ORAL ARGUMENT NOT YET SCHEDULED

Case No. 13-7049

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

UNITED STATES OF AMERICA *ex rel*. BRADY FOLLIARD,

Plaintiff-Appellant,

v.

GOVPLACE,

Defendant-Appellee.

On Appeal from a Judgment of the United States District Court for the District of Columbia, Civil No. 07-719 (RCL) (Lamberth, C.J.)

AMICUS CURIAE BRIEF OF THE COALITION FOR GOVERNMENT PROCUREMENT IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*: The Appellant is Brady Folliard ("Folliard"). The Appellee is Govplace, Inc. ("Govplace"). The *amicus curiae* is the Coalition for Government Procurement (the "Coalition").

(B) Rulings Under Review: References to the rulings at issue in this appeal appear in the Brief for Appellant. The ruling that is the focus of this *amicus* brief is the district court's Memorandum Opinion dated March 18, 2013, which dismissed the case.

(C) Related Cases: The Coalition is not aware of any related cases.

CORPORATE DISCLOSURE STATEMENT

The Coalition for Government Procurement is a national trade association that represents commercial contractors in the federal market. The Coalition has no parent company, and no publicly-held company has a 10% or more ownership interest in the Coalition.

STATEMENT REGARDING CONSENT TO FILE

Pursuant to Fed. R. App. P. 29(a) and D.C. Circuit Rule 29(b), the Coalition states that all parties to this appeal have consented to the filing of this *amicus curiae* brief.

Further, pursuant to Fed. R. App. P. 29(c)(5), the Coalition states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF THE *AMICUS CURIAE*

The Coalition for Government Procurement is a national trade association that represents commercial contractors in the federal market. For more than 30 years, the Coalition has advocated for common sense policies that improve the acquisition environment for the government, industry, and, ultimately, American taxpayers. Reflecting the concerns and priorities of its members, the Coalition maintains a strong focus on U.S. General Services Administration ("GSA") Schedule contracts—the type of contracts at issue in this case.

GSA Schedule contracts are long-term contracts between the federal government and commercial firms that allow the government access to millions of commercial products and services at volume discount pricing. *See* GSA Schedules, http://www.gsa.gov/portal/category/100611 (last visited Sept. 6, 2013). Participating contractors may offer and sell their products and services through one or more GSA Schedules, which are categorized by the type of product or service offered. *See* GSA eLibrary, Schedule List, http://www.gsaelibrary.gsa.gov/ElibMain/scheduleList.do (last visited Sept. 6, 2013). Government customers may then purchase products and services directly from GSA Schedule contractors or through the GSAAdvantage!® online system. *See id*.

In order to obtain a GSA Schedule contract, a contractor must agree to comply with certain requirements, including, as relevant to this case, the Trade Agreements Act (the "TAA"), 19 U.S.C. §§ 2501-2581. Subject to certain exceptions, the TAA generally requires that products sold to the government through a GSA Schedule contract be made or substantially transformed in the United States or other designated countries. *See* 48 C.F.R. §§ 52.225-5 and 52.225-6.

The Coalition's member companies are heavily involved in GSA Schedule contracting. Indeed, the Coalition's membership accounts for the majority of all commercial services and products sold through the Schedules program; it includes 10 of the top 15 GSA Schedule contractors; and it includes 10 of the top 15 GSA Information Technology Schedule contractors.

As such, the Coalition has a strong interest in how the civil False Claims Act (the "FCA"), 31 U.S.C. §§ 3729-3733, is applied to GSA Schedule contractors. Moreover, the Coalition has a particular interest in the specific issue presented by this appeal: whether a contractor's reasonable reliance on its supplier's certification of TAA compliance negates the scienter required for a violation of the FCA.

ARGUMENT

I. THIS COURT SHOULD ADDRESS WHETHER A CONTRACTOR'S REASONABLE RELIANCE ON ITS SUPPLIER'S CERTIFICATION OF TAA COMPLIANCE NEGATES THE SCIENTER REQUIRED FOR AN FCA VIOLATION.

In recent years, there has been a proliferation of FCA cases brought by relators and the government against GSA Schedule contractors based on alleged violations of the TAA. *See, e.g.*, Compl., *United States v. GIGA, Inc.*, No. 13-cv-00771 (D.D.C. May 28, 2013), ECF No. 1; *United States ex rel. Sandager v. Dell Marketing, L.P.*, 872 F. Supp. 2d 801 (D. Minn. 2012); *United States ex rel. Liotine v. CDW Govt., Inc*., No. 05-33-DRH, 2012 WL 2807040 (S.D. Ill. July 10, 2012); *United States ex rel. Folliard v. Hewlett-Packard Co.*, 272 F.R.D. 31 (D.D.C. 2011); *United States ex rel. Crennen v. Dell Marketing L.P.*, 711 F. Supp. 2d 157 (D. Mass. 2010); *United States ex rel. Folliard v. CDW Tech. Servs., Inc.*, 722 F. Supp. 2d 20 (D.D.C. 2010); *United States ex rel. Dugan v. ADT Sec. Servs., Inc.*, Civil No. DKC 2003-3485, 2009 WL 3232080 (D. Md. Sept. 29, 2009).

