
In the
UNITED STATES COURT OF APPEALS
for the Ninth Circuit

No. 00-17230

UNITED STATES OF AMERICA ex rel. ASHOK BHATNAGAR,
Plaintiff/Appellant,
vs.
KIEWIT PACIFIC CO.,
STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Defendants/Appellees.

Appeal from the Judgment of the
United States District Court for the
Northern District of California
Honorable Marilyn Hall Patel
(USDC Case No. C98-02068 MHP)

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION 1

 1. BASIS FOR SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT 1

 2. BASIS FOR JURISDICTION IN THE COURT OF APPEAL 1

 3. TIMELINESS OF APPEAL 1

ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

 1. NATURE OF THE CASE 2

 2. COURSE OF PROCEEDINGS AND DISPOSITION BELOW 3

STATEMENT OF FACTS 4

 A. THE ROLE OF THE PARTIES IN THE PROJECT 4

 B. THE CONTRACT 5

 C. FEDERAL GOVERNMENT CHARGED FOR JANITORIAL SERVICE, COPIER REPAIRS, AND SWPPP WORK UNDER CONTRACT CHANGE ORDER NO. 1, WHICH WAS OSTENSIBLY NECESSARY TO MAINTAIN ROADWAY 9

 D. KIEWIT CONTENDS WORK APPROPRIATELY BILLED BECAUSE WOOD APPROVED IT, AND BECAUSE SWPPP WORK BEYOND SCOPE ORIGINALLY ANTICIPATED 12

ARGUMENT 18

 1. SUMMARY OF ARGUMENT 18

 2. ON APPEAL, COURT REVIEWS GRANT OF SUMMARY JUDGMENT *DE NOVO*, DRAWING ALL JUSTIFIABLE INFERENCES IN FAVOR OF NONMOVANT 19

 3. REASONABLE JURY COULD FIND THAT KIEWIT KNOWINGLY SUBMITTED FALSE CLAIMS, WHERE CLAIMS FOR ROOFING, COPIER REPAIRS, AND STORM WATER PROTECTION WERE ALL MADE UNDER CHANGE ORDER PURPORTEDLY PAYING FOR ROADWAY MAINTENANCE, AND ALL SWPPP WORK WAS COVERED UNDER ORIGINAL CONTRACT PRICE 20

a.	Overview of False Claims Act	20
b.	Claim Was Made Against United States .	21
c.	U.S.D.O.T., Caltrans Determined that Claims Were False	23
d.	Kiewit Knowingly Submitted False Claims	25
CONCLUSION	28

TABLE OF AUTHORITIES

STATUTES:

28 U.S.C. § 1291 1

31 U.S.C. § 3729 1

31 U.S.C. § 3729 (a) (1) 21

31 U.S.C. § 3729 (b) 21, 26

31 U.S.C. § 3729 (b) (3) 21

31 U.S.C. § 3729 (c) 22

31 U.S.C. § 3732 (a) 1

31 U.S.C. §§ 3729-3733 3, 20

Federal Rule of Appellate Procedure 4(a) (1) (A) 1

Federal Rule of Civil Procedure 12(b) (1) 3

Federal Rule of Civil Procedure 12(b) (6) 3

CASES:

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986) 19

*BMY-Combat Systems Division of Harsco Corporation v.
United States*
38 Fed. Cl. 109 (1997) 24, 26

Mackinney v. Nielsen
69 F.3d 1002 (9TH Cir. 1995) 19

<i>McCarthy v. Mayo</i>	
827 F.3d 1310 (9th Cir. 1987)	19
<i>United States ex rel. Anderson v. Northern Telecom, Inc.</i>	
52 F.3d 810 (9 th Cir. 1995)	20
<i>United States ex rel. Hopper v. Anton</i>	
91 F.3d 1261 (9 th Cir. 1996)	20, 21
<i>United States ex rel. Marcus v. Hess, et al.</i>	
317 U.S. 537 (1943)	22
<i>United States ex rel. Oliver v. The Parsons Company</i>	
195 F.3d 457 (9 th Cir. 1999)	21, 24, 25, 27
<i>United States v. Mack, No. H-98-1488</i>	
2000 U.S. Dist. LEXIS 17367 (S.D. Tex. 2000)	26
<i>Wang ex rel. United States v. FMC Corporations</i>	
975 F.2d 1412 (9 th Cir. 1992)	25, 26

