IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA
ex rel. TODD HEATH,

Plaintiff/Relator,

v.

WISCONSIN BELL, INC.,

Defendant.

Case No. 2:08-cv-000876-LA
(Lead Case No. 2:08-CV-00724-LA)

Judge Lynn Adelman

PLAINTIFF/RELATOR'S RESPONSE TO *AMICUS CURIAE* BRIEF FILED BY THE CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT

INTRODUCTION

As a "friend of the court," one reasonably would expect the Chamber of Commerce of the United States (Chamber) to take a more forthright and unbiased approach, perhaps providing the Court with a fresh perspective on the issues consistent with the interests of its members. Instead, the Chamber chooses to regurgitate Wisconsin Bell's arguments and makes no bones about the fact it stands firmly behind Wisconsin Bell's billing misconduct, as alleged here. In the process of trying to defend and deflect attention away from Wisconsin Bell's overbilling, the Chamber takes unwarranted jabs at the both the Relator and the Government, unfortunately misstating both the facts and the law in doing so.

The E-Rate program was established by Congress to promote a clear governmental objective. Specifically, E-Rate legislation was passed by Congress in 1996 to give our nation's schools and libraries greater access to new technologies, including the internet, so that teachers and students could take better advantage of them. By passing E-Rate legislation, Congress intended to improve the educational opportunities available to our children thereby allowing the

United States to maintain and improve its standing as a world leader in education. These fundamental governmental objectives are seriously undermined when telecommunications companies blatantly ignore the E-Rate program's most-favored pricing requirement and knowingly overcharge schools, libraries and the federal E-Rate program by many millions of dollars.

Simply said, telecommunications companies cannot be allowed to defraud and siphon many millions of dollars out of the federal E-Rate program with impunity, merely because they wish to inflate already massive bottom lines. Contrary to what the Chamber might want the Court to believe, E-Rate is not a private charity funded by the telecommunications industry. It is a federal program established by Congress that distributes billions of dollars annually, and it would not exist (and, indeed, could not exist) but for the federal legislation that established it in 1996. *See* 47 U.S.C. § 254 (establishing the Universal Service mechanism that funds E-Rate and similar governmental programs). When the Universal Service Administrative Corporation (USAC) administers E-Rate, it does this on behalf of the United States (not for any of its own private purposes) and subject to the control of the FCC. (*See* Relator's Br. Opp'n Def.'s Second Mot. Dismiss at 18, Jan. 7, 2015, ECF No. 16 [hereinafter Relator's Br. Opp'n] (citing 47 C.F.R. §§ 54.701-.702, .711)).

Still, despite these clear governmental objectives and the nature of the E-Rate program, the Chamber insists that E-Rate is a "private" program, such that companies who knowingly defraud it cannot possibly be held accountable under the False Claims Act, 31 U.S.C. § 3729. To make these arguments, however, the Chamber must ignore the clear language, fundamental purpose, and legislative history of the False Claims Act, including the 2009 FERA amendments. The Chamber also must blatantly disregard the fact that the United States has repeatedly

prosecuted criminal cases and settled False Claims Act litigation involving E-Rate fraud, which would not have been possible if E-Rate funds were not government funds, as the Chamber now contends. *See, e.g., U.S. v. AT&T Missouri*, 06cv0389 (W.D. Mo. May 10, 2006) (United States intervened and settled False Claims Act case alleging AT&T Missouri colluded with school representatives to overbill USAC) (*see* http://www.justice.gov/opa/pr/att-missouri-agrees-settle-false-claims-act-lawsuit-involving-e-rate-program for settlement details); http://www.justice.gov/opa/pr/att-technical-services-corp-pay-us-more-82-million-settle-false-claims-involving-e-rate (reporting case where an AT&T entity settled fraud claims brought by the DOJ and the FCC Office of the Inspector General for $8.3 million and, in its settlement with the FCC, agreed to abide by the lowest corresponding price requirements under the E-Rate program in the state of Indiana); *see also U.S. v. Lehmann*, No. 05cv3836 (S.D. Tex. Nov. 14, 2005) (United States intervened and settled a False Claims Act case involving inflated billing to USAC after the district court denied motions to dismiss); *U.S. v. Harper*, No. 10cr326 (E.D. La. Nov. 18, 2010) (United States successfully prosecuted defendant for conspiracy to defraud the United States for submitting false bills to USAC); *U.S. v. Rowner*, 08cr464 (N.D. Ill. June 10, 2008) (sentencing individual to 27 months for conspiracy to defraud the United States for submitting false invoices to USAC under the E-Rate program).[1]

