IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *ex rel.* Dr. Aaron J. Westrick, Plaintiffs, v. SECOND CHANCE BODY ARMOR, INC., *et al.*, Defendants.	)	Civil Action No. 04-280 (PLF)

RELATOR DR. AARON WESTRICK'S PRETRIAL REPLY BRIEF

The False Claims Act ("FCA") conspiracy claim against Toyobo Co., Ltd., Toyobo America, Inc. (collectively "Toyobo"), and Richard C. Davis has not been dismissed from this case and is still an issue to be decided at trial. The controversy around this issue is the direct result of this Court's inadvertent confusion arising from a footnote in this Court's June 14, 2017 Opinion on the United States' Motion for Reconsideration ("Reconsideration Opinion"). [Dkt. 486]. The confusion arose because years ago Judge Roberts dismissed conspiracy claims in the related case, *United States v. Toyobo Co., Ltd.* ("*Toyobo*"), but expressly allowed the conspiracy claims in *United States ex rel. Westrick v. Second Chance Body Armor, Inc.* ("*Westrick*") to survive Toyobo's motions to dismiss and for summary judgment. *Westrick*, 685 F. Supp. 2d 129, 141 (D.D.C. 2010); *Westrick*, 128 F. Supp. 3d 1, 22 (D.D.C. 2015). It is not in the interest of justice and it would constitute legal error for this Court to dismiss the FCA conspiracy claim even though Toyobo's motions to dismiss and for summary judgment on that count had been denied by Judge Roberts. It is understandable how confusion between the two motion to dismiss

opinions in the related cases could arise but it is incumbent upon this Court to ensure that any such confusion not be prejudicial to justice.

Toyobo never moved for reconsideration on Judge Robert's denial of summary judgment on the conspiracy count, the conspiracy count was never discussed, briefed, or argued during the proceedings on the United States' reconsideration motion, and it was therefore never at issue in Judge Friedman's Reconsideration Order. However, Toyobo's Response to Relator's Trial Brief [Dkt. 556] continues to pettifog this issue and attempts to create a dismissal were none existed. All of Toyobo's arguments against the inclusion of the conspiracy claim in this case are unpersuasive and Relator Westrick is attempting to clear up this confusion before any prejudicial error is made.

ARGUMENT

I. Toyobo's Motions to Dismiss and for Summary Judgment on the Conspiracy Claim in *Westrick* Were Expressly Denied and Were Never Reconsidered

It is indisputable that Judge Roberts declined to dismiss the claim of an FCA conspiracy between Toyobo and Second Chance Body Armor, Inc. ("Second Chance") in the *Westrick* case now set for trial.[1] Likewise, it is indisputable that Judge Roberts did dismiss the conspiracy count against Toyobo and all other vest manufacturers in the *Toyobo* case. *Toyobo*, 811 F. Supp. 2d 37, 51 (D.D.C. 2011). Finally, it is indisputable that Judge Roberts did not dismiss the conspiracy count concerning Second Chance and Toyobo when he issued his decision on summary judgment in the *Westrick* case.[2]

[1] Judge Roberts' denial of Toyobo's motion to dismiss is incontrovertible: "The detailed assertion about the meetings between Toyobo and Second Chance fulfills the requirements for a conspiracy claim under § 3729(a)(3) at the motion to dismiss stage in the litigation." *Westrick*, 685 F. Supp. 2d at 141.

[2] "ORDERED that Toyobo's Motion for Partial Summary Judgment in Civil Action 04-280[270] . . . be and hereby [is], DENIED in part . . . . Summary Judgment is .

According to the standards controlling his decision denying Toyobo's motions for summary judgment, Judge Roberts analyzed "the pleadings, the discovery and disclosure materials, and any affidavits" and found that a "genuine dispute as to any material fact" existed with regards to the Toyobo and Second Chance conspiracy claim and therefore Toyobo was not "entitled to judgment as a matter of law." *Id.* at 7-8 (citing Fed. R. Civ. P. 56(a)). Toyobo accepted this decision and did not move for reconsideration of this Court's decision to allow the conspiracy claim to proceed to trial.

Judge Roberts issued one consolidated decision on summary judgment discussing both cases. *Westrick*, 128 F. Supp. 3d at 4 n.1. The United States moved for reconsideration of separate portions of Judge Roberts summary judgment ruling concerning both cases. [*Westrick* Dkt. 450; *Toyobo* Dkt. 184]. This led to extensive briefing in front of this Court. Nowhere in all the briefing or argument does Toyobo request that Judge Friedman reconsider the denial of summary judgment, or the denial of its motion to dismiss, on the conspiracy claim in the *Westrick* case. In fact, besides a couple passing mentions of the conspiracy by the United States, the conspiracy claim was wholly absent from the reconsideration proceedings. [Dkt. 461 at 15 n.43; 472 at 94:21-96:2].

