated fall within the "good faith" requirement that Louisiana law imposes on all contracts. *See Yohey v. Collins,*

985 F.2d 222, 225 (5th Cir. 1993) ("As a general rule, this Court does not review issues raised for the first time on appeal.").

Patton has produced no evidence regarding the presentment of any claim to the government that was false or fraudulent within the meaning of the FCA. There is no indication, for instance, that Shaw falsely certified compliance with the contract provisions or construction methods that Patton alleges Shaw violated; nor has he shown that compliance with those provisions or methods was a condition to payment under the contract. *See Steury, 625 F.3d at 268* [**11] (upholding dismissal of FCA claims premised on a contractor's billing for work that did not comply with federal statutes, regulations, or contract provisions when a contractor's compliance "was not a 'condition' or 'prerequisite' to payment under a contract"); *cf. United* [*371] *States v. Southland Mgmt. Corp., 326 F.3d 669, 674-75 (5th Cir. 2003)* (en banc) ("It is only those claims for money or property to which a defendant is not entitled that are 'false' for purposes of the False Claims Act."). Moreover, Patton admitted to the district court that he could not point to a any false record or certification that the construction work was done correctly, but speculated that Shaw must have falsified records because he never saw an inspector at the job site. However, "[c]onclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." *Farmer, 523 F.3d at 337* (citation and internal quotation marks omitted).

Furthermore, Patton has not put forth evidence creating a genuine dispute as to whether Shaw acted with the requisite scienter. For FCA liability [**12] to attach, not only must the defendant submit false claims, but the defendant must have "*knowingly* or *recklessly* cheated the government." *United States ex rel. Taylor-Vick v. Smith, 513 F.3d 228, 232 (5th Cir. 2008)* (emphasis added); *see also 31 U.S.C. §§ 3729(b)(1)(A)(i)--(iii)*; *Southland Mgmt. Corp., 326 F.3d at 682* (Jones, J., specially concurring) (mere violations of regulations and contractual provisions "are not fraud unless the violator knowingly lies to the government about them" (quoting *United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999)*). At best, Patton has put forth unsubstantiated allegations that his supervisors admitted to employing substandard or improper construction practices, but these allegations are insufficient to create a genuine dispute as to whether Shaw knowingly or recklessly submitted false claims to the government. *See Farmer, 523 F.3d at 337*.

Because Patton has not adduced evidence to create a genuine dispute as to the essential elements of his claims, the district court did not err in granting summary judgment in favor of Shaw. *See Farmer, 523 F.3d at 337* ("'[A] complete failure of proof concerning an essential element [**13] of the nonmoving party's case necessarily renders all other facts immaterial' and 'mandates the entry of summary judgment' for the moving party.") (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*).

B. Retaliation under *31 U.S.C. § 3730(h)*

The whistleblower provision of the False Claims Act, *31 U.S.C. § 3730(h)*, encourages employees with knowledge of fraud to come forward by prohibiting retaliation against employees who assist in or bring *qui tam* actions against their employers. *Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Cir. 1994)*. *Section 3730(h)*, as applicable to Patton's suit, protects "lawful acts done by [an] employee . . . in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section."[5] *§ 3730(h)*. To bring an FCA retaliation claim for his termination, Patton was required to show that he engaged in activity protected under the statute, that his employer knew he engaged in protected activity, and that he was discharged because [*372] of it. *Id.; Robertson, 32 F.3d at 951*.

5 Congress amended this section in 2009 to provide relief to any employee [**14] discharged for acting "in furtherance of other efforts to stop 1 or more violations of this subchapter." Pub.L. No. 111-21, § 4(d), 123 Stat. 1617, 1624-25 (2009). The amendment only applies to conduct on or after May 20, 2009. *See id.* § 4(f), 123 Stat. at 1625. Shaw fired Patton in July 2008, so these changes do not apply here.

Patton declared that he "complained repeatedly" to on-site Shaw supervisors and to off-site management about "fraudulent construction mistakes," the same allegedly improper construction methods that Patton alleges gave rise to his *§ 3729(a)* claims. Patton contends that his complaints constituted protected activity within

the meaning of the anti-retaliation provision of the FCA. Patton also alleged that he complained to state and federal authorities about Shaw's work prior to his termination.

