Docket No. 15-3548

*In the*

# UNITED STATES COURT OF APPEALS

*For the*

# THIRD CIRCUIT

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United States ex rel. Anthony Spay,
*Plaintiff-Appellant,*

*vs.*

CVS Caremark Corp.; Caremark Rx, LLC (F/k/a/ Caremark Rx., Inc.); Caremark, LLC (f/k/a Caremark, Inc.); Silverscript, LLC (f/k/a Silverscript Inc.),
*Defendants-Appellees.*

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ON APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
CASE NO. 09-4672
HON. BUCKWALTER, UNITED STATES DISTRICT JUDGE

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## BRIEF OF AMICUS CURIAE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANT

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Taxpayers Against Fraud Education Fund ("TAFEF") makes the following disclosures:

1. TAFEF is not a publicly held corporation or other publicly held entity.

2. TAFEF does not have any parent corporations.

3. No publicly held corporation or other publicly held entity owns 10% or more of any TAFEF stock, as TAFEF is a non-profit organization.

Respectfully submitted,

Dated: May 20, 2016

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**TO THE HONORABLE UNITED STATES COURT OF APPEALS:**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Taxpayers Against Fraud Education Fund respectfully submits this brief as *Amicus Curiae* in support of Appellant. A Motion for Leave to File has been filed contemporaneously herewith, and this brief is subject to that Motion. The Taxpayers Against Fraud Education Fund supports Appellant for the reasons set forth below.

## I. STATEMENT OF INTEREST

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. TAFEF is committed to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has participated in litigation as *amicus curiae*, and has provided testimony to Congress about ways to improve the FCA. TAFEF has a strong interest in ensuring proper interpretation and application of the FCA. TAFEF is supported by whistleblowers and their counsel, and by membership dues

and foundation grants. TAFEF is the 501(c)(3) arm of Taxpayers Against Fraud, which was founded in 1986.[1]

TAFEF submits this brief solely to address the so-called "government knowledge defense" or "inference," which the court below relied upon in granting summary judgment for the defendants-appellees. Joint Appendix ("J.A.") 00052 (finding merit to the argument that "CMS's knowledge of dummy prescriber IDs bars the claim."). "Government knowledge" is not a defense to FCA liability, which turns on the state of mind of the defendant, not the information in the government's possession. When Congress amended the FCA in 1986, it specifically eliminated the "government knowledge" bar that had precluded *qui tam* suits when the government already possessed information about the defendant's conduct. Whether labeled as a "defense" or "inference," broad statements about the relevance of government knowledge, like those made by the district court below, risk returning the law to its pre-1986 state, contrary to Congress's intentions. TAFEF's sole purpose in this case is to address the law on the relevance of information in the government's possession to liability under the

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amicus Curiae* represents that no party's counsel has authored this brief in whole or in part, no party or party's counsel has contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amicus Curiae*, its members, or its counsel has contributed money that was intended to fund preparing or submitting the brief.

FCA and it takes no position on any of the other issues in dispute between the parties in this case. TAFEF has a strong interest in ensuring that the Third Circuit, which is one of the few circuits that have not yet addressed this issue, consider its history and development, as well as the potential for expansive statements about "government knowledge" to undermine the FCA's broad purposes of protecting the federal Treasury.

## II. ARGUMENT

This appeal concerns the district court's grant of summary judgment based on the determination that application of the "government knowledge inference doctrine" provided a defense to liability under the FCA. While referring to the "government knowledge inference," the court also referred to government knowledge as a "defense," albeit one that does not automatically preclude a finding that a defendant acted knowingly. J.A. 00056. In describing this inference or defense, the court made broad statements that are not supported by the cases it cited, and the court did not follow its own description of the doctrine.

The court's errors are understandable, as the phrase "government knowledge" has generated substantial litigation and confusion in the lower courts. As the Fifth Circuit has noted, the label "government knowledge defense" is inapt, given that government knowledge is not the relevant inquiry under the statute. *See, e.g., United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 263 (5th Cir. 2014).

As the statute, its legislative history, and the decisions by the federal courts of appeals that have addressed this issue demonstrate, the relevant question is whether the *defendant* knowingly submitted materially false claims for payment. The *government's* overlapping knowledge of the defendant's conduct does not negate a prima facie showing of the defendant's knowledge or liability.

