

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, <u>ex rel.</u>	)	
AARON J. WESTRICK, Ph.D.,	)	Civil No. 04-0280 (PLF)
	)	
Plaintiffs,	)	Hon. Paul L. Friedman
	)	
v.	)	
	)	
SECOND CHANCE BODY ARMOR, INC.	)	
<u>et al.</u> ,	)	
	)	
Defendants.	)	
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UNITED STATES OF AMERICA,	)	Case No. 1:07-CV-1144 (PLF)
	)	
Plaintiff,	)	Hon. Paul L. Friedman
	)	
v.	)	
	)	
TOYOBO COMPANY, LTD., <u>et al.</u> ,	)	
	)	
Defendants.	)	
<hr/>		

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Universal Health Services, Inc. v. United States ex rel. Escobar,  
579 U.S. ---, 2016 WL 3317565, *slip op.*, No. 15-7 (June 16, 2016)

The United States hereby notifies the Court of the recent decision of the United States Supreme Court in Universal Health Services, Inc. v. United States ex rel. Escobar, 579 U.S. ---, 2016 WL 3317565, *slip op.* No. 15-7 (June 16, 2016), which is relevant to the United States' pending motions for reconsideration of its fraudulent inducement claims under the False Claims Act, 31 U.S.C. § 3729, *et seq.*<sup>1</sup> Specifically, the unanimous Supreme Court decision unequivocally supports the United States' argument that Defendants Toyobo Co. Ltd. and Toyobo America, Inc. (collectively Toyobo) had a legal duty to disclose the internal Zylon degradation information that Toyobo withheld and that contradicted Toyobo's misrepresentations about the superiority of Zylon as a ballistic material.<sup>2</sup>

In Escobar, the Supreme Court unanimously held that liability under the False Claims Act could be predicated on an implied false certification theory based upon the requirements of the contract, as well as statutory and regulatory requirements. The Court further held that that omissions and partial half-truths may form the basis of False Claims Act liability.

The Court's discussion of misleading half-truths affirms Toyobo's duty to disclose its internal Zylon degradation information to the United States, which is at issue in the pending motion for reconsideration. The Court concluded that the defendants' claims in Escobar fell "squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." *Id.* at 10 (*citing* 3 D. Dobbs, P. Hayden, & H. Bublick, LAW OF TORTS §682, pp. 702–703, & n.14 (2d ed.2011)). The Court also noted that "[t]his rule recurs throughout the common law. In tort law, for example, 'if the defendant does speak, he must disclose enough to prevent his words

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<sup>1</sup> A copy of the Escobar opinion is attached hereto as Exhibit A.

<sup>2</sup> Second Chance Dkt. No. 461, pp. 5-7 (Supplemental Brief); Toyobo Dkt. No. 194, pp. 5-7 (Supplemental Brief).

from being misleading.” *Id.* at p. 10 n. 3 (*citing* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON LAW OF TORTS §106, p. 738 (5th ed. 1984)). *See also id.* at 8-9 (noting that the False Claims Act is based on principles of common law fraud, “[b]ecause common law fraud has long encompassed certain misrepresentations by omission ‘false or fraudulent claims’ include more than just claims containing express falsehoods”).

The Court used “classic example[s]” of half-truths to explain its rationale, including a seller who discloses two planned roads near a parcel of property without disclosing a third potential road which might bisect the property and an applicant for a job who lists his prior jobs and claims he recently was retired without disclosing that the cause of his retirement was a prison term for fraud. *Id.* at 10 (citations omitted).

Moreover, a defendant’s misrepresentation need not be tied to an explicitly labeled condition of payment to be actionable. “A statement that misleadingly omits critical facts is a misrepresentation irrespective of whether the other party has expressly signaled the importance of the qualifying information.” *Id.* at 11-12.

In its discussion about express conditions of payment, the Court’s analysis is directly on point with the facts of the instant cases:

If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has “actual knowledge.” Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant’s failure to appreciate the materiality of that condition 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.

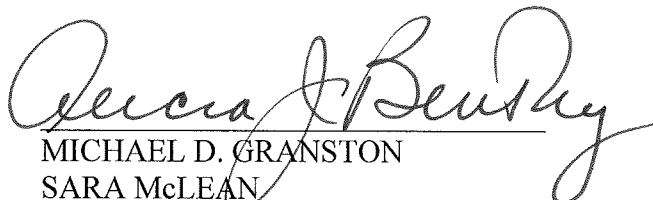
*Id.* at 12-13 (emphasis added). As with the common-sense idea that guns must actually shoot, any reasonable person would have realized the imperative of a functioning Zylon-containing

ballistic vest was to stop bullets and that Toyobo's internal Zylon degradation data was material information that Toyobo withheld.

Additionally, the Escobar decision addresses other portions of this Court's September 4, 2015 Order granting in part and denying in part Toyobo's motion for partial summary judgment as to Sections (a)(1), (a)(2) and (a)(3) of the False Claims Act on an implied false certification theory. In light of this decision by the Supreme Court, the United States anticipates filing a second motion for reconsideration on the grounds that the Escobar decision is a controlling and significant change in the law.

DATED: June 22, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of June 2016, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to Stephen M. Kohn and David K. Colapinto, counsel for the relator; and Holly Elizabeth Loiseau, counsel for defendants Toyobo America, Inc. and Toyobo Co., Ltd.

I further certify that on the same date, a paper copy of the forgoing document was served by United States Mail, first class, postage prepaid on the following parties:

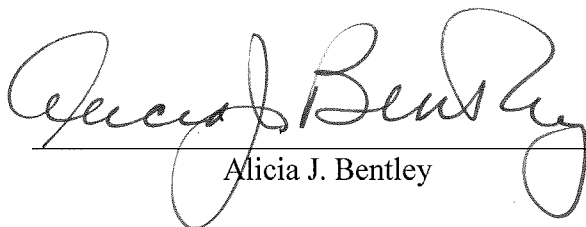
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