UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. EDCV 06-55-GW Date March 4, 2013

Title *United States of America et al v. J-M Manufacturing Company, Inc.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Mary Rickey	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
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PROCEEDINGS: **DEFENDANT J-M MANUFACTURING COMPANY, INC.'S MOTION FOR SUMMARY ADJUDICATION (filed 01/24/13)**

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. Based on the Tentative and for reasons stated on the record, Defendant J-M Manufacturing Company, Inc.'s Motion for Summary Adjudication, is **DENIED**.

Defendant J-M Manufacturing Company, Inc.'s Ex Parte Application for the Immediate Return of Misappropriated Documents, Expedited Discovery, a Temporary Stay, and Other Relief, filed on March 4, 2013 is set for **March 25, 2013 at 9:30 a.m.** Plaintiff's Response will be filed by March 13, 2013. Defendants Reply, if any, will be filed by March 20, 2013.

Defendant J-M Manufacturing Company, Inc.'s Motion to Compel Plaintiffs to Provide Further Responses to Request for Production No. 13, filed on February 28, 2013, and referred to Magistrate Judge Walsh, on March 1, 2013, is referred back to this Court. This Court will review the motion and advise counsel of a hearing date.

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Initials of Preparer JG

United States ex rel. Hendrix v. J-M Mfg. Co., Inc., et al., Case No. CV-06-0055-GW
Tentative Ruling on Defendants' Motion for Summary Adjudication

The instant motion filed by defendant J-M Manufacturing Company, Inc. d/b/a JM Eagle ("J-M"), and joined by its co-defendant, Formosa Plastics Corporation, U.S.A. ("Formosa"),[1] presents what would appear to be a simple question of law. As J-M has further[2] specified in its Reply brief, it wants to know the answer to the following question: whether Plaintiffs can establish a false claim – the *sine qua non* of a claim under the False Claims Act ("FCA"), *see U.S. ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002) – "in a substandard products case . . . , under the conventional theory of FCA liability, without proving that they actually received a substandard product?" Docket No. 791, at 5:16-18. J-M wants to resolve this issue because of its concern that not every Plaintiff in this case will attempt to demonstrate receipt of actual substandard products. In fact, given the Plaintiffs' assertions about the expense of extracting in-place pipe and their concern that "tracing" pipe is effectively impossible,[3] it appears as though perhaps the vast majority of Plaintiffs, if not all, might be readying themselves to take this approach.

Before the Court proceeds into assessing the handful of cases Plaintiffs assert demonstrate that the answer to the question J-M poses by way of this motion is "yes," it would consider several statements in J-M's Reply brief which appear to muddy the waters flowing around J-M's position – or at least its insistence that it takes the *right* position:

1) "J-M does not dispute that products can be 'substandard' or 'nonconforming'

[1] The Court would agree with Plaintiffs' view in Docket No. 806 that Formosa's reply brief, to the extent it engages in a substantive discussion of the so-called "Inadvertent Submission"/"Subsequent Discovery" ("I/S") claims, is inappropriate. Although Formosa did reference those claims in its "opening" joinder, its limited argument only took on the same argument that J-M had presented in its own motion, which was not an argument directed at the I/S claims. As such, if Formosa is to benefit from any ruling on J-M's motion, it will not be due to any arguments it specifically advances in connection with the I/S claims. Its (presumably) feigned shock that Plaintiffs' opposition brief "wholly ignored" the effect of the "lottery ticket" theory on the I/S claims is not credible.

[2] Plaintiffs argue that J-M's motion was impermissibly vague as originally filed. The Court disagrees.

[3] J-M has offered reasonable explanations for why this is likely not at all true. *See* Docket No. 791, at 8:17-28 n.3.

either because they are physically defective, *or* because they were not subject to required quality assurance or other testing." Docket No. 791, at 5:24-26.

2) "J-M's motion expressly acknowledged that pipe 'may be "substandard" if it fails to comply with contractually-required standards either with respect to its manufacturing or its testing.'" *Id.* at 12:14-17 (quoting J-M's opening brief, at 21:23-24).

3) "In short, the parties are in agreement that a product may be 'substandard' either because it does not meet industry standards in terms of its manufacturing or physical characteristics, or because it was not subject to the required quality assurance testing. The relevant question is whether the quality assurance line of cases allows the lottery ticket Plaintiffs to proceed without each of them actually proving that they received product that is 'substandard,' either with respect to manufacturing or testing. They clearly do not." Docket No. 791, at 12:21-13:4.

The Court would ask J-M to explain why these statements in its Reply brief do not doom its motion certainly as to phase one of the trial (unless the Court misunderstands the full tenor of J-M's motion).