The Chamber enthusiastically proclaims its *amicus* brief was filed to advance the interests of more than three million businesses and professional organizations. But, truth be told, very few of the Chamber's members are involved with E-Rate, a federal program that generally benefits large telecommunications companies, not ordinary small businesses like those the

[1]Although it does not bear directly on the pending motion, if the Chamber's position is adopted by this Court and others, what does this mean for the ability of the United States government to prosecute E-Rate fraud (of any type) going forward, not to mention what happens to those individuals who were criminally prosecuted and convicted for defrauding the United States by submitting false invoices to USAC?

Chamber claims to represent. The overwhelming majority of the Chamber's members (especially, small business owners) are law-abiding taxpayers, who (if asked) would certainly share the Relator's interest in ensuring that important government programs, such as the E-Rate program, are not defrauded.

Certainly, the Chamber's millions of members (primarily small businesses) would be greatly disappointed to learn that the Chamber is advocating legal positions that would (if accepted) allow large telecommunications companies to knowingly overcharge an important government program simply to garner enormous (additional) profits for themselves, all at the expense of our country's schools and libraries and contrary to the fundamental interests we should share in educating children.

SUMMARY OF ARGUMENT

The threshold question presented here is whether USAC acts as an "agent" of the United States when it administers the E-Rate program. Given that E-Rate is a government-*administered* program, the False Claims Act is clear that any party who knowingly submits false payment demands to USAC (as the government *agent* responsible for administering the program) may be held liable under the statute, regardless of the source of the program funds. Whether those funds are considered "federal funds" flowing directly from the U.S. Treasury, or "private funds," as the Chamber argues here, whenever a company knowingly submits false payment demands to a government agent administering such a program, it subjects itself to False Claims Act liability.

On this point, Congress could not have been clearer, as demonstrated by the Senate Report on the 2009 FERA amendments to the False Claims Act:

> When the U.S. Government elects to invest its resources in administering funds ***belonging to another entity***, … it does so because use of such investments for their designated purposes will further the interest of the United States. False claims against ***Government-administered funds*** harm the ultimate goals and U.S.

> interests and reflect negatively on the United States. ***The FCA should extend to these administered funds*** to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term "claim" in new Section 3729(b)(2)(A) and attaches liability to knowingly false requests or demands for money or property from the United States Government, ***without regard for whether the United States holds title to the funds under its administration***.

S. Rep. No. 111-10, at 12-13 (emphasis added).

While the Chamber tries to rebut many of the Relator's arguments, it conveniently ignores this legislative history, even though it was prominently highlighted (more than once) in the Relator's opposition brief. Indeed, given the plain language of the False Claims Act and this clear legislative history, the Chamber cannot (and does not) dispute that knowingly false claims submitted to an *agent* of the United States for a government-administered program are actionable, regardless of whether program funds are public or private. Rather, the Chamber chooses to focus on the much narrower question of whether USAC is, in fact, an "agent" of the United States. (*See* Br. Chamber of Commerce at 18-22 [hereinafter Chamber's Br.], ECF No. 118.)

The Chamber argues that USAC is not an "agent" of the United States because it cannot "bind" the government, even half-heartedly suggesting that USAC is nothing more than a run-of-the-mill private business subject to federal regulation just like "countless other private entities." (*See* Chamber's Br. at 21.) According to the Chamber, USAC cannot possibly be an agent of the United States because it does not meet the one and only criterion that the Chamber incorrectly asserts is dispositive. (*Id.* at 19-20.) Specifically, the Chamber contends that USAC cannot be an "agent" of the United States *unless* the government expressly delegates to it the authority to "enter into contracts that bind the Government." (*Id.* at 19.) This is an absurdly high standard that is inconsistent with the common law of agency. *Some* agents of the federal government may

be explicitly authorized to enter into contracts that bind the government, but it does not follow that *all* agents of the United States must be given such authority. (*Id.* (citing federal legislation authorizing insurance companies and banks to act as "fiscal agents" that, when acting within the scope of their designated authority, may obligate the federal government contractually))

