No. _____

In The
Supreme Court of the United States

UNITED STATES, EX REL. THOMAS A. BERG, TIMOTHY A. BERG, RYNE J. LINEHAN, NAYER M. MAHMOUD, AND STANLEY E. SMITH,

Petitioners,

v.

HONEYWELL INTERNATIONAL, INC., AND HONEYWELL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although fraud-in-the-inducement taints all subsequent payments, belated discovery of the truth can leave the Government with no practical choice but to continue with the tainted contract. In this False Claims Act (FCA) case, an Energy Savings Performance Contract (ESPC) project's concealed inability to meet mandatory statutory requirements for a true guarantee of aggregate post-project utility cost savings left the United States Army in just such a dilemma. However, in purported reliance upon *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 579 U.S. ___, 136 S.Ct. 1989, 2003 (2016), the Ninth Circuit Court of Appeals declined to address noncompliance with these core legal requirements of the ESPC statute, 42 U.S.C. § 8287, *et seq.*, and instead applied common law principles and the judicially created "government knowledge" concept to uphold summary judgment.

1. Are guaranteed "savings" which will actually result in higher aggregate utility costs true "savings" under 42 U.S.C. § 8287(a)(2)(B)?

2. Is the mere existence of evidence of "government knowledge" sufficient to "negate" FCA falsity, materiality or scienter, or is the relevance of such evidence subject to the established evidentiary rules which govern reasonable inferences?

3. Did the appellate court short-circuit the FCA's tripartite statutory scienter analysis in its resort to the "government knowledge" concept?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioners here, and appellants below, are the *qui tam* plaintiffs (Relators) Thomas A. Berg, Timothy A. Berg, Ryne J. Linehan, Nayer M. Mahmoud, and Stanley E. Smith.

The respondents here, and appellees below, are Honeywell International, Inc., and Honeywell, Inc. Honeywell, Inc. merged with Honeywell International, Inc. in 2002, with Honeywell International, Inc. being the surviving corporation in the merger.

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INTRODUCTION

On February 13, 2018, Senator Charles E. Grassley, one of the co-sponsors of the transformative 1986 amendments to the False Claims Act (FCA),[1] spoke from the floor of the United States Senate to express concerns about "troubling developments in the courts' interpretation of the False Claims Act,"[2] specifically, interpretations arising from the portion of *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 579 U.S. ___, 136 S.Ct. 1989, 2003, 195 L.Ed.2d 348 (2016) which states: "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material."

Far from improperly "offering of the views of a subsequent Congress" as a basis for "inferring the intent of an earlier one,"[3] Senator Grassley's comments called upon courts and litigants to read the language employed by Justice Thomas in *Escobar* more carefully, and in analyzing FCA materiality, to eschew reliance upon the so-called "government knowledge defense," a judicially-created concept notable for producing "complex, confusing, and inconsistent" holdings,[4] in favor of

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[1] 31 U.S.C. § 3729, *et seq*.

[2] 164 Cong. Rec. S892 (daily ed. Feb. 13, 2018) (statement of Sen. Grassley). (App. 81.)

[3] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

[4] 1 John T. Boese, *Civil False Claims and Qui Tam Actions* 2-176.2 (4th ed. 2017). *See also* Claire M. Sylvia, *The False Claims*

a more faithful adherence to the language of the FCA, informed by its history. (App. 82-87.)

Senator Grassley warned an overly strict or inappropriate reading of *Escobar*'s language could lead to absurd results, and that a failure to consider the history of the False Claims Act, which included Congress' deliberate elimination of the jurisdictional "government knowledge" defense in 1986, could lead courts into adopting "ridiculous" rules entirely out of keeping with the language and purposes of the Act. (App. 84-86.)

Senator Grassley's sharpest criticism, however, was reserved for those courts which failed to recognize that because the government's duty to the public is not restricted merely to protecting the public fisc, there can be numerous situations in which the government might choose to pay a claim despite knowledge of a contractor's fraud, not because the fraud was "immaterial," but because some other critical public policy interest was also at stake:

> Can you imagine if that were the rule? Can you imagine if providers could avoid all accountability because the government decided to not let someone suffer? Then fraudsters could hold the government hostage. They could submit bogus claims all the time with no consequences because they know the government is not going to deny treatment to the

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Act 261-267 (3d ed. 2016); James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* 871-876 (7th ed. 2017).

> sick and the vulnerable. That is just not what the False Claims Act says. Courts should not read such a ridiculous rule into that statute.

(App. 86.)

Here the factual circumstances presented just such a dilemma. The United States Army was induced to award two contracts ("Task Orders"; App. 89-92) to Honeywell based upon its false guarantees of utility cost "savings" in connection with a project which, from the outset, did not and could not satisfy the mandatory payment restrictions set forth in 42 U.S.C. § 8287(a)(2)(B) regarding Energy Savings Performance Contracts (ESPCs). In short, the project could not "pay for itself" as statutorily mandated.[5]

When this noncompliance was later revealed, however, the heating project Honeywell had proposed was already well underway, although not completed. Termination would have cost twice as much as the option the Army ultimately chose, which was to modify the contractual terms in an attempt to bring it within the parameters of the statute's payment limitations. Proceeding with the project was, moreover, dictated by the necessity of completing the unfinished heating system so those housed at the Ft. Richardson Army base would

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[5] As the attorney for the Army's Contracting Officer stated, "If the correct cost analysis had been performed, showing that this project would not pay for itself, then the contract would not have been awarded." [ER 365.] ("ER" references identify the page within the Relators' Excerpts of Record submitted to the Ninth Circuit Court.)

be prepared for oncoming winters in Anchorage, Alaska.

The result, however, was the Army ultimately had to pay Honeywell $25 million *more* than what the contractual agreements had originally required, on a project the Army never would have agreed to in the first place, had it known the project could not "pay for itself" as the statute required.

However, the Ninth Circuit fell into the very kind of interpretive error identified by Senator Grassley by focusing narrowly on language plucked from *Escobar* but applying it in accordance with common law and "government knowledge" concepts, rather than *Escobar*'s actual reasoning.

