IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RELATOR DR. AARON WESTRICK'S PRETRIAL BRIEF

Pursuant to this Court's Order of October 16, 2017, the Relator, Dr. Aaron Westrick, hereby files his pretrial brief. Dr. Westrick will also be filing a joint pretrial statement as required under Local Rule 16.5. The law governing this matter was set forth by the Court in its Opinion on Reconsideration dated July 14, 2017. *U.S. ex rel. Westrick v. Second Chance Body Armor, Inc,* 266 F. Supp. 3d 110, 132 (D.D.C. 2017) (identifying the claims that will be presented to the jury). As explained below, there is some confusion regarding the pendency of Count 3 of the United States' Second Amended Complain (the conspiracy count). [*Westrick* Dkt. 408]. A clarification of this issue will resolve a number of factual and evidentiary issues that may arise during the trial.

ARGUMENT

THE PENDENCY OF COUNT III OF THE AMENDED COMPLAINT (CONSPIRACY) SHOULD BE CLARIFIED

The Relator maintains that Count 3 of the United States' Second Amended Complaint [*Westrick* Dkt. 408] for a violation of 31 USC 3729(a)(3), which prohibits a conspiracy to violate any other False Claims Act provision, is still at issue in *United States ex rel. Westrick v. Second Chance Body Armor, Inc., et al*. In reviewing this Court's opinion and order on the United States' motion for reconsideration, there appears to be confusion over the pendency of the conspiracy claims in this case. *U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.,* 266 F. Supp. 3d 110, 116 n.8 (D.D.C. 2017). Specifically, Judge Roberts issued two decisions on motions filed by Defendants Toyobo America, Inc. and Toyobo Co. Ltd. ("Toyobo") to dismiss the conspiracy claims. The first ruling was in the above-captioned case, *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, *et al.,* Civil Action No. 04-0280 ("*Westrick*"). In that case Judge Roberts explicitly rejected Toyobo's motion to dismiss Count 3 of the *Westrick* case, which is the conspiracy count. *U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.*, 685 F. Supp. 2d. 129, 141 (D.D.C. 2010).

However, in *United States v. Toyobo Company, Ltd.*, Civil Action No. 07-1144 ("*Toyobo*"), Judge Roberts did issue a ruling dismissing the conspiracy count (which coincidently was also Count 3 of the *Toyobo* case) as it related to all bullet proof manufacturing companies, **except** Second Chance. *U.S. v. Toyobo*. *United States v. Toyobo Co., Ltd.*, 811 F. Supp. 2d 37, 51 (D.D.C. 2011). Dr. Westrick, is **not** a party to the *Toyobo* case, and Second Chance Body Armor, Inc. ("Second Chance") was not named as a defendant in that case. As set forth in the complaint filed by the United States in the *Toyobo* case, all issues related to Toyobo's relationship with Second Chance were explicitly excluded from that lawsuit. *United*

States v. Toyobo Co. Ltd., No 07-1144, [*Toyobo* Dkt. 1 ¶ 1] ("This lawsuit expressly excludes any claims for defective Zylon body armor sold to the United States . . . by Second Chance . . . [A]ny reference to Zylon vests and/or vest manufacturers herein expressly excludes Second Chance Body Armor").

Because Toyobo is the principle defendant in both the *Westrick* and the *Toyobo* cases, and because both cases concern the sale of Zylon body armor to the United States, these two cases have often been litigated as if they had been consolidated (*e.g.*, shared judges, filings, opinion, etc.), even though they have not. Because of this overlap, it appears some confusion has occurred regarding the pendency of Count 3 in the *Westrick* proceeding.

This Court cited to Judge Roberts' dismissal of the conspiracy count in the *Toyobo* case when discussing the status of the conspiracy count in the *Westrick* case, and concluding that the *Westrick* conspiracy count had been dismissed by Judge Roberts. *U.S. ex rel. Westrick*, 266 F. Supp. 3d at 116 n.8. Because the specific rulings as to the pendency of the Count 3 conspiracy claims in the two cases are diametrically opposite, the ruling by Judge Roberts on Count 3 in *Toyobo* has **no bearing whatsoever** on the pendency of the Count 3 conspiracy claims in *Westrick.* Consequently, the conspiracy claim in the *Westrick* case has never been dismissed, and must be presented to the jury.