STATEMENT OF JURISDICTION

1. BASIS FOR SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT

The District Court had original jurisdiction of this action pursuant to 31 U.S.C. § 3732(a), in that appellant had filed a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729 *et seq.*

2. BASIS FOR JURISDICTION IN THE COURT OF APPEAL

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 on this appeal from a final decision of the District Court dismissing the action with prejudice as to all defendants and disposing of all claims with respect to all parties.

3. TIMELINESS OF APPEAL

The District Court entered Judgment in this case on September 22, 2000, (Clerk's Docket No. (CD) 55; Excerpts of Record (ER) 458), and appellant filed his Notice of Appeal on October 20, 2000, (CD 58; ER 459), making this appeal timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Could a reasonable jury conclude that a contractor had knowingly submitted false claims to the government when 89 of the 280 claims it submitted, representing over \$41,000, were totally unrelated to the type of work for which it was purportedly seeking reimbursement.

2. Could a reasonable jury conclude that a contractor had knowingly submitted false claims to the government when it submitted claims purported for extra work which was already included in the original contract price.

STATEMENT OF THE CASE

1. NATURE OF THE CASE

Relator Ashok Bhatnagar is a Senior Transportation Engineer employed by the State of California, Department of Transportation (Caltrans), who was involved in a federally-funded project to improve Route 238 in this District. Bhatnagar brought suit against Caltrans and

the main contractor on the project, Kiewit Pacific Company (Kiewit), alleging violations of the False Claims Act, 31 U.S.C. §§ 3729-3733.

2. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Bhatnagar filed his complaint on May 21, 1998. (CD 2, ER 1.) The United State of America declined to intervene on March 31, 1999, and the complaint was unsealed on April 5, 1999. (CD 9, 10.) Defendant Kiewit filed its answer on June 22, 1999, and defendant Caltrans answered on June 25, 1999. (CD 12-13, ER 8.)

On March 27, 2000, defendant Caltrans moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). (CD 23-25, 41.) Defendant Kiewit filed a motion for summary judgment on August 7, 2000. (CD 34-38, 48-51, ER 17-329.) Relator Bhatnagar opposed both motions. (CD 26-27, 33, 42-43, ER 330-408.)

Chief Judge Marilyn Hall Patel heard argument on the motions on September 11, 2000, and granted both motions on September 22, 2000. (CD 54; ER 443.) The

court concluded that, while there may have been financial irregularities in the handling of Kiewit's extra work bills, they amounted only to a contract dispute, rather than an appropriate claim under the False Claims Act. (Memorandum and Order p. 10, ER 452.)

Bhatnagar appeals only from the grant of summary judgment in favor of Kiewit.

STATEMENT OF FACTS

A. THE ROLE OF THE PARTIES IN THE PROJECT

Ashok Bhatnagar is a Senior Transportation Engineer who has been employed by the State of California, Department of Transportation (Caltrans) since 1984. (Declaration of Relator Ashok Bhatnagar In Opposition to Kiewit Pacific Co.'s Motion for Summary Judgment (Bhatnagar Dec.) ¶ 2, CD 43, ER 330.)

Kiewit was the general contractor on Caltrans Contract No. 04-131124, involving roadway construction and modifications to BART tracks along State Highway 238 in San Leandro, California (the Project).

(Declaration of Chris Villa In Support of Kiewit Pacific Co. s Motion for Summary Judgment (Villa Dec.) ¶ 2, CD 36, ER 104-05; Declaration of Lloyd Wood In Support of Kiewit Pacific Company s Motion for Summary Judgment (Wood Dec.) ¶ 3, CD 37, ER 218); Parties Joint Statement of Undisputed Material Facts and Supporting Evidence (Undisputed Material Fact) 1, CD 45, ER 409.)

