UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *et al.* *ex rel.* JOHN R. BORZILLERI, M.D., Plaintiffs, - v - ABBVIE, INC., *et al.*, Defendants.	:	15 Civ. 7881 (JMF)

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS PURSUANT TO 31 U.S.C. § 3730(c)(2)(A)

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007
Telephone: (212) 637-2734

Of Counsel:

LI YU
Assistant United States Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

In accordance with the Court's order dated November 16, 2018, and pursuant to its authority under 31 U.S.C. § 3730(c)(2)(A), the United States (the "Government") respectfully submits this memorandum of law in support of its motion to dismiss this action brought by relator John Borzilleri (the "Relator") under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*.

PRELIMINARY STATEMENT

While the FCA authorizes private parties, known as "relators," to file suits on the Government's behalf to recover damages due to fraud, *see* 31 U.S.C. § 3730(b)(1), Congress also expressly included protections in the statute to ensure that the Government retains substantial control over *qui tam* suits filed on its behalf. As relevant here, the FCA expressly provides that the Government may "dismiss the [*qui tam*] action notwithstanding the objections of the [relator]" as long as the relator has notice "of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).[1]

Here, the Government has concluded that it is appropriate to exercise this statutory authority here to dismiss this *qui tam* action. The Court should grant the Government's motion to dismiss because under the standard enunciated by the D.C. Circuit in *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), the Government's discretion under § 3730(c)(2)(A) is "unfettered." The *Swift* standard, as discussed below, *see infra* Pt. I.B, represents a faithful reading of § 3730(c)(2)(A) and accords with well-established principles of deference to the Government's exercise of prosecutorial discretion.

---

[1] As *Swift* explained, the "the function of a hearing [under § 3730(c)(2)(A)] when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case[.]" 318 F.3d at 253; *see also U.S. ex rel. Piacentile v. Amgen Inc.*, 2013 WL 5460640, at *2 (opportunity to respond to government's motion and appear at oral argument satisfied hearing requirement); *U.S. ex rel Levine v. Avnet*, 14-CV-17, 2015 WL 1499519 *4 (E.D. Ky. Apr. 1, 2015) (opportunity to respond and oral argument sufficient, noting that a more substantive hearing standard could raise constitutional concerns given the discretion conferred on the United States by the statute).

Further, even if the Court were to apply the standard from another line of cases that follow the Ninth Circuit's decision in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139, 1145 (9th Cir. 1998), the Government is only required to identify a "valid government purpose" and to show that dismissal is rationally related to that purpose. Here, the record amply demonstrates a rational basis for dismissal in light of the burden that the Government can be expected to bear in continued litigation, concerns about the merits of Relator's theories of liability, and Relator's own conduct. *See infra* at 4-5, Pt. II.C. Accordingly, dismissal of Relator's claims is also appropriate under the *Sequoia Orange* standard.

RELEVANT BACKGROUND

A. The False Claims Act

The FCA imposes treble damages and civil penalties on any person who "knowingly presents, or causes to be presented, [to the Government] a false or fraudulent claim for payment or approval," or commits related acts. 31 U.S.C. §§ 3729(a)(1)(A)-(G). Suits to enforce the FCA may be brought by the Government or by a private relator, who files a *qui tam* suit in the United States' name "for the [relator] and for the [] Government," *Id*. §§ 3730(a), (b)(1).

If a *qui tam* action results in a monetary recovery to the Government, the relator may seek a share of that recovery. *See id*. § 3730(d). Although relators have standing as "partial assignee[s]" of the Government's FCA claim, they bring suit to redress injuries in fact suffered by the Government, and not their own injuries. *See Vt. Agency of Natural Resources v. U.S. ex rel. Stevens,* 529 U.S. 765, 772-74 (2000). "[T]he Government," therefore, "remains the real party in interest in any such action." *United States ex rel. Mergent Servs. v. Flaherty,* 540 F.3d 89, 93 (2d. Cir. 2008) (quotation marks omitted).