I. UNITED STATES EX REL. WESTRICK V. SECOND CHANCE BODY ARMOR, INC.

The *Westrick* case began when Relator Dr. Aaron Westrick filed a *qui tam* complaint on February 20, 2004 against Second Chance and remaining Defendants Toyobo, among others. [*Westrick* Dkt. 1]. The United States chose to intervene and filed its own complaint [*Westrick* Dkt. 14] on September 23, 2004. Count 3 of this complaint alleged a violation of the False

Claims Act conspiracy provision.[1] [*Westrick* Dkt. 14 ¶ 115-17]. Toyobo filed a motion to dismiss all the claims contained in the original complaint on October 18, 2005. [*Westrick* Dkt. 25]. Judge Roberts specifically analyzed the alleged conspiracy between Toyobo and Second Chance in *Westrick* and **denied** the motion to dismiss it by stating: "The detailed assertion about the meetings between Toyobo and Second Chance fulfills the requirements for a conspiracy claim under § 3729(a)(3)." *U.S. ex rel. Westrick*, 685 F. Supp. 2d. at 141.

Thus, the Count 3 conspiracy claim was not dismissed in the *Westrick* case.

II. UNITED STATES V. TOYOBO COMPANY, LTD.

The related case, *Toyobo*, was initiated solely by the government three years after *Westrick* by the filing of the initial complaint on June 26, 2007. [*Toyobo* Dkt. 1]. This case arose out of the same underlying controversy as *Westrick* but importantly dealt with Toyobo's dealings with all the other ballistic vest manufacturers **besides** Second Chance. All issues related to Toyobo and Second Chance were explicitly carved-out of this second Zylon based lawsuit. As specifically stated in the United States' Complaint in *Toyobo*:

> **This lawsuit expressly excludes any claims for defective Zylon** body armor **sold to the United States** and to state, local and tribal law enforcement agencies **by Second Chance** Body Armor, Inc., **which are the subject of a separate False Claims Act *qui tam* lawsuit entitled** United States ex rel. Westrick v. Second Chance Body Armor, Inc., et al. (D.D.C. No. 04-0280).[]. **Any reference to Zylon vests and/or vest manufacturers herein expressly excludes Second Chance Body Armor and its products**.
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> *United States v. Toyobo Co. Ltd.*, No 07-1144, [*Toyobo* Dkt. 1 ¶ 1] (emphasis added).[2]

[1] The United States has amended its original complaint twice [*Westrick* Dkt. 38; 408] but has included the conspiracy claim as Count 3 in all the amended pleadings.

[2] The United States filed an Amended Complaint [*Toyobo* Dkt. 73] after the relevant Motion to Dismiss, discussed in depth below, was decided by Judge Roberts. It contained identical language.

The United States government laid out clearly that Second Chance was not to be considered a "vest manufacturer" in *Toyobo*. Toyobo then sought to have all the claims in *Toyobo* dismissed. [*Toyobo* Dkt. 14]. Just like in *Westrick*, Judge Roberts specifically analyzed the conspiracy claims in the United States' complaint in *Toyobo*. *Toyobo*, 811 F. Supp. 2d at 51. However, unlike in *Westrick*, Judge Roberts determined that the conspiracy claims between Toyobo and all vest manufacturers, **excluding Second Chance,** should be dismissed by holding:

> The government's allegations that the vest manufacturers were aware by mid 2001 that Zylon was defective [] yet continued to sell Zylon vests through 2005 are insufficient to aver that Toyobo and the vest manufacturers agreed to anything. Moreover, the notion that Toyobo conspired with the vest manufacturers is inconsistent with the government's allegations that Toyobo misrepresented the extent and severity of Zylon's degradation to the vest manufacturers to induce them to continue to sell their vests to the government.
>
> *Toyobo*, 811 F. Supp. 2d at 51.

This decision, and the reasoning behind it, **only** affected vest manufacturers relevant in the *Toyobo* case. As explicitly set forth in the *Toyobo* complaint, the *Toyobo* case only alleged a conspiracy between Toyobo and the non-Second Chance vest manufacturers. This is precisely why Judge Roberts could sustain the conspiracy count in the *Westrick* case (which involved an actual whistleblower/witness and extensive documentation concerning communications between Toyobo and Second Chance), but not sustain the conspiracy count as to the non-Second Chance vest manufacturers.

III. SUMMARY JUDGMENT

Toyobo moved for summary judgment on the conspiracy claims, among other issues, in both *Westrick* [*Westrick* Dkt. 270; 343] and *Toyobo* [*Toyobo* Dkt. 95]. While Toyobo sought summary judgment on the conspiracy Count 3 in *Westrick,* it did not advance any arguments on the merits of the conspiracy alone, effectively conceding that the extensive discussions and

agreements reached between Second Chance and Toyobo in the 2001-03 time-frame would, as Judge Roberts had previously decided, satisfy the evidentiary requirements to sustain a conspiracy. Rather it relied on its arguments for summary judgment on the other False Claims Act violations, which are a prerequisite for the conspiracy count. Accordingly, when Judge Roberts issued his joint decision on summary judgment in *Westrick* and *Toyobo* on September 9, 2015, he also did not address the merits of the conspiracy claim but **denied** summary judgment for Toyobo on Count 3 in the *Westrick* case. *U.S. ex rel. Westrick v. Second Chance Body Armor Inc.*, 128 F. Supp. 3d 1 (D.D.C. 2015), *reconsideration denied in part sub nom. United States v. Second Chance Body Armor Inc.*, No. 04-0280, 2016 WL 3033937 (D.D.C. Feb. 11, 2016).