However, one of these passing references appears to have led Judge Friedman to include a footnote dealing with conspiracy in his Reconsideration Order. [Dkt. 486 at 7 n.8]. Despite Toyobo's argument that this footnote "expressly addressed—and dismissed—the United States' claim that there was a conspiracy between Toyobo and Second Chance," Judge Friedman did no

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. . denied as to the government's claims related to Zylon vests sold off of the GSA MAS after the 2002 contract modification. It is further ORDERED that Toyobo's Motion for Partial Summary Judgment in Civil Action 04-280[343] be, and hereby is, DENIED." *Westrick*, 128 F. Supp. 3d at 22.

such thing. [Dkt. 556 at 1]. He did not consider or discuss the summary judgment merits of the conspiracy claim. Rather, he mistakenly stated that "Judge Roberts previously rejected any such conspiracy." [Dkt. 486 at 7 n.8]. This was an inadvertent mistake as the case cited for the proposition was the *Toyobo* case in which Judge Roberts dismissed the conspiracy claims between Toyobo and all other relevant vest manufacturers **besides** Second Chance. *Toyobo*, 811 F. Supp. 2d at 51.[3] Judge Roberts unequivocally did not dismiss the Toyobo and Second Chance conspiracy claim. *Westrick*, 685 F. Supp. 2d at 141 ("The detailed assertions about the meetings between Toyobo and Second Chance fulfills the requirement for a conspiracy under § 3729(a)(3) at the motion to dismiss stage in the litigation."). This mistake in the Reconsideration Order is understandable, as the parties had submitting identical filings in the two related cases and so Judge Friedman addressed the issues on the merits as if they had been consolidated, when in fact they had not. [Dkt. 486 at 1 n.1].

This has proven to be a complicated case with many moving parts. Two cases, *Westrick* and *Toyobo*, have often been treated as if they were consolidated even though they were not. The conspiracy count remains for trial in the *Westrick* trial set to begin on March 5, 2018. The conspiracy count between Toyobo and non-Second Chance vest manufacturers does not remain in the *Toyobo* case that is not currently set for trial. Any belief otherwise simply stems from the confusion caused by the related nature of the two proceedings, the fact that the parties often

[3] It is critical to keep in mind that the complaint in the *Toyobo* case expressly excluded Second Chance from the definition of "vest manufacturer." The United States' complaints in *Toyobo* recognized the sharp distinction between the issues in the *Westrick* case and the issues in the *Toyobo* case. That complaint explicitly carved out any reference to the *Westrick* case from the *Toyobo* case. In this regard, Relator Westrick is only a party to the *Westrick* case and has no interest whatsoever in the *Toyobo* case. A point that the United States clearly made in defining the contours of the two proceedings.

briefed the two cases identically and simultaneously, and the Court's issuance of its summary judgment and reconsideration orders in a consolidated fashion.

In summary, when all the surrounding noise is stripped away, the procedural history shows clearly why the conspiracy claim remains:

1) The United States intervened in Relator Westrick's case which had asserted a conspiracy between Toyobo and Second Chance. [Dkt. 12].
2) The United States filed its own claim, which explicitly carved out the *Westrick* proceeding. All the claims and damages between Toyobo and Second Chance were only at issue in the *Westrick* case, whereas claims between Toyobo and non-Second Chance vest manufacturers were exclusively dealt with in the *Toyobo* case.
3) The conspiracy claim between Toyobo and Second Chance survived the motion to dismiss stage. *Westrick*, 685 F. Supp. 2d at 141.
4) The conspiracy claim between Toyobo and all other body armor manufacturers (except Second Chance) was dismissed in the *Toyobo* case. *Toyobo*, 811 F. Supp. 2d at 51.
5) No parties produced any documents or testimony on the record in the *Westrick* proceeding that would justify or support a dismissal of the conspiracy claim.
6) Toyobo made no mention of the conspiracy factual allegations in its statements of undisputed material facts submitted with its summary judgment motions. [Dkt. 270-2; 343-2].

7) Toyobo's motions for summary judgment on the conspiracy claim between Toyobo and Second Chance were denied. *Westrick*, 128 F. Supp. 3d at 22.

8) Toyobo never moved for reconsideration of those denials or discussed conspiracy in any brief or argument related to the United States' reconsideration motion.

9) The United States did not move for reconsideration of the conspiracy count in *Westrick* as it had not been dismissed and any such motion for reconsideration would be senseless.