Even where the Government initially declines to intervene, it retains significant control over the litigation as the real party in interest; and the relator's "right to conduct the

action" is circumscribed.[2] *See id.* §§ 3730(b)(1) (relator cannot dismiss action without Attorney General consent); § 3730(c)(3) (Government may intervene at any time after declination for "good cause"); *see also Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925, 932 (10th Cir. 2005) (affirming dismissal after declination); *Sequoia Orange*, 151 F.3d at 1145 (noting that § 3730(c)(2)(A) "may permit the government to dismiss a qui tam action without actually intervening in the case at all"); *cf. United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996) ("[relators] are merely agents suing on behalf of the government, which is always the real party in interest.") (collecting cases).

B. Procedural History of This *Qui Tam* Action and Relator's *Qui Tam* Action in the District of Rhode Island Involving Virtually Identical Claims

Relator filed this FCA *qui tam* action on October 6, 2015, after having filed an earlier *qui tam* action, *U.S. ex rel. Borzilleri v. Bayer et al*, 14-CV-031-WES-LDA, in the District of Rhode Island (the "D-RI Action").[3] In the D-RI Action and this case, Relator advanced, with factual distinctions immaterial for purposes of this motion, virtually identical theories of liability.

In both cases, Relator alleged, *inter alia*, that the various defendant pharmaceutical companies and Pharmacy Benefit Managers ("PBMs") submitted, or caused the submission of, false claims to the Medicare Part D program based upon a widespread practice of purportedly paying or receiving kickback payments disguised as so-called *bona fide* administrative service fees. Central to the issue of whether this set of allegations give rise to FCA liability are questions about whether the fees in question reflect fair market value for the services provided

---

[2] If the Government intervenes in a *qui tam* case, it assumes "the primary responsibility for prosecuting the action" and is not bound by the relator's acts. 31 U.S.C. § 3730(c)(1). The relator remains a party, but the Government may settle the case over his or her objection, *id*. § 3730(c)(2)(B), or may seek to limit his or her participation in the litigation, *id*. § 3730(c)(2)(C).

[3] Unlike the whistleblowers contemplated by Congress, Relator is not a current or former employee of any defendant or even one of their suppliers, customers, or competitors. Instead, he worked until recently as an investment manager focusing on the healthcare field.

by the PBMs, whether they were accurately reported to the Government, and whether they can meet several regulatory tests. *See* Complaint [Dkt. 20] ¶¶ 4-12.

From early 2016 to March 2018, this Office, working along with the United States Attorney's Offices for the District of Rhode Island ("D-RI USAO"), the Fraud Section of the Department of Justice's Civil Division, and investigators from multiple federal agencies, undertook an extensive investigation of Relator's allegations. This investigation was prolonged by the complexity of the subject matter, the number of alleged wrongdoers, Relator's lack of insider or programmatic knowledge concerning his allegations, the opacity of many of these allegations, and Relator's repeated changes of counsel here and in the D-RI Action.

In March 2018, the Government declined to intervene in both this case and the D-RI Action. Shortly thereafter, both cases were unsealed. On October 1, 2018, the defendants in this case moved to dismiss Relator's claims for lack of particularity under Rule 9(b), as subject to the public disclosure bar under 31 U.S.C. § 3730(e)(4)(A), and for failure to state a claim. On November 19, 2018, Relator filed a consolidated opposition to the defendants' motions. In the meantime, motions to dismiss by defendants in the D-RI Action are due in January 2019.

C. The Basis for the Government's Invocation of § 3730(c)(2)(A)

Since it declined to intervene in Relator's two *qui tam* cases, several developments have led the Government to conclude that it should exercise its statutory authority to dismiss both cases.[4] While the Government's view is that the dismissal under § 3730 (c)(2)(A) is a matter wholly committed to the Government's discretion, *see infra* Pt. I.B., three factors – considered both individually and together – animate the decision to invoke that authority here.

