

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

THE UNITED STATES OF AMERICA ex rel.
BRIAN M. HOLBROOK;

Plaintiff,

vs.

AMENDED COMPLAINT

Case No. 06-C-90

W. W. GRAINGER, INC.,

Defendant.

NOW COMES the plaintiff, the United States of America ex rel. Brian M. Holbrook and, through their attorneys, the office of the United States Attorney General, and Alan C. Olson & Associates, S.C., by Alan C. Olson; and, as and for an Amended Complaint against the defendant, W. W. Grainger, Inc., alleges and shows to the Court the amendments to the original Complaint set forth in bold-lettering below, as follows:

NATURE OF CASE

1. This is a *qui tam* action in which plaintiff, Brian M. Holbrook, a former District Sales Manager of Government Sales for defendant, W. W. Grainger, Inc., (“Grainger”) claims that Grainger attempted to obtain federal funds through the submission of false or fraudulent claims for payment in violation of the False Claims Act (“FCA”), [31 U.S.C. § 3729, *et seq.*]

JURISDICTION AND VENUE

2. Jurisdiction over the claims of the United States of America ex rel. Brian M. Holbrook under the FCA, [31 U.S.C. § 3729, *et seq.*] is conferred on this Court by 31 U.S.C. § 3732(a). In this *qui tam* action under the FCA, the plaintiff sues on behalf of

and in the name of the government and invokes the standing of the government resulting from the fraud injury.

3. The Eastern District of Wisconsin is the proper federal venue for this action pursuant to 28 U.S.C. § 1391, in that defendant, Grainger, resides within the Eastern District and the unlawful actions occurred in the Eastern District.

CONDITIONS PRECEDENT

4. All conditions precedent to this action within the meaning of Rule 9(c), Fed. R. Civ. Pro., have been performed or have otherwise occurred.

JURY DEMAND

5. The United States of America ex rel. Brian M. Holbrook demands that this cause of action be tried to a jury of Mr. Holbrook's peers.

PARTIES

6. Plaintiff, the United States of America, ("the Government") effectively assigns the government's claims under FCA to plaintiff, Mr. Holbrook, who may sue based upon an injury to the federal treasury.

7. Plaintiff, Brian M. Holbrook, is an adult citizen of the United States, residing at 18327 Hillcrest Dr., New Berlin, WI 53146.

8. Grainger is upon information and belief, organized under the laws of the State of Illinois, and operates a facility at N21 W23020 Watertown Rd., Waukesha, WI 53186, in the Eastern District of Wisconsin, in an industry affecting commerce.

OPERATIVE FACTS

9. On or about December 16, 2004, Mr. Holbrook commenced employment with Grainger as the District Sales Manager of Government Sales.

10. Grainger sells industrial equipment and supplies.

11. Grainger's annual sales to the Government are approximately \$750,000,000.

12. Mr. Holbrook was responsible in his position to manage Grainger's government sales force in Wisconsin, Minnesota, Iowa, Nebraska, North Dakota, and South Dakota.

13. Mr. Holbrook was responsible in his position at Grainger to manage twelve Account Managers and one District Sales Assistant.

14. Mr. Holbrook's District generated \$18,000,000 of annual sales to the Government which is approximately 2.4% of Grainger's total annual government sales in the United States.

15. On or about April 4, 2005, Sam Johnson, the Senior Vice President of Government Sales for Grainger, and Ellen Upchurch, the Contracting Officer for the Government, entered a written contract, a copy of which is annexed hereto as Exhibit A, to modify contract GS-06F-00073, pursuant to which the Government would, *inter alia*, accept a fixed-percentage mark-up of 26% which would be added to Grainger's total cost (as invoiced from the source of supply) for each sourced item.

16. In the course of Mr. Holbrook fulfilling his job duties to Grainger, he discovered in or around July 2005 that Grainger is selling its products to the Government on an ongoing basis at prices that exceed the contractual 26% mark-up.

17. On or about July 12, 2005, Mr. Holbrook discovered that Grainger had outsourced a laser marking machine for \$18,000 and quoted the Government (U.S. Air Force), a sale price of \$27,134.10—a mark-up in excess of 26%.