10) This Court simply misstated in a footnote to its Reconsideration Opinion that Judge Roberts dismissed the conspiracy claim as to the *Westrick* case, mixing up the ruling on the conspiracy claims in the *Toyobo* proceeding (which were in fact dismissed) with the conspiracy claim remaining in the *Westrick* proceeding (that was never dismissed). [Dkt. 468 at 7 n.8].

11) The Reconsideration Opinion footnote only cites to Judge Roberts' opinion in the *Toyobo* case as authority and does not cite to any authority which would justify dismissal of the conspiracy count in the *Westrick* case. [Dkt. 468 at 7 n.8].

II. Judge Robert's Reasoning for Dismissing the Conspiracy Claim in *Toyobo* Does Not Apply to the Conspiracy Claim in *Westrick*

Toyobo is confusing the factual predicate for the conspiracy claim in *Westrick* with the factual claims concerning the conspiracy claim in *Toyobo,* thereby confusing and misleading this Court when it comes to the distinction between the vest manufacturers at issue in *Toyobo* and Second Chance in *Westrick*. In its response to Relator's Pretrial Brief, Toyobo parrots the

Reconsideration Opinion footnote and Judge Robert's original *Toyobo* opinion by arguing that a Toyobo and Second Chance conspiracy claim cannot move forward to trial. [Dkt. 556 at 1]. Or, as Toyobo puts it, "the Government cannot have its cake and eat it too by proceeding to trial on a theory that Toyobo was fraudulently inducing—and conspiring with—Second Chance at the same time." *Id.*

To be clear, the United States is alleging that Toyobo **fraudulently induced the United States Government**.[4] It is **not** alleging Toyobo fraudulently induced Second Chance.[5] This is not a lawsuit between Toyobo and Second Chance, it is a lawsuit between Toyobo and the United States Government. Therefore, the "cake eating" logic advanced by Toyobo regarding Toyobo supposedly fraudulently inducing Second Chance is wholly erroneous, misleading, and irrelevant.

The Plaintiffs and this Court have repeatedly emphasized that the relationship between Toyobo and Second Chance differs greatly from the relationships between Toyobo and the vest manufacturers in the *Toyobo* case. The differing treatment of the conspiracy claims in *Toyobo*

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[4] Toyobo should be abundantly clear of this fact as the United States' Second Amended Complaint specifically charges that "Defendants fraudulently induced the United States' purchases by withholding data and information about the defectiveness of the Second Chance Zylon vests and conspired to withhold data and information about the defectiveness of the Second Chance Zylon vest . . . ." [Dkt. 408 at ¶ 4].

[5] The United States made this distinction abundantly clear in its motion for reconsideration by stating:

> The United States **does not allege that Toyobo fraudulently induced Second Chance** to continue selling Zylon armor but rather that Second Chance and Toyobo conspired to keep information concerning Zylon degradation in armor, including Second Chance's 2001 used Zylon vest testing results, from being disclosed.
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> [Dkt. 450 at 4 n.2] (emphasis added).

and *Westrick* by Judge Roberts highlights this distinction. Unlike the other vest manufacturers, Toyobo and Second Chance worked in concert to continually deceive the United States and withhold information regarding the Zylon safety issues. Allegations regarding extensive communications, meetings, planning and rebates between Toyobo and Second Chance, among other things, directly led Judge Roberts to decide a valid conspiracy claim existed despite Toyobo's motions to dismiss and for summary judgment. *Westrick*, 685 F. Supp. 2d 129, 141 (D.D.C. 2010); *Westrick*, 128 F. Supp. 3d 1, 22 (D.D.C. 2015). Moreover, in his ruling on Toyobo's motion to dismiss in *Westrick*, Judge Roberts permitted both the fraudulent inducement and the conspiracy claims to proceed, once again proving the irrelevancy of Toyobo's "cake eating" argument.

III. The Conspiracy Allegations "Fit" With the Remaining Issues for Trial

Toyobo also argues that "the United States' conspiracy allegations do not 'fit' the remaining issues in the case." [Dkt. 556 at 1]. The example it uses to support this theory is that "Second Chance's 6% catalog guarantee had nothing to do with Toyobo or Zylon—as that language was in Second Chance's catalogs before Toyobo even began selling Zylon. Therefore, it is implausible that the 6% catalog guarantee could in any way support a conspiracy claim." *Id.* at 2. This logic completely cuts against the principles and standards that govern conspiracy claims.