The injection of common law fraud concepts such as viewing falsity as an element restricted to false statements of fact, conflicts with congressional intent concerning the intended breadth of the FCA. Similarly, the "government knowledge" concept, which began as no more than a recognition that evidence of what the government knew in a given instance can, under certain circumstances, reasonably give rise to an inference of a lack of scienter,[6] has now morphed into a poorly defined all-purpose litigation tool which contractors have been openly encouraged to employ "like a club" to "nip an incipient [government] investigation

[6] *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

in the bud or to secure a more favorable resolution."[7] Ultimately, resort to such inappropriate concepts distorts the analysis of FCA falsity, materiality and scienter, blunting the most effective weapon against fraud in the government's litigation arsenal.

The mistaken approach employed by the Ninth Circuit is inconsistent with long-standing Supreme Court authority dating back to 1943,[8] with *Escobar*, with decisions from its sister circuits and even with its own precedential authority. Review and guidance from this Court is therefore necessary.

DECISIONS AND ORDERS BELOW

The Memorandum Decision of the Court of Appeals is unreported but may be found at 740 F. App'x 535. (App. 1-7.) The Court of Appeals' order denying appellant Relators' petition for rehearing or rehearing en banc is unreported. (App. 52.) The district court's Order re Cross Motions for Summary Judgment may be found at 226 F. Supp. 3d 962. (App. 8-51.)

[7] Geoffrey R. Kaiser and Anderson Kill, *United States: When The Government Knows Too Much For Its Own Good – Liability Under The Federal False Claims Act And "Knowing" Submission* (last updated January 6, 2012 originally published in Law360, September 9, 2011); available at: http://www.mondaq.com/unitedstates/x/159700/Fraud+White+Collar+Crime/When+The+Government+Knows+Too+Much+For+Its+Own+Good).

[8] *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943).

JURISDICTION

The Court of Appeals denied the appellant Relators' petition for panel rehearing or rehearing en banc on October 5, 2018. (App. 52.) An extension of time to February 2, 2019, within which to file this petition was granted on December 13, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the False Claims Act (FCA) (31 U.S.C. § 3729, *et seq.*), and the Energy Savings Performance Contract (ESPC) provisions (42 U.S.C. § 8287, *et seq.*) are reproduced in the appendix. (App. 53, 58, 63.)

STATEMENT OF THE CASE

This case was filed pursuant to the False Claims Act (31 U.S.C. § 3729, *et seq.*), in the District Court for the District of Alaska on October 19, 2007. The district court's jurisdiction was based upon 28 U.S.C. § 1331. After two prior successful appeals,[9] the Relators'

[9] *Berg v. Honeywell Intern., Inc.*, 502 Fed. App'x 674 (9th Cir. 2012) (reversal of dismissal on "public disclosure" grounds; 31 U.S.C. § 3730(e)(4)(A)); *Berg v. Honeywell Intern., Inc.*, 580 Fed. App'x 559 (9th Cir. 2014) (reversal of dismissal on particularity grounds).

Second Amended Complaint (SAC), filed on August 13, 2014, became the operative pleading.

Relators alleged Honeywell fraudulently induced the award of two Task Orders, covering Phase I and II of the proposed ESPC project, at Ft. Richardson, Alaska, by providing false promises: the "guarantee of savings" required by 42 U.S.C. § 8287.

The Energy Policy Act of 1992 (42 U.S.C. § 8287, *et seq*.) permits private sector financing to be used to initiate projects at federal facilities and provides that the contracting company is to be paid thereafter out of the resulting energy cost savings.[10] The authorization of such contracts is intended to allow the federal agency to achieve lower utility energy costs through improved efficiency, provide the company with opportunities to undertake major projects at federally-owned properties and assure the project will be paid for without the necessity of additional appropriations from Congress or burden upon America's taxpayers.

In order to assure financial feasibility, the ESPC statute provides:

> Aggregate annual payments by an agency to both utilities and energy savings performance contractors, under an energy savings

[10] As stated in the IDIQ, the master ESPC contract, the underlying concept is that in return for providing to the Government "the maximum amount of savings possible" contractors "may receive the maximum return on their investment. Therefore, the more energy dollars saved, the more the selected contractors may earn." [ER 471.]

> performance contract, may not exceed the amount that the agency would have paid for utilities without an energy savings performance contract (as estimated through the procedures developed pursuant to this section) during contract years. The contract shall provide for a guarantee of savings to the agency, and shall establish payment schedules reflecting such guarantee, taking into account any capital costs under the contract.

42 U.S.C. § 8287(a)(2)(B); (App. 58-59.)

These payment limitations recognize it cannot serve the public's interest for an agency to agree to a project which promises cost savings in one area, such as heating costs, if it means the costs of another utility, such as electricity, would simultaneously rise and "cancel out" any supposed heating savings, or worse, outstrip such savings and create an overall increase in aggregate utility costs.

Consequently, accurately assessing pre-project "baseline" utility energy costs is critically necessary to assure true overall savings sufficient to permit the project to "pay for itself." The ESPC statutes, regulations promulgated pursuant thereto, and the indefinite delivery/ indefinite quantity (IDIQ) contract which is the "parent" contract to all individual ESPC contracts ("Task Orders"), reinforce the necessity of accurately identifying actual pre-project utility energy costs, so that post-conversion energy cost savings can be accurately ascertained. The IDIQ further imposes upon the contractor the responsibility for conducting feasibility

studies before submitting a proposal to avoid beginning "a job the Government might not accept due to technical or cost factors." [ER 465; 477; 485.]

In late 1999, when Honeywell first raised the prospect of conducting an ESPC project, Ft. Richardson had its own Central Heating and Power Plant (CHPP), a "co-generation" plant fueled largely by natural gas which produced heat and electricity. Honeywell proposed decentralizing the CHPP and installing individual boilers to heat the buildings on the base. Closing the CHPP would result in only a small reduction in actual energy costs for heating, but would involve considerable savings, which Honeywell estimated at over $4.8 million in the first year following shut-down, owing to decreased operating and maintenance (O&M) costs. Honeywell would be entitled to an amount equivalent to such savings from the project. [ER 63.]

The O&M savings could only be realized, however, from a complete closure of the CHPP, which would require Ft. Richardson to thereafter purchase electricity from a commercial power utility. However, in assessing Ft. Richardson's "baseline," or actual historical cost for electricity before the ESPC project was implemented, Honeywell made an improper "adjustment" in its estimates, by adding the future costs of buying electricity into the baseline calculation.