Lloyd Wood was the Resident Engineer for Caltrans on the Project, responsible for overseeing the construction and possessing authority to approve contract change orders up to \$20,000. (Wood Dec. ¶ 2, ER 217.) Bhatnagar was an Assistant Resident Engineer on the Project, responsible for reviewing and processing extra work bills submitted by Kiewit, (Bhatnagar Dec. ¶¶ 3, 5, ER 330-31), while Chris Villa was the Project Manager for Kiewit, responsible for billings and change order requests. (Villa Dec. ¶¶ 2-3, ER 104-05.)

B. THE CONTRACT

Contract No. 04-131124 (the Contract) specified on its title page that it was Federal Aid Project

*ACNH-P238(005), and page 15 contained a warning about the use of Federal funds for lobbying purposes by anyone involved in a Federal-aid contract. (Villa Dec. ¶ 2, Ex. A pp. 1, 15, ER 104-05, 111, 122.) Kiewit was required to erect large signs at the site identifying the sources of funding on the Project, including Federal Highway Trust Funds. (Villa Dec., Ex. A p. 32, ER 126.)¹

The Contract incorporated Caltrans Standard Specifications and Special Provisions dated July 1992 (Standard Specifications), detailing procedures regarding payment for any new and unforeseen work which Caltrans required Kiewit to perform. (Bhatnagar Dec. ¶¶ 37-38, Ex. K, L, ER 339, 404, 406; Villa Dec. ¶ 4 Ex. A pp. 15, 4/1-4/5, 9/8-9/15, ER 105-06, 122, 139-43, 154-61; Wood Dec. ¶ 9, ER 220; Undisputed Material Fact 2, ER 409.)

Extra work was to be performed either pursuant to a

¹
According to Villa, he had no idea whether there was any federal funding involvement. (Villa Dec. ¶ 17.)

written change order, or under the force account provisions, Standard Specification 9-1.03. (Bhatnagar Dec. ¶ 37, Ex. K, ER 339, 404; Villa Dec. ¶¶ 4(b)-(c), (g), (h), Ex. A pp. 4/5, 9/11-9/13, ER 1-5-06, 143, 157-59; Undisputed Material Facts 3-4, 6, ER 410.) Kiewit had the right to request additional compensation for extra work, but had to provide daily extra work bills detailing the labor, material, equipment or special services performed each day. (Villa Dec. ¶ 4(g), Ex. A pp. 9/11-9/12, ER 106, 157-58; Undisputed Material Facts 5, 8-9, ER 410-11.)

The Contract also provided that no additional payment would be made for certain categories of work. For example, Special Provision 10-1.02 of the Contract required Kiewit to comply with Section 7-1.01G of the Standard Specifications regarding a storm water pollution prevention plan (SWPPP), but further provided:

Full compensation for conforming to the requirements in Section 7-1.01G, Water Pollution, of the Standard Specifications and these provisions shall be considered as included in the contract prices paid for the various items of work and no additional compensation will be made therefor.

(Bhatnagar Dec. ¶ 14, Ex. C pp. 33-34, ER 333, 359-60; Villa Dec. ¶¶ 2, 4(i), Ex. A pp. 33-34, ER 104-06, 127-28.)

Any work performed for temporary erosion control and temporary fencing was also included in the contract price. (Villa Dec., Ex. A pp. 34-36, 52, ER 128-31.)

Similarly, Special Provision 5-1.05 required Kiewit to comply with Section 7-1.09, Public Safety, of the Standard Specifications, with full compensation for complying with the requirements included in the contract price, and no additional compensation allowed therefor ; Section 7-1.09 itself required the contractor to provide fences, temporary railings, signs and other public safety materials at his expense and without cost to the State. (Bhatnagar Dec. Ex. A, ER 344-48; Villa Dec., Ex. A pp. 21-22, 7/21-7/23, ER 123-24, 149-51.)