First, the continued litigation of Relator's two *qui tam* cases, should they survive

[4] The Government is simultaneously seeking dismissal of the D-RI Action pursuant to its authority under 31 U.S.C. § 3730(c)(2)(A) in the District of Rhode Island.

defendants' motions to dismiss, likely will require significant expenditure of government resources by this Office, the D-RI USAO, the Civil Division at the Department of Justice, and the component of the federal agency tasked with administering Medicare Part D. Specifically, this will involve monitoring the progress of the cases and, potentially, being a third-party participant in discovery. Perhaps more importantly, the demands of ongoing litigation on the Government may go well beyond expenditure of attorney times and may require the federal agency component administering the Medicare Part D program to divert its limited resources from its primary regulatory role. With a total of 16 discrete defendants in both cases (with five overlaps), the burden on this single, relatively small unit within the Centers of Medicare and Medicaid Services ("CMS"), which possesses much of the relevant information and expertise and has significant ongoing regulatory responsibilities, will likely be substantial.

Second, the Government's interest in avoiding such a burden on federal agency resources is heightened by the absence of any reasonable likelihood of significant monetary recovery. As noted above, the Government has undertaken a careful and wide-ranging investigation into Relator's core allegations and determined that these claims are unlikely to result in any material recovery for the United States. Further, Relator's refusal to transfer and consolidate his two *qui tam* cases may cause government agencies to needlessly duplicate their case monitoring and discovery efforts.[5] *See* Declaration of Li Yu dated December 21, 2018 ("Yu Decl.) ¶¶ 2-4.

Finally, Relator's behavior, including actions since the declination of these cases, indicates to the Government that he is not an appropriate advocate of the Government's interests in this FCA case. For example, Relator rejected the Government's suggestion to consolidate his

[5] If the Court would like to consider transferring this case in lieu of deciding the pending motions to dismiss, the Government is prepared to brief that issue on an expedited basis.

two *qui tam* cases in the interests of efficiency and judicial economy. This concern is further exacerbated by allegations that Relator has sought to leverage the FCA's *qui tam* mechanism to further his financial interests by short-selling the shares of some or all of the public companies he has named as defendants in this action or in the D-RI Action.

ARGUMENT

POINT I

UNDER 31 U.S.C. § 3730(C)(2)(A), THE DECISION TO DISMISS A *QUI TAM* ACTION IS COMMITTED TO THE GOVERNMENT'S DISCRETION

A. Legal Standard for Dismissal under § 3730(c)(2)(A)

The FCA limits the circumstances in which a relator is permitted to pursue a *qui tam* action, setting forth multiple standards under which a *qui tam* complaint is to be dismissed. As relevant here, "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).

The Second Circuit has recognized that § 3730(c)(2)(A) affords the Government "ample authority to bring the litigation to an early end, and although the [relator] must be given a hearing, the court need not, in order to dismiss, determine that the government's decision is reasonable." *U.S. ex rel. Stevens v. Vt. Agency of Natural Resources*, 162 F.3d 195, 201 (2d Cir. 1998) (citations omitted), *rev'd on other grounds*, 529 U.S. 765 (2000). The Second Circuit, however, did not decide in *Stevens* what specific standard applies under § 3730(c)(2)(A). *See* Opinion and Order at 8, *U.S. ex rel. Amico v. Citigroup, Inc.*, 14 Civ. 4370 (CS), (S.D.N.Y. June 8, 2015) ("*Amico*") (recognizing the lack of precedent in the Second Circuit); *accord* Opinion and Order at 2, *U.S. ex rel. Pervez v. Empire Health Choice Assurance, Inc.*, 16-cv-1258-NG

(E.D.N.Y. Dec. 12, 2017) ("*Empire Health*").[6]

In other circuits, appellate courts have articulated two different standards for assessing the Government's motions to dismiss under § 3730(c)(2)(A) — the *Swift* standard from the D.C. Circuit and the *Sequoia Orange* standard from the Ninth Circuit. In *Swift*, the D.C. Circuit interpreted § 3730(c)(2)(A) as a grant of "an unfettered right to dismiss" a *qui tam* action to the Government.[7] 318 F.3d at 252. The earlier-issued Ninth Circuit *Sequoia-Orange* decision, on the other hand, applied a "rational relation test" for dismissal, recognizing that the Government has broad prosecutorial discretion to dismiss even meritorious *qui tam* cases so long as the reasons for dismissal are rationally related to a legitimate government interest. *See* 151 F.3d at 1145; *see also Ridenour*, 397 F.3d at 937 (the Tenth Circuit noting that "it is enough that there are plausible, or arguable, reasons supporting the agency decision [to move for dismissal]") (internal quotation marks omitted).