Certain kinds of adjustments to the baseline calculation, when necessary for greater accuracy, are allowable under ESPC regulations. However, Honeywell's "adjustment," as the United States Army Audit

Agency (USAAA) later concluded, was "inappropriate" and "overstated" the "true electricity baseline" by $1.4 million [ER 383-384; 424], making it appear as though the project would create ample savings – and thus pay for itself – when in reality, closing down the CHPP and thereafter purchasing electricity would instead result in substantial annual shortfalls:

> The shortfall created a problem not only because more funds were needed, but because of the statutory limitation. The Energy Policy Act of 1992 and 10 Code of Federal Regulations 436.36 state that the aggregate annual payments by an agency for utilities and an energy savings performance contract, may not exceed the amount that the agency would have paid for utilities and related operation and maintenance costs without the energy savings performance contract.

[ER 424.]

The USAAA thus confirmed the ultimate result of Honeywell's proposed project would be an aggregate increase in Ft. Richardson's energy costs in violation of the payment limitations of 42 U.S.C. § 8287(a)(2)(B). [ER 424-425.]

This presented the Army with a predicament. It could not go forward with the original contracts without violating 42 U.S.C. § 8287(a)(2)(B), which could in turn constitute an Anti-Deficiency Act violation.[11] The

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[11] The Anti-Deficiency Act prohibits federal employees from making expenditures in excess of the amount available in the

Army could not dip into funds appropriated for another purpose because 42 U.S.C. § 8287a provided that ESPC payments could only be made with funds appropriated or otherwise made available "for the payment of energy expenses (and related operation and maintenance expenses)." (App. 63.)

The Army could have terminated the contract, but termination fees were tied to the level of completion. When the fatal flaw in Honeywell's project was finally revealed, the conversion was approximately 80% complete. [ER 74.] Termination would have required a fee of approximately $50 million. Furthermore, immediate termination would have left Ft. Richardson with an unfinished heating system, despite its responsibility to protect families of deployed American soldiers from oncoming Alaska winters. [ER 67; 80; 90; 751; 835.]

Given the requirements of the statute, the contractual termination terms, and the overriding necessity of completing the project so Ft. Richardson would have a functioning heating system, the Army determined the only viable way forward would require modification of the contract in an attempt to bring it into compliance with 42 U.S.C. § 8287(a)(2)(B).[12] [ER 88.] The Army

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relevant appropriation or fund unless authorized by law. 31 U.S.C. § 1341.

[12] The Army initially believed the modification had accomplished this goal of assuring compliance, albeit by only a slender margin of actual savings. [ER 95-96.] Later, however, additional information concerning heat infiltration rates related to Ft. Richardson's decades-old buildings came to light which made it

ultimately agreed to modify the contract ("Mod 2") by extending its lifetime from 18 years to 25 years, lowering the interest rate, and agreeing to an additional payment to Honeywell of $25 million (as opposed to the $50 million the termination fee would have required).[13] [ER 67; 425-426.] This solution also entailed seeking additional funds from Congress. [ER 832.]

Evidence disclosed during discovery demonstrated that, prior to submitting its proposals, Honeywell knew Ft. Richardson would be faced with higher electricity costs if it no longer generated electricity at the CHPP and instead purchased electricity from a commercial utility provider. Honeywell's project leader, Suzanne Wunsch, testified Honeywell also understood the result of its proposed project would require Ft. Richardson to pay more overall for its heating and electricity than it had before. [ER 311-314.] Wunsch even admitted to Relator Linehan that she did not think Ft. Richardson command understood there were not enough savings in the ESPC to cover the additional electricity cost or how the baseline had been "expanded." [ER 849.]

During her deposition, however, Wunsch testified "everyone," including both Honeywell's team and Army personnel, knew that if the project went forward the Army would be paying more for heat and electricity than before. When asked if Honeywell ever informed

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evident that in this critical respect, the modification had not succeeded after all. [ER 96.]

[13] This modification increased the total project price from $137 to $162 million. [ER 421; 426.]

anyone within the Army the project would not qualify under the statute if that occurred, Wunsch answered "No," and added that if anyone within the government "thought that was the case, they had a lot of opportunity to say that." [ER 314.]

In fact, not one of the deposed government personnel testified that, at the time Honeywell's proposals were accepted, they knew the proposed project would actually increase overall costs rather than produce net savings, and would thus contravene the ESPC statute. [ER 99; 295-297; 305-307; 1006.] Even those who were aware electricity costs would be higher stated they understood the savings produced by shutting down the CHPP would outweigh any such increased electricity cost. [ER 1065.]

Thus, when the two Task Orders were awarded in 2000, those within the government did not know Honeywell's baseline "adjustment" was improper, or that any "savings" resulting from Honeywell's heating project would be outstripped by increased aggregate costs for heat and electricity, in violation of the ESPC statute. [ER 99; 292-301; 303-307.] Government personnel instead thought Honeywell's "guarantee of savings" meant there would be actual net savings, notwithstanding any additional expense for electricity. [App. 89-92; ER 1065.] As the attorney for the Army's Contracting Officer stated, "If the correct cost analysis had been performed, showing that this project would not pay for itself, then the contract would not have been awarded." [ER 365.]

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Falsity Analysis Conflicts with *Marcus v. Hess*, *Escobar* and Its Own Pre-*Escobar* Precedents.

A. The Ninth Circuit's Analysis Conflated Falsity and Scienter by Ignoring the Legal Requirements Imposed Upon Honeywell and Accepting at Face Value Its Unsubstantiated "Two Project" Excuse.

Escobar established that FCA falsity can be based upon a "half-truth," a representation which is rendered misleading by the omission of "critical qualifying information," when a defendant fails to disclose noncompliance with an underlying statutory, regulatory or contractual requirement. *Escobar*, 136 S.Ct. at 1999-2000. *Escobar* further clarified that when the legal requirement is of such importance the Government would not have committed its resources had the full truth been known, the misrepresentation meets the "demanding" FCA standard for materiality. *Id.* at 2003; citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543, 63 S.Ct. 379, 87 L.Ed. 443 (1943). *Escobar* also confirmed that where a "reasonable person" would realize the materiality of a particular requirement, a defendant's failure to do so "would amount to 'deliberate ignorance' or 'reckless disregard' of the 'truth or falsity of the information' even if the Government did not spell this out." *Id.* at 2001-2002.