18. After discovering Grainger's excess mark-ups, Mr. Holbrook made repeated efforts in the course of fulfilling his job duties to specifically identify each fraudulent sale by Grainger to the Government, but was prevented by Grainger from accessing the records he needed.

19. In order to specifically identify each fraudulent sale by Grainger to the Government after April 4, 2005, the following steps would be necessary: 1) identify all Government accounts by track codes and those that reside within Grainger's house accounts; 2) retrieve the invoices from the source of supply to Grainger for each sourced item; 3) multiply Grainger's cost for each sourced item by 126%; 4) for each price invoiced by Grainger to the Government that exceeds the number calculated in step 2, subtract from it the 126% price to determine the dollar amount of overcharge; 4) add the individual overcharges in step 3 to determine the total amount of Grainger's overcharges to the Government.

20. At Mr. Holbrook's request, John Vaccarello, Grainger's FindMRO Manager, researched one example of Grainger's fraud against the Government involving a May 26, 2005 Invoice #751253 from Grainger Branch 938 to Account #85-874-042-6 for the purchase of 3M Clear Anti-Static Tape (Item 9US99) in the amount of \$153.36.

21. Upon information and belief, based on a small sample, at least 1 out of 10 sales by Grainger to the Government exceed the contractual 26% mark-up.

22. Grainger fills tens of thousands of the Government's sales orders each year.

23. Mr. Holbrook complained to his supervisor, Gerald Frank, and other Grainger management personnel, on July 19, 20, 29, and August 5, 2005, about the

fraudulent sales to the Government, asked Grainger to audit the accounts, contact the Government Contracting Officer regarding Grainger's failure to comply with the contractual 26% mark-up, and specify Grainger's remedial action.

24. On July 29, 2005, Mr. Holbrook received notice that Grainger was selling to a Government account (United States Postal Service) at profit margins in the mid 30% to 60% range.

25. In response to Mr. Holbrook's complaints, Grainger credited approximately forty (40) randomly identified accounts, but in at least one case issued the credit to credit card #4716300005191433 that Grainger knew was no longer active or valid, thus denying the Government its due credit.

26. After Grainger purported to credit approximately 40 Government accounts, it did nothing to stop the ongoing fraudulent billing to the Government which, upon information and belief, is widespread and greatly exceeds the 40 credited accounts.

27. Upon information and belief, Grainger has not conducted a proper audit of its Government accounts to assure compliance with the contractual 26% mark-up.

28. Upon information and belief, Grainger has not contacted the Government Contracting Officer regarding Grainger's failure to comply with the contractual 26% mark-up, or to specify Grainger's remedial action.

29. Grainger receives new contacts and shipping addresses from agencies of the Government for the purchase of Grainger's products. The new information is often not categorized properly for purposes of issuing discounts and fall into Grainger's house accounts. As a result, Grainger fraudulently sells its products to the Government at prices

that knowingly exceed the standard catalog discount and the contractual 26% mark-up on outsourced items.

30. Grainger is required by contract with the Government to provide high-volume discounts to the Government. Grainger regularly sells to the Government at prices that knowingly do not include the contractual high-volume discount.

31. Grainger's sales to the Government in excess of a 26% mark-up cause injury to the federal treasury.

32. Grainger's sales to the Government that do not include the high-volume discount cause injury to the federal treasury.

33. Grainger Global Sourcing, (GGS) based in Hong Kong, functions as the international procurement organization within Grainger. The Grainger parent company is a direct importer of more than 4,500 products, which it sells under private-label brands.

34. Grainger publishes that the GGS's mission is to "procure high quality and cost competitive products from reliable Asian manufacturers to meet the private branded product needs of the various business units."

35. Grainger re-labels products manufactured in non-Trade Agreement countries, publishes them for sale in their catalogs, and sells them to the U.S. government on an ongoing basis.

36. For example, Grainger's products branded as, "Westward", "Condor", "Blackhawk", "LumaPro", and "Dayton", are made in China, Taiwan, and other non-Trade Agreement countries.