Although the Second Circuit has yet to decide on the standard under § 3730(c)(2)(A), recent decisions from this District and the Eastern District of New York have expressed support for the *Swift* standard. *See Amico* at 8 ("this Court is more inclined toward *Swift* than *Sequoia* [*Orange*]"); *Piacentile*, 2013 WL 5460640, at *2-3 (finding *Swift* "persuasive reasoning"); *Empire Health* at 4. Other district courts in circuits that have not yet decided the issue have come to similar conclusions. *See U.S. ex rel. Nasuti v. Savage Farms, Inc.*, 12-30121-GAO, 2014 WL 1327015, at *1 (D. Mass. Mar. 27, 2014) ("I find the *Swift* rationale more persuasive"), *aff'd on other grounds*, 2015 WL 9598315 (1st Cir. Mar. 12, 2015).

---

[6] While unpublished, both the *Amico* and the Empire Health decisions are available as entries 44 and 9, respectively, on the public dockets for these cases.

[7] The Fifth Circuit, in dicta, agreed with the *Swift* standard for § 3730(c)(2)(A) dismissal. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) ("the government retains the unilateral power to dismiss an action" under section 3730(c)(2)(A)).

B. The Court Should Adopt the *Swift* Standard and Dismiss This *Qui Tam* Action

The D.C. Circuit adopted the *Swift* standard based on long-standing principle of separation of powers and judicial deference to the Executive Branch's exercise of prosecutorial discretion. 318 F.3d at 251-52. Further, the *Swift* standard gives proper effect to the text of § 3730(c)(2)(A) and accords with Supreme Court precedents.

1. *The plain language of section 3730(c)(2)(A) is unambiguous in allowing the Government an unfettered discretion to dismiss qui tam actions*

Judicial interpretation of § 3730(c)(2)(A) begins with its text. *See Hedges v. Obama*, 724 F.3d 170, 189 (2d Cir. 2013) ("in interpreting a statute a court should always turn first to one, cardinal canon before all others," namely that "courts must presume that a legislature says in statute what it means and means in a statute what it says there.") (internal quotation marks omitted). So long as "the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry in complete." *Hedges*, 724 F.3d at 189 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). A court's "sole function" at that point "is to enforce [the statute] according to its terms." *United States v. DiCristina*, 726 F.3d 92, 96 (2d Cir. 2013) (internal quotation marks omitted).

By expressly specifying *who* may dismiss a *qui tam* action — "The *Government* may dismiss the action notwithstanding the objections of the person initiating the action …," 31 U.S.C. § 3730(c)(2)(A) (emphasis added), the statute directly answers the question of whether courts should conduct a follow-on review of this decision. Further, this language stands in telling contrast with text from the very same section, just several provisions below: "The *court* shall dismiss an action . . . if substantially the same allegations or transactions . . . were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (emphasis added). Because Congress "says in a statute what it means and means in a statute what it says there," this Court must presume Congress meant "the Government" — *i.e.*, the Executive — to have exclusive dismissal authority under

section 3730(c)(2)(A).

Other sections of the FCA make even more clear that Congress knows how to impose express limits on the Government's discretion when it so intends. The very next paragraph after section 3730(c)(2)(A) states:

> The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action *if the court determines*, after a hearing, that the proposed settlement is fair, adequate, and reasonable . . . .