As held in *Lyttle*, which decided the question presented here directly, the *two* pertinent criteria for determining whether USAC is an agent of the United States are those set forth in the Restatement (Third) of Agency (2006) (hereinafter, Restatement), which are: (1) whether USAC acts on the United States' behalf and subject to its control; and (2) whether USAC manifests assent or otherwise consents to so act. *Lyttle v. AT&T Corp.*, Civil Action No. 2:10-1376, 2012 WL 6738242, at *18 (W.D. Pa. Nov. 15 2012) (citing Restatement § 1.01.). Applying these two Restatement criteria, *Lyttle* had no difficulty concluding that USAC's parent company (NECA) was an agent of the United States when administering USF funds under a government program similar to E-Rate. *Id.*

The Chamber "disagrees" with *Lyttle*'s holding, at least as it pertains to the "agent" issue. It agrees with other parts of *Lyttle*'s holding (*i.e.* whether the United States "provides" funds to USAC), but relegates *Lyttle*'s analysis of the "agent" issue to a final footnote in its *amicus* brief. (Chamber's Br. at 22 n.15.) In its effort to get around the part of *Lyttle* it dislikes, the Chamber relies on an *incomplete* quotation from a portion of *one* of the *comments* to Restatement § 1.01, ignoring the plain language of the Restatement itself. *Id.* Notably, in *Lyttle*, the defendant (AT&T Corp.) made the same desperate arguments, without success. *Lyttle*, 2012 WL 6738242, at *16-18.

In *Lyttle*, AT&T Corp.'s agency arguments were fully considered by the court, and then soundly rejected. *Lyttle*, 2012 WL 6738242, at *16-18. *Lyttle* correctly relied on the *actual*

language of Restatement § 1.01 itself, explaining that different agents can have many different functions and the scope of an agency relationship is fact-specific and differs from case to case. *Id.* Some agents may be full-fledged statutory "fiscal agents" of the United States or agents who are delegated broad authority to "bind" the United States to certain types of contracts within the scope of their delegated authority, while others (like NECA, USAC's parent) are agents of the United States because they have been delegated the authority to administer a federal program and distribute payments under that program, such as the billions of dollars that USAC pays annually to telecommunications companies under E-Rate. *Lyttle*, 2012 WL 6738242, at *18.

As both *Lyttle* and Restatement § 1.01 make clear, it is not necessary for an agent of the United States to be a "fiscal agent" or a formal government agency or department with express authority to enter into contracts that "bind" the United States. Nor must an agent of the United States be delegated certain arguably non-delegable governmental powers such as the "authority to issue binding interpretations of FCC regulations," as was the issue addressed by *Farmers Tel. Co. v. FCC*, 184 F.3d 1241(10th Cir. 1999).[2] It simply is *not* accurate for the Chamber to assert, as it does, that *every* agent must be delegated authority to interpret laws or "bind" its principal contractually in every respect, or it is no agent at all. (Chamber's Br. at 19-21.) As *Lyttle* holds, a private entity can be an agent of the United States *even if* it cannot legally "bind" the United States to contracts, to adjudicatory determinations, or in every other respect. *Lyttle*, 2012 WL 6738242, at * 18 (holding that NECA was an agent of the United States even though it could not "bind" the government where it "acted on the FCC's behalf and subject to its control").