Because labels like "government knowledge inference doctrine" or "government knowledge defense" threaten to revive a defense that Congress explicitly repealed, courts should eschew such labels in favor of focusing on the FCA's elements—scienter, falsity, and materiality. *Compare, e.g., United States ex rel. Hutcheson v. Blackstone*, 647 F.3d 377, 385 (1st Cir. 2011) (observing that "[j]udicially-created categories sometimes can help carry out a statute's requirements, but they can also create artificial barriers that obscure and distort those requirements."). A defendant may defeat liability by demonstrating that it did not act with actual knowledge, reckless disregard, or deliberate ignorance of the falsity of a claim for payment when it submitted the claim. Where the defendant was forthcoming with the relevant government officials, those officials approved of the defendant's conduct, and the defendant was aware of the approval at the time it submitted the claim, those facts may be relevant to whether a defendant had the knowledge required for liability under the FCA, which is a factual question to be resolved in most cases by a jury. Where the government's

awareness of the defendant's conduct sheds no light on the defendant's state of mind, it cannot aid the court or jury in resolving the proper question under the statute—whether the defendant knowingly presented a claim for payment that was materially false or fraudulent.

### A. "GOVERNMENT KNOWLEDGE" IS NOT A DEFENSE

To establish a violation of the FCA, 31 U.S.C. § 3729(a)(1), the plaintiff must show that the defendant: (1) knowingly; (2) submitted or caused to be submitted; (3) a materially false or fraudulent claim for payment to the United States. A defendant acts knowingly if it acts with actual knowledge, in reckless disregard, or with deliberate ignorance of the truth or falsity of the information. 31 U.S.C. § 3729(b)(1)(A). No specific intent to defraud is required. 31 U.S.C. § 3729(b)(1)(B). *See United States ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 109 (3rd Cir. 2007).

As every circuit court to consider the question has concluded, when a defendant submits a false or fraudulent claim for payment to the government, the government's possession of overlapping knowledge about the defendant's conduct is not itself a defense to the FCA. While information in the government's possession about the underlying allegations may in some cases be among the several factors the jury may consider in evaluating the defendant's state of mind, the government's mere awareness of the defendant's conduct does not

automatically disprove a prima facie showing of knowledge. Nor is a defendant absolved of responsibility merely because the government pays the claim while some government agents were on notice of its falsity. As both the statute and its legislative history make clear, the FCA addresses the conduct of the person knowingly submitting the false or fraudulent claim for payment and not whether the government could or should have prevented the misappropriation of its funds.

### 1. Congress eliminated "government knowledge" as a defense to FCA liability.

When Congress first enacted the FCA in 1863, the Act permitted any person to file a suit in the name of the government to recover damages caused by false, fraudulent or fictitious claims for payment submitted to the government. Act of March 2, 1863, 12 Stat. 696. In 1943, the Solicitor General, concerned about parasitic *qui tam* actions that were based on copying the government's work product in order to claim a reward, urged the Supreme Court to prohibit *qui tam* actions. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The Supreme Court rejected that plea. *Id.* at 546-547 (noting that "the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did."). In response, the Executive Branch asked Congress to eliminate FCA *qui tam* actions. Congress did not do so, but in 1943, it amended the statute to prohibit certain parasitic lawsuits by barring *qui tam* actions that were:

> based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof at the time such suit was brought.

Act of December 23, 1943, Ch. 377, 57 Stat. 608, *codified at* 31 U.S.C. § 232(C) (1976).

The "government knowledge" bar proved too limiting, as worthy cases were dismissed merely because someone in the government possessed relevant information—even when the relevant government officials were not aware of the information, or that the information indicated fraud. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled."). *Qui tam* actions were precluded even if the information the government had in its possession had been provided to it by the relator. *See, e.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (holding that Wisconsin's provision of information to the federal government as required by law barred it from subsequently pursuing a *qui tam* action); *see also United States v. Aster*, 275 F.2d 281, 283 (3rd Cir. 1960); *Pettis ex rel. United States v. Morison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978); False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. at 12-13, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78 (noting that the National

Association of Attorneys General urged Congress to address "the unfortunate results of the *Wisconsin v. Dean* decision.").