This case falls well within each of *Escobar*'s identified parameters for FCA falsity, materiality and

scienter. Honeywell presented its "guarantee[s] of savings" without disclosing the critical qualifying information that the "savings" it promised would actually involve an aggregate increase in utility costs which would leave Ft. Richardson paying more for heat and electricity than it had before. The Army not only would not, but *could* not, in light of the ESPC statutory restrictions, have entered into the ESPC agreements had it known the truth. 42 U.S.C. § 8287(a)(2)(B). Thus, Honeywell's omissions were material. Moreover, as a self-professed "highly qualified" ESPC contractor [ER 325], Honeywell certainly should have realized the materiality of this fundamental requirement, and if not, then Honeywell was either "deliberately ignorant" or acting in "reckless disregard." 31 U.S.C. § 3729(b)(1)(A).

In the decisions below, however, both the district and the appellate court refused to address the statutory, regulatory and contractual context in which the case arose. The determination of falsity was restricted to a search for a false statement of fact, as if a factual "lie" was the only form of falsity the FCA acknowledges (App. 4, 49), while any issue concerning Honeywell's legal obligations were brushed aside, either on the grounds that the FCA does not punish "garden-variety breaches of contract or regulatory violations" (App. 4, quoting *Escobar*, 136 S.Ct. at 2003; App. 37, n. 105), or that any issue having to do with the law is merely a matter of opinion. (App. 49.) Thus, in a remarkable blame-the-victim fashion, the Ninth Circuit concluded:

> That the Army should have rejected Honeywell's proposals under the ESPC statutes and regulations does not mean that Honeywell's detailed calculations were false.

(App. 4.)

The failure to consider applicable law severely distorted the appellate court's analysis. Because the Ninth Circuit failed to address 42 U.S.C. § 8287(a)(2)(B), it failed to recognize Honeywell's promised "savings" were fundamentally false, not because of its "calculations," but because of the project's inability to satisfy the statute. Failure to address the regulatory requirements caused the appellate court to overlook the manner in which the improper "adjustment" (which the USAAA independently and objectively concluded had "overstated" the "true electricity baseline" [ER 434]), served to conceal the project's inherent statutory defect. Moreover, had the appellate court considered the terms of the IDIQ contract, it would have seen that, unlike an arm's length agreement in which each party must look to its own self-interest, the IDIQ contractually obligated Honeywell to assess economic feasibility and to "pursue projects which provide the maximum return *to the Government*." [ER 477; emphasis added.]

When viewed within this legal context, Honeywell's actions and "assumptions" take on an entirely different hue. Honeywell's supposed justification for concealing the true economic consequences Ft. Richardson would face was its professed "understanding"

that there were two different projects occurring in conjunction: (1) Honeywell's heating project; and (2) an entirely separate government "privatization" plan to shut down the CHPP and thereafter purchase Ft. Richardson's electrical needs from a commercial utility company. Both the district court and the Ninth Circuit accepted this "two project" excuse entirely at face value.

However, Relators dispute that a true "privatization" plan was actually in place *or* that Honeywell had a good faith belief in the existence of such a plan, given the structure of Honeywell's own proposals.

Honeywell's project was predicated upon the complete closure of the CHPP, including both its heat and electrical generating capacity. The savings in Operations and Maintenance (O&M) costs resulting from complete shutdown were estimated by Honeywell at over $4.8 million [ER 63], with heat and electricity savings each representing approximately 50%. [ER 63; App. 89-92.] If, as Honeywell claimed, there was already an electrical "privatization" plan in place which involved shutting down the CHPP, it would be the Government, not Honeywell, which would have brought about 50% of those O&M savings. Honeywell instead claimed credit for *all* of it, and thus sought to be paid during the first year following completion of its project an amount commensurate with **100%** of the O&M savings.[14] [ER 63.]

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[14] *See* Relators' Petition for Rehearing and Rehearing En Banc at 5-6, 13-18, Aug. 7, 2018 (9th Cir. Case No. 17-35083, Doc. 55).

ESPC contractors are prohibited under the IDIQ contract from taking credit for energy cost-saving efforts funded by parties other than the ESPC contractor. [ER 479.] Thus, ***unless*** shutting down the CHPP was due entirely to Honeywell's ESPC project, it would never have been entitled to claim credit for the 50% of O&M savings related to electricity. Yet it did.

Honeywell's "understanding" that "increased electricity costs were to be allocated" to the "privatization" project, rather than its ESPC project for "accounting purposes" (App. 3), is, if anything, even more incredible. Honeywell has pointed to no legitimate accounting purpose or method which would allow a private contractor to reap more than $2.4 million in payments resulting from a separate government-initiated effort, while burdening the government's separate project with all of the costs. Such a bizarre arrangement would allow the contractor to walk away with both the cream *and* the milk, leaving the Government holding the empty bucket.

Even Honeywell's conception of what "privatization" entails was patently inaccurate. Far from involving the decommissioning of a functioning federally-owned utility, for the purpose of thereafter purchasing utilities at a higher cost from a private commercial vendor, "privatization" instead involves the conveyance of a functioning facility *to* a private entity, in order to reduce costs to the government.[15] No privatization

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[15] *See* Department of Defense Reform Initiative Directives (DRIDs) Nos. 9 and 49. (App. 66-79.)

plan could even be approved unless the conveyance would result in lower utility costs to the government. (App. 76-77.) Honeywell's "assumption" that the Army wanted to "privatize" so it could pay more for electricity was thus nonsensical.

The ludicrousness of Honeywell's claimed "understanding" only comes into sharp focus, however, when placed against the background of applicable law. The Ninth Circuit's refusal to consider the law and its willingness to unquestioningly frame its falsity analysis within Honeywell's professed subjective beliefs meant its analysis was hardly objective, but instead devolved into an illogical conflation of falsity and scienter in which neither the law nor the material issues in dispute were ever squarely addressed. This approach was not only erroneous, but a radical departure from long-standing authority.

B. A Court Cannot Abdicate Its Responsibility to Address Objective Falsity in Light of Applicable Law When the Case Rests on Noncompliance with an Unambiguous and Mandatory Statutory Provision Such as 42 U.S.C. § 8287(a)(2)(B).