These cases, as here, typically involve allegations that a GSA Schedule contractor offered and/or sold products to the government that did not comply with the TAA – such as products manufactured in China or other non-designated countries. *See, e.g.*, Mem. Op. at 1-2, Mar. 18, 2013, ECF No. 171 ("Mem. Op."); *Sandager*, 872 F. Supp. 2d at 804-05; *Crennen*, 711 F. Supp. 2d at 159-60. Moreover, these cases often involve defendant contractors who do not manufacture

the products at issue, but rather purchase the products from suppliers, distributors, or manufacturers (collectively, "suppliers") and resell them to the government. *See, e.g.*, Mem. Op. at 13-14; *Sandager*, 872 F. Supp. 2d at 804; *Crennen*, 711 F. Supp. 2d at 159-60. In order to ensure that the products they sell to the government comply with the TAA, many contractors, like Govplace in this case, require their suppliers to certify expressly that the products supplied comply with the TAA.

Despite the spate of FCA cases based on alleged TAA violations, however, no appellate court has addressed the critical and recurring issue of whether a contractor's reasonable reliance on its supplier's certification of TAA compliance negates the scienter required for an FCA violation. This Court, therefore, should address that issue in order to provide much needed guidance to other courts for existing and future FCA cases, and to contractors for their compliance programs.

II. THIS COURT SHOULD AFFIRM THAT A CONTRACTOR'S REASONABLE RELIANCE ON ITS SUPPLIER'S CERTIFICATION OF TAA COMPLIANCE NEGATES THE SCIENTER REQUIRED FOR AN FCA VIOLATION.

As relevant to this appeal, the FCA imposes liability on any person who "knowingly" presents, or causes to be presented, a false or fraudulent claim for payment or approval, 31 U.S.C. § 3729(a)(1)(A), or "knowingly" makes, uses, or causes to be made or used, a false record or statement that is material to a false or fraudulent claim, 31 U.S.C. § 3729(a)(1)(B).

Under the FCA, a person acts "knowingly" if the person "(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)(A). Mere negligence cannot support FCA liability. *See United States v. Science Applications Int'l Corp*., 626 F.3d 1257, 1274-75 (D.C. Cir. 2010); *accord United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 338 (5th Cir. 2008); *Wang v. FMC Corp*., 975 F.2d 1412, 1420 (9th Cir. 1992). Indeed, this Court has explained that the lowest level of scienter required to sustain an FCA violation—recklessness—requires something akin to "aggravated gross negligence," *Science Applications Int'l Corp*., 626 F.3d at 1275, or "'an extreme version of ordinary negligence,'" *United States ex rel. K&R Ltd. P'ship v. Mass. Housing Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008) (citation omitted).

Here, Folliard alleged that Govplace violated the FCA by knowingly selling products to the government that did not comply with the TAA. But it was undisputed that Govplace received express certifications from its supplier, Ingram Micro, that the products at issue were "compliant with the Trade Agreements Act," Mem. Op. at 12, and that Govplace relied solely on those certifications, *id*. at 14, 22. Accordingly, the district court held that, absent some specific reason to question Ingram Micro's representations, it was not grossly negligent, or reckless,

for Govplace to rely on its supplier's TAA certification. *Id*. at 17. In other words, the district court ruled that Govplace's reasonable reliance on its supplier's TAA certification negated the scienter required for an FCA violation. *Id*. That common sense rule should be affirmed because, as explained below, it is consistent with precedent, fair to relators and the government, and fair to contractors.

A. The Rule is Consistent with Precedent Establishing that Reasonable Reliance on the Advice of a Third-Party Negates a Finding of Recklessness.

The district court's ruling should be affirmed because it is consistent with precedent establishing that reasonable reliance on the advice of a third-party—such as counsel, an expert, or a subcontractor—negates a finding of recklessness.

For example, in *Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004), this Court reviewed an SEC order imposing sanctions on a defendant for aiding and abetting securities violations—an offense for which the required scienter was recklessness. The Court concluded that the defendant did not act recklessly because he relied on the advice of counsel with respect to the transactions at issue. *See id*. at 1147-49. The Court explained that reliance on the expertise of a third-party is "evidence of good faith, a relevant consideration in evaluating a defendant's scienter." *Id*. at 1147. The Court further noted that such reliance supports the conclusion that a defendant acted with "'due care or good faith.'" *Id*. (citation omitted). Indeed, rather than ignoring red flags (which might indicate recklessness), the defendant

"encountered green ones" because he relied on expert advice. *Id*. As such, this Court vacated the sanctions order that was based on a finding of recklessness. *Id*. at 1150.