37. Grainger directly sourced 5% of its products from abroad, mostly Asia in 2005. Of those, 44% were made in China and 26% in Taiwan.

38. Grainger's 5600 products made abroad are sold under private label brands of tools, material handling, motors and safety equipment and generated \$243 million of Grainger's \$5 billion in sales in 2004/05. As of October 2005, Grainger expected sales of foreign-made products to grow by more than 30% that year.

39. Grainger has engaged in global sourcing since 1997 and now has established Procurement offices in Taiwan and China, with plans for further geographic expansion into India, South East Asia/Vietnam.

40. 54% of Grainger's total sourced items are from China and 25% are sourced from Taiwan.

41. Global sourcing significantly increases Grainger's gross profit margin.

42. Grainger's globally sourced private label products will increase by approximately 20% with a countervailing decrease in all other Grainger private label products.

43. On October 31, 2006, Mr. Holbrook purchased from Grainger through its on-line catalogue Jobber Drill Bit, 1/8, manufactured by Westward, and listed as product 4UI46. Nowhere in the catalogue does Grainger identify the country of origin and said product is, upon information and belief manufactured in non-Trade Agreement countries.

44. On November 3, 2006, Mr. Holbrook purchased from Grainger through its on-line catalogue 10 pr. Slip-on Side Shields, manufactured by Condor,

and listed as product 5AL29. Nowhere in the catalogue or on the packaging does Grainger identify the country of origin and said product is, upon information and belief manufactured in non-Trade Agreement countries.

45. The General Services Administration (GSA) is an agency of the Federal Government.

46. Upon information and belief, Grainger was required by its contract with the GSA to prevent items from countries that do not have reciprocal trade agreements with the U.S., such as China and Taiwan, from being offered for sale to U.S. government agencies.

47. GSA has created a website entitled, GSA Advantage, www.gsaadvantage.gov. This website permits Government employees in Government agencies throughout the United States to purchase industrial equipment and supplies through the website for use in Government offices.

48. Grainger entered into contracts with GSA in order to be a part of the GSA website. Grainger is selling products to various agencies of the Government. Employees at various Government agencies throughout the United States are currently using this website, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government, to order industrial equipment and supplies directly from Grainger.

49. The Buy American Act, Title 41 U.S.C. Section 10 a-d and the Trade Agreements Act, 19 U.S.C. Section 2501; *et. seq.* provide that each end product such as industrial equipment and supplies being supplied to the Government, except those that have been specifically identified, is a product that was made in the United

States or made in a country that has been specifically designated as an approved country from which end products such as industrial equipment and supplies can be purchased for use by the Federal Government.

50. The countries of China and Taiwan are not approved countries in accordance with the Buy American Act or the Trade Agreements Act.

51. The Buy American Act and the Trade Agreements Act apply to the products sold via the GSA website, www.gsaadvantage.gov, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government.

52. When Grainger contracted with the Government to sell their industrial equipment and supplies *via* the GSA website, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government, they were required to state that the goods which they sold were in compliance with the Buy American Act and the Trade Agreements Act.

53. Grainger entered into contracts with the General Services Administration to sell their goods *via* the GSA website and swore/affirmed that the goods they were selling on the GSA website were in compliance with the Buy American Act and the Trade Agreements Act.

54. As of July 2005 and for sometime prior thereto, Grainger has been selling to various agencies of the Government through the GSA website, www.gsaadvantage.gov, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government,

industrial equipment and supplies which are end products from China and Taiwan in contravention of the Buy American Act and the Trade Agreements Act.

55. Each sell by Grainger of an industrial product from China or Taiwan to employees of Government agencies throughout the United States for use in Government facilities, on the GSA website, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government, which is an end product from China or Taiwan is a false claim in violation of the Federal False Claims Act.

56. Grainger knowingly offered these industrial equipment and supplies for sale to the Government through the GSA website, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government, which they knew were end products from China and Taiwan in contravention of the Buy American Act and the Trade Agreements Act.

57. Grainger knowingly sold these industrial equipment and supplies to the Government through the GSA Website, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government, which they knew were end products from China and Taiwan in contravention of the Buy American Act and the Trade Agreements Act.