[2]The Chamber repeatedly cites this case though it addressed very different issues – *i.e.* whether the FCC delegated to NECA certain *adjudicatory* or other inherently governmental powers, including the power to issue binding interpretations of FCC rules. (Chamber's Br. at 20); *Farmer's Tel. Co.*, 184 F.3d at 1250 ([NECA had] "no authority to perform adjudicatory or other governmental functions."). As in *Lyttle* (and unlike in *Farmers*), the present case does not involve the question of whether NECA can "issue binding interpretations of FCC regulations." *Lyttle*, 2012 WL 6738242, at *16. As *Lyttle* held: "The *Farmers* case is not on point." *Id.*

Although the Relator devoted much of its opposition brief to the "agent" question, the Chamber hides its response to these arguments at the very end of its brief. (Chamber's Br. at 18-22). To be clear, the Relator whole-heartedly agrees with the United States Department of Justice (DOJ) when it argues that the holding of *U.S. ex rel. Shupe v. Cisco Sys., Inc.*, 759 F.3d 379 (5th Cir. 2014) is flawed and should not be followed. As discussed herein, USAC is not some private charity, and it would never have access to the *billions* of dollars in E-Rate funds that it distributes annually but for the United States making those funds available to USAC. As such, the United States "provides" E-Rate funds for USAC to distribute for governmental purposes. But, rather than repeat the arguments being made by the DOJ on these issues, the Relator joins in those arguments. The United States has greater first-hand knowledge of how E-Rate funds are handled and administered and, therefore, it is likely in a better position to address these issues.

The Court does not need to confront the Fifth Circuit Court of Appeals' decision in *Shupe* because *Shupe* did not analyze the "agent" issue that is the focus of the Relator's arguments here. Consistent with *Lyttle* and the two criteria of Restatement § 1.01, USAC acts as an "agent" of the United States when it administers the E-Rate Program and distributes billions of dollars to telecommunications companies annually. As such, when Wisconsin Bell knowingly overcharges the E-Rate Program, it subjects itself to False Claims Act liability. The Chamber's assertion that no False Claims Act liability (or presumably criminal liability) ever attaches, even where a company knowingly defrauds the E-Rate program, is incorrect and should be flatly rejected.

ARGUMENT

I. The Threshold Question Presented Here is Whether USAC is an "Agent" of the United States for Purposes of the False Claims Act.

Contrary to what the Chamber argues, the central question presented here is not whether the Government "provides" the E-Rate funds that USAC administers. While that question is

certainly raised by the pending motion to dismiss, the *threshold* question is whether USAC is an "agent" of the United States for purposes of the False Claims Act when it administers the E-Rate Program and distributes billions of dollars to telecommunications companies annually. *See* 31 U.S.C. § 3729(b)(2)(A)(i) (2012) (defining "claim" to include any request for payment submitted to an "agent" of the United States, regardless of "whether or not the United States has title to the money"). The "agent" issue presented here was *not* analyzed or decided in *Shupe* and, therefore, this Court does not need to confront the Fifth Circuit Court of Appeals' decision to decide this issue. *See U.S. ex rel. Shupe v Cisco Sys., Inc.*, 759 F.3d 379, 387-88 (5th Cir. 2014) (noting the United States' agency argument but deciding the appeal based solely on fact that USAC is not a government entity and the government does not "provide" the funds).

A false payment demand made to an "agent" of the United States is actionable under the False Claims Act *regardless* of whether the United States "provides" the funds being administered by the government agent. *See* 31 U.S.C. § 3729(b)(2)(A) (2012); *see also* S. Rep. No. 111-10, at 12-13. In a sign of desperation, the Chamber improperly suggests that the False Claims Act requires *both* that USAC act as an "agent" of the United States *and* that the United States "provide[]" the E-Rate funds that USAC distributes. (Chamber's Br. at 18.) The manner in which the Chamber does this is troubling. Specifically, it quotes from § 3729(b)(2)(A), but emphasizes the word "*and*" in a misleading way. (*See id.*) As the plain words of the statute make clear, the "and" that the Chamber chooses to emphasize applies only to a portion of the statute that is not relevant to the "agent" question – discussing claims made to "a contractor, grantee, or other recipient" of government funds. *See* 31 U.S.C. § 3729(b)(2)(A)(ii)(I) and (II). There was

no reason for the Chamber to emphasize the word "and" and, in doing so, it is apparent that the Chamber was not being entirely "friendly" to the Court.[3]