We agree with the district court that Patton failed to put forth sufficient evidence to overcome summary judgment on his retaliation claim. Patton's allegations that Shaw supervisors retaliated against him for internally reporting "fraudulent" construction practices or "false claims construction mistakes" are conclusory and unsupported by specific facts creating a genuine [**15] issue for trial. *Clark v. America's Favorite Chicken Co., 110 F.3d 295, 297 (5th Cir. 1997)* (citations omitted) ("Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment."); *see also United States v. Lawrence, 276 F.3d 193, 197 (5th Cir. 2001)* ("[S]elf-serving allegations are not the type of significant probative evidence required to defeat summary judgment.") (citation and internal quotation marks omitted). Additionally, assuming that he contacted state and federal authorities prior to his termination, Patton has put forth no evidence to support the allegation in his Complaint that "his complaints to the governmental entities were known to defendant."

Moreover, although Patton alleges that he internally reported "fraud," it is clear that the substance of his complaints concerned Shaw's allegedly unsafe or improper construction methods, and not that Patton was concerned that Shaw was defrauding the government. For internal complaints to constitute protected activity "in furtherance of" a *qui tam* action, the complaints must concern false or fraudulent claims [**16] for payment submitted to the government. *See Robertson, 32 F.3d at 952* (finding no protected activity where employee "never characterized his concerns as involving illegal, unlawful, or false-claims investigations"). Mere criticism of Shaw's construction methods, without any suggestion that Patton was attempting to expose illegality or fraud within the meaning of the FCA, does not rise to the level of protected activity. *See United States ex rel. Owens v. First Kuwaiti General Trading & Contracting Co., 612 F.3d 724, 736 (4th Cir. 2010)* (employee on a government-funded construction project was not engaged in protected activity where he merely complained of "construction mistakes" and improper construction methods, and where there was no evidence that the employee was concerned about fraud). Furthermore, "[a]n employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor to litigation," *Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 733 (7th Cir. 1999)*, and allegations regarding construction methods do not demonstrate that Patton put Shaw on notice that he was investigating fraud against the government.

Without knowledge that Patton [**17] was investigating fraud, Shaw "could not possess the retaliatory intent necessary to establish a violation" of *§ 3730(h). Robertson, 32 F.3d at 952*. To the contrary, Shaw produced an affidavit from the supervisor who fired Patton, as well as documentation from Patton's HR file, corroborating Shaw's contention that Shaw management [*373] did not have knowledge of any complaints about fraud, and that Patton was terminated after an altercation with his supervisors about a construction matter unrelated to his FCA allegations, rather than because anyone believed Patton was engaged in any activity in furtherance of FCA litigation. Patton's conclusory statement that he was wrongfully discharged after confronting his supervisor about Shaw's "false claims construction mistakes" is insufficient to raise a genuine dispute as to whether Shaw management retaliated against him "because of activities which the employer had reason to believe were taken in contemplation of a *qui tam* action against the employer." *McKenzie v. BellSouth Telecomms., Inc., 219 F.3d 508, 518 (6th Cir. 2000)*. Accordingly, summary judgment in favor of Shaw was proper.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment [**18] of the district court.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ex rel. AUGUST W. ARNOLD, an individual, Appellant v. CMC ENGINEERING; M. A. BEECH; MICHAEL BAKER, JR., INC.; SAI CONSULTING ENGINEERS, INC.; ERDMAN ANTHONY ASSOCIATES, INC.; L. ROBERT KIMBALL & ASSOCIATES, INC.; MACKIN ENGINEERING; MCTISH, KUNKEL & ASSOCIATES; VE ENGINEERING, INC.

No. 13-2759

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

567 Fed. Appx. 166*; *2014 U.S. App. LEXIS 10150

May 16, 2014, Submitted Under Third Circuit LAR 34.1(a)
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NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. (D.C. No. 2-03-cv-01580). District Judge: Hon. Cathy Bissoon.

United States DOT ex rel. Arnold v. CMC Eng'g, Inc., 947 F. Supp. 2d 537, 2013 U.S. Dist. LEXIS 74378 (W.D. Pa., 2013)

COUNSEL: For UNITED STATES DEPARTMENT OF TRANSPORTATION, EX REL AUGUST W. ARNOLD, Plaintiff - Appellant: James A. Ashton, Esq., Pittsburgh, PA; George P. Chada, Esq., Natrona Heights, PA; Jon Pushinsky, Esq., Pittsburgh, PA.

For CMC ENGINEERING, Defendant - Appellee: David M. Abijanac, Jr., Esq., Powell,Trachtman, Logan, Carrle & Lombardo, Pittsburgh, PA; David M. Burkholder, Esq., Jonathan K. Hollin, Esq., Jason Karasik, Esq., Paul A. Logan, Esq., Powell, Trachtman, Logan, Carrle & Lombardo, King of Prussia, PA.