31 U.SC. § 3730(c)(2)(B) (emphasis added). § 3730(c)(2)(B) thus imposes judicial review on the Government's power to settle a *qui tam* action and specifies the proper standard of that review. The absence of any such limitation in § 3730(c)(2)(A), and the absence of any standard of review, makes clear that Congress neither intended nor desired judicial review of the Government's decision to dismiss under that authority. *See Mendez v. Holder*, 566 F.3d 316, 321-322 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).[8]

2. *The Executive has full discretion to dismiss* qui tam *actions based a long-standing separation of power principles*

The Judicial Branch has long recognized that the Executive's decision *not* to prosecute a case is unreviewable. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[T]he

[8] Courts look beyond the clear meaning of the statutory text to legislative history only when the plain language yields an absurd result. *In re Chateaugay Corp.*, 89 F.3d 942, 954 (2d Cir. 1996); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."). Neither the Ninth Circuit in *Sequoia Orange* nor the Tenth Circuit in *Ridenour* identified any absurd result or contrary legislative purpose in following the plain language of section 3720(c)(2)(a). Yet, those decisions erroneously focused on legislative history and compounded the error by relying on statements related to a failed Senate proposal, rather than the actually enacted bill. *See Swift*, 318 F.3d at 253. *Swift*, on the other hand, properly employs the judicial tools of statutory construction and remains faithful to the cardinal canon that courts follow the plain meaning expressed by Congress.

decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch.") (considering FDA's criminal, civil, and administrative authorities under the Food Drug and Cosmetic Act); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . or whether to dismiss a proceeding once brought."); *see, also Citizens for Responsibility and Ethics in Washington v. Federal Election Comm'n*, 892 F.3d 434, 438 (D.C. Cir. 2018) (discussing applicability of doctrine to civil enforcement). Accordingly, and as the D.C. Circuit recognized in *Swift*, the imposition of even a rational relation test "deprive[s] the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States" and "is not an accurate statement of constitutional law with respect to the government's judgment not to prosecute." 318 F.3d at 253.

It bears emphasis that Congress enacted the FCA statutory scheme against the backdrop of bedrock constitutional principles vesting the authority to pursue litigation for the United States in the Executive Branch alone. This power derives from the Take Care Clause of the Constitution; and the Attorney General – as "the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed" – "exercises a discretion as to whether or not there shall be a prosecution in a particular case." *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965). Within this constitutional framework, imposing even a rational relation test notwithstanding the text of § 3730(c)(2)(a) denies the Executive Branch's long-standing, and constitutional, "prerogative to

decide which cases should go forward in the name of the United States." *Swift*, 318 F.3d at 253.[9]

3. *The Supreme Court has long recognized the general unsuitability for judicial review of agency decisions to refuse enforcement.*

The Supreme Court "has recognized . . . over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and is therefore "presumed immune from judicial review." *Heckler*, 470 U.S. at 831–32. As *Heckler* recognized, many practical reasons — all relevant to the decision of the Attorney General not to prosecute — support "the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id*. To begin with, "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831. The agency must not only assess whether a violation has occurred, but whether agency resources are best spent investigating or prosecuting other violations. *Id.* An agency must also consider whether it "is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

The Government applies the same analysis in deciding whether to prosecute an FCA action. Even in instances where the relator conducts the action, the Government expends resources monitoring and reviewing the pleadings, filing statements of interest, participating in motions or attending mediation, when necessary, and participating as *amicus* on appeal. Likewise, the affected agency incurs costs responding to *Touhy* requests for documents and testimony. *See generally U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Additionally, the

---

[9] The fact that a relator has brought suit on behalf of the United States does nothing to limit the Government's authority to dismiss a *qui tam* action. *See, e.g.*, *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) ("That a private citizen may pursue a *qui tam* litigation under the FCA . . . does not interfere with the President's constitutionally assigned functions under Article II's Take Care Clause.") (*en banc*).

decision to dismiss a *qui tam* complaint must take into account whether the action is likely to succeed, whether the Department of Justice component and the affected agency have available resources, and whether such resources are best spent on other matters. The Government must also consider whether the particular matter fits the purpose of the FCA and whether the FCA contains a proper remedy for the harm asserted. Here, the Government has taken these factors into consideration and concluded that it is in the interests of the United States to dismiss this case and the D-RI Action under 31 U.S.C. § 3730(c)(2)(A).

* * *

In light of the foregoing, the Government respectfully submits that it has full discretion in deciding whether to dismiss this *qui tam* case pursuant to § 3730(c)(2)(A), and that the Court should dismiss the case based on the Government's motion.