C. FEDERAL GOVERNMENT CHARGED FOR JANITORIAL SERVICE, COPIER REPAIRS, AND SWPPP WORK UNDER CONTRACT CHANGE ORDER NO. 1, WHICH WAS OSTENSIBLY NECESSARY TO MAINTAIN ROADWAY

Kiewit started work on the project in approximately November 1993. (Villa Dec. ¶ 2, ER 104-05; Wood Dec. ¶ 5, Ex. D (receipt of Ex. D in August 1994 was some nine months into the project), ER 218-19, 248.) In December 1993, Caltrans and Kiewit entered into Contract Change Order No. 1 (CCO #1.) (Bhatnagar Dec. ¶ 16, Ex. E, ER 333, 381-82.) CCO #1 identified the Federal Aid Project number, indicated federal participation in funding, and provided for the following extra work at force account, at an estimated cost increase of \$120,000:

Maintain roadway, provide flaggers, and furnish, erect and dismantle additional traffic control devices, as ordered by the Engineer, for the convenience of public traffic. All in accordance with Section 7-1.08, 7-1.09 and 12-2.02 of the Standard Specifications, and Section 10-1.15 of the Contract Special Provisions.

(Bhatnagar Dec. ¶ 16, Ex. E pp. 1-2, ER 333, 381-82.)

The total amount of CCO #1 was significantly beyond Wood s approval limit of \$20,000, and it was actually

approved by Caltrans Chief Engineer James P. Siebe.
(Wood Dec. ¶ 2, ER 217; Bhatnagar Dec., Ex. E p. 1, ER 381.) Under CCO #1, Kiewit submitted 280 extra work bills from January 1994 to May 1996, totaling \$128,426.83, and including many claims for SWPPP work. (Bhatnagar Dec. ¶¶ 22-24, Ex. H-I, ER 335-36, 391-92, 394-400; Villa Dec. ¶ 14, Ex. D-1, ER 108, 198-215; Wood Dec. ¶ 12, Ex. H, ER 221, 311-329.)

Bhatnagar believed most of these claims were improper and complained to Caltrans, which either ignored his charges or responded with threats against him if he did not go along. (Bhatnagar Dec. ¶¶ 18-20, Ex. F, ER 334, 384-87.)

Bhatnagar then complained to the United States Department of Transportation (U.S.D.O.T.), which promptly determined that the SWPPP payments were not allowable for Federal-aid reimbursement, and required Caltrans to perform an audit to determine whether the remaining charges were properly related to reimbursable traffic control costs. (Bhatnagar Dec. ¶ 21, Ex. G,

ER 334-35, 389.)

The Caltrans audit determined that only \$10,921 of the extra work bills pertained to traffic control costs clearly eligible for federal reimbursement. (Bhatnagar Dec. ¶ 22, Ex. H, ER 335, 391-92.) Regarding \$16,547 of the remaining extra work bills, the Caltrans auditor concluded that they involved:

costs such as janitorial and yard services, furniture moving, re-roofing the R/E [Wood s] facilities, facility security improvements, copier repair, magnetic particle and hardness testing, fence repair and window replacement. These costs are clearly inappropriate for inclusion in CCO #1.

(Bhatnagar Dec. ¶¶ 15, 22-23, 25, Ex. D, H, J (emphasis added), ER 333, 335-36, 363-79, 391-92, 402.)

Caltrans acknowledged to the U.S.D.O.T. that the \$16,547 for re-roofing and other miscellaneous, unrelated work was ineligible for federal reimbursement. (Bhatnagar Dec., Ex. H, J, ER 391-92, 402.) In many cases, Kiewit did not even perform the work itself, but simply passed on billings from other vendors, along with its 15% markup. (Bhatnagar Dec., Ex. D, ER 363-79.)

Caltrans also acknowledged that \$24,764 in SWPPP work was ineligible, as the U.S.D.O.T. had concluded in its letter requesting the audit. (Bhatnagar Dec. Ex. G, H, ER 389, 391-92.)

According to Caltrans, 89 of the 280 extra work bills submitted under CCO #1 were unallowable. (Bhatnagar Dec. ¶ 24; Ex. I (items in columns designated Storm Water Prevention, CalTrans Off. 602 Kendall, and Misc. are included in column designated Unallowable), ER 335-36, 394-400.) The total dollar value of the unallowable claims was \$41,310.23. (Bhatnagar Dec., Ex. I p. 7, ER 400.)