When Congress amended the FCA in 1986, it "replac[ed] the government knowledge defense with the less restrictive public disclosure bar." *United States ex rel. Moore v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298 (3rd Cir. 2016); *see also United States ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720, 729-30 (1st Cir. 2007) ("'Congress thus changed the focus of the jurisdictional bar from evidence of fraud inside the government's overcrowded file cabinets to fraud already exposed in the public domain.'") (citation omitted). Under the public disclosure bar, 31 U.S.C. § 3730(e)(4), even cases involving allegations or transactions of fraud that have been publicly disclosed (and therefore the information may be known or knowable by the government) may still proceed if the person bringing the case is the "original source" of the information. 31 U.S.C. § 3730(e)(4)(B). Congress retained the government knowledge bar only for cases brought against members of Congress, the judiciary and senior government officials. *See* 31 U.S.C. § 3730(e)(2). As the Senate Report accompanying the proposed 1986 amendments explained, the provision relating to government officials

> reflects current law in that any qui tam suit based on information already known to the Government is currently without jurisdiction. While [the bill] **repeals that jurisdictional bar for most suits**, the Committee, at the request of the Justice Department, retained the bar for those suits which might be politically motivated.

S. Rep. No. 99-345 at 29*, reprinted in* 1986 U.S.C.C.A.N. 5266, 5294 (emphasis added).

Thus, in 1986 Congress explicitly eliminated the "government knowledge" bar to *qui tam* suits, which Congress had recognized as not sufficiently protective of the government's interests. *See United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 408 (3rd Cir. 1999) (noting that the pre-1986 government knowledge bar imperfectly achieved its goal because, among other reasons, a government official "may not recognize the connection between the information and a particular false claim"). Reintroducing a broad theory of "government knowledge" as a defense to liability returns the law to its pre-1986 state in contradiction of Congress's efforts.

**2. Most circuits have concluded that "government knowledge" is not a defense.**

As the evolution of this issue in the appellate courts demonstrates, courts have unanimously agreed that the focus of the inquiry into FCA liability is the *defendant's* state of mind, not the information in the government's possession.

In the first appellate decision to confront the argument that "government knowledge" is a defense to FCA liability, the Ninth Circuit held that under the FCA, "[t]he requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a

defense." *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). The court rejected application of such a defense at the motion to dismiss stage, observing that it was not possible to determine from the complaint itself that the defendant did not act with the requisite scienter. *Id.*

In *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), the Ninth Circuit subsequently affirmed a grant of summary judgment for the defendant where the facts showed not simply that the government was *aware* of information about the defendant's conduct, but that the defendant was forthcoming with the government and that the government and defendant were working together to solve the problem. *Id.* at 1421.[2] *See also United States ex rel. Butler v. Hughes Helicopters, Inc*., 71 F.3d 321, 326 (9th Cir. 1995) (holding that the defendant did not knowingly make false statements about non-compliant tests where the defendant and Army representatives fully discussed changes to the test and the Army approved the changes). *Wang* and *Butler* did not overrule *Hagood*. Instead, they recognized that, in limited circumstances, a defendant's complete candor in communications with the government prior to the submission of the false claim could be incompatible with a finding that the defendant knew or recklessly disregarded that its conduct was unlawful.

[2] *Wang* was subsequently overruled on grounds not relevant here. *United States ex rel. Hartpence v. Kinetic Concepts, Inc.,* 792 F.3d 1121 (9th Cir. 2015).

Although it did not ultimately reach the question of the defendant's scienter, the Second Circuit concurred with the Ninth Circuit's view of the role of government knowledge, observing in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp*., 985 F.2d 1148 (2d Cir. 1993) that "we agree with *Hagood* that the statutory basis for an FCA claim is the defendant's knowledge of the falsity of its claim . . . which is not automatically exonerated by any overlapping knowledge by government officials." *Id.* at 1156-59.

Several years later, the Seventh Circuit held in *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542 (7th Cir. 1999) that the defendant did not act "knowingly" in allegedly pricing its bid falsely or fraudulently because the relevant government officials *directed* the defendant to price the bid the way it did. Observing that all FCA cases are fact specific, the court concluded that the defendant could not have been defrauding the government if it was "following the government's explicit direction." *Id.* at 545. The Fourth and Eighth Circuits subsequently took similar approaches when they found a defendant's scienter negated by the fact that the government either directed the defendant to take the steps that it did, *see United States ex rel. Becker v. Westinghouse*, 305 F.3d 284 (4th Cir. 2002), or that the defendant was open with the government in discussing a problem and working cooperatively toward a solution. *See United States ex rel. Costner v. URS Consultants, Inc*., 317 F.3d 883 (8th Cir. 2003) (affirming district

court's finding that the defendant's openness and close working relationship with the Environmental Protection Agency about the problem negated the defendant's scienter).