58. Grainger knowingly submitted or caused to be submitted false and fraudulent contracts or false statements in support of contracts to the Government in order to be permitted by GSA to sell its industrial equipment and supplies which are end products from China and Taiwan on the GSA website, Grainger's website,

Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government.

59. Grainger knowingly submitted or caused to be submitted false claims for payment or false statements in support of false claims for payment to the Government as a result of selling its industrial equipment and supplies which are end products from China and Taiwan on the GSA website, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government.

60. As a result of Grainger's sales to the Government of products manufactured in non-Trade Agreement countries and Grainger's failure to accurately certify the origin of such products the United States Government has been damaged and continues to be damaged in substantial amounts causing injury to the federal treasury.

**FIRST CLAIM FOR RELIEF
(False Claims Act 31 U.S. C. §3729(a)(1) and (a)(2))**

61. As and for a first claim for relief, Mr. Holbrook and the United States of America re-assert the allegations recited above and fully incorporate those paragraphs herein by reference.

62. This is a claim for treble damages and forfeitures under the False Claims Act, 31 U.S.C. §§ 3729-32.

63. By virtue of the acts described above, Grainger knowingly submitted, caused to be submitted and continues to submit and to cause to be submitted false or fraudulent claims for payment and reimbursement by the United States Government through the vehicle of the GSA website, www.gsaadvantage.gov,

Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government for industrial equipment and supplies it sold which were from China and Taiwan.

64. By virtue of the acts described above, Grainger knowingly made, used or caused to be made or used, and continues to make or use or cause to be made or used, false statements to obtain Government payment for false or fraudulent claims.

65. The United States Government has been severely damaged as the result of Grainger's fraudulent statements that its industrial equipment and supplies were not from China or Taiwan. The United States Government has been severely damaged by Grainger's violations of the False Claims Act.

66. As set forth in the preceding paragraphs, Grainger violated 31 U.S.C. §3729 and has thereby damaged and continues to damage the United States Government by its actions in an amount to be determined at trial.

**SECOND CLAIM FOR RELIEF
(False Claims Act, 31 U.S.C. §3729 (a)(3))**

67. As and for a second claim for relief, Mr. Holbrook and the United States of America re-assert the allegations recited above and fully incorporate those paragraphs herein by reference.

68. This is a claim for treble damages and for forfeitures under the False Claims Act, 31 U.S.C. §. §3729-32.

69. By virtue of the acts described above, Grainger defrauded the United States by getting false or fraudulent claims allowed or paid when it sold to various Government agencies through the GSA website GSA website, Grainger's website,

Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government, products that were from China and Taiwan.

70. The United States, unaware of the falsity of the records, statements and/or claims made by Grainger, and in reliance on the accuracy thereof, paid and may continue to pay for aforementioned false claims as a result of the fact that Grainger's industrial equipment and supplies from China and Taiwan remain on the GSA website and continue to be purchased on a daily basis by Government employees through the GSA website, Grainger's website, Grainger's catalog, bid boards, requests for quotations, and individual solicitations from the Government.

Wherefore plaintiff, the United States of America ex rel. Brian M. Holbrook, demands relief as follows:

- A. That defendant cease and desist from violating 31 U.S.C. §3729;**
- B. That this Court enter judgment against the above-named defendant in an amount equal to three times the amount of damages the United States Government has sustained because of defendant's actions, plus a civil penalty of not less than \$5,000 and not more than \$10,000 for each violation of 31 U.S.C. §3729; et seq.**
- C. That this Court enter judgment** against the above-named defendant awarding Mr. Holbrook at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which Mr. Holbrook substantially contributed to the prosecution of the action;

D. That this Court enter judgment against the above-named defendant awarding Mr. Holbrook an amount for reasonable expenses which the court finds to have been necessarily incurred;

E. That this Court enter judgment against the above-named defendant awarding Mr. Holbrook an amount for reasonable attorneys' fees and costs; and

F. Such other relief as the Court deems just and equitable.

Dated this 15th day of November, 2006.

s/Alan C. Olson

Alan C. Olson, Bar Number: 1008953

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