For ERDMAN ANTHONY ASSOCIATES INC, Defendant: Jonathan K. Hollin, Esq., Paul A. Logan, Esq., Powell, Trachtman, Logan, Carrle & Lombardo, King of Prussia, PA.

JUDGES: Before: SMITH, VANASKIE, and SHWARTZ, Circuit Judges.

OPINION BY: SHWARTZ

OPINION

[*167] SHWARTZ, Circuit Judge.

In this qui tam action under the False Claims Act ("FCA"), *31 U.S.C. § 3729*, relator August W. Arnold asserts that the District Court improperly granted summary judgment against him on his claim that CMC Engineering, Inc. ("CMC") submitted false claims for payment to the federal government via the Pennsylvania Department of Transportation ("PennDOT") for the

services of inspectors who worked on highway projects. Arnold claims that the inspectors who worked on the projects did not have the qualifications that entitled them to the pay rates claimed. Because the contracts setting forth the qualifications necessary to trigger each pay rate were ambiguous and this undermines Arnold's ability to prove that even arguably inaccurate claims were knowingly made, we will affirm.

I

As we write principally for the benefit of the parties, we recite only the essential facts and procedural history. Arnold was a PennDOT Assistant Construction Engineer who helped oversee the [**2] selection of private engineering firms that performed inspection services on PennDOT's federally funded highway projects. PennDOT sought services for different classes of inspectors based upon their experience, training, and certifications, and set pay rates that increased based upon the inspectors' credentials. PennDOT's contract included two provisions that set forth the types and number of inspectors needed for a particular project, the credentials each type of inspector was required to possess, and the corresponding pay rate. In the first provision on this topic, the contract stated that each inspector needed to either meet the minimum standard set by the inspectors' national accreditation association, the National Institute for Certification in Engineering Technologies ("NICET"), or a state equivalent. The contract then set forth, in what is referred to as Table B, various combinations of field experience and certifications necessary for each type of inspector. The contract also set forth, in what is referred to as Table C, an alternative means to satisfy the qualifications through combinations of formal education and field experience.

The very next section of the contract states [**3] that "[t]he entire Engineer's inspection staff shall meet the qualifications and requirements as shown in Attachment 'A' . . . ." App. 274. Attachment A contained a job description for each inspector classification and listed minimum experience requirements, some of which differed from those set forth in the Tables and all of which included a "catchall" provision that was not set forth in Tables B and C that allowed an inspector to satisfy the qualification requirements for the position with "[a]ny equivalent combination of experience and/or training which provides the required knowledge, skills, and abilities." App. 291-301. This "catchall" was [*168] relied upon in submitting credentials to PennDOT in justifying certain inspectors' pay rates.

Arnold became concerned about the relationship between PennDOT and the engineering firms and conducted a review of the qualifications of the firms' inspectors. Arnold believed that many inspectors, including those from CMC, lacked or overstated the credentials necessary to qualify them for the hourly rates at which they were being billed [1] and filed an FCA complaint. The United States declined to intervene and CMC moved to dismiss, arguing that Arnold [**4] was required to plead a closer connection between the allegedly false claims and payment by the federal government. *U.S. Dep't of Transp., ex rel. Arnold v. CMC Eng'g, 564 F.3d 673, 675-76 (3d Cir. 2009)*. The District Court granted the motion, but this Court vacated the District Court's dismissal and remanded, holding that "Arnold's claims may be actionable under the FCA" if the federal government "was involved in the disbursement of funds from PennDOT to the consultants upon submission of the fraudulent claims in any way . . . ." *Id. at 679*. After discovery, CMC moved for summary judgment. The District Court granted CMC's motion, holding in part that "Arnold has failed to present evidence sufficient to show that CMC had actual knowledge" about, or that it had "acted with deliberate indifference or reckless disregard" with respect to, the alleged deficiencies of its inspectors' qualifications. App. 13. Arnold appeals.

1 Arnold reported his findings to PennDOT's central office, the Pennsylvania Inspector General's Office, and the United States Department of Transportation. PennDOT's audit revealed that CMC "had in fact, provided and billed [PennDOT] for individuals who did not possess [**5] the requisite experience and credentials . . . and submitted resumes that misrepresented the experience level, certification, licensure, and or academic qualifications of the requisite inspectors, in the amount of $67,849." App. 665. As a result, PennDOT initiated debarment proceedings against CMC. PennDOT and CMC reached a settlement agreement pursuant to which CMC paid PennDOT $61,064.10, and which stated that CMC had submitted "complete and accurate" information to PennDOT and had not acted "in any deceptive, false, [or] misleading way" in its dealings with PennDOT. App. 667-68.