D. KIEWIT CONTENDS WORK APPROPRIATELY BILLED BECAUSE WOOD APPROVED IT, AND BECAUSE SWPPP WORK BEYOND SCOPE ORIGINALLY ANTICIPATED

Kiewit's only explanation for including the re-roofing and other unrelated work under CCO #1 was to blame Wood, who allegedly required the work to be done and directed that it be billed under CCO #1, even though the work was unrelated to traffic controls or roadway maintenance. (Villa Dec. ¶¶ 10-14, ER 107-08; Wood Dec.

¶¶ 11-13, ER 220-21.)² Villa contended that Wood directed Kiewit to do the work, while Wood stated that he directed Kiewit and others to do the work, and to bill everything through Kiewit. (Compare Villa Dec. ¶ 10 with Wood Dec. ¶ 11, ER 107-08, 220.)

Regarding the SWPPP work, Kiewit contended that it was appropriately billed under CCO #1, despite the determination of the U.S.D.O.T., Caltrans admission, Special Provision 10-1.02 of the Contract, and Section 7-1.01G of the Standard Specifications. Once again, this was based primarily on Wood, but Kiewit also contended that the SWPPP work it performed was substantially beyond what was originally contemplated, entitling it to additional payments. (Villa Dec. ¶¶ 5-9, ER 106-07.)

CCO # 1, of course, made no reference to Special Provision 10-1.02 or Section 7-1.01G of the Standard

²

While Wood submitted a declaration supporting Kiewit, he no longer works for Caltrans and acknowledges that he has no authority to speak on its behalf. (Wood Dec. ¶ 16, ER 222.)

Specifications, the portions of the Contract that pertained to SWPPP work. (Bhatnagar Dec., Ex. E, ER 381-82.)

Special Provision 10-1.02 required Kiewit to include a storm water pollution prevention plan [SWPPP] to prevent, to the extent feasible, any net increase in pollution of storm water runoff from entering waterways, and to comply with National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS 000002, which set out detailed SWPPP requirements including a map extending one-quarter mile beyond the construction site showing discharge locations, etc. (Bhatnagar Dec. ¶ 13, Ex. C pp. 33-34, ER 332-33, 359-60; Villa Dec. ¶¶ 2, 4(i), Ex. A pp. 33-34, ER 1-4-06, 128-29; Wood Dec. ¶ 4, Ex. A pp. 9-12, ER 218, 232-35; Undisputed Material Fact 13, ER 411.)

Section 7-1.01G in turn required Kiewit to submit the SWPPP before starting any work, and to submit an amended plan when a change in construction affected discharge, or if there were a violation of the General

Permit. (Bhatnagar Dec. ¶¶ 9, 13, Ex. A p. 7/12, Ex. C p. 34, ER 331-34, 346, 360.)

Although Kiewit started work on the project in November 1993, it had not submitted any SWPPP as of August 10, 1994, when the California Regional Water Quality Board (the Regional Board) issued Clean-up and Abatement Order No. 94-092, prohibiting the discharge, or creation of potential for discharge, of any soil materials ... to storm drains, creeks and tributaries at 10 BART construction sites, including the Project. (Bhatnagar Dec. ¶¶ 6-10, ER 331-32; Wood Dec. ¶ 5, Ex. D p. 2, ER 218-19, 249; Undisputed Material Fact 18, ER 412.) The Order further required the contractor at each site, including Kiewit, to submit an SWPPP by August 15, 1994. (Wood Dec. ¶ 5, Ex. D p. 2, ER 218-19, 249.)

Kiewit first submitted its SWPPP on August 16, 1994. (Villa Dec., Ex. B, ER 163-65; Wood Dec. ¶ 4, Ex. B, 218, 242-44; Undisputed Material Fact 14, ER 411.) The 8/16/94 plan is three pages long (including cover sheet), and gives no specifics as to what Kiewit will do

to prevent discharges. (Villa Dec., Ex. B, ER 163-65; Wood Dec., Ex. B, ER 242-44.)

On August 17, 1994, the Regional Board issued NPDES Permit No. CAS029998, which required Caltrans to develop SWPPPs at all larger construction projects by October 1, 1994. (Wood Dec., Ex. E p. 7, ER 259; Undisputed Material Facts 18-19, ER 412.) After meeting with Regional Board staff, Wood prepared a new SWPPP on September 15, 1995. (Wood Dec. ¶¶ 6-7, Ex. F, ER 219, 279-306; Undisputed Material Facts 26-27, ER 413.)