II. USAC Acts As an "Agent" of the United States When It Administers the E-Rate Program.

The Chamber does not (and cannot) dispute that the False Claims Act prohibits a party from knowingly submitting false claims to agents of the United States who are responsible for government-administered programs. On this point, the statute is clear. 31 U.S.C. § 3729 (b)(2)(A)(ii) (false "claim" includes false payment demands to an "agent" of the United States). So is the legislative history. *See* S. Rep. No. 111-10, at 12-13 (quoted above). Because it cannot dispute this point, the Chamber instead argues that USAC is not an *agent* of the United States. (*See* Chamber's Br. at 18-21.) But, the Chamber proposes an inappropriately narrow definition of "agent" inconsistent both with the holding of *Lyttle* and the clear language of the Restatement. The Chamber's proposed definition of "agent" finds no support in the law and should be rejected, just as the court did in *Lyttle*. *See Lyttle*, 2012 WL 6738242, at *18 (holding that USAC's parent, NECA, was an "agent" of the United States under the False Claims Act).

The Chamber concedes that Congress did not define "agent" for purposes of 31 U.S.C. § 3729(b)(2)(A) (2012). (Chamber's Br. at 19). It also concedes that the term must be construed consistent with the common law as expressed by the Restatement, including Restatement § 1.01. (*See id.* at 19, 20 (citing comments to Restatement § 1.01.)) In relevant part, the Restatement provides:

[3] The Chamber's law firm was involved in the briefing of the *Shupe* case, so it certainly understands the False Claims Act and knows that that this portion of the statute's definition of "claim" refers to 31 U.S.C. § 3729(b)(2)(A)(ii) (involving "a contractor, grantee, or other recipient" of government funds), and not to 31 U.S.C. § 3729(b)(2)(A)(i)(involving an "officer, employee, or agent of the United States.") The Chamber does not argue otherwise, but inexplicably chooses to emphasize an irrelevant "and" instead of the pertinent "or" that is between 31 U.S.C. § 3729(b)(2)(A)(i) and (A)(ii).

> § 1.01 Agency Defined
>
> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Restatement (Third) § 1.01 (2006). As this quote shows, the fundamental basis of an agency relationship is a consensual arrangement (through words or conduct) whereby one party undertakes to act for another. *Id.* Contrary to what the Chamber suggests, nothing in the Restatement says that an agent is somehow not really an agent unless the principal provides it with broad authority to "bind" the principal in contract or alter its "legal relations" with third parties in every conceivable way. (Chamber's Br. at 19, 20). If that was the standard, then an agent necessarily would need to have *all* the same authority as its principal, and it would effectively be identical to the principal and not really an agent at all.

Not only does Restatement § 1.01 articulate the common law, it makes common sense. The scope of an agent's actual authority is necessarily defined and limited by the principal. Not every agent is (or needs to be) delegated the specific authority necessary to "bind" a principal contractually, and even when agents are authorized to bind a principal contractually or alter its "legal relations" with third parties, that authority is not without limits. For example, when a corporation designates an agent for service of process, it authorizes the agent to accept pleadings and other legal papers on its behalf. In that sense, the agent can be said to "bind" the principal or affect its "legal relations" with third parties in that the corporation is deemed to have received legal process once the agent is properly served. But, this does not mean that the agent has broad authority to enter into business contracts for the corporation or otherwise "bind" it legally on a wide range of matters that are outside the scope of its designated authority.

Here, the United States and FCC delegated to USAC certain responsibilities for administering and disbursing funds under E-Rate. Applying the two criteria identified in Restatement § 1.01 to those delegated duties to administer E-Rate, the United States and FCC "manifested assent to [USAC] that [USAC] shall act on [the Government's] behalf and subject to [the Government's] control" when administering the E-Rate program. Restatement § 1.01. Likewise, USAC has "manifest[ed] assent or otherwise consent[ed] to act" on the Government's behalf by administering E-Rate for many years. *Id.* As discussed in detail in Relator's opposition to Wisconsin Bell's motion to dismiss, the FCC closely supervises and controls USAC's activities when it administers E-Rate. *See* Relator's Br. Opp'n at 18 (citing 47 C.F.R. §§ 54.701-.702, .711). Thus, when USAC administers E-Rate and disburses billions of dollars to telecommunications companies annually, it does so in its capacity as an agent of the United States consistent with the agency definition set forth in Restatement § 1.01. *See Lyttle*, 2012 WL 6738242, at *18 (holding that NECA was an "agent" of the United States applying the criteria of Restatement § 1.01).