II

The District Court had jurisdiction under *31 U.S.C. § 3732(a)* and *28 U.S.C. § 1331*. We have jurisdiction pursuant to *28 U.S.C. § 1291*. This Court's "review of the grant or denial of summary judgment is plenary . . . ." *Mylan Inc. v. SmithKline Beecham Corp., 723 F.3d 413, 418 (3d Cir. 2013)*. Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. We apply the same standard the District Court applied, viewing facts and making reasonable inferences in the non-moving party's favor. *Hugh v. Butler Cnty. Family YMCA, 418 F.3d 265, 266-67 (3d Cir. 2005)*.

III

A

As [**6] a preliminary matter, we must address the parties' arguments regarding Arnold's status as the "original source" of information concerning CMC's allegedly false claims, as this requirement is jurisdictional. *Rockwell Int'l Corp. v. United States, 549 U.S. 457, 467-70, 127 S. Ct. 1397, 167 L. Ed. 2d 190 (2007)*. An "original source" under the FCA is an individual who either voluntarily discloses information to the federal government prior to a public disclosure or "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the [*169] information to the [federal government] before filing an [FCA] action . . . ." *31 U.S.C. §3730(e)(4)(B)*. The District Court analyzed this issue in detail at the motion to dismiss stage, and we agree with its conclusion that Arnold qualifies as an "original source" under the FCA with respect to his allegations about CMC's request for payment for inspectors at rates not commensurate with their experience, as Arnold directly and independently reviewed the credentials of CMC inspectors and voluntarily disclosed his findings to the federal government.[2] *U.S. Dep't of Transp. ex rel. Arnold v. CMC Eng'g, 745 F. Supp. 2d 637, 644-46 (W.D. Pa. 2010)*. [**7] Thus, we can proceed to consider the merits of Arnold's FCA claim.

2 CMC contends that Arnold was not the original source with respect to certain specific inspectors, but this does not undermine his status as the original source concerning CMC's alleged practice.

B

The FCA makes it unlawful for any person to "knowingly present[], or cause[] to be presented,[3] a false or fraudulent claim for payment or approval," *31 U.S.C. § 3729(a)(1)(A)*,[4] or to "knowingly make[], use[], or cause[] to be made or used, a false record or statement material to [5] a false or fraudulent claim," *31 U.S.C. § 3729(a)(1)(B)*.[6] To establish an FCA claim, a plaintiff must prove that: "(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent." *U.S. ex rel. Wilkins v. United Health Grp., Inc., 659 F.3d 295, 304-05 (3d Cir. 2011)* (internal quotation marks omitted). There is no dispute CMC presented claims to PennDOT for payment for work on federally funded projects. At issue is whether CMC knowingly submitted false or fraudulent claims.[7] The FCA defines "knowing" and "knowingly" [**8] to mean acting with actual [*170] knowledge, deliberate ignorance, or reckless disregard of information's truth or falsity. *31 U.S.C. § 3729(b)(1)(A)*. Specific intent to defraud is not required. *31 U.S.C. § 3729(b)(1)(B)*.

3 The parties dispute whether Arnold has waived his "presentment" claim. Because the same scienter requirement applies to and defeats all of Arnold's FCA claims, his claim would fail even if we were to conclude it was not waived.

4 The statutory citations are to the FCA as amended by the Fraud Enforcement and Recovery Act of 2009 ("FERA").

5 The phrase "material to" was inserted as an amendment to the FCA by FERA, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

6 Prior to its amendment by FERA, the FCA applied to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . . ." *31 U.S.C. § 3729(a)(2)* (pre-FERA) (emphasis added). The Supreme Court suggested that *§ 3729(a)(2)*'s use of "to get" created an intent requirement. S. Rep. No. 111-10, at 11 (2009); see *Allison Engine Co. v. U.S. ex rel. Sanders, 553 U.S. 662, 668-69, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (2008)* ("'To get' denotes purpose, and thus a person [**9] must

have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under *§ 3729(a)(2)*."). FERA replaced the words "to get" with the words "material to" to make clear that the statute's focus was on the nature of the statement made to the government and not the intent of the person making the statement. *U.S. ex rel. Wilkins v. United Health Grp., Inc., 659 F.3d 295, 304 n.12 (3d Cir. 2011)*. We have not yet decided whether FERA applies retroactively, see *id. at 303-04* (declining to resolve retroactivity), and need not do so here. Nonetheless, because FERA did not change the FCA's requirement that the defendant's conduct be "knowing" and does not have a specific intent requirement, we will apply it as the post-FERA version limits what Arnold must prove concerning CMC's state of mind.