While both Kiewit and Wood contend that the new SWPPP significantly expanded the scope of Kiewit's SWPPP work, Kiewit does not point to any activities, much less any specific extra work bills, that were beyond the scope of the original SWPPP, or the original NSDES Permit No CAS00002 in effect when Kiewit entered into the Contract. (Villa Dec. ¶¶ 5-9, ER 106-07; Wood Dec., Ex. A, ER 224-40.) Wood refers to aggregate pads 6 inches deep, sweeping of sediment from additional roads, and use of gravel bags at drain inlets, but does not

identify a single extra work bill for any of this work. (Wood Dec. ¶ 8, ER 219-20.) Both Kiewit and Wood contend that all work billed was actually completed. (Villa Dec. ¶ 15, ER 108; Wood Dec. ¶¶ 14-15, ER 221-22.)

A review of the spreadsheet prepared by the Caltrans auditor regarding the extra work bills, (Bhatnagar Dec., Ex. I, ER 394-400), does not support Wood's contentions regarding the type of additional work performed. Exhibit I discloses that extra work bill number 133 predated the new SWPPP, numbers 167-68, 192-96, and 208-09 all refer to streets identified as being affected in the original SWPPP (Westerman, Kendall, Ragland, Morrill, Ashland, Alisal and Mission), and there is no extra work bill for the pads. (Bhatnagar Dec., Ex. I pp. 4-6, ER 39-99; Villa Dec., Ex. B p. 2, ER 164; Wood Dec., Ex. B p.2, ER 243.) In addition, according to the diagrams contained in the new SWPPP, any work would be largely within 150 feet of the project, the area that Wood contended was contemplated

by the original SWPPP. (Wood Dec. ¶ 4, Ex. F pp. 17-28, ER 218, 295-306.)

ARGUMENT

1. SUMMARY OF ARGUMENT

After reviewing the grant of summary judgment *de novo*, this Court should reverse the decision of the lower court because a reasonable jury could well conclude that Kiewit had knowingly submitted false claims to the government.

This was a federally-funded project, and 89 out of the 280 claims that Kiewit submitted were inaccurate and false they had nothing to do with roadway maintenance, the purported reason for all payments made under CCO #1, as the U.S.D.O.T. and Caltrans determined.

A reasonable jury could reject Kiewit's claims that the false claims were innocent mistakes or part of a contract dispute. Kiewit knew the bills were unrelated to the purported work necessary under CCO #1, and knew all SWPPP work was included in the original Contract

price. Since there is no need to prove an intent to deceive, there was substantial evidence from which a jury could find a knowing submission of false claims.

2. ON APPEAL, COURT REVIEWS GRANT OF SUMMARY JUDGMENT DE NOVO, DRAWING ALL JUSTIFIABLE INFERENCES IN FAVOR OF NONMOVANT

On appeal, this Court must review the trial court's grant of summary judgment *de novo* to determine whether the law was properly applied and whether there was a genuine issue of material fact. *Mackinney v. Nielsen*, 69 F.3d 1002, 1004 (9th Cir. 1995); *McCarthy v. Mayo*, 827 F.3d 1310, 1314 (9th Cir. 1987).

A genuine issue exists, and the motion should be denied, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Supreme Court has urged trial courts to act with caution in granting motions for summary judgment:

The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255.

In determining whether summary judgment was appropriate in a False Claims Act case, the question is whether there is sufficient evidence to support an inference of knowing fraud. *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995).

3. REASONABLE JURY COULD FIND THAT KIEWIT KNOWINGLY SUBMITTED FALSE CLAIMS, WHERE CLAIMS FOR ROOFING, COPIER REPAIRS, AND STORM WATER PROTECTION WERE ALL MADE UNDER CHANGE ORDER PURPORTEDLY PAYING FOR ROADWAY MAINTENANCE, AND ALL SWPPP WORK WAS COVERED UNDER ORIGINAL CONTRACT PRICE

a. Overview of False Claims Act

Congress enacted the False Claims Act, 31 U.S.C. § 3729 *et seq.* (FCA), during the Civil War with the purpose of forfending widespread fraud by government contractors who were submitting inflated invoices and shipping faulty goods to the government. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir. 1996), *cert denied*, 519 U.S. 1115 (1997).