In a desperate attempt to confuse the standard, rather than discussing the language of Restatement § 1.01 itself, the Chamber seems to rely on *a portion* of *one sentence* from comment (c) to Restatement § 1.01. (*See, e.g.*, Chamber's Br. at 22 n.15 ("[U]nder the Restatement, an agent has authority to 'bind' the principal.") (quoting without attribution a portion of one sentence of Restatement § 1.01 cmt. c)). The sentence that the Chamber apparently relies upon does not even use the word "bind." *See Lyttle*, 2012 WL 6738242, at *16 (discussing AT&T Corp.'s "bind" argument and the alleged basis for it). In its entirety, it as follows (*see id.*), with the limited portion apparently relied upon by the Chamber emphasized in italics below:

> As defined by common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another,

> acts as a representative of or otherwise acts on behalf of another person **or** otherwise *acts on behalf of another person with the power to affect legal rights and duties of the other person.*

Restatement § 1.01, cmt. c. (emphasis added). As the *complete* sentence states (including the word "or" bolded above), it is not a prerequisite to an agency relationship that the principal delegate broad authority allowing the agent to bind the principal or "affect" (the word the Restatement comment actually uses, rather than "bind") its legal rights in every respect. *Id.* Yet, this is what the Chamber contends when it argues that USAC cannot possibly be an "agent" of the United States because it allegedly does not have the authority to "bind" the FCC in some unspecified way that it believes is dispositive. (Chamber's Br. at 19-20).

While an agent can, through actual or apparent authority, affect the legal rights and duties of its principal (subject to various factors, including the scope of authority granted to it by the principal, as well as the expectations of the third party with which the agent is dealing), it certainly is not necessary, as the Chamber suggests, that every agent be delegated the authority to "bind" its principal contractually or affect all of its "legal relations" with third parties in every conceivable sense. Indeed, the very same comment cited by the Chamber makes this point clear, when it says:

> *Agents who lack authority **to bind** their principals to contracts* nevertheless often have authority to negotiate or to transmit or receive information on their behalf.

Restatement § 1.01, cmt. c (emphasis added). Thus, contrary to what the Chamber suggests, an agent is still an agent even if it does not have the specific authority to bind its principal contractually. *Id.* Later, the same Restatement comment reinforces the point, when it says:

> The fact that an agent acts on behalf of, or represents, another person implies the existence of limits on the scope of the agency relationship and on the extent to which the principal is accountable for the agent's acts.

Id., cmt c. Thus, the comment confirms that an agent's authority is necessarily limited, so any suggestion that an agent must have *full* authority to bind and affect the legal relations of its principal (in all respects) is refuted by the very authority cited by the Chamber.

Here, E-Rate is a program established by Congress and supervised by the FCC, and USAC administers that program on behalf of the United States with the consent of the government. USAC has manifested its consent to administer the E-Rate program by continuing to do so for many years, since it was first appointed to do so in 1997. 47 C.F.R § 54.701. As such, USAC is an agent of the United States. When it considers requests for E-Rate funds and disburses those funds, USAC acts within the scope of its authority and is undeniably an agent of the United States. It does not matter whether USAC can legally "bind" the United States in matters that are outside the scope of its agency. That is not the test for agency. Restatement § 1.01. When USAC administers E-Rate and disburses funds (and nobody disputes it does this), it acts as an agent of the United States. Just as NECA was determined to be an agent of the United States in *Lyttle*, 2012 WL 6738242, at *18, USAC too is an agent of the government here.

Finally, while the Chamber does not represent USAC, it still weakly asserts that USAC is not an agent of the United States because, according to the Chamber, USAC is no different than any other "private entity" that is regulated by the federal government. (Chamber's Br. at 22). This argument has no merit. USAC is not like the small manufacturer or corner retail business (which the Chamber often represents) that must comply with a wide range of federal, state and local regulations as part of running its business. Rather, USAC was specifically delegated the authority by Congress and the FCC to administer a multi-billion dollar government program, the FCC has maintained final decision making authority over the use of funds in that program, 47 C.F.R. §§ 57.702(6)-(c); 54.719, USAC has had the full weight of the FCC and DOJ prosecuting

fraud related to those funds, and the FCC and the U.S. Treasury have collected $100 million in unpaid debts and fines for USAC, *see* Statement of Interest ECF No. 111 at 2-3. In short, USAC is nothing like a private entity.

