UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES of AMERICA *ex rel.* LINDA NICHOLSON,	)	
Plaintiff,	)	
v.	)	No. 10 C 3361
LILIAN SPIGELMAN M.D., HEPHZIBAH CHILDREN'S ASSOCIATION, and SEARS PHARMACY,	)	Judge Feinerman
Defendants.	)	

UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS

The United States' motion to dismiss relator's complaint pursuant to § 3730(c)(2)(A) of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (FCA), should be granted because the motion satisfies the standards set forth in both *Swift v. United States*, 318 F. 3d 250 (D.C. Cir. 2003), and *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). This case will not further the primary purpose of the False Claims Act, which is to recover money to the public fisc. The burden of complying with anticipated discovery requests from the defendants — and, apparently, the relator — will far exceed any potential recovery in this case, including penalties.

The relator argues that the United States' motion should be denied because it violates the relator's due process rights and because the United States' decision is arbitrary and capricious. These arguments are without merit. The right to maintain a *qui tam* action is not a fundamental right. Instead, the FCA sets forth all the process that relator is due. *Sequoia* and *Swift* apply the standard for evaluating the Government's motion, and both standards comport with due process

requirements. Applying a due process analysis in evaluating the Government's action, *Sequoia* adopted a rational relation test requiring only that the United States' decision to dismiss should be rationally related to a legitimate governmental purpose. *Swift* adopted a broader standard, holding that the Executive Branch has an "unfettered right to dismiss" a *qui tam* action under § 3730(c)(2)(A). 318 F.3d at 252. Neither concluded that a relator is entitled to a hearing on the merits of the FCA case, as suggested by Nicholson.

Under the *Sequoia* standard, the United States satisfies the rational basis test "if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction." *Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990), cited in *Lamers Dairy, Inc. v. USDA*, 379 F.3d 466, 473 (7th Cir. 2004). The United States' rationale for dismissing this case plainly satisfies this test. The United States has determined that any potential recovery is not large enough to warrant further expenditure of prosecutorial and agency resources monitoring the case and complying with discovery requests. Relator argues that the Government will not be subject to burdensome discovery requests, but contradicts herself in her response by seeking depositions of four agency officials in connection with the pending motion. Relator has failed to explain why the Government's decision is arbitrary, capricious or illegal. Accordingly, the United States' motion to dismiss relator's complaint pursuant to § 3730(c)(2)(A) should be granted.

I. Relator Does Not Have a Fundamental Right to Pursue a *Qui Tam* Action under the False Claims Act

Unlike *Hamdi v. Rumsfeld*, cited by the relator, no fundamental rights are at issue in this case. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, the Supreme Court held that a United States citizen, held in detention indefinitely, has a right to a hearing to challenge his classification as an "enemy combatant." This motion, on the other hand, concerns rights granted to a relator under

the FCA that are explicitly limited by the language of that same statute. By its terms, the statute does not give a relator a fundamental right to maintain a *qui tam* action. The *qui tam* provisions of the FCA are accompanied by clear limitations and restrictions, including the United States' right to dismiss the action under § 3730(c)(2)(a). Significantly, the Government's authority to do so exists even where a case may be meritorious. *Sequoia Orange*, 151 F.3d at 1146 (concluding "31 U.S.C. § 3730(c)(2)(A) permits the government to dismiss a *meritorious* qui tam action over a relator's objections.") (emphasis added). "To claim a property interest protected by the Fourteenth Amendment, 'a person . . . must have more than a unilateral expectation of [the claimed interest]. He must, instead, have a legitimate claim of entitlement to it.'" *Khan v. Bland*, 630 F.3d 519, 527 (7th Cir. 2010) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Because the relator does not have a fundamental right to pursue a *qui tam* action, the FCA circumscribes the process relator is due.

Nor does *Sequoia Orange* support relator's due process argument. *See* Relator's Response at 2-3. *Sequoia Orange* states that the rational relation test is the "same analysis [that] is applied to determine whether executive action violates substantive due process." *Id.* at 1145 (citing *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990)). As stated in *Lockary*, "[u]nless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest." 917 F.2d at 1155. In adopting the rational relation standard, *Sequoia Orange* stated: "Here, the district court has respected the Executive Branch's prosecutorial authority by requiring no greater justification of the dismissal motion than is mandated by the Constitution itself." *Sequoia Orange*, 151 F.3d at1146 (citation omitted).

As Judge Easterbrook wrote, "governmental action passes the rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction." *Northside Sanitary Landfill*, 902 F.2d 521 at 522, cited in *Lamers Dairy*, 379 F.3d 466, 473. Accordingly, dismissal does not violate relator's due process rights, because it is rationally related to a legitimate government interest.

II. Avoiding Burdens Associated with Discovery Is a Legitimate Government Purpose

Avoiding the strain on limited government resources that would result from discovery in this matter is a legitimate governmental purpose. As noted, the primary purpose of the FCA is to recover money to the federal fisc. Expending agency resources to respond to discovery in a case involving five allegedly false claims, reimbursed for a total of $320, even with statutory penalties, would be counterproductive to this goal. Nonetheless, the relator argues that the Government's assumption that it will be subject to discovery is "invalid," because the relator claims that she does not intend to take discovery of the United States. Relator's Response at 8. The relator states: "*Relator* is certainly willing to stipulate that beyond the specific discovery requested below, she will not seek discovery against the United States Government without leave of this Court." *Id.* at 8-9 (emphasis in original). As is evident from defendants' motion to dismiss and relator's opposition thereto, however, it is clear that both parties intend to rely on the Government's payment and coverage rules in support of their positions, which will undoubtedly result in the Government being subject to discovery in this matter that may well be substantial and time-consuming.

Furthermore, the relator contradicts her own assertion that the United States will not face a discovery burden in this case, because she herself claims a need to depose four employees of the Centers for Medicare and Medicaid Services (CMS). Resp. at 9. The burdens associated with

preparing for and defending the depositions of United States employees, particularly on issues involving national policies and practices, are substantial. Attorneys from the Department of Justice, CMS, and the Department of Health and Human Services ("HHS") would all be required to expend substantial time and resources tin responding to such requests. The relator has thus provided the Court with all the information it needs to conclude that the United States has offered a legitimate basis on which to grant the United States' motion to dismiss.

As the Government has demonstrated that dismissal is rationally related to a valid government interest, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia Orange*, 151 F.3d at 1145 (internal quotation omitted). The relator has not offered any facts to support an argument that the Government's motion is arbitrary or capricious. Relator cannot reasonably challenge that dismissal is an appropriate exercise of the Government's prosecutorial discretion given the facts of this case. Relator offers that "the government has decided to allow massive Medicaid fraud to continue." Relator's Response at 5. "Massive Medicaid fraud" is not at issue in this complaint. *Id.* at 6-8. Relator's complaint alleges only that one doctor, one pharmacy, and one institution are collectively responsible for submitting or causing the submission of five false claims to Illinois Medicaid. Moreover, the Government has exercised its discretion to pursue a FCA case against Forest Laboratories, the manufacturer of the drug at issue here. *See U.S. ex rel Gobble v. Forest Laboratories*, Case No. 03-10395 (D. Mass.).

Conclusion

In light of the limited number of claims at issue, the limited amount of damages at issue, and the Government's potential discovery obligations to defendants and relator, the decision to dismiss this case is rationally related to a legitimate government purpose and a sensible exercise of the

Government's prosecutorial discretion. For these reasons, the United States' motion to dismiss relator's complaint satisfies the standards set forth in *Swift* and *Sequoia Orange* and the court should grant the United States' motion to dismiss.

Respectfully submitted,

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