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Whistleblower Defense Alert: Fourth Circuit's Opinion Shows Influence of Government's Decision to Intervene on Court's Determination of Materiality

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On January 8, 2015, the United States Court of Appeals for the Fourth Circuit reinstated the government's False Claims Act (FCA) claims in *United States v. Triple Canopy, Inc.*, No. 13-2190. In reversing the district court's dismissal of the government's case, the Fourth Circuit highlighted, both explicitly and implicitly, the importance of the government's decision to intervene in the case. While most courts have said that they draw no significance from the government's presence or absence, the Fourth Circuit has previously noted the absence of the government as one of the reasons to find that breaches of contract alleged by a relator were not material. The Fourth Circuit's recent decision in *Triple Canopy* shows that the converse is also true—the court seemed more willing to find that the complaint adequately alleged the contractual breaches were material because the government had intervened. From the perspective of potential *qui tam* defendants, the court's reasoning highlights the importance of convincing the government not to intervene. The decision also stands as a warning to defendants in intervened cases. When the government has intervened, defendants should think carefully about whether to file a motion to dismiss and on what ground.

The case arose out of contract in which Triple Canopy agreed to provide security services at the Al Asad Airbase in Iraq. The contract called for a guard force that satisfied 20 "responsibilities," including rifle marksmanship. Although payment was not expressly conditioned upon compliance with any of the responsibilities, the contract required Triple Canopy to include a scorecard reflecting a qualifying marksmanship score in the personnel file of each guard. The government's complaint alleged that, after Triple Canopy's managers determined that the hired guards could not and would not be able to obtain a qualifying marksmanship score, Triple Canopy simply created false scorecards and included them in the personnel files. Each month, Triple Canopy submitted a request for payment that listed the number of guards employed, and the government paid the agreed fixed price for each

guard. Triple Canopy neither expressly certified compliance with any contractual term, nor provided the false scorecards to the government.

One of the employees allegedly directed to falsify the scorecards filed a *qui tam* complaint and the government intervened. The district court dismissed the government's claims, finding that the government failed to plead that Triple Canopy submitted a demand for payment that contained an objectively false statement or that the contracting officer ever reviewed (or knew about) the falsified scorecards.

In reversing the district court, the Fourth Circuit noted that the lack of express certification was not dispositive because “[c]ourts infer implied certifications from silence where certification was a prerequisite to the government action sought.” Thus, the proper test was whether the government had sufficiently alleged that its contractor had “withheld information about its noncompliance with material contractual requirements.” The court noted that the FCA defines a materially false statement as one that had “a natural tendency to influence, or be capable of influencing’ the government’s decision to pay” (quoting 31 U.S.C. § 3729(b)(4)). The Fourth Circuit held that the proper focus of the “natural tendency” test was on Triple Canopy’s intent in creating the scorecards and the potential effect of the falsified scorecards if reviewed by the government and did not depend on whether the contracting officer actually reviewed the falsified scorecards. Under this approach, the court stated that “common sense” necessitated its holding that the government sufficiently pleaded materiality because “the government’s decision to pay a contractor for providing security in an active combat zone would naturally be influenced by knowledge that the guards could not, for lack of a better term, shoot straight.”

In reaching this decision, the Fourth Circuit acknowledged that there is a fine and sometimes difficult to distinguish line between breaches of contract, which are not actionable under the FCA, and a knowing breach of a material contract term, which rises to the level of fraud. It also conceded that in two prior decisions, it had instructed lower courts that “mere allegations of poor and inefficient management of contractual duties” (*U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 377 (4th Cir. 2008) and “garden-variety issues of contractual performance” involving “this or that construction defect and this or that corrective measure” (*U.S. ex rel. Owens v. First Kuwaiti Gen. Trading and Contracting Co.*, 612 F.3d 724, 729, 734 (4th Cir. 2010)) did not rise to the level of fraud. The panel attempted to distinguish *Wilson* by noting that the contractual requirement at issue there was whether the defendant had a vague and undefined “maintenance program,” whereas Triple Canopy’s marksmanship requirement was objectively verifiable (23 rounds out of 40 from a distance of 25 meters). The court made no attempt to distinguish *Owens*, which involved construction defects—something that courts determine on a regular basis. Instead, the Fourth Circuit acknowledged (in a footnote) the real reason why it believed the plaintiff had satisfied the FCA’s materiality requirement: in this case, unlike *Wilson* and *Owens*, “the government has clearly expressed its displeasure with Triple Canopy’s actions by prosecuting this action.” In other words, this case was different because it was being prosecuted by the government and not a *qui tam* relator.

This decision confirms what FCA defendants have long believed—the government’s decision to intervene affects how courts rule on motions to dismiss. As the Fourth Circuit’s opinion suggests, the government’s intervention in FCA actions predicated on breaches of contract may *ipso facto* satisfy the pleading standard for materiality. In contrast, when the government declines to intervene, courts draw significance not only from that decision, but also from any corresponding declination by the government to seek any contractual remedy under the relevant contract. Many courts, including the Fourth Circuit, perceive

relators in such cases to be meddling in the contractual relationship of third parties in order to secure a financial windfall and view their allegations of materiality with great skepticism.

Triple Canopy provides two practical implications for FCA defendants. The first is obvious—defendants should work hard to convince the government not to intervene. This effort includes not only advocacy, but also cooperation with the government during its investigation, and if warranted, negotiation to resolve the underlying non-compliance through applicable contractual vehicles.

The second implication is less obvious, but equally critical. If the government does intervene, defendants should carefully consider whether to file a motion to dismiss that raises issues like scienter and materiality. An unfavorable decision on an issue of law at the motion to dismiss stage can impose greater obstacles at summary judgment. *Triple Canopy* provides a good example. The government's allegation that Triple Canopy falsified records to conceal the fact that its guard force literally could not shoot straight presents what are, to put it charitably, "bad facts." And, at the motion to dismiss stage, the government's allegations are the only facts. When considering the issue of materiality based solely on the pleadings, the Fourth Circuit unsurprisingly concluded that it was a material omission for Triple Canopy to "knowingly employ guards who were unable to use their weapons properly."

Evidence obtained in discovery, however, could refute that "common sense" notion. For example, the contracting officer could testify that he or she never considered reviewing the scorecards because marksmanship was a minor requirement. Discovery could also reveal that no guard at the base ever fired a rifle, or that guards spent a significant percentage of their working time not carrying a rifle, or that actual security was provided by the military while the guard force assumed the administrative functions of reviewing credentials and tracking individuals coming to and leaving the base. By forgoing a motion to dismiss, the defendant may be in a better position to provide context before taking on the overarching issue of materiality. However, in *Triple Canopy*, even if the defendant is able to identify helpful facts in discovery, those facts might not be enough to convince the district court at summary judgment that the guards' lack of marksmanship was immaterial given the Fourth Circuit's sweeping opinion on that issue.

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