Under the FCA, a private individual or relator can file a *qui tam* action on behalf of the United

States government against a person or entity who has knowingly presented or caused to be presented a false or fraudulent claim. 31 U.S.C. § 3729(a)(1); *Hopper*, 91 F.3d at 1266 n.7. The FAC specifically provides that no proof of specific intent to defraud is required, 31 U.S.C. § 3729(b)(3), and that knowing and knowingly mean that a person:

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information,...

31 U.S.C. § 3729(b).

A prima facie case under the FCA therefore requires proof of three elements: (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) that the defendant knew the claim was false or fraudulent. *United States ex rel. Oliver v. The Parsons Company*, 195 F.3d 457, 461 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 2657 (2000).

b. Claim Was Made Against United States

The FCA provides that a claim against the United

States can include any request or demand for money if the United States Government provides any portion of the money or will reimburse another recipient for any portion of the money ... which is requested or demanded. 31 U.S.C. § 3729(c). It has long been clear that, since the object of the bill was to provide protection against those who would cheat the United States, it does not matter whether the claim is made directly to the federal government, or through a state intermediary. *United States ex rel. Marcus v. Hess, et al.*, 317 U.S. 537, 544 (1943).

The contention of Kiewit's project manager, Chris Villa, that he was unaware of any federal involvement in this large highway project, (Villa Dec. ¶ 17), would therefore not insulate Kiewit even if it were believed by a trier of fact.

Since federal participation in the project was not only indicated on the Contract and on CCO #1 itself, but also on large signs that Kiewit was required to erect on the construction site, (Bhatnagar Dec., Ex. E, ER 381-

82; Villa Dec., Ex. A pp. 1, 15, 32, ER 111, 122, 126), a reasonable jury may well reject Villa's contention.

In addition, the U.S.D.O.T.'s requirement that Caltrans audit its records to determine the appropriateness of extra work bills submitted under CCO #1 further demonstrates that these were claims against the United States government. (Bhatnagar Dec., Ex. G, ER 389.)

c. U.S.D.O.T., Caltrans Determined that Claims Were False

Kiewit signed CCO #1, seeking \$120,000 in payment for additional work necessary to [m]aintain roadway, provide flaggers, and ... traffic control devices, ... for the convenience of the public. (Bhatnagar Dec., Ex. E, ER 381-82.) It then submitted 280 extra work orders, 89 of which had nothing to do with roadway maintenance. (Bhatnagar Dec., Ex. I, ER 394-400.)

While Kiewit's claim that it was reasonable to include these unrelated claims may be relevant in deciding whether it knowingly submitted false claims,

the question of falsity itself is determined by whether [defendant s] representations were accurate *Oliver*, 195 F.3d at 463. An implied misrepresentation on an invoice may constitute a false claim for purposes of the FCA. *BMV-Combat Systems Division of Harsco Corporation v. United States*, 38 Fed. Cl. 109, 125 (1997).

The claims in this case were not accurate, as they had nothing to do with roadway maintenance or traffic control. In determining whether the claims in this case were false, the Court need look no further than the conclusions of the Caltrans auditor, who found that janitorial and yard services, furniture moving, re-roofing the R/E facilities, . . . copier repair, . . . are clearly inappropriate for inclusion in CCO #1. (Bhatnagar Dec., Ex. J, ER 402.)

The audit, of course, was performed in response to the U.S.D.O.T.'s letter informing Caltrans that SWPPP costs in CCO # 1 were not allowable and requiring Caltrans to determine the extent of other non-

reimbursable claims. (Bhatnagar Dec., Ex. G, ER 389.)

The total amount of the claims which should not have been included in CCO #1 was \$41,310. (Bhatnagar Dec., Ex. H, Ex. I p. 7, ER 400.)