As explained by the Supreme Court, "since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence, and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith v. United States*, 568 U.S. 106, 111 (2013) (citing *United States v. Kissel*, 218 U.S. 601, 610 (1910), and *Hyde v. United States*, 225 U.S. 347 369 (1912) (quotation

marks and alterations omitted)). If a conspiracy is found between Toyobo and Second Chance, Toyobo would be liable for all acts taken by Second Chance in furtherance of that conspiracy. Therefore, once Toyobo is found to have joined the conspiracy to submit false claims to the United States Government for bulletproof vests, Second Chance's inclusion of the 6% guarantee its catalog is an overt act for which Toyobo can be held liable.

Toyobo's argument that the 6% guarantee language was included long before Toyobo joined the alleged conspiracy is a red herring. Toyobo's argument seems to imply that the inclusion of the 6% guarantee language happened only once. However, while the language may have been used previously, Second Chance committed the overt act of once again specifically including the language in its 2002 catalog, which occurred after Toyobo allegedly joined the conspiracy and after Toyobo and Second Chance knew of the Zylon degradation and safety issues. Consequently, Toyobo would be liable for this act under conspiracy principles.

The conspiracy claim "fits" perfectly with the rest of the issues in this case. If Toyobo is found to have entered a conspiracy to submit false claims to the government, it should then be held liable for all the acts of its co-conspirators and be held jointly and severally liable for all damages resulting from the conspiracy.

IV. Toyobo's Procedural Arguments Are Without Merit

Toyobo next implies that the efforts of the Relator and the United States to clarify this issue before trial are improper and should have been advanced in procedural forms other than pretrial briefs. [Dkt. 556 at 2]. Regardless of these squabbles over how to characterize Relator's request, Relator Westrick believes this issue needs to be clarified before any prejudicial error occurs which would lead to years more worth of litigation. Even if the Relator's request to clarify this issue could be seen as a motion to reconsider, it would not be "belated" as Toyobo

suggests. Unquestionably, the effective granting of a motion to dismiss or for summary judgment when no proper motion was filed seeking such relief would constitute legal error. In fact, if this mistake were to continue to move forward unchecked, Relator Westrick would have 28 days after any final judgment is entered to move to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). Additionally, Relator believes that the mistake to exclude the conspiracy claim from trial would prove to be highly prejudicial. *See Huthnance v. District of Columbia*, 722 F.3d 371, 381 (D.C. Cir. 2013) ("A court confronting a trial error must ask whether the error substantially affected the outcome of the case. If the court cannot say with fair assurance the error was harmless, it must conclude the error was not").

Erroneously dismissing one of three FCA counts would impact, among other factors, the admission of evidence, jury instructions, and damages and would constitute harmful error. Therefore, Relator respectfully asked for clarification and a relatively painless fix now before the trial commences.

V. Sufficient Evidence Exists of a Conspiracy Between Toyobo and Second Chance

Toyobo finally argues that Relator and the United States did not properly take into context summary judgment standards when discussing the conspiracy claims. [Dkt. 556 at 2]. Toyobo seems to claim that the record contains insufficient evidence on the conspiracy, making summary judgment in its favor proper. However, Toyobo already had the opportunity to make this argument during its summary judgment filings, and it did not. Toyobo failed to argue against the merits of the conspiracy claim in its summary judgment motions and specifically omitted any reference to conspiracy in the accompanying statements of undisputed material facts. [Dkt. 270-2; 343-2].

Toyobo's approach was to focus on dismissing the other substantive FCA claims which were required for the conspiracy claim to move forward. As laid out in detail above, Toyobo did not prevail in this plan as this Court denied Toyobo's summary judgment requests on the conspiracy claim. *Westrick*, 128 F. Supp. 3d at 22. The Court did not, as Toyobo argues "examine[] the record and dismiss[] the claim," but in fact did the opposite. The statements of undisputed material facts for which Toyobo's motion for summary judgment was predicated, did not address the factual issues that gave rise to the conspiracy count.

Specifically, Toyobo does not contest any of the allegations made by the United States regarding conspiracy that Judge Roberts found persuasive enough for the conspiracy count to survive summary judgment. These allegations cited by Judge Roberts include: 1) "Toyobo's six million dollar 'rebate' payment to Second Chance"; 2) "Toyobo's January 2002 retraction of its earlier data showing a dramatic drop in Zylon fiber strength"; 3) Toyobo and Second Chance's decision "not to warn customers in December 2001"; 4) Second Chance "selling vests with a five-year warranty until September 2003"; and 5) "[t]he detailed assertion about the meetings between Toyobo and Second Chance." *Westrick*, 685 F. Supp. 2d at 141. A review of Toyobo's statements of undisputed material facts along with the relevant United States complaints, fully demonstrates Toyobo did not take issue with any of the factual predicates relied upon by Judge Roberts.