7 A claim can be factually false or legally false. *Wilkins, 659 F.3d at 305*. As we explained in Wilkins,

> A claim is factually false when the claimant misrepresents what goods or services that it provided to the Government and a claim is legally false when the claimant knowingly falsely certifies that it has complied with a statute or regulation the compliance [**10] with which is a condition for Government payment.

Id. A legally false claim is, therefore, one based upon a false certification of compliance. Id. An express false certification is proven where the claimant has falsely certified that it is in compliance with relevant regulations that are prerequisites to payment. Id. An implied false certification is proven where the claimant has made a claim for payment without disclosing that it is not in compliance. *Id. at 305-06*.

Here, Arnold contends that CMC submitted factually and legally false claims by knowingly requesting payment at certain rates for certain "inspectors it knew did not meet credentialing requirements." Appellant Br. 33-34. Arnold argues that the contracts required inspectors to meet the requirements described in Tables B and C and that "inspectors who only met the catch all Attachment A standards were not eligible to fill positions for which certification or certification equivalency was required." App. 828. Arnold contends that this is the only reasonable interpretation of the contractual language.

The language of the contracts, however, undermines his assertion that the contract is susceptible to only one reading. As noted [**11] above, Attachment A provides alternative criteria for inspectors and is in tension with the language set forth in the Tables.[8] For example, Table B and Attachment A provide inconsistent sets of qualifications for the "Transportation Construction Manager 1" position. For this position, Table B's "NICET Certification Requirement" lists 10 years of field experience, a NICET certification as a Senior Engineering Technician, a NICET Sub-field of Highway Construction, and a NICET Level of 4, App. 272, whereas Attachment A states that the position requires "NICET Level 4 or Equivalent" and lists several options written in the disjunctive under "Minimum Experience Training," including: "Any equivalent combination of experience and/or training which provides the required knowledge, skills, and abilities," App. 290-92 (emphasis added). Thus, the contracts themselves are ambiguous concerning the credentials required for particular positions that justify particular pay rates.[9]

8 PennDOT employees testified that the contract terms were "open to interpretation" and that PennDOT took steps to revise the contracts in an effort to make them clearer. App. 577 ("I made the determination that [the pay rate [**12] provisions were] open to interpretation and I made the interpretation that the Attachment A, which is also part of the scope of work, also had specification information in there that helped determine whether an inspector could be paid an inspector's rate or not."); see also App. 513 (stating that granting an inspector a particular classification "based on the phrase any equivalent combination of experience or training" in Attachment A was "a big gray area").

9 CMC also asserts "that PennDOT knew of and approved CMC's supposedly culpable conduct," and it urges this Court to apply the "government knowledge inference," a doctrine that can defeat the FCA's scienter requirement where the government knows and approves of the relevant facts underlying the allegedly false claim. Appellee Br. 37-39; see *U.S. ex rel. Burlbaw v.*

Orenduff, 548 F.3d 931, 951-52 (10th Cir. 2008) (describing the inference). This Court has not yet adopted that inference and we need not do so here. Further, we question the applicability of the doctrine in this case. Because the FCA applies to false claims submitted to the federal government, the inference would seem to be inapplicable to this case, where there may be [**13] evidence of PennDOT's knowledge of the accuracy of CMC's submissions, but no evidence in the record concerning the federal government's knowledge.

[*171] As a result of that ambiguity, there is no evidence from which a reasonable jury could find CMC "knowingly" made a factually false claim or false certification, as defined under the FCA, by requesting reimbursement for inspectors at rates for which Arnold contends they were unqualified. Cf. *U.S. ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency, 530 F.3d 980, 984, 382 U.S. App. D.C. 67 (D.C. Cir. 2008)* (holding that, where relator and defendant "simply disagree about how to interpret ambiguous contract language" and relator could not point to anything that might have dissuaded defendant from its interpretation, "there is no genuine issue as to whether [the defendant] knowingly presented false claims"); *United States v. Basin Elec. Power Coop., 248 F.3d 781, 805 (8th Cir. 2001)* (holding relator had failed to state a claim under the FCA where the defendant's "interpretation and performance under the contract was reasonable" and the relator thus "did not prove that [the defendant] acted with the requisite knowledge"). Thus, the District Court properly granted CMC's [**14] motion for summary judgment.

IV

For the foregoing reasons, we will affirm the District Court's grant of summary judgment in favor of CMC.