Both governmental entities therefore concluded that Kiewit had submitted claims for unallowable costs, which can trigger FCA liability. *United States ex rel. Oliver v. The Parsons Company*, 195 F.3d 457, 463 (9th Cir. 1999.)

A reasonable jury could conclude that Kiewit had submitted false or fraudulent claims for payment, and the summary judgment should not have been granted.

d. Kiewit Knowingly Submitted False Claims

[I]nnocent mistakes and negligence are not offenses under the FCA. *Wang ex rel. United States v. FMC Corporations*, 975 F.2d 1412, 1420 (9th Cir. 1992).

What constitutes the offense is not intent to deceive but knowing presentation of a claim that is either fraudulent or simply false.

Wang, 975 F.2d at 1420.

Under the FCA, knowing includes deliberate

ignorance as well as reckless disregard. 31 U.S.C. § 3729(b).

The statute does not excuse defendants who claim the defense of confusion over billing practices or records, but also does not punish those who make innocent mistakes.

United States v. Mack, No. H-98-1488, 2000 U.S. Dist. LEXIS 17367, at 15-16 (S.D. Tex. 2000.)

This is not a case, like *Wang*, in which Kiewit can contend that its claims were merely bad math, mistakes or inabilities, or the common failings of engineers. *Wang*, 975 F.2d 1412.

Instead, Kiewit knew that one-third of the extra work bills it was submitting had nothing to do with roadway maintenance, the only work authorized under CCO #1. *BMV-Combat Systems*, 38 Fed. Cl. at 126. Kiewit knew that janitorial work, re-roofing and copier repairs were not included in CCO #1. Kiewit knew that all SWPPP work was included in the Contract price under Special Provision 10-1.02 and Standard Specification 7-1.0G. Kiewit knew that CCO #1 made no reference to the type of extra work bills that it was actually submitting for

payment, so that no one in the U.S.D.O.T. would question them.

Finally, a jury could find that Kiewit knew that it had performed no work pursuant to the new SWPPP that was beyond what it was required to perform under the original Contract. Despite the claims of Villa and Wood, neither pointed to a single extra work bill that referred to this additional work, making it appear that Kiewit was knowingly attempting to get paid for work that it knew was included in the original Contract price.

This is not a case, as the District Court concluded, of a contract dispute. (Memorandum and Order, ER .) The District Court erroneously restricted its review to the SWPPP payments; even if Kiewit could argue that contractual provisions related to SWPPP work could be subject to differing interpretations so as to preclude a finding of knowing falsity, *Oliver*, 195 F.3d at 463, that argument would not extend to the \$16,547 in extra work orders for janitorial work, etc., which had

nothing whatsoever to do with roadway maintenance.

Kiewit's reliance on Lloyd Wood is misplaced. No matter what Wood was telling Kiewit, Wood did not have authority to approve the \$41,310 in false claims that Kiewit submitted for payment, and had no authority to approve CCO #1, which was done by Caltrans' chief engineer. The U.S.D.O.T. knew nothing of the improprieties until Bhatnagar advised them, and immediately determined that the claims were false.

Under all the evidence, a reasonable jury could conclude that Kiewit knew it was submitting false claims when it tried to get paid for 89 extra work bills that had nothing to do with the CCO which purportedly allowed payment.

CONCLUSION

Thanks to Ashok Bhatnagar, the United States learned of more than \$41,000 in false extra work bills submitted by Kiewit. Despite doing exactly what those who first enacted the FCA had hoped he would do,

Bhatnagar has received nothing for his efforts except a summary judgment against him.

This Court should reverse that judgment, and allow this case to proceed to trial.

DATED: March 22, 2007

LAW OFFICE OF PAUL KLEVEN

by: _____
PAUL KLEVEN

STATEMENT OF RELATED CASES

Appellant is not aware of any related cases pending in this court.

DATED: March 22, 2007

LAW OFFICE OF PAUL KLEVEN

by: _____
PAUL KLEVEN

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using the 13 point Courier New typeface, which appears to be a monospace typeface of no more than 10.5 characters per inch. The brief is double spaced, except for quotations, headings and footnotes. According to my word processing system, there are 4392 words in the brief.

DATED: March 21, 2001

PAUL KLEVEN