The Tenth Circuit also has held that "government knowledge of a contractor's wrongdoing is no longer an automatic defense to an FCA action" after Congressional repeal of that defense. *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000). Although the Tenth Circuit recognized that the "government's knowledge of or cooperation with a contractor's actions [may be] so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA," it held that the government's mere awareness of the defendant's failure to meet contractual obligations did not present such a circumstance. *Id*. at 534 (noting that such a finding would be appropriate if the defendant "so completely cooperated and shared all information [with the government]" that a jury could not reasonably find that the defendant had the requisite knowledge for FCA liability).

Subsequently, the Tenth Circuit recognized that the government's knowledge of a false claim "does not automatically preclude a finding of scienter," and that a defendant's "knowledge of the falsity of [a] claim . . . is not automatically exonerated by any overlapping knowledge by government officials." *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952 (10th Cir. 2008).

The court held that the government's knowledge of relevant facts may give rise to an "inference" relevant to the FCA's knowledge element. This inference arises only when the government "*knows and approves* of the facts underlying an allegedly false claim *prior* to presentment" and nonetheless "authorizes the contractor to make that claim." *Id*. at 952 (emphasis added) (citing *Wang*, 975 F.2d at 1421). Because the undisputed facts in *Burlbaw* showed that the defendant followed the government's instructions and disclosed all relevant facts to the proper government agency, the Tenth Circuit held that there was insufficient evidence for a jury to find that the defendant acted knowingly. *Id.* at 934.

The Sixth Circuit addressed whether government knowledge is a defense in *United States ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc.*, 400 F.3d 428 (6th Cir. 2005). Finding "unpersuasive" the argument that the government's knowledge precluded liability for submitting false employee pension expenses on Medicare cost reports, the court noted that the owner of a home health care agency had not provided the government with the pertinent information. *Id.* at 454 n.21. *See also Varljen v. Cleveland Gear Co*., 250 F.3d 426, 430 (6th Cir. 2001) (government knowledge of fraud does not necessarily absolve a contractor of liability).

The Fifth Circuit is the most recent appellate court to address the argument that "government knowledge" is a defense. In *United States v. Bollinger*

*Shipyards, Inc*., 775 F.3d 255 (2014), the court reversed the district court's decision that the government's continued payment of the claims after its awareness of a structural failure with the ships barred the case. The Fifth Circuit held that government knowledge could not be asserted as a defense at the motion to dismiss stage, given that it serves "simply as a factor weighing against the defendant's knowledge, as opposed to a complete negation of the knowledge element." *Id.* at 264.

In *Bollinger*, the Fifth Circuit cited the concurring opinion of Judge Jones in an earlier Fifth Circuit case in which she had cogently explained that the so-called government knowledge defense "is inaptly named because it is not a statutory defense to FCA liability but a means by which the defendant can rebut the government's assertion of the 'knowing' presentation of a false claim." *United States v. Southland Mgmt. Corp*., 326 F.3d 669, 682, n.8 (5th Cir. 2003) (en banc) (Jones, J., specially concurring). In *Southland*, the court had concluded that a request for payment for housing allegedly not kept in a decent, safe and sanitary condition was not false because the contract contemplated a correction period during which the owner of the housing could address problems and still be entitled to receive payment. In her concurring opinion, Judge Jones stated that she would have held that the representations were not material and the defendants did not act "knowingly," given the defendant's transparency with the government about the

property conditions, as well as the fact that the defendant and government were trying to find a solution given the limited funds devoted to the project. *Id*. at 682-84.

This court was presented with the argument that "government knowledge" is a defense to FCA liability in *United States ex rel. Arnold v. CMC Engineering*, 567 Fed. Appx. 166 (3rd Cir. 2014), but did not rule on it. Although there was evidence that *state* government officials knew and approved of the defendant's conduct, there was no evidence that the *federal* government did, and the FCA addresses the submission of false claims to the federal government. *Id.* at 170, n.9.

The court below mistakenly asserted that "multiple district courts within the Third Circuit" have relied upon "government knowledge" as a basis for dismissing FCA claims. *See* J.A. 00055 (citing cases). In *United States v. Education Management, LLC*, No. 2:07-cv-00461, 2013 WL 3854458 (W.D. Pa. May 14, 2013), the court affirmed a magistrate's decision declining to block discovery requests related to this issue. *See also United States v. Educ. Mgmt. LLC*, No. 2:07-cv-00461, 2013 WL 386393, *7 (W.D. Pa. July 23, 2013) (stating that it "expresses no opinion on the merits of the parties' respective positions" on the issue of government knowledge). And given this court's determination in *Arnold* that government knowledge was inapplicable to the case, the court's citation of the *district court* decision in *Arnold,* J.A. 00055, is dubious as best.