POINT II

IN THE ALTERNATIVE, THE GOVERNMENT AMPLY SATISFIES THE *SEQUOIA ORANGE* RATIONAL RELATION TEST

Even if the Court were to decline to adopt the *Swift* standard and to instead review this motion under the rational relation test from *Sequoia Orange*, the Government easily satisfies that standard here. Under *Sequoia Orange*, that the Government only needs to identify "a valid government purpose" and show a "rational relation between dismissal and accomplishment of the purpose." 151 F.3d at 1145. Here, as noted above, *see supra* at 4-5, the Government's rationale for seeking dismissal of this case and the D-RI Action is threefold: (1) ongoing litigation is likely to burden the Government and require expenditure of resources that could better be applied elsewhere; (2) the Government is particularly disinclined to bear this burden given its determination that Relator's claims are weak on the merits; and (3) Relator's behavior creates serious concern that he will not pursue the Government's interests in this case, as distinct from his own.

A. Ongoing Litigation Will Impose a Significant Resource Allocation Burden on the Government

The Government has serious concerns about the burden that ongoing litigation in this case will impose on the time and resources of its litigating and programmatic agencies. This concern – and the related governmental interest in preserving agency resources – has been recognized by the Ninth, Tenth and D.C. Circuits, as well as numerous district courts, as a valid government purpose supporting dismissal under § 3730(c)(2)(A). *Sequoia Orange*, for example, affirmed the district court's grant of the Government's motion to dismiss, holding that "the government's concern with litigation costs" was a valid government purpose. *Id.* at 1146 (also noting that "[e]ven if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs")*; accord Ridenour*, 397 F.3d at 937 (Tenth Circuit affirming grant of the Government's motion to dismiss based on interest in limiting agency costs and preserving agency resources). Likewise, the D.C. Circuit noted in *Swift* that, even if § 3730(c)(2)(A) were to authorize judicial review per *Sequoia Orange*, "the government's goal of minimizing its expenses is still a legitimate objective, and dismissal of the suit furthered that objective." 318 F.3d at 354. District courts in the Second Circuit have adopted this reasoning, *see Piacentile*, 2013 WL 5460640, at *3-4 (finding that the rational relation standard is satisfied by the Government's preference to avoid expending further resources to a declined *qui tam* action); *Empire Health at* 5 ("conservation of government resources is a valid objective").[10]

[10] District courts in other circuits have reached the same conclusion. *See*, *e.g.*, *U.S. ex rel. Stovall v. Webster Univ.*, 3:15-cv-03530, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018) (granting government's motion to dismiss because "dismissal will further its interest in preserving scarce resources by avoiding the time and expense necessary to monitor this action"); *Avnet*, 2015 WL 1499519, at *5 (same); *U.S.ex rel. Nicholson v. Spigelman*, 10-cv-3361, 2011 WL 2683161, at *2 (N.D. Ill. July 8, 2011) (same).

Here, the scope, breadth, and opacity of Relator's allegations, as well as the complexity of the underlying regulatory regime at issue, magnify the burden on the Government from having to monitor or participate in discovery. As a starting point, Medicare Part D does not involve direct payments by the federal government on a per-service or per-drug basis; instead, private entities, known as Part D Plan Sponsors, contract with CMS, to provide prescription drug coverage to subscribers under a joint publicly-funded, privately operated model.[11] *See* 42 U.S.C. § 1395w-11(b); 42 C.F.R. § 423.265. Even drastically simplified for purposes of an overview, the financial structure of Part D is complex, involving: (1) an up-front estimate from the plan sponsor of its cost to provide a typical Part D enrollee (a beneficiary) with basic coverage on a monthly basis after subtracting expected cost-sharing payments by enrollees and government catastrophic and low-income subsidies; (2) periodic payments by CMS to the plan sponsor; and (3) a data-intensive reconciliation process comparing the actual cost of services against the estimate, resulting in either a refund to CMS or supplementary payments from CMS to the plan sponsor. *See U.S. ex rel Sprey v. CVS Caremark*, 875 F.3d 746, 749 (3d Cir. 2017) (describing operation of Part D); *see also* 42 C.F.R. §§ 423.265, 423.279, 423.293, 423.505.