1. The Ninth Circuit's Decision Ignores Long-Standing Authority.

Long before *Escobar* was decided, the decision in *Marcus v. Hess* established that: (1) fraud-in-the-inducement is a viable basis for a False Claims Act action; (2) a hidden violation of a federal requirement can

satisfy the FCA's falsity requirement; and (3) where the federal government would not have committed its funds had it known of the hidden noncompliance, the falsity involved is material.[16]

The principles articulated in *Marcus* have been relied upon as a touchstone by Congress,[17] by the Ninth Circuit Court[18] and more recently by this Court in its decision in *Escobar*, where *Marcus* was cited as a prime example of a circumstance in which the "demanding" standard of materiality required by the FCA had been met. *Escobar*, 136 S.Ct. at 2003.

Marcus thus stands as controlling Supreme Court authority which establishes that, although the FCA has always included false statements of fact within the scope of the falsity element, for more than three-quarters of a century the FCA has also embraced other forms of false or fraudulent conduct, such as a failure to disclose noncompliance with a critical legal condition, as equally capable of fulfilling that requirement.

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[16] *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943) (superseded by statute on other grounds)

[17] S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

[18] *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1170-1171, 1173 (9th Cir. 2006).

2. Where Legal Falsity is Involved, Courts Cannot Shirk the Responsibility of Deciding Critical Preliminary Questions of Law.

Congress has made it clear the FCA embraces circumstances where the falsity involved arises from noncompliance with a legal requirement.[19] Where the element of falsity rests upon a hidden noncompliance, a question of law is presented, and it is therefore the court which must make the initial determination:

> The FCA does not define false. Rather, courts decide whether a claim is false or fraudulent by determining whether a defendant's representations are accurate in light of applicable law.

United States v. Bourseau, 531 F.3d 1159, 1164 (9th Cir. 2008).

This is not a responsibility a court can shirk. Even where the matter is "unquestionably technical and complex," if the specific requirement is "not discretionary," then its "meaning is ultimately the subject of judicial interpretation," and it is the defendant's compliance, *as interpreted by the court*, which determines

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[19] "[E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

falsity. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457,463 (9th Cir. 1999).

In this case, falsity does not rest upon a "disputed legal issue" or an expression of mere "opinion," or a differing "reasonable interpretation" of the law.[20] (App. 49-50.) It rests upon an unambiguous mandatory statutory requirement central to the viability of any ESPC project.

Yet the district court's published decision first misquoted the critical provision[21] at the heart of this case and then flatly refused to consider noncompliance as a pertinent factor:

> Relators have focused substantial briefing on whether the baseline was permissible or proper under the applicable statutes and

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[20] Honeywell has never argued that the payment limitations in 42 U.S.C. § 8287(a)(2)(B) are discretionary or ambiguous, and expressly waived any advice of counsel defense which might otherwise have supported a contention that it had reasonably relied upon a different interpretation of the statute's requirements. [ER 54.]

[21] The district court's single reference to 42 U.S.C. § 8287(a)(2)(B) stated, inaccurately, "By statute, payments ***to a contractor*** in a given year cannot exceed 'the amount that the agency would have paid for utilities without an [ESPC]' during that year. Federal law also requires that the contract 'provide for a guarantee of savings to the agency.' " (App. 10; emphasis added.)

However, the payment limitations do **not** apply only to payments made to the ESPC contractor, but instead restrict the ***aggregate*** payments which can be made to cover both the ESPC project *and* the agency's other utility costs. Thus, in assessing a project's economic feasibility, the ultimate impact upon the agency's overall utility costs must be considered.

> regulations. But FCA liability does not attach to mere regulatory violations. See *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006). Thus, the Court need not decide whether or not the applicable regulations allowed an ESPC to account for the electricity costs in the manner these ones did. *See also infra* Part IV.

(App. 37, n. 105.)

At "Part IV" of its Order, the district court further stated:

> . . . [I]n their opposition to Honeywell's motion [Relators] revive their claim that Honeywell misrepresented the contracts as 'legal' under the relevant ESPC statutes and regulations. But a legal assertion of this type cannot form the basis of an FCA claim. While a false promise to comply with statutory or regulatory requirements might be sufficient to support an FCA claim, Honeywell's proffered view of the legality of a contract is entirely different. For any such legal assertion is not a promise or statement ***of fact*** at all, so much as it is an opinion. Taking a position on a 'disputed legal issue . . . is not enough to support a reasonable inference that [the claim] was *false* within the meaning of the False Claims Act.'

(App. 49; footnotes omitted; boldface added; emphasis in original.) (*See* n. 20, *supra.*)

Relators had not alleged Honeywell had falsely "asserted" the contracts were "legal," but rather that

Honeywell had failed to disclose that its proposed project would inevitably run afoul of the statute's aggregate payment limitations. The required "guarantee[s] of savings," were objectively false *in light of* 42 U.S.C. § 8287(a)(2)(B)'s specific payment restrictions.[22]

The Ninth Circuit nevertheless adopted the flawed reasoning of the district court, and cast the Relators' case as one limited to "two categories of alleged false statements":

> (1) false promises of savings Honeywell calculated upon the 'Electrical Baseline Adjustment,' and (2) false statements of savings calculated upon the low 'infiltration rates' assumed in Honeywell's calculations.

(App. 2.) The Ninth Circuit thus narrowed the focus of its analysis down to a search for "a lie" somewhere within Honeywell's calculations. (App. 4.) The Ninth Circuit ***never once*** addressed 42 U.S.C. § 8287(a)(2)(B) anywhere in its decision.

Instead, the Ninth Circuit couched its falsity analysis within the parameters of Honeywell's professed subjective "understanding":[23]

> At the time Honeywell prepared its proposals, it understood that the government was independently planning to address its electricity needs with a separate 'privatization' plan, and, for accounting purposes, the increased

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[22] SAC at ¶ 13, at 5, D. Alaska, Case No. 3:07-cv-215, Doc. 101, Aug. 13, 2014.

[23] *See* section I.A., *supra*.

> electricity costs were to be allocated to *that* project, not to the Honeywell Energy Savings Performance Contract ("ESPC").

(App. 3; emphasis in original.). *See* I.A., *supra*.