While *United States ex rel. Watson v. Connecticut General Life Insurance Co.*, No. Civ. A. 98-6698, 2003 WL 303142 (E.D. Pa. Feb. 11, 2003), referenced the government's awareness of the defendant's practice, the grant of summary judgment for the defendant turned on the plaintiff's failure to provide any evidence that the practice was not in accordance with regulations or that the defendant was aware the practice would cause the government economic loss.[3]

Thus, contrary to the district court's assertion that the overwhelming "weight of the cases" recognize this defense, J.A. 00056, every circuit that has considered the argument that "government knowledge" is a defense to FCA liability has rejected it. While not ruling out that in a particular case information that relevant government officials have may be one of many factors relevant to the defendant's state of mind, the cases reflect a nuanced evaluation of the relevance of that evidence to the defendant's scienter.

[3] Subsumed in its discussion of "government knowledge," the court below cited a separate line of cases that consider whether a defendant's argument that it relied on an ambiguous reasonable interpretation of a regulation precludes a finding of scienter. *See* J.A. 00053-54 (citing, *e.g., United States ex rel. K&R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983-84 (D.C. Cir. 2008)). These cases do not involve government knowledge of and approval of a defendant's conduct, but rather address whether a defendant's interpretation of an ambiguous regulatory or contractual requirement demonstrates that its conduct was not knowingly false. *See United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999).

### B. IN LIMITED CIRCUMSTANCES, THE GOVERNMENT'S CONDUCT MAY BE RELEVANT TO THE DEFENDANT'S SCIENTER

"The proper focus of the scienter inquiry under [the FCA] must always rest on the defendant's 'knowledge' of whether the claim for payment was false." *Burlbaw,* 548 F.3d at 952-53. Accordingly, "government knowledge" of the defendant's conduct can never be sufficient to negate liability under the FCA. It may be relevant only to the extent that the circumstances surrounding the government's knowledge shed light on the defendant's state of mind. Those circumstances do not merit summary judgment unless they demonstrate that "the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA." *Shaw*, 213 F.3d at 534. In applying the FCA's knowledge standards, courts "must heed the basic rule that a defendant's state of mind typically should not be decided on summary judgment." *Cantekin,* 192 F.3d at 411.

Case law reveals the factors necessary to support the contention that the circumstances surrounding the government's awareness of fraud, as a matter of law, preclude a jury from finding that the defendant possessed the requisite knowledge for FCA liability. Those factors include that: (1) the defendant has fully disclosed the relevant information to the government before submission of the claims for payment; (2) the information was provided to the relevant decision-

makers; (3) the relevant government officials approved of the conduct; and (4) the defendant was aware of what the government knew. Absent all of these factors, the government's mere awareness of the defendant's conduct (or the conduct of similar industry actors) is not sufficient to negate a prima facie showing of scienter.

**1. The government's knowledge is not relevant unless the defendant made full disclosure of all relevant information.**

Unless the government has all of the information that would enable it to reject the claim as false at the time of submission, there is no basis for a defendant to assume that the government has approved the conduct that renders the claim false. The government must be aware not only that conduct is occurring, but also of the circumstances that would make the claim for payment false. *See, e.g.*, *United States v. Guy*, 257 Fed. Appx. 965, 968 (6th Cir. 2007) (government knowledge of irregular work hours did not equate to knowledge that claim was for overtime not actually worked).

The circumstances surrounding the government's knowledge are relevant only where they are incompatible with a defendant's scienter. As every appellate decision considering this issue makes clear, this requires a showing that the defendant was open and candid with the government about what it was doing. *See Durcholz,* 189 F.3d at 545 (defendants were following government's explicit directions); *Wang,* 975 F.2d at 1421 (government and defendant working together

to solve a problem); *Becker*, 305 F.3d 284 (government directed defendant to take the steps it did); *Burlbaw,* 548 F.3d at 953-54 (defendant complied with the government's instructions); *Butler,* 71 F.3d at 327 ("the only reasonable conclusion a jury could draw from the evidence was that [defendant] and the Army had so completely cooperated and shared all information . . . that [defendant] did not 'knowingly' submit false claims . . .."); *Costner*, 317 F.3d 883 (defendant worked closely with EPA). Where a defendant's conduct does not demonstrate such candor—such as where the government learned the relevant information from someone other than the defendant—that conduct is not incompatible with finding that the defendant acted knowingly. *See, e.g., Shaw*, 213 F.3d at 534 (government learned of the relevant facts from the relator, not the defendants).

