

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, <u>ex rel.</u>	:	
Branch Consultants, LLC,	:	
	:	
Plaintiff,	:	Civil Action No. 06-4091
	:	
v.	:	Section "M," Mag. 1
	:	
ALLSTATE INS. CO., et al.	:	FILED UNDER SEAL
	:	
Defendants.	:	Oral Argument Not Requested

MEMORANDUM IN SUPPORT OF THE UNITED STATES'
MOTION FOR RECONSIDERATION OF ORDER TO SHOW CAUSE

The United States of America submits this memorandum in support of its motion for reconsideration and to vacate of the Court's order of June 5, 2007 directing the United States to intervene in this matter by July 9, 2007 or else appear on July 11, 2007 to show cause why it is not intervening.

I. The United States Is Not In A Position To Intervene In This Case At This Time.

On May 18, 2007, the United States filed a pleading stating that it was not able to make an informed decision regarding intervention by the deadline established by the Court, and so it was not intervening at this time. As of the current date there is no change in that position.

The False Claims Act explicitly recognizes that the Government will need time to investigate allegations in a *qui tam* relator's complaint. To enable the Government to gather enough information to make an informed decision about whether it should intervene in, and take over prosecution of, a *qui tam* complaint, the FCA provides that complaints be filed under seal

for 60 days and further provides that the seal period may be extended at the request of the United States. 31 U.S.C. § 3730(b)(2).

Intervention in a *qui tam* suit is a significant step that the Government only takes on the basis of full and careful investigation. To the Government, intervention in a *qui tam* suit represents an assertion by the Government that it has independently determined that there is a basis for alleging a cause of action sounding in fraud against the named defendants and that it is prepared to charge the defendants with submitting, or causing the submission of, false claims. Because the United States assumes direct control of, and responsibility for, a *qui tam* suit upon intervention, the Government cannot simply accept a relator's allegations on faith alone. Rather, it must conduct its own investigation to explore a relator's allegations to determine whether they are factually supported and whether, as a legal matter, those facts state a claim for violation of the False Claims Act. In other words, the Government must determine whether the facts establish sufficient evidence of a false or fraudulent claim submitted for payment, with appropriate scienter.

The Government's investigation of a *qui tam* suit is usually carried out jointly by the Department of Justice and the affected agency or agencies. Often, such an investigation will involve the review of relevant documents internal to the Government, as well as the production of documents from defendant(s) or other third parties, either via voluntary cooperation or compulsory process through an agency inspector general subpoena. Also, the Government usually interviews the relator(s) and other potential witnesses, possibly including current and former employees of defendant(s). The affected agency may conduct an audit of some sort. In

some cases, an independent expert may be retained to review evidence. It is entirely typical for an investigation of this nature, especially one involving multiple defendants and claims, as well as complex facts, to take many months and for the election deadline to be extended accordingly.

In this case, the Government sought additional time from the Court to carry out that investigation and make an informed decision on intervention. A full investigation of this case would necessarily take considerable time. Hurricane Katrina has been referred to by many as the largest natural disaster ever to strike the United States. Its effects have been far-ranging and in many ways unprecedented, and it has imposed unusual complexities upon the Government's investigation. Relator's allegations postulate a wide-ranging fraud potentially involving several defendants and hundreds or even thousands of residential properties and insurance claims files. Investigation of these allegations would be time-consuming and labor intensive. However, the Court set a May 18, 2007 deadline for an intervention decision. Counsel for the United States informed the Court at that time that the United States was not prepared to intervene in the case and take over the litigation, but that the United States intended to continue to investigate the allegations.¹

The Government wishes to emphasize that its decision not to intervene at this time was not formally a declination of this matter, nor was it a judgment that the Relator's allegations lack merit or should not proceed. The Relator has made significant, detailed allegations that deserve a full and careful investigation.

¹ The Government notes in this regard that since it filed its notice, the Inspector General of the Department of Homeland Security issued a preliminary report. See Exhibit 1 attached hereto. In testimony before a Congressional committee, the Department of Homeland Security's Office of Inspector General reported the results of a limited review of files relating to payments made by FEMA under the National Flood Insurance Program ("NFIP"). The OIG's interim conclusion was that it did not find evidence that wind damage was paid by the NFIP as flood damage, but that further investigation was warranted.

The FCA specifically anticipates that a relator may proceed with a *qui tam* action if the United States declines to, or otherwise does not, intervene. 31 U.S.C. § 3730(b)(4)(B). In such a situation, the relator conducts the litigation on behalf of the United States, although the United States remains the real party in interest. The Government monitors the litigation, including any discovery and motions practice. Frequently, the Government makes an appearance to advocate for the interests of the United States by filing briefs on legal issues that may arise.² Moreover, the Government may intervene at a later point in the litigation on a showing of “good cause.” 31 U.S.C. § 3730(b)(3). The relator may become entitled to a slightly larger share of any recovery if the Government has not intervened, but the United States still receives the bulk of any funds recovered. 31 U.S.C. § 3730(d)(2).

Since the Government notified the Court of its inability to make an informed decision as to whether to intervene in the case, the Government has not been able to complete its investigation to enable it to intervene (or to decline to intervene) in this matter. At this point, counsel for the United States has no non-privileged information it could share with the Court in a hearing in open court.³ As a result, the United States respectfully requests that the hearing be cancelled and the Court’s order of June 5, 2007 be vacated.