Had the Ninth Circuit examined 42 U.S.C. § 8287(a)(2)(B), it would have been apparent Honeywell's proffered excuse entirely begs the question. Given the payment limitations placed upon a federal agency's *aggregate* utility costs, in order to present an economically feasible ESPC to the Army, the additional costs which would later have to be paid for electricity could not be ignored. This is not a question of "proper accounting methods" (App. 4), but of mandatory statutory requirements.

Honeywell's promised savings were not false because of bad arithmetic, or any kind of "accounting" error, but because the proposed project, from its inception, could not produce the kind of true savings the statute demanded. Moreover, neither Honeywell's disclosures of its calculations nor its disclosures of its subjective "assumptions" alter that objective reality.

3. Disclosure Cannot Magically Transform Objective Falsity into Truth.

The appellate court concluded "Honeywell's statements of the energy baseline and the expected savings were not objectively false" (App. 3, n. 2) because "Honeywell disclosed the assumptions and math underlying

its estimates."[24] Although the appellate court stated it was not deciding whether the "government knowledge" concept can serve to "negate" the element of falsity, it failed to recognize its adopted approach followed the same path.

The Ninth Circuit only examined information the Government "possessed," including information concerning Honeywell's subjective explanations of its "assumptions," without addressing the misleading manner in which such information was provided, or the undisputed fact that government personnel were indeed misled. The Ninth Circuit thus turned the clock back to 1985 and judicially re-enacted the discarded "government knowledge" bar, while still leaving the essential falsity question in this case unanswered.

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[24] The appellate court's reliance upon *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 328 (9th Cir. 1995) was misplaced. The Ninth Circuit cited *Butler* for the proposition that "statements were 'not false' where they 'actually disclose[d] what [the relator] claim[ed] they conceal[ed].' " (App. 3.)

In *Butler*, however, the relator alleged a written report was false because it stated radios to be used in military helicopters had been "successfully demonstrated" and "because the report did not provide the results of the tests in the Test Plan." The *Butler* court found, however, the report said nothing about "successful demonstration" and in fact did disclose that the test report would not be "in exact accord" with the test plan.

Thus, the *Butler* court made an objective determination that the report did not contain the assertion the relator had alleged it contained, and the information which the relator had alleged was lacking had actually been included. Here, by contrast, the Ninth Circuit *never addressed* what the Relators alleged had been concealed.

Are guaranteed "savings" which will actually result in higher aggregate utility costs true "savings" under 42 U.S.C. § 8287(a)(2)(B)? If the answer to that question is no, then the disclosures of Honeywell's assumptions and calculations cannot alter that conclusion.

Honeywell's promises were objectively false when made, and they remained false even after the project's inherent inability to comply with the statutory payment restrictions was later revealed.

II. The Ninth Circuit's Mistaken Approach to Materiality Contravenes *Escobar* and Conflicts with Its Sister Circuits.

A. The Ninth Circuit's Dispositive Single-Factor Analysis Repudiates *Escobar*'s Holistic Approach.

As the First Circuit Court stated on remand in *Escobar*:

> The language that the Supreme Court used in *Escobar II* makes clear that courts are to conduct a holistic approach to determining materiality in connection with a payment decision, with no one factor being necessarily dispositive. As the Court observed, 'materiality cannot rest "on a single fact or occurrence as always determinative."' *Escobar II*, 136 S.Ct. at 2001 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39, 131 S.Ct. 1309, 179 L.Ed.2d 398 (2011)).

United States ex rel. Escobar v. Universal Health Services, Inc., 842 F.3d 103, 109 (1st Cir. 2016).

Here, however, the Ninth Circuit did just that. The appellate court initially noted: "[T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive" (App. 5; quoting *Escobar*, 136 S.Ct. at 2003.) Yet because the appellate court *never considered* 42 U.S.C. § 8287(A)(2)(B), the Ninth Circuit did not address the "condition of payment" issue which *Escobar* had expressly identified as a factor which is relevant, though not dispositive, to materiality.

Instead, the appellate court stated as follows:

> Indeed, 'if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.' *Escobar*, 136 S.Ct. at 2003. Here, the Army began paying Honeywell's claims in 2003, and continued up to at least 2008, despite being aware of Relators' fraud allegations since 2002, the results of its own audit since 2003, and the problems with the infiltration rates since 2004. Accordingly, Relators also failed to raise a triable issue as to the element of materiality on the 'demanding' standard established in *Escobar* and *Kelly*.[25]

(App. 5.)

The appellate court looked to one factor only – the payments made after the Government realized it had

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[25] *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 334 (9th Cir. 2017).

no other option – and considered that factor alone as sufficient justification to conclude materiality was lacking.

As the Fourth Circuit recognized in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916 (4th Cir. 2003), exclusively focusing on whether the government made payments after learning of the fraud, rather than assessing materiality as of the time when the false statement or fraudulent conduct occurred, would mean a "contractor could never be held liable under the FCA if the governmental entity decides it should continue to fund the contract." Indeed, the more important the public policy interest to be protected by continued payment, the more likely it would be the defendant would escape liability.[26] The FCA would effectively be gutted.

In a fraud-in-the-inducement action, the "original fraud" which causes the ultimate payment arises from the "false statement or fraudulent course of conduct" which initially induced the government's decision to enter into the contractual arrangement.[27] Thus, the

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[26] This case illustrates the pernicious consequences which result from fraud-in-the-inducement. Once the Army was "on the hook" contractually, the longer the truth remained hidden, the more difficult it became to extricate itself from a situation involving multi-million-dollar termination fees and an incomplete heating system, while still bearing responsibility for protecting those on base from oncoming winters.

[27] *Hendow*, 461 F.3d at 1173-1174; *Marsteller*, 880 F.3d at 1314-1315. *See also United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 915 (7th Cir. 2005) ("The statute requires a

question of materiality concerns whether the falsity involved in Honeywell's "guarantee[s] of savings" was capable of influencing the Government's decision to initially award the Task Orders.[28] Multiple factors support the conclusion that it was.

The ability of an ESPC project to pay for itself goes "to the very essence of the bargain." *Escobar*, 136 S.Ct. at 2003, n. 5. A federal agency's authority to enter into an ESPC arrangement is dependent upon compliance with the terms of 42 U.S.C. § 8287, and the payment restrictions of § 8287(a)(2)(B) are mandatory. Thus, had the Army known at the time Honeywell's proposed project could not satisfy those requirements, the Army's contracting officer would have lacked legal authority to make the Task Order awards.