The same rationale applies in the FCA context. As a leading FCA treatise explains, if a defendant relies in good faith on expert advice from a lawyer or other third-party, "there is no way the false claim could be submitted 'knowingly.'" 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.06[D] (3d ed. 2010). That is so because good faith reliance on the advice of a third-party "contradict[s] any suggestion that a contractor 'knowingly' submitted a false claim, or did so with deliberate ignorance or reckless disregard." *United States v. Newport News Shipbuilding*, 276 F. Supp. 2d 539, 565 (E.D. Va. 2003).[1]

Entirely consistent with this line of authorities is *United States ex rel. Ervin & Associates, Inc. v. Hamilton Securities Group, Inc*., 298 F. Supp. 2d 91 (D.D.C. 2004), on which the district court relied here. In *Ervin*, the relator brought an FCA case alleging that Hamilton acted recklessly by failing to verify the accuracy of certain test results performed by its subcontractor, who was hired because of the

[1] In *Newport News*, the district court recognized that reasonable reliance on a third-party's advice negates the scienter required for an FCA violation, but denied the contractor's motion for summary judgment because the contractor failed to establish that it relied in good faith on the advice it received. 276 F. Supp. 2d at 566. Here, in contrast, "Folliard does *not* dispute that Govplace relied solely on Ingram Micro's representations about the country of origin for the disputed product numbers." Mem. Op. at 14 (emphasis added).

subcontractor's technical expertise. *See id*. at 101. Rejecting the relator's argument, the court explained that, absent a legal obligation to verify its subcontractor's tests, it was "not negligent in the extreme, if negligent at all, for Hamilton to rely" on its subcontractor's tests. *Id*. Accordingly, the court found that Hamilton did not act recklessly, and thus granted summary judgment in favor of the contractor. *Id*. at 102.

The foregoing authorities illustrate a simple and fundamental point: a contractor who seeks out the expert advice of a third-party and reasonably relies on that advice—specifically to ensure compliance with an obligation—does not act recklessly. Consistent with those authorities, the district court here correctly ruled that a contractor who reasonably relies on its supplier's certification of TAA compliance does not act recklessly, and thus should not be liable under the FCA.

Absent a relator or the government producing specific, admissible evidence to demonstrate that a contractor's reliance on a TAA certification was unreasonable, it cannot be said that the contractor "knowingly" violated the FCA. Here, there was no such evidence, and therefore the district court properly entered summary judgment against Folliard.

B. The Rule is Fair to Relators and the Government, Who Retain a Remedy Under the FCA Against a Party Who Knowingly Makes a False Certification.

Besides being consistent with precedent, the reasonable reliance rule applied by the district court is fair to relators and the government, who retain a remedy under the FCA against any party that knowingly makes a false TAA certification.

First, under the district court's rule, a relator or the government may introduce specific evidence (to the extent any exists) to demonstrate that, under the circumstances of a particular case, a contractor's reliance was unreasonable. *See* Mem. Op. at 18 (explaining that "if Govplace had reason to believe that Ingram Micro was wrong, ignored that information and continued to rely on Ingram Micro, then Govplace might have been deliberately ignorant"). No such evidence was introduced here. Instead, the undisputed evidence shows that Govplace relied on its supplier's representations and certifications, which indicated that the products at issue complied with the TAA. *See* Mem. Op. at 14, 22. As such, there is no basis for a finding of recklessness.

Second, under the rule applied by the district court, relators and the government still have a remedy under the FCA—but the remedy lies against the party that knowingly made the false TAA certification (if any), not against the contractor who reasonably relied on it and had no knowledge of its falsity. As set forth above, the FCA imposes liability on, among others, any person who

knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(B). Accordingly, if a supplier knowingly makes a false TAA certification, it is potentially exposed to liability under the FCA.

The rule applied by the district court properly shields from FCA liability a contractor who reasonably relies on its supplier's certification of TAA compliance because the contractor has not knowingly made a false record or submitted a false claim. But a supplier who knowingly makes a false TAA certification remains subject to potential liability, and a relator or the government may bring an FCA action against that supplier. As such, the district court's ruling does not prejudice relators or the government, who retain a remedy under the FCA—it simply requires that the remedy be pursued against the party that possessed the requisite scienter, not against an innocent contractor who might be a more convenient defendant or perhaps one with deeper pockets.

C. The Rule is Fair to Contractors by Aligning FCA Liability with Culpability, and Avoiding Unnecessary and Duplicative Re-Certifications.