IV. JUDGE FRIEDMAN'S RECONSIDERATION

The United States moved for reconsideration of Judge Robert's summary judgment decisions on September 28, 2015 [*Westrick* Dkt. 450]. As Judge Robert's had ruled in the United States favor on the conspiracy count in his summary judgment opinion, any mention of it was excluded from the United States' motion for reconsideration. In fact, the only mention of the conspiracy in all the briefing from either side on the reconsideration motion came in a footnote of the United States' supplemental brief filed on February 22, 2016 which briefly mentions the "conspiracy between Toyobo and Second Chance." [*Westrick* Dkt. 461].

In its reconsideration opinion (which ruled simultaneously on both the *Westrick* and *Toyobo* cases), this Court referenced the conspiracy claims which were still alive, and had not been disputed, in *Westrick*. In a footnote designed, in part, to clarify what claims were still pending in the cases, this Court cited to Judge Roberts' motion to dismiss opinion in *Toyobo* as authority for the pendency of the conspiracy claim in the *Westrick* case. As previously discussed, the *Toyobo* precedent was not controlling as to the conspiracy claim in *Westrick.* The

opposite was the case. However, because of the overlap between these two related cases, this Court reasoned:

> The United States supplemental brief describes these events as a "conspiracy between Toyobo and Second Chance." US Supp. at 15 n.43. Judge Roberts previously rejected any such conspiracy stating:
>
> > The government's allegations that the vest manufacturers were aware by mid 2001 that Zylon was defective [] yet continued to sell Zylon vests through 2005 are insufficient to aver that Toyobo and the vest manufacturers agreed to anything. Moreover, the notion that Toyobo conspired with the vest manufacturers is inconsistent with the government's allegations that Toyobo misrepresented the extent and severity of Zylon's degradation to the vest manufacturers to induce them to continue to sell their vests to the government. *United States v. Toyobo Co.*, 811 F. Supp. 2d at 51.
>
> *Westrick*, 266 F. Supp. 3d at 116 n.8.

As explained above, the "vest manufacturers" described in Judge Friedman's footnote **do not include Second Chance**, as was made clear in the United States' complaint in *Toyobo*. [*Toyobo* Dkt. 1 ¶ 1]. This Court then went on to list all the claims which had "survive[d] summary judgment and shall proceed to trial," but did not explicitly list the conspiracy claim in *Westrick* among them. *Westrick*, 266 F. Supp. 3d at 132.

Relator believes this omission was simply an error caused by the confusion of the interconnectedness of the two related cases. It appears as if the Court relied upon the ruling in *Toyobo,* which dismissed the conspiracy claims, and believed the conspiracy claims were also dismissed in *Westrick*. However, while Judge Roberts did dismiss the conspiracy claims in *Toyobo* he **denied** their dismissal in the *Westrick* case, holding that "[t]he 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 of the litigation." *Westrick,* 685 F. Supp. 2d. at 141.

The merits of the conspiracy count were not directly challenged in any of the subsequent summary judgment filings. Instead, the continued vitality of Count 3 (conspiracy) was only indirectly challenged, because the conspiracy count was dependent upon a substantive violation of the False Claims Act. In other words, if Toyobo's summary judgment argument had been accepted as to Counts 1 and 2 of the complaint, Count 3 would have also fallen. However, this Court rejected Toyobo's request to grant summary judgment in its favor for the other False Claims Act counts, and explicitly held that the United States and Relator's claims alleging "fraudulent inducement" against all Defendants and for all claims, and "express and implied certification" as it related to the 6 percent Second Chance catalog guarantee and the GSA MAS claims, "survive[d] summary judgment." *Westrick,* 266 F. Supp. 3d at 132. Thus, the rationale for also dismissing Count 3 did not exist. Because this Court did not dismiss Counts 1 and 2, the conspiracy claims remain at issue in this case.

Relator respectfully requests clarification from this Court that the conspiracy claims against Defendants in *Westrick* are still a viable issue to be decided at trial in this case. Such a clarification will not prejudice any party. Prior to this Court's ruling on the government's motion for reconsideration, there was no confusion as to the pendency of the conspiracy count. All discovery on the issue has already been conducted during this litigation, and the facts necessary to demonstrate conspiracy will all be admitted into the record as further evidence of the Defendants' knowledge and willfulness, among other material issues.

The United States agrees with the position taken by Dr. Westrick in this brief concerning the pendency of Count 3.

CONCLUSION

For the above stated reasons 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 5, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on that on this 5th 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 Motion in *Limine* 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 parties who do not receive CM/ECF filings:

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