Furthermore, although subsequent payment can be a factor which weighs against materiality, nothing in *Escobar*'s language makes that sole factor dispositive, or precludes a court from considering the

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causal rather than a temporal connection between fraud and payment.").

[28] *See* 31 U.S.C. § 3729(b)(4) ("the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"); *Escobar*, 136 S.Ct. at 2002-2003 (common law materiality similarly "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation"). *See also United States v. Triple Canopy, Inc.*, 775 F.3d 628, 639 (4th Cir. 2015) ("Materiality focuses on the 'potential effect of the false statement when it is made, *not on the actual effect of the false statement when it is discovered*' "; emphasis in original, internal citation omitted).

circumstances surrounding such a subsequent occurrence. *Escobar*, 842 F.3d at 110.

Justice Thomas' comments concerning when "government knowledge" could be relevant to materiality were conditioned upon payment being made "in full," and only after the government has "actual knowledge" of the fraud. Even assuming such foundational facts were established, payment was described only as "very strong evidence," not as conclusive proof of a lack of materiality. *Escobar*, 136 S.Ct. at 2003-2004. Thus, although payment may, in certain circumstances, give rise to a reasonable inference of a lack of materiality, nothing in *Escobar* makes payment sufficient, standing alone, to automatically "negate" all other evidence supporting a contrary conclusion.

In a case such as this, the question of materiality is whether the contracts would have been awarded in the first place *if* the Army had known the full truth, and it defies common sense to maintain the Army would have still made the two Task Order awards, which it believed would result in substantial real savings (App. 89-92), had it known at the time the true result would actually be *increased* aggregate utility costs, in violation of the authorizing statute. The Ninth Circuit's assumption that payment is invariably conclusive proof of the Government's approval of a defendant's prior actions is simply incorrect.

B. A Sharp Conflict Exists Between the Ninth and First Circuit Regarding the Significance of an Underlying Legal Requirement to FCA Materiality.

The Ninth Circuit stated as follows:

> Relators attempt to distinguish *Escobar* on the basis that the noncompliance here was not 'minor or insubstantial.' But *Escobar*'s rule applies to substantial noncompliance (which is not sufficient to establish materiality) '*in addition*' to 'insubstantial' noncompliance. *See Escobar*, 136 S.Ct. at 2003 (emphasis added).

(App. 5, n. 5.)

That the Ninth Circuit viewed the comment in *Escobar* ("if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material")[29] as establishing a "rule" is itself noteworthy. Given the context in which this illustrative comment was made, and that *Escobar* did not involve any issue which made it necessary to the decision, this language has been correctly described as dicta.[30] Dicta found in a Supreme Court opinion commands respect, but to accord dicta the status of a controlling rule of law goes too far.

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[29] *Escobar*, 136 S.Ct. at 2003.

[30] Sylvia, *supra* n. 4, at 266.

The Ninth Circuit has not only rejected the "holistic" approach the First Circuit employed by following this Court's guidance in *Escobar*[31] but has further rejected the First Circuit's position that the importance of a particular legal requirement can be "strong evidence that a failure to comply" would be sufficient to influence the behavior of the government. *Escobar*, 842 F.3d at 110.[32]

Where the Ninth Circuit has fundamentally misconstrued *Escobar* and simultaneously set itself at odds with its sister circuits on such a significant issue as the determination of FCA materiality, the further guidance of the Supreme Court is needed.

III. Use of the "Government Knowledge" Concept to "Negate" Scienter Raises Important Recurring Questions with Wide Implications.

A. The Judiciary Should Not Repeat the "Big Mistake" That Gutted the FCA in 1943.

As Senator Grassley pointed out, federal courts applying the judicially-created "government knowledge" doctrine are in danger of re-creating the "big mistake" Congress made when it enacted the 1943

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[31] *See also United States v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822, 831 (6th Cir. 2018) (FCA materiality analysis is "holistic").

[32] *See also United States ex rel. Winkelman et al. v. CVS Caremark Corp*., 827 F.3d 201, 211 (1st Cir. 2016).

jurisdictional bar. (App. 81; 84.) That provision was enacted following issuance of *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546, 63 S.Ct. 379, 87 L.Ed. 443 (1943), which held, *inter alia*, that there was nothing in the FCA at that time which would prevent a relator from filing suit based on information copied from a federal indictment. The "government knowledge" jurisdictional bar precluded FCA *qui tam* actions "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).

As the Third Circuit noted:

> The implicit logic of the pre-1986 law was that if the government had the relevant information before the plaintiff initiated suit, then the government must be aware of the false claims and didn't need the assistance of private parties to ferret them out.

United States ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 408 (3d Cir. 1999) (superseded by statute on another ground).

Because contractors "were almost always able to find some government official somewhere who had *some* knowledge of the fraudulent activities involved,"[33] after this enactment, "qui tam actions under

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[33] Helmer, *supra* n. 4, at 72; emphasis in original.

the False Claims Act were rarely viable"[34] and "In the years that followed the 1943 amendment, the volume and efficacy of qui tam litigation dwindled."[35]

1. Mere Disclosure of Data Is Not Equivalent to the Government's Actual Knowledge of an Underlying Violation.

The assumption that all the Government needed was possession of information proved to be woefully incorrect. Government personnel who receive such information may be unaware of its significance,[36] or unable,[37] or even unwilling[38] to respond effectively. Nor

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[34] Sylvia, *supra* n. 4, at 55.

[35] *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010).

[36] *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 408 (3d Cir. 1999) (a government official "may not recognize the connection between the information and a particular false claim"); *United States v. Guy*, 257 Fed. App'x 965, 968 (6th Cir. 2007) (government may be aware of some information, but not the information which demonstrates the claim is false). As Senator Grassley pointed out, the Government may "possess" information and still lack actual knowledge of fraud. 164 Cong. Rec. at S893; (App. 85-86.).

[37] *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008) (government is "entitled to guard the public fisc against schemes designed to take advantage of overworked, harried, or inattentive disbursing officers"); *Cantekin*, 192 F.3d at 408 ("the government lacks the resources to investigate and prosecute all false claims even when the government has information revealing fraud").