II. The United States Intends To Remain Involved In This Matter

The United States remains highly interested in the progress of this particular case and intends to remain heavily involved in its development. The FCA provides a variety of

² The United States appears pursuant to 28 U.S.C. § 517.

³ Information concerning the Government’s investigation would be protected by the attorney-client, work-product, investigative, and other privileges. Furthermore, the Government is generally reluctant to make public the results of its investigation, to avoid any possibility of prejudice to a relator’s case.

mechanisms whereby the United States may exercise significant oversight authority over a *qui tam* suit in which it has not intervened. The Fifth Circuit, in *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (*en banc*), explained these tools. First and foremost, “not only may the government take over a case within 60 days of notification, but it may also intervene at a date beyond the 60-day period upon a showing of good cause.” *Id.* at 753, citing *Searcy v. Philips Electronics N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir.1997). That is to say, the Government may intervene upon a showing of good cause and assume control of this litigation at any later date, particularly if additional factual evidence supporting liability under the FCA is developed and verified. “[I]n addition to [these] control mechanisms . . . the government ‘may request that it be served with copies of pleadings and be sent deposition transcripts . . .’” *Riley*, 252 F.2d at 754, citing *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 307 (5th Cir.1999). The Fifth Circuit went on to note that

the FCA itself describes several additional ways in which the United States retains control over a lawsuit filed by a *qui tam* plaintiff. In the area of settlement, for example, the government may settle a case over a relator's objections if the relator receives notice and hearing of the settlement. 31 U.S.C. § 3730(c)(2)(B). Additionally, in the area of discovery, if the government shows that discovery initiated by a *qui tam* plaintiff “would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for sixty days or more,” whether or not the government intervenes. 31 U.S.C. § 3730(c)(4).

Riley, 252 F.2d at 754.

There are thus a number of methods available to the Government to maintain oversight of this case even though it has not intervened. This Court need not be concerned that the Government has abandoned this case, and it is not necessary or appropriate to order the United States to intervene in order to ensure a high level of Government interest and participation.

Rather, the United States intends to monitor the case as it proceeds and intends to continue to investigate the allegations. If the facts of this matter develop appropriately, the Government may seek to intervene for good cause at some later point in time. *See* 31 U.S.C. § 3730(c)(3). Finally, under the FCA, the parties cannot agree to settle or dismiss this action without the participation and consent of the United States. 31 U.S.C. § 3730(b)(1); *see also Searcy*, 117 F.3d at 159-60.

III. The United States' Decision That It Is Not Able To Intervene At This Time Is An Unreviewable Exercise Of Prosecutorial Discretion

The Government also respectfully submits that its decision not to intervene in this case at this time was an exercise of prosecutorial discretion that is not reviewable by this Court. The Government has not been able to locate any case law precisely on point, apparently because no court has ever previously entered an order requiring the United States to intervene in a *qui tam* suit. However, controlling law in analogous contexts is quite clear.

The Fifth Circuit has firmly established that a decision by the United States not to criminally indict someone is an unreviewable act committed to the discretion of the Executive Branch. *See, e.g., United States v. Cox*, 342 F.2d 167, 171-172 (5th Cir. 1965). The Supreme Court reached a similar conclusion in the civil context in *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). In that case, the Court found that an administrative agency's decision not to pursue enforcement proceedings against a particular person or entity was essentially unreviewable under the Administrative Procedure Act.

The Fifth Circuit noted in *Riley* that “the government retains the unilateral power to dismiss [a *qui tam*] action “notwithstanding the objections of the [relator].” 252 F.3d 749, 753, *citing* 31 U.S.C. § 3730(c)(2)(A). Similarly, the D.C. Circuit has held that the Department of Justice's decision to dismiss a *qui tam* case over the objections of the relator is not reviewable by

the court absent some sort of fraud on the court. *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). That court explained that the Government's decision to dismiss was an exercise of its prosecutorial discretion to determine what cases are prosecuted in its name. *Id.* In *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the Supreme Court found that Congress can set certain conditions upon the prosecutorial discretion of the Executive in a civil context, but only if it sets forth explicit constraints in the governing statutory language.

The False Claims Act, however, contains no such constraints. On its face, it provides that decisions to intervene or not in a *qui tam* suit are committed wholly to the discretion of the Attorney General. The statute states only that, where a basis for FCA liability has been shown to exist, the Attorney General *may* intervene and pursue FCA litigation against that defendant. 31 U.S.C. § 3730(a). No further conditions or constraints are set forth in the statute. The FCA nowhere sets "substantive priorities" nor circumscribes the Government's "power to discriminate among issues or cases it will pursue." *See Chaney*, 470 U.S. at 831-32; see also *Swift*, 318 F.3d at 252. Exercise of discretion to intervene in a *qui tam* case or not is therefore not reviewable because there are "no judicially manageable standards . . . available for judging how and when an agency should exercise its discretion. . ." *See Chaney*, 470 U.S. at 831-31. Therefore, the United States respectfully suggests that there is no basis for judicial review of its decision not to intervene in this case at this time.

CONCLUSION

For the above reasons, the United States respectfully requests that this Court reconsider and vacate its June 5 Order.

Respectfully submitted,

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Dated: July 5, 2007

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