Under Medicare Part D, CMS established reporting requirements on Part D plan sponsors, including one central to Relator's allegations — a report of the "Direct and Indirect Remuneration" ("DIR") received by each plan sponsor. *Id.* At the crux of the sprawling allegations in Relator's two *qui tam* cases is his claim that Part D PBMs have engaged "in a collusive fraud scheme" with pharmaceutical companies to receive service and administrative fees based invariably on a percentage of drug prices, in return for negotiating aggressively to

[11] This distinguishes Medicare Part D from predecessor programs like Medicare Part A (insurance coverage for hospital care), Medicare Part B (outpatient medical insurance), and Medicaid (health insurance for low-income patients),

keep drug prices in check. *See* Memorandum of Law in Support of Relator's Opposition to the Defendants' Motions to Dismiss ("Rel. Opp. Br. A") [Dkt. 271] at 1-2. Relator contends that PBMs and pharmaceutical companies have "knowingly and secretly conspired" to cause the submission of false or inaccurate DIR reports to CMS, which are necessary to conceal alleged kickbacks disguised as fair-market-value service or administrative fees. *See id*. Notably, these allegations draw no distinction among the PBMs or drug manufacturers, instead broadly hypothesizing that the same pattern of conduct applies to the numerous bilateral relationships between each of the PBMs and each of the drug manufacturers he has named as defendants.

Practically, however, litigating just this theory of fraud will involve inquiry into each of these bilateral relationships, requiring, in turn, analysis of contractual, billing, reporting, and analytical material by means of potentially vast and intrusive discovery. Equally if not more importantly for the government's burden analysis, litigating virtually any aspect of relator's theories will almost inevitably involve third-party discovery requests to the relevant components at CMS — addressing policy issues, regulatory evolution, and actual data compiled and received by the agency. Even assuming that some of the many defendants collaborate to consolidate or streamline discovery requests, multiple, overlapping and burdensome requests for documents and testimony are inevitable.

Responding to such requests will impose a significant burden on the two U.S. Attorney's Offices, other components within the Department of Justice, and, most importantly, on components of CMS. This likely will compel CMS officials to divert their time and limited resources to discovery matters at the expense of the actual administration of the Medicare program. While these concerns might weigh considerably less in an FCA case where the Government has made the choice to intervene and prosecute, such concerns are heightened where, as here, the Government has determined that a *qui tam* case does *not* merit prosecution.

Put simply, because the Government has concluded that it is not in the public interest to pursue this lawsuit, it should not be put to the burden of superintending and responding to extensive discovery post-declination.

B. The Burden of Two Litigations Cannot Be Justified Where the Government Has Determined There Is No Reasonable Likelihood of Significant Recovery

The Government's concern about needing to expend limited agency resources is exacerbated here in light of the Government's determination that this case offers no reasonable likelihood of a significant monetary recovery. Specifically, at their core, Relator's allegations hypothesize the same type of collusive relationships among a host of pharmaceutical companies and PBMs. *See* Rel. Opp. Br. A at 1 (alleging a "collusive fraudulent scheme" amounting to "the largest healthcare fraud in the history of this nation"). Having invested substantial time and resources to thoroughly investigate this theory regarding uniform collusive relationships, the Government determined that the theory is deeply flawed and unlikely to result in any significant recovery to the United States.

Given these circumstances, the Government has a substantial interest in avoiding the burdens of having to participate in discovery in two cases, monitor both cases, and, if necessary, file statements of interest on legal questions that implicate broader governmental concerns. Relator's decision to reject the Government's suggestion to transfer and consolidate the related two *qui tam* cases in order to conserve agency as well as judicial resources, *see* Yu Decl. ¶¶ 3-4, further underscores the reasonableness of the Government's decision to dismiss these cases pursuant to § 3730(c)(2)(A).

C. Relator's Actions Further Lead the Government to Believe That He Should Not Represent What Remain Governmental Interests in Litigation.

