

Testimony of

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HB 525
Maryland False Claims Act of 2013
Maryland Legislature

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My name is Vincent McKnight of the law firm of McKnight & Kennedy, LLC. I submit this testimony in support of HB 525 (the Maryland False Claims Act of 2013). I have been a Maryland resident since 1986, and I am a life-long resident of the Washington, DC metropolitan area. More importantly, I practice law focusing on representing whistleblowers against government contractors accused of fraudulent conduct. McKnight & Kennedy, LLC is located in Lee Plaza in downtown Silver Spring, MD.

On August 7, 2009 Vincent McKnight and Altomease Kennedy founded the firm of McKnight & Kennedy, LLC, specializing in the representation of whistleblowers advancing claims under the False Claims Act. This minority owned and operated whistleblower law firm is the only African American firm in the country concentrating in this area, according to the organization, Taxpayers Against Fraud. Mr. McKnight and Ms. Kennedy have combined experience of over 50 years advocating and trying cases on behalf of plaintiffs, but over the last several years their practice increasingly focused on representing whistleblowers.

In these matters, called *qui tam* actions, whistleblowers allege that government contractors are knowingly making false or deceptive statements to obtain monies from the government. The statute permits the whistleblowers, also known as Relators, to bring these actions on behalf of themselves as well as the Government. Prior to August, 2009, Mr. McKnight and Ms. Kennedy developed a successful *qui tam* department at the law firm of Ashcraft & Gerel, LLP. There they litigated several ground breaking decisions including:

- *United States of America Ex. Rel. Edward Totten v. Bombardier*, 380 F.3d. 488 (DC Circuit 2004). Mr. Totten, an Amtrak engineer, claimed that significant irregularities in the procurement process associated with the design and building of the Acela Train system violated the Federal False Claims Act. Then DC Circuit Judge John Roberts concluded that the False Claims Act did not apply because the claims had not been “presented” to a federal employee for payment, rather all claims had been submitted to

Amtrak officials. This allowed Bombardier to escape liability even though the funding for the Acela Train came from Congressional Appropriations. In the subsequent years, the “presentment” argument was used to narrow the reach of the False Claims Act. On May 9, 2009, President Barack Obama signed the Fraud Enforcement Recovery Act. In the Senate Report (Report 111-10), Senator Leahy specifically rejected the rationale of the Totten court, and adopted the position that Mr. McKnight had argued in 2004. (“The Totten decision...runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.” Page 10 – 11)

- *United States Ex. Rel. Safina Office Products v. Office Depot, Inc., et. al.* Edward Wilder and Robert Lee, officers of Safina Office Products noticed that many of their government contracting competitors were violating the Trade Agreements Act. Safina Office Products sold products to government agencies through a GSA MAS contract. In any given year, over \$35 Billion dollars of goods and services are sold through the GSA contracting process. Vendors who participate in the process promise to abide by the Trade Agreements Act, and certify that they will not sell products to the Government that originate in a country that has not signed a trade agreement with the United States. These countries include China, Taiwan and India. However, having promised not to do so, many companies did sell forbidden products. As a result of this action, the Department of Justice secured several large settlements: Office Max (\$9.8 Million); Staples (\$7.4 Million); Corporate Express (\$5.02 Million); Office Depot (\$4.75 Million). These cases were some of the largest Trade Agreements Act cases on record, and brought this issue to light.
- *U.S. Ex. Rel. Kapuscinski v. Network Appliance.* Mr. Kapuscinski worked for Network Appliance, a vendor, specializing in providing high-end information technology solutions to commercial and government customers. Network Appliance maintained a GSA

contract. Companies that sell through the GSA procurement portal, promise to give the Government “Most Favored Customer” status. That is, the Government expects to receive pricing discounts that are better or, at least similar, to the discounts being offered to commercial customers. Indeed, during contract negotiations, GSA vendors are required to identify the prices paid by their best commercial customers so that the Government can negotiate a fair pricing point. In this case, Network Appliance failed to give the Government proper pricing. The Department of Justice settled this case for \$128 million which is the largest GSA procurement fraud settlement in history.

You will notice that these cases involve general procurement issues as opposed to medical claims and defense claims. While we do assist whistleblowers with medical claims, we have continued to pursue claims respecting the Trade Agreements Act, Best Price Clause, and price manipulation.

Over the last 10 years in this practice, I have learned that fraud happens. First, fraud happens because a certain percentage of businesses will take advantage if given the opportunity. Second, fraud happens because contracting officers in my experience are focused on implementing the program at hand. Moreover, contracting officers often manage several multi-million dollar contracts and are matched against procurement departments from corporations that may be staffed by 30 or more persons. Third, fraud happens because, there is a substantial likelihood that the perpetrator of fraud will not be caught.

At the time that the Congress was considering the 1986 Amendments to the Federal False Claims Act, some estimated that fraud impacted 5 to 10% of the federal budget. Indeed, this estimate was reported again recently in an article.¹ Furthermore, in the state of Florida it has been recently estimated that the amount of dollars lost to fraud on an annual basis is between 5% and 10% of the annual budget.² These percentages do not sound alarming until they are placed in context. The federal budget for 2012

¹ <http://www.examiner.com/article/10-of-the-entire-annual-u-s-government-budget-of-3-6-trillion-lost-fraud>

² <http://insurancenewsnet.com/article.aspx?id=364294&type=lifehealth>

was \$3.7 Trillion. Ten percent of \$3.7 Trillion is \$370 Billion. That's a lot of money. In spite of the robust efforts of the DOJ and whistleblowers in 2012, DOJ reports that it only recovered \$4.9 Billion in 2012.³ This means that only 1.3% to 2.6% of fraud was recovered in 2012 by the Federal Government. Flipping these numbers around, it means that at least 97% of the dollars lost to fraud were not captured. So right now, fraud pays.

The Federal Government is fighting back. It has recovered \$24.2 Billion since 1986. *Id.* Progress is being made.

Maryland had a budget of \$14.7 Billion dollars. Assuming that Maryland suffers from fraud at the same rate as the federal government and the state of Florida then 5% to 10% of the budget was lost to fraud. This amounts to \$73.5 Million to \$147 Million. What makes this worse is that Maryland has no general mechanism to track down and capture cheaters, other than the Health Care False Claims Act. While Maryland had a budget surplus in 2012, by failing to pursue all of procurement fraud, waste, and abuse, the state of Maryland is losing between \$73.5 Million to \$147 Million each year.

Why does fraud happen? Right now, those who are stealing have little incentive to stop. Second, there is a surplus and contracting officers are focused on implementation and are outgunned by corporate procurement divisions. Third, fraud pays.

I strongly encourage this body to take a step in the right direction, and begin to recapture the dollars lost to fraud in the state of Maryland.

³ <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>