**2. The relevant government official must be aware of the conduct.**

Where the relevant government agency, with full information, provides assurances that the specific conduct is permissible, a defendant may contend that it could not have acted with the requisite scienter. *See, e.g.*, *Burlbaw,* 548 F.3d at 954, 957 (defendant did not merely accept oral advice from an unauthorized agent but rather "reasonably relied upon written assurances of the governmental agency responsible for administering the program.").

But where the defendant provides its information to government officials with no role in deciding whether to approve or deny the claims, the government's

knowledge is not relevant to scienter. A defendant's admissions of misconduct to officials who lack the responsibility or authority to correct that misconduct do not tend to disprove that the defendant knew its conduct was unlawful. It is well-settled "that the United States is not bound by the unauthorized acts of its agents, that it is not estopped to assert lack of authority as a defense, and that persons dealing with an agent of the government must take notice of the limitations of his authority." *Bornstein v. United States*, 345 F.2d 558, 582 (Ct. Cl. 1965) (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)). *See also* M. Davidson, *The Government Knowledge Defense to the Civil False Claims Act: A Misnomer By Any Other Name Does Not Sound as Sweet*, 45 Idaho L. Rev. 41, *58 (2008) ("Unless [the government official] is someone with the requisite level of authority and approves or otherwise indicates to the defendant that its conduct is permissible, then the defendant's scienter remains unaffected.").

Moreover, if any government employee could authorize a defendant's conduct, even a defendant who *intended* to defraud the government could escape liability simply by finding someone in the government who approved the challenged conduct regardless of that person's authority or relationship with the underlying program or activity. Davidson, *supra*, at *59.

For similar reasons, courts do not require that a government official with decision-making authority testify that he or she would have terminated payments if

aware of the information in order to establish materiality. "The United States is entitled to guard the public fisc against schemes designed to take advantage of overworked, harried, or inattentive disbursing officers; the False Claims Act does this by insisting that persons who send bills to the Treasury tell the truth." *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008). *See also United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 95 (2d Cir. 2012) (following *Rogan* and concluding that jury verdict was not clearly erroneous where it did not accept testimony of official regarding materiality over agency's unambiguous guidelines and instructions).

**3. The relevant government officials must have approved the conduct.**

Even where the government is aware that false information is being provided, that awareness is not sufficient to negate the defendant's scienter. As the court explained in *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218 (D. Md. 1995), "deception is not an element of a False Claims Act violation. . . . Thus, a contractor who tells a government contracting officer that a claim is false still violates the statute when the false claim is submitted." *Id.* at 223. The responsible official or officials must have taken some affirmative action to approve of the defendant's conduct, by, for example, working with the

defendant to solve the problem, *Wang,* 975 F.2d at 1421,[4] or directing the defendant to take a particular action. *Durcholz,* 189 F.3d at 545; *Burlbaw,* 548 F.3d at 956.[5]

Mere acquiescence by government employees is not sufficient to support that a defendant lacked scienter. If it were, FCA liability would be precluded "any time a government employee and a defendant were in cahoots." *United States v. Amerigroup Illinois, Inc*., 488 F. Supp. 2d 719, 730 (N.D. Ill. 2007); *United States ex rel. Asch v. Teller, Levit & Silvertrust, P.C.*, No. 00-3289, 2004 WL 1093784 at *3 (N.D. Ill. May 7, 2004) (same); *United States ex rel. Mayman v. Martin Marietta Corp*., 894 F. Supp. 218, 223 (D. Md. 1995) ("Even assuming that [the defendant] did inform the government of its precise actions, a government officer cannot authorize a contractor to violate federal regulations.").

**4. The defendant must be aware of what the government knows at the time the defendant presented the claim for payment.**

By definition the government's knowledge of the underlying facts cannot be

[4] *See also e.g*., *Hooper v. Lockheed Martin Corp.,* 688 F.3d 1037, 1051 (9th Cir. 2012) (concluding that the defendant shared its allegedly defective testing methods with the government, which approved them).