USAC is an agent of the United States, and it certainly acts within the scope of its agency when it receives and responds to demands for E-Rate funds from Wisconsin Bell and many other telecommunications companies. As such, when Wisconsin Bell knowingly submits false payment demands to USAC acting as an agent of the United States, it is exposing itself to liability under the False Claims Act. Knowingly submitting false payment demands to a government-administered program is precisely the type of wrongful conduct that the False Claims Act was always intended to address. *See* S. Rep. No. 111-10, at 12-13.[4]

II. Even Before the 2009 FERA Amendments, the False Claims Act Applied to the Wrongful Conduct at Issue Here.

The "agent" question is pertinent not only with respect to Wisconsin Bell's post-2009 conduct, but also its pre-2009 conduct. Even before the 2009 FERA amendments, the False Claims Act was meant to be construed broadly to cover knowingly false claims submitted to government-administered programs, including programs administered by *agents* of the United States. *See* 31 U.S.C. § 3729(C) (2008) (broadly defining the term "claim" in an open-ended manner to "include[]" various types of payment demands to government representatives); *see*

[4]The Chamber seemingly attempts to downplay the impact of the 2009 Senate Report showing the FCA amendments were intended to clarify the previous definition of claim. In particular, it cites a case finding committee reports from a later Congress less persuasive where the legislation does not "mention clarification," and claims the same is true here. Chamber's Br. at 11. But the Chamber has the facts wrong. The Public Act that was passed to amend the FCA gave the following heading to the section in which it amended the definition of "claim": "CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW." Pub. L. 111-21, 123 Stat. 1617, 1621. Thus, Congress clearly stated it was clarifying the statute in the legislation it passed, and the cases the Chamber cites are inapplicable. Further, although the Chamber cites *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011), which states in dicta that committee reports by a later Congress are not authoritative legislative history, the case does not deal with clarifying legislation as is the case with the 2009 amendments to the FCA, and thus is not on point. Rather, this clarifying legislation and the statements of that Congress are strong persuasive authority for interpreting the definition of "claim."

also Stansell v. Revolutionary Armed Forces of Colom., 704 F.3d 910, 915 (11th Cir. 2013) ("When a statutory definition declares what a term 'means' rather than 'includes,' any meaning not stated is excluded. This is because the term 'means' denotes an exhaustive definition, *while 'includes' is merely illustrative*.") (emphasis added; internal citations omitted).

This is *not* a question of "retroactive" application of the FERA amendments, as the Chamber argues. It is a question of what type of misconduct Congress intended to be covered by the False Claims Act *before* the 2009 FERA amendments. The best indicator of what Congress intended is Congress itself. *See Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 734 (7th Cir. 1991) ("Whether we examine only the wording of an unambiguous statute or consider other evidence when the meaning is not clear, our task remains the same – *to determine the will of Congress and to apply it*.") (emphasis added).

Before the 2009 FERA amendments, the term "claim" was defined by the False Claims Act as follows:

> (c) CLAIM DEFINED. – For purposes of this section, "claim" ***includes*** any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. §3729(c) (2008) (emphasis added). Congress very specifically chose to use the word "includes" rather than "means" in this definition. When Congress uses the word "includes" in a statute, it intends that what follows will be exemplary, but not an exhaustive list. *See Samantar v. Yousuf*, 560 U.S. 305, 316 & n.10 (2010). In other words, "includes" means "includes but not limited to." *See id.*; *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). Thus, the pre-FERA definition of "claim" was intended by Congress to provide examples

of what constituted a "claim," but it was not intended to say that these were the *only* types of false claims that could trigger False Claims Act liability.