The simple fact is the record contains a plethora of evidence which implicates Second Chance and Toyobo in an FCA conspiracy. As general civil conspiracy principles apply to FCA conspiracy claims, Plaintiffs in this case must show "(1) that an agreement existed to have false or fraudulent claims allowed or paid by the United States; (2) the [defendants] willfully joined that agreement . . .; and (3) that one or more conspirators knowingly committed one or more

overt acts in furtherance of the object of the conspiracy." *United States ex rel. Miller v. Bill Harbert Intern. Const., Inc.*, 608 F.3d 871, 899 (D.C. Cir. 2010).

The reason Toyobo did not contest the facts supporting the conspiracy count is obvious. Those facts are highly damaging to Toyobo, and Toyobo clearly made a strategic decision to keep those facts out of the summary judgment adjudication, so they could focus on more technical issues for which they calculated a stronger claim for dismissal existed. *See Noble Energy, Inc. v. Salazar*, 691 F. Supp. 2d 14, 23 n.6 (D.D.C. 2010) (holding arguments not raised in summary judgment were waived).

Evidence in the record shows that Toyobo and Second Chance agreed to work together to continue selling Zylon bulletproof vests to the United States Government while preventing the disclosure of the degradation and safety issues associated with them. It also shows that overt acts were carried out to implement this plan. Relator believes that the evidence is therefore more than sufficient for a reasonable jury to find Toyobo liable an FCA conspiracy violation.

Although Judge Roberts' order denying Toyobo's motion to dismiss on the conspiracy count is more than sufficient to defeat Toyobo's current arguments, Relator Westrick would like to call the Court's attention to a small sampling of the extensive documentation that will be presented to the jury in this case to establish the factual predicate for an FCA conspiracy:

1) Emails from Toyobo to Second Chance shortly after they were made aware of adverse Zylon tests citing the two's "continuous effort on spreading ZYLON all over the world" and describing Second Chance as Toyobo's "best partner" which illustrates the agreement between the two companies to sell Zylon vests despite the safety issues. (Ex. 1).

2) Confidentiality Agreement between Second Chance and Toyobo to prohibit disclosure of Zylon testing data to any third party, demonstrating the intent to withhold Zylon degradation and safety data from the United States. (Ex. 2).

3) Letter confirming that the Confidentiality Agreement extended to disclosures to all governmental agencies, further showing the co-conspirators' intent to withhold Zylon data from the United States. (Ex. 3).

4) Notes from the "Crisis Management Meeting" between executives from Toyobo and Second Chance on December 13, 2001 showing the joint decision making of the two companies and the desire that "Toyobo and Second Chance must act together and immediately" to deal with issues and promote Zylon. (Ex. 4).

5) Letter from Second Chance President Richard Davis to Toyobo on December 20, 2001 showing the openness of disclosure and communication between the co-conspirators. (Ex. 5).

6) Email from Toyobo to Second Chance on December 20, 2001 proposing an initial offer for an increase in rebate payments to Second Chance for continuing to purchase Zylon even after both companies were aware of Zylon issues. (Ex. 6).

7) Presentation slides from February 1, 2002 meeting between Toyobo and Second Chance in which Toyobo offers six million dollars in additional compensation for the continuing promotion of Zylon vests after adverse testing results. (Ex. 7).

8) Final agreement between Toyobo and Second Chance approving the payment of increased rebates from Toyobo to Second Chance in exchange for Second Chance "promot[ing] the sale of [Zylon] fiber to be used in the manufacturing of ballistic jackets for the police force." This agreement totaled $12.75 million in estimated

additional compensation to Second Chance, including retroactive rebates, and highlights the incentives of both parties to continue in the conspiracy. (Ex. 8).

9) Report documenting the payment of retroactive rebates from Toyobo to Second Chance for Zylon used in vests Second Chance had already sold from January 1, 2002 through March 31, 2002, confirming that both parties, to their benefit, continued in the conspiracy. (Ex. 9).

CONCLUSION

For the above stated reasons, and the reasons stated in Relator Westrick's Pretrial Brief [Dkt. 531], this Court should clarify that the allegations set forth in Count 3 of the Second Amended Complaint of the United States of America remain as issues to be decided by the jury.

Sincerely,

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February 20, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on that on this 20th day of February, 2018, I caused to be served by the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system a true copy of Relator's Pretrial Reply Brief to counsel for the United Sates and Defendants Toyobo America, Inc. and Toyobo. Co. Ltd. I also certify that I caused to be served by U.S. First Class Mail postage prepaid and e-mail on the following party who does not receive CM/ECF filings:

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