[5] *See also, e.g*., *United States ex rel. Werner v. Fuentez Sys. Concepts, Inc.*, 319 F. Supp. 2d 682 (N.D.W.Va.) (Coast Guard officials responsible for contracts directed defendants to bill for time not worked), *aff'd* 115 Fed. Appx. 127 (4th Cir. 2004). *Compare United States v. Chen*, 402 Fed. Appx. 185 (9th Cir. 2010) (government did not instruct the defendant to bill as he did).

relevant to the defendant's scienter in submitting a claim for payment if the defendant is unaware of what the government knows at the time the defendant submits the claim. *See Southland Management*, 326 F.3d at 682, n.9 (Jones, concurring) (observing that "in principle, it would seem that the government's knowledge of a false claim would not be an effective defense [to rebut the government's assertion that the defendant acted knowingly] if the person making the false statement did not know that the government knew it was false."). The defendant's state of mind must be evaluated as of the time it submits the claim. *Burlbaw*, 548 F.3d at 951-52; *Durcholz*, 189 F.3d at 545; *Hagood*, 929 F.2d at 1421. *See also Cantekin*, 192 F.3d at 414 (rejecting argument that defendant's letter purporting to disclose industry funding months after application and after he was under investigation did not exonerate defendant). This requirement is consistent with the underlying premise of the scienter inquiry—that the defendant did not knowingly submit a false or fraudulent claim.

### C. GOVERNMENT PAYMENT OF CLAIMS DESPITE KNOWLEDGE OF INDIVIDUAL OR INDUSTRY-WIDE VIOLATIONS DOES NOT DEMONSTRATE LACK OF SCIENTER

The government's payment of a claim with full knowledge of the facts or the government's general awareness of problems across an industry does not negate a defendant's scienter.

### 1. The Government's payment of a claim with full knowledge of the facts does not negate scienter.

Payment of a claim when the government is aware that the claim is false does not necessarily mean that the government approves of the defendant's conduct. *See Burlbaw*, 548 F.3d at 953 (A defendant's knowing submission of false claims for payment "may certainly exist even when a government agency misinterprets its own regulations and chooses—with full comprehension of the facts—to pay a false claim.") (citing *Southland Mgmt.*, 326 F.3d at 672 & nn. 8, 9 (Jones, J., concurring)). It may be contrary to the best interests of the United States or its beneficiaries to terminate or change a contractual relationship or to cease paying claims.

There are many circumstances in which the government may be on notice of the defendant's conduct, but needs to investigate or evaluate the information before making a determination and must, in the public's interest, continue paying the claims. For example, when a *qui tam* relator files a complaint, the government may be on notice of the defendant's underlying conduct. But until the government can investigate the allegations thoroughly it may be premature to stop payment. As a practical matter, stopping the payment of claims upon learning of possible wrongdoing could potentially jeopardize the public health, safety and welfare, as well as contractual rights. *See, e.g., United States v. Incorporated Village of Island Park*, 888 F. Supp. 429, 442 (E.D.N.Y. 1995) (government continued to pay claims

after learning of falsity because it was contractually bound to make the payments).

For the same reason, payment of a false claim does not mean the misrepresentation was not material, as materiality turns on what the government might have done, not what it did. *United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 98 (2d Cir. 2012) (holding district court did not err in precluding testimony about agency's failure to investigate alleged false statements, which would not inform the jury about the reasons for nonaction). As the Fourth Circuit has explained, there are a number of potential

> instances in which a government entity might choose to continue funding the contract despite earlier wrongdoing by the contractor. For example, the contract might be so advantageous to the government that the particular governmental entity would rather not contest the false statement, … [or] to avoid further costs the government might want the subcontractor to continue the project rather than terminate the contract and start over.

*United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003); *see also United States ex rel. Am. Sys. Consulting, Inc. v. ManTech Advance Sys.*, 600 Fed. Appx. 969, 978 (6th Cir. 2015) (observing that "contractors who make such misrepresentations are not protected by the government's subsequent decision to continue working with them.").

This is particularly true in the healthcare context. The government is required to pay most Medicare claims within 30 days, *see* 42 U.S.C. § 1395h(c); 42 U.S.C. § 1395u(c)(2)(A). The government has long followed a "pay and chase"

model to ensure that patients do not experience delay in receiving medical services and providers are not delayed payment. *See* Preventing Health Care Fraud: New Tools and Approaches to Combat Old Challenges, Hearing Bef. the Sen. Comm. on Finance, 112 Cong, 1st Sess. (Mar. 2, 2011) at 32 (statement of Dr. Peter Budetti, Deputy Admin. and Dir. of CMS Center for Program Integrity), *available at* http://www.finance.senate.gov/imo/media/doc/71524.pdf. The assumption that paying a claim constitutes approval of the conduct that makes the claim false would dramatically undermine efforts to combat healthcare fraud. And beyond healthcare, the government, as a practical matter, must pay claims as they are received and investigate potential fraud afterward. Given the billions of claims that the government pays every year, if the government had to investigate and prevent the payment of claims unless they were valid the result would be either a broad waiver of fraud claims or incalculable delay and disruption in federal contracting and payment systems.