In 2009, after finding that courts were not interpreting the False Claims Act correctly, Congress replaced the word "includes" with "means" and provided greater detail about the types of payment demands *always* intended by Congress to be covered by the False Claims Act. *See* S. Rep. No. 111-10, at 12-13. Congress clarified the original intent of the law in response to a number of court decisions, including *U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2006). S. Rep. No. 111-10, at 10-13. In *Custer Battles* (as in the present case) an agent of the United States (the Coalition Provisional Authority (CPA)) administered funds that (in relevant part) were *not* derived from the U.S. Treasury. The district court decided (as the Chamber asks this Court to do) that there was no False Claims Act liability because there were no government funds at issue and because the CPA was not a government entity. *Custer Battles*, 376 F. Supp. 2d 617. When it passed the 2009 FERA amendments, Congress unambiguously declared that *Custer Battles* got it wrong. That court misinterpreted and misapplied the *pre*-2009 version of the False Claims Act, which was always intended to cover the very type of claim (involving a government-administered program, regardless of the source of funds) at issue in *Custer Battles*. S. Rep. No. 111-10, at 10-13. This eminently clear and unambiguous expression of legislative intent shows that, in the present case also, Congress *always* intended that the types of false claims at issue here (*i.e.* Wisconsin Bell's false claims to an agent of a government-administered program, USAC) would fall squarely within the scope of the False Claims Act. *See* Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009) (titled "Clarifications to the False Claims Act *to Reflect the Original Intent of the Law*.") (emphasis added).

So, Congress itself has weighed in on this issue and declared that, under the *pre*-FERA version of the False Claims Act, liability attached where false payments were submitted an "agent" of the United States, which administered a government program *even where* a portion of the funds at issue were not "federal funds" tied to the U.S. Treasury.

For all these reasons, even before the 2009 amendments, Congress intended that the False Claims Act would apply to the very type of false claims at issue here – specifically, false claims submitted to an agent of the United States, like USAC, when administering a government program, such as E-Rate. Thus, Wisconsin Bell faces liability under the False Claims Act with respect to both its pre-2009 and post-2009 conduct. For this additional reason, Wisconsin Bell's motion should be denied.

III. The United States "Provides" USAC with the Billions of Dollars It Pays Out Under the E-Rate Program.

As discussed herein, the threshold question presented by the pending motion to dismiss is whether USAC as an "agent" of the United States. If the Court follows *Lyttle* and holds that USAC is an "agent" of the United States, then Wisconsin Bell faces liability under the False Claims Act regardless of whether the United States "provides" the funds at issue. Indeed, the Court need not even decide the "provides" issue if it concludes that USAC acts as an agent of the United States when it administers the E-Rate program.

If the Court does reach the "provides" issue, then the Relator agrees with the DOJ that the United States makes available and thus *provides* the E-Rate funds to USAC. (*See* United States Statement of Interest 7-21 ("Statement of Interest"), January 7, 2015, ECF No. 106; Supplemental Filing 1-5, February 18, 2015, ECF No. 111). Rather than repeat those arguments

here, the Relator joins in those arguments and incorporates them by reference to the extent not inconsistent with the arguments specifically made here.[5]

CONCLUSION

For these reasons, the Chamber's amicus brief does not support granting the dismissal of this case. USAC is an agent of the United States when it administers E-Rate funds, such that False Claims Act liability attaches regardless of the source of funds. In addition, to the extent the source of the funds is pertinent, the United States makes available and "provides" the billions of dollars that USAC needs each year and pays to telecommunications companies when it administers the E-Rate Program.

As set forth herein, and in the other filings of the Relator and the DOJ, Wisconsin Bell's motion to dismiss should be denied.

[5] However, one inconsequential aspect of the DOJ's brief is incorrect. The DOJ states in footnote six that "[a]lthough the False Claims Act's definition of a 'claim' was amended in 2009, that new definition is not retroactive and thus does not currently apply in the instant case." Statement of Interest at n. 6. The Relator's current Amended Complaint, filed on December 9, 2011, alleges that the defendant made false or fraudulent claims "[f]rom 1997 through the present. . . ." Amend. Compl., ECF No. 64 at ¶ 74. Accordingly, Relator's existing cause of action does include allegations of the Defendant's conduct after the False Claims Act was amended in 2009. Further, Relator has also recently moved to amend the complaint further clarifying Defendant's conduct after 2009. *See* Motion for Leave, ECF No. 105

Respectfully submitted this 3rd day of April, 2015.

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