IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

THE UNITED STATES OF AMERICA, *ex rel.*, W. BLAKE VANDERLAN, M.D. **RELATORS**

V. **CIVIL ACTION NO. 3:15