Lastly, two aspects of relator's conduct provide an additional basis for the Government's decision. *First*, Relator's refusal to consent to the Government's proposal for

consolidating what are essentially two duplicative *qui tam* cases not only puts duplicative demands on agency resources as discussed above, this refusal also will place a unreasonable burden on judicial resources and unnecessarily creates the potential for inconsistencies in the law. For example, even at this early stage of litigation, Relator's decision will require duplicative briefing and burden two United States District Courts with having to adjudicate multiple, complex motions to dismiss.

Apart from the hope that two cases will afford Relator the proverbial "two bites at the proverbial apple" in pursuit of his claims, there is no rational reason – and certainly no rational reason that furthers any governmental interest – for Relator to proceed with two duplicative, overlapping litigations. Relator's decision to rebuff a request on such a straightforward procedural matter, moreover, gives the Government scant confidence that he will serve the sole interest that the FCA exists to vindicate – those of the United States, rather than his own – as this case proceeds further into litigation.

Second, it recently came to the Government's attention that Relator has been accused by his former employer with having engaged in abusive securities trading relating to his *qui tam* suits. This includes the allegation that he took short positions in the stock of one or more defendants, and then made public statements about his allegations and the unsealing of these cases in a manner designed to impact the price of various defendants' stock. *See Borzilleri v. Shepherd Kaplan Krochuk, LLC*, No. 18 Civ. 4654 (RJS) (S.D.N.Y.) (the "SDNY SKK Litigation").[12] As shown by filings in the SDNY SKK Litigation, Relator, in his own words, "admits making short trades in the securities of defendants [in what he describes as the

[12] The SDNY SKK Litigation relates to Relator's termination from the financial firm and an investment fund with which he was previously associated, based at least in part on his alleged trading activity relative to the two *qui tam* suits.

'Pharmaceutical Conspiracy Lawsuits'],'' and goes on to admit that, after he supposedly was told by the Government that his allegations were not based on inside information, that he "began shorting the equities of some of the related stocks driven by his proprietary research, due to his fiduciary obligation to the investors in [a] fund" that he managed. *See* Answer to Counterclaim by John R. Borzilleri ¶¶ 31-32 (attached as Exhibit 1 to Yu Declaration). The docket of the SKK SDNY Litigation also shows that, in April 2018, and shortly after these cases were unsealed, Relator emailed dozens of news outlets and financial analysts describing his allegations and making sensational (and, based on the Government's investigation, unsubstantiated) claims that "[m]any vulnerable patients have lost their lives," as a result of the scheme alleged in his *qui tam* cases. *See* 4/17/2018 Borzillieri email (Yu Declaration Ex. 2).

While the FCA provides a financial incentive for relators in the form of a share of the Government's recovery in litigation, it is not intended to be used a lever to further private financial dealings by a whistleblower.[13] Here, the Government finds these allegations sufficiently concerning that, combined with the other factors discussed above, it does not believe Relator should proceed as the representative of its interests in litigation.

* * *

In sum, the Government believes that any of these rationales (particularly the resource burden), standing alone, satisfies the *Sequoia Orange* rational relation test, and that considered together, they provide a clear and rational basis for dismissal.

[13] The Government emphasizes that it has made no finding with respect to relator's securities trading conduct, nor has it taken any steps – in connection with this motion – to determine whether any violation of the applicable securities laws took place. But that inquiry is neither required by, nor conclusive on, its decision to dismiss here. Sufficient allegations have been raised, however, that relator used the filing or unsealing of this suit to engage in, or further, at least some trading activity for his own or his former investment funds' benefit, and his answers to the government's direct questions on this topic have been evasive.

CONCLUSION

For the reasons above, the Government respectfully submits that the Court should grant its motion and dismiss this *qui tam* action pursuant to 31 U.S.C. § 3730(c)(2)(A).

Dated: New York, New York
December 21, 2018

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: */s/ Li Yu*
LI YU
Assistant United States Attorney
86 Chambers Street
New York, NY 10007
Tel.: (212) 637-2734
E-mail: li.yu@usdoj.gov