The reasonable reliance rule applied by the district court also is fair to contractors by aligning FCA liability with culpability, and avoiding the need for unnecessary and duplicative re-certifications.

The district court's ruling correctly recognized, at least implicitly, that if any FCA liability is to be imposed, it should be imposed on the culpable party that committed fraud, not on the contractor who relied in good faith on an express certification of compliance. Many contractors offer hundreds—or even thousands—of different products to the government through their GSA Schedule contracts. Those diverse products are manufactured in numerous countries around the world, and many products are themselves made in more than one country. Needless to say, for contractors, the logistics involved in procuring and reselling such an array of products, while complying with the numerous legal requirements of the GSA Schedules program, are complicated and expensive. In that environment, contractors must be able to rely in good faith on the express representations and certifications of their suppliers.

No supplier should knowingly submit to a GSA Schedule contractor a false certification of compliance with the TAA or any other requirement; if a supplier does so, it risks FCA liability and a variety of other sanctions. But a contractor who reasonably relies on its supplier's TAA certification—even if the certification is proved to be inaccurate—should not be held liable for any fraud (or recklessness) for which it is not responsible. To hold otherwise, exposing a contractor to the threat of FCA liability simply because it may have sold a product that does not comply with the TAA to the government, would risk turning every

breach of contract into a fraud—something the FCA was never meant to do. *See Science Applications Int'l Corp*., 626 F.3d at 1271 ("Strict enforcement of the FCA's scienter requirement will also help to ensure that ordinary breaches of contract are not converted into FCA liability."); *see also United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co*., 612 F.3d 724, 728 (4th Cir. 2010) (explaining that the FCA's scienter requirement "does not allow a *qui tam* relator to 'shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the False Claims Act'") (citation omitted).

The district court's ruling also properly recognized that imposing on GSA Schedule contractors a duty to "recheck" the certifications provided by their suppliers—at least absent some specific reason to question those certifications—would not make sense. Mem. Op. at 18. Plainly, if contractors had such a "non-delegable duty" to independently verify the certifications of their suppliers, as urged by Folliard, *id*. at 17, that would drastically "undermine the beneficial effects of the partnership" between the contractors and their suppliers, rendering the suppliers' TAA certifications valueless and irrelevant. *Id*. at 18. Moreover, the additional cost and delay associated with mandatory re-certification ultimately would be passed on to the government, making the acquisition process more expensive and cumbersome.

Finally, the district court appropriately recognized that, in order to render a contractor's reliance on its supplier's TAA certification unreasonable (or to trigger a duty to re-verify certified information), a relator or the government must point to something more than unsolicited junk mail. Hoping to undermine the reasonableness of Govplace's reliance on Ingram Micro's TAA certifications, Folliard argued that Govplace received several "unsolicited price lists" from Tech Data, an Ingram Micro competitor, which purportedly contradicted the certified country of origin information provided by Ingram Micro. Mem. Op. at 19. But the district court correctly rejected that argument because (1) Folliard produced no evidence to show that Govplace actually read the unsolicited price lists; and, (2) even if Govplace read the price lists, the lists contained language *expressly disclaiming their reliability*. *Id*. at 20. Accordingly, the district court concluded that the receipt of "unsolicited price lists from a company with which [Govplace] does not do business"—lists that explicitly disclaimed their own reliability—did not trigger a duty to question the certified representations from Govplace's supplier, Ingram Micro. *Id*. at 21.[2]

[2] Beyond the unsolicited price lists, Folliard also claimed that one e-mail from HP, with a product list attached, contradicted the TAA certifications from Ingram Micro. Mem. Op. at 18-19. But the HP e-mail was *consistent* with the information provided by Ingram Micro and, in any event, it was received *after* the alleged sales of the product at issue. *Id*. at 19. Thus, the district court correctly found that the e-mail could not show Govplace acted knowingly at the time of the sales. *Id*.

That conclusion is unassailable. Contractors receive numerous unsolicited communications, including advertisements, offers, and a variety of product data, on a daily basis. Imposing a duty on contractors to review all such communications—regardless of their source or accuracy—in order to avoid a potential finding that they knowingly defrauded the government, would be facially unreasonable.

In sum, the district court's ruling that Govplace's reasonable reliance on its supplier's TAA certification negated the scienter required for an FCA violation should be affirmed: the ruling comports with precedent; it does not unfairly prejudice relators or the government; and it avoids imposing unreasonable burdens on contractors.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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September 6, 2013

CERTIFICATE OF COMPLIANCE

I certify that the foregoing *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 3301 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font and Times New Roman type style.

/s/
Timothy K. Halloran

September 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2013, I electronically filed the foregoing *Amicus Curiae* Brief of the Coalition for Government Procurement in Support of Appellee and Affirmance with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the registered CM/ECF users listed below:

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