[38] A government official "may have an interest in not bringing the fraud to light for a number of reasons, such as an interest in protecting the official's or the agency's reputation" (*Cantekin*,

does the Government possess infinite resources to monitor and triple-check everything a contractor does. Even when those within the Government with authority to act are fully aware of ongoing fraud, prosecutions of meritorious cases often cannot be pursued due to limited resources. Consequently, as Congress acknowledged in 1986: "The sad truth is that crime against the Government often *does* pay,"[39] and the old "government knowledge" defense was a major reason why.

2. The Government Knowledge Concept Must Be Treated as an Evidentiary Inference, Not a Magic Wand.

An incautious application of the "government knowledge" concept poses the same risk to effective enforcement of the FCA. The concept began simply enough as a recognition that in certain situations evidence of "government knowledge" could give rise to a reasonable inference that the defendant had not acted "knowingly" as defined in 31 U.S.C. § 3729(b)(1)(A).

To be valid, however, both the normal rules governing inferences and all three forms of FCA scienter must be considered. Thus, the inference must be drawn from a foundation of established fact and the

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192 F.3d at 408), or worse, may even be "in cahoots" with the defendant. *United States v. Amerigroup Illinois, Inc*., 488 F. Supp. 2d 719, 730 (N.D. Ill. 2007).

[39] S. Rep. No. 99-345, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268; quoting a 1981 GAO Report to Congress, "Fraud in Government Programs: How Extensive is It? How Can it be Controlled?"

circumstances must reasonably demonstrate not only that the defendant lacked "actual knowledge" of the alleged falsity, but that the defendant also did not act in "deliberate ignorance" or with "reckless disregard" for the truth or falsity of the information involved.[40]

Stated differently, the established facts must demonstrate the defendant did indeed act in honest good faith, and with the kind of reasonable prudence[41] necessary to meet the duty of limited inquiry Congress intended[42] to impose by the addition of the "deliberate ignorance"[43] and "reckless disregard"[44] standards before it can reasonably be said an inference rebutting *all three forms* of scienter has arisen. Consequently, unless the evidence first demonstrates the defendant

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[40] 31 U.S.C. § 3729(b)(1)(A).

[41] For example, Honeywell did not rely upon instructions received directly from the Contracting Officer or upon published DoD policy statements (App. 66-79) in "assuming" the Army had a "privatization" plan already in place, but instead upon instructions it claims to have received from Paul Knauff, a civil employee of the Army who worked as a utilities engineer and was tasked with providing Honeywell with raw data concerning Ft. Richardson's energy use. Knauff, who had no prior experience with ESPC projects, denied he had instructed Honeywell on how it should carry out its baseline calculations. [ER 309.] Whether Honeywell acted in good faith and with reasonable prudence in supposedly relying upon Mr. Knauff as an authoritative source on DoD policy and the Army's future plans is a question the Ninth Circuit refused to address. (App. 4-5, n. 3.)

[42] S. Rep. No. 99-345, at 3; H. Rep. No. 99-660, at 21.

[43] *See* 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (statement of FCA co-sponsor Rep. Berman).

[44] *See* 132 Cong. Rec. S11244 (daily ed. Aug. 11, 1986) (statement of co-sponsor Sen. Grassley).

has disclosed *all* pertinent information and has done so in a manner consistent with good faith and reasonable prudence, the required basis for the inference is lacking.

B. The Ninth Circuit's Approach Short-Circuits the Required Tripartite Scienter Analysis of 31 U.S.C. § 3729(b)(1)(A).

Mere disclosure of information to someone within the government is therefore insufficient. If such disclosure is incomplete, untimely, made in a piecemeal fashion, or under circumstances in which the defendant is aware the recipients of the information do not understand its significance, the foundational facts do not give rise to an inference of either good faith or reasonable prudence.

Yet here the Ninth Circuit reduced the required analysis to a simplistic equation where "disclosure = government knowledge," without addressing any of the evidence indicative of a lack of good faith or reasonable prudence on Honeywell's part, and without addressing the consistent testimony of government witnesses that they did ***not*** know at the time the contracts were awarded that: (1) the baseline had been improperly calculated, contrary to regulatory requirements; (2) the "savings" the project would produce[45] would be

[45] The Government's understanding is reflected in the letters requesting the award of the two Task Orders be made, in which the anticipated savings are set forth in positive terms and specific amounts. (App. 89-92.)

outstripped by increased costs for electricity; or (3) the project was therefore fundamentally incapable of producing the kind of aggregate savings necessary in order to comply with 42 U.S.C. § 8287(a)(2)(B).

Similarly, with regard to the "infiltration rates," the appellate court looked only to the initial government "approval" of Honeywell's rates (App. 7), which was given at a time when government personnel did ***not*** know the rates did not conform to the actual conditions of the 1950s era buildings on base, but were rates for excellent new tight construction. [ER 1073.] The testimony of the government engineer responsible for reviewing Honeywell's rates was that, had he known Honeywell's projections were erroneous, he would not have recommended the subsequent modification ("Mod 2"). [ER 96.] Yet the Ninth Circuit disregarded this evidence and never questioned whether Honeywell's purported excuse for employing the erroneous rates could pass muster under all three forms of FCA scienter.

This approach, in which the legal requirements under which Honeywell was required to operate were persistently ignored, while Honeywell's subjective justifications for its actions were accepted at face value, and without consideration of the Relators' contrary evidence, carries the Ninth Circuit's analysis far outside the normal boundaries of an evidentiary inference, and into a circumstance where a defendant need only show someone within the Government somehow "possessed" the information, but not that those within the government actually understood its significance.

The Ninth Circuit's decision is therefore in conflict with earlier cases such as *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000) (summary judgment denied where there was not a complete sharing of information and cooperation with the government) and *United States ex rel. A+ Homecare, Inc. v. Medshares Management Group, Inc.*, 400 F.3d 428, 454, n. 21 (6th Cir. 2005) (failure to disclose all pertinent information is inadequate) which correctly addressed such evidence within the framework of an evidentiary inference.

Contractors whose conduct is inconsistent with the good faith and reasonable prudence Congress demanded by enacting 31 U.S.C. § 3729(b)(1)(A)(ii) and (iii) are not entitled to a dispensation at the hands of the judiciary, and when it becomes necessary for Senator Grassley, a co-sponsor of those critical 1986 amendments, to take to the Senate floor to warn against the increasingly corrosive effect of the "government knowledge" concept, the matter is ripe for review by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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