Getting beyond that point, Plaintiffs have directed the Court to a group of cases which, they assert, support their position on this question. They are: *U.S. ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998); *U.S. ex rel. Lockhart v. Gen. Dynamics Corp.*, 529 F.Supp.2d 1335 (N.D. Fla. 2007); *U.S. ex rel. Fallon v. Accudyne Corp.*, 921 F.Supp. 611 (W.D. Wis. 1995); *U.S. v. Collyer Insulated Wire Co.*, 94 F.Supp. 493 (D.R.I. 1950); *BMY-Combat Sys. Div. of Harsco Corp. v. United States*, 38 Fed. Cl. 109 (Fed. Cl. 1997); *U.S. ex rel. King v. DSE, Inc.*, 2011 U.S. Dist. LEXIS 52830 (M.D. Fla. May 17, 2011); and *U.S. ex rel. Jordan v. Northrop Grumman*, 2002 U.S. Dist. LEXIS 26674 (C.D. Cal. Aug. 5, 2002). J-M responds that in each of those cases, the plaintiff[4] actually knew that it had received substandard products.

The "falsity" question in *Compton* could not have been more clearly explained by

[4] J-M emphasizes that each of the cases involved only a single plaintiff. But, whichever side is correct on the law on this question, the number of plaintiffs in a case seems somewhat beside the point. Either each plaintiff must demonstrate receipt (in connection with a claim) of an actually defective product, or none of them do, but instead need only show it received a product which was not subject to the quality testing as represented.

the Sixth Circuit. It involved "whether [the defendant] incorrectly represented that the brake-shoe kits conformed to the contracts" the defendant had with the army, 142 F.3d at 301, which, among other things, required testing of 1 out of every 250 sets of brake shoes, *see id.* at 297-98, 301. The defendant in *Compton* may have *argued* "that it would be improper to hold it liable under a jeep brake-shoe contract for its failure to comply with a testing method . . . when the jeep brake shoes delivered by [the defendant] satisfied the 5,000-pound shearing resistance requirement even though they were not properly tested," *id.* at 302, but the court rejected the idea that it was supported by the facts (and, in any event, the Sixth Circuit rejected the argument, *see id.*).

In fact, the opinion indicated that, "as a factual matter, [the defendant's] brake shoes decidedly did not comply with the 5,000-pound shearing resistance requirement; the summary judgment record indicates that more than 60 percent of the brake shoes tested in an Army investigation failed this requirement." *Id.* The recovery in that case was not for three times *60%* of the contract price, but was for three times *the entire* contract price. *See id.* at 299, 304-05; *see also id.* at 304 ("The record demonstrates that the brake shoe kits delivered by [the defendant] to the Army were completely valueless, not only because most of them could not withstand 5,000 pounds of force, but also because *none* of them came with the quality assurance of a product that had been subjected to periodic production testing."). The Sixth Circuit also commented, in a footnoted reference to an earlier Fifth Circuit case, that "'[t]he mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of liability' if the item does not in fact conform to the express contract terms." *Id.* at 302 n.4 (quoting *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972)); *see also id.* at 304 ("[E]ven pre-1986 precedent makes clear that a manufacturer who knowingly supplies nonconforming goods to the government, based on a belief that the nonconforming goods are just as good as the goods specified in the contract, is liable."); *id.* at 305 n.8 ("We stress that the government did not bargain only for plug-welded brake shoes that could withstand a certain amount of force; they also bargained for the confidence that comes with a product that has been subjected to production testing.").

In short, with *Compton* on the books, it is not clear why the Court would need to go any deeper into its case-analysis to conclude that J-M may not prevail in this motion,

at least insofar as it had a goal of demonstrating the need to prove receipt of an actually-defective product. The remainder of the cases only seem to strengthen Plaintiffs' position on this point. *See, e.g.*, *Lockhart*, 529 F.Supp.2d at 1341 ("The fraud, though, was the failure to test and the failure to disclose the failure to test."); *Collyer Insulated Wire*, 94 F.Supp. at 496 ("The fraudulent practices of the defendants made it impossible to distinguish satisfactory wire and cable from that which was inferior; and, in this way, these fraudulent practices tainted each voucher so that each separate voucher constituted a false claim."). If J-M's goal is to have the Court rule that Plaintiffs cannot prevail by proving only that they received pipe that did not conform to J-M's testing obligations (as informed by the independent standards agencies), these cases suggest that J-M will not achieve that goal.

Now, does that mean that Plaintiffs (or any single plaintiff) can get away without demonstrating at least that the pipe they received in connection with a claim was among the pipe that is affected by the alleged failure-to-test or false testing practices? The answer to that would seem to be "no." But, it would seem that the Defendant's current motion for summary judgment, which rests primarily on legal argument, does not set up that issue for resolution.[5] Needless to say, this issue needs to be addressed at the hearing by both sides.

[5] Part of the problem is that the Court has ordered bifurcation of the case and limited the discovery to certain representative Plaintiffs.