Moreover, negating liability if the government paid a claim would essentially estop the government from recovering whenever it paid a claim while on notice of facts relevant to its falsity. But absent misconduct on the part of the government, estoppel is not a defense against the government for good reason. "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of the law. . . ." *Office of Personnel*

*Management v. Richmond*, 496 U.S. 414, 426 (1990).[6]

The district court below cited Judge Jones' concurring opinion in *Southland Management* and two district court opinions for the proposition that if the government was aware of the falsity of a claim and was willing to pay anyway, the defendant could not have knowingly presented a false claim. J.A. 00054. But in *Southland,* mere awareness of falsity at the time the claim was paid was not evidence of approval. At the time of the submission and payment of the claim, the government was not only aware of the violations, but had also looked into them, provided the defendant time to correct them, and was aware that payments from the government were necessary to fund the corrections. *Id.* at 680-81.

The district court decisions cited also do not provide support for this broad rule. *United States ex rel. Thomas v. Siemens*, 991 F. Supp. 2d 540, 568 (E.D. Pa. 2014) relied on authority that has since been called into question, including the district court decision in *Bollinger*, which was later reversed.[7]

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[6] Although the court in this case earlier declined to hold that an estoppel defense was unavailable as a matter of law, the court agreed that the defense is available only in extreme circumstances, such as affirmative misconduct by the government. *United States ex rel. Spay v. CVS Caremark Corp*., No. 09-4672, 2013 WL 1755214 *10 (E.D. Pa. Apr. 24, 2013).

[7] *Siemens* also cited *United States ex rel. Marquis v. Northrop Grumman,* No. 09-7704, 2013 WL 951095 (N.D. Ill. Mar. 12, 2013), which observed that the government paid after being aware of "*and investigating"* the conduct. *Id.* at *2 (emphasis added). *See also Bollinger,* 775 F.3d at 264, n.26 (questioning *Marquis*).

### 2. The government's knowledge of industry practice does not negate scienter.

The district court observed that the relator provided no case law to support the assertion that the government knowledge of an industry-wide practice does not negate scienter. J.A. 00063-64. The court concluded that "it would be illogical for FCA liability to lie against Defendants where CMS knew and accepted that this practice was being done commonly in the industry, but simply may not have known about the specifics of Defendant's practices." *Id.* But the lack of such authority is unsurprising, as a rule that the government's knowledge of industry-wide practice negates liability would dramatically undermine the FCA.

If an entire industry is submitting false claims to the government and the government has not yet enforced the law against any one entity, the lack of enforcement may be relevant to the factual question of the defendant's scienter, but it does not negate a prima facie showing of scienter. If it did, the most widespread frauds would be beyond the reach of the law if the government delayed in taking action. The government may not take action for reasons that have no relationship to approval of the defendant's conduct, such as lack of resources, lack of adequate information about the defendant's conduct, or failure to pay attention.

Courts have grappled with a parallel issue under the FCA's public disclosure bar. "Numerous 'courts of appeals have concluded that reports documenting a significant rate of false claims by an industry as a whole without attributing fraud

to particular firms do not prevent a qui tam suit against any particular member of that industry.'" *United States v. Educ. Mgmt. LLC*, No. 2:07-cv-461, 2014 WL 2766115 (W.D. Pa. June 18, 2014) (rejecting contention that widespread reports about fraud in the for-profit education industry revealed information about a particular defendant), *citing United States ex rel. Baltazar v. Warden*, 635 F.3d 866, 868 (7th Cir. 2011)). For example, in *Baltazar*, the Seventh Circuit reversed a district court's determination that GAO Reports about widespread chiropractor upcoding were adequate to put the government on notice of fraud by a particular chiropractor. As the court explained, the absence of specific information about particular defendants "undoubtedly explains why the Department of Health and Human Services did not stop, or reduce, payments to any chiropractor based on [the report]." 635 F.3d at 868 (noting that the government could not file suit against an individual chiropractor based upon those reports).

## CONCLUSION

Government knowledge is not a defense to the FCA. Doctrines invoking "government knowledge," while perhaps a convenient shorthand, only perpetuate focus on the wrong question. The relevant question is whether a defendant knowingly submitted materially false or fraudulent claims for payment. No extra statutory doctrine is necessary to evaluate whether those elements have been met in a particular case.

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(Fed. R. App. P. 32(a); Local Appellate Rule 113.3)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,961 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 word processing program, a 14-point font size, and the Times New Roman type style.

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The undersigned is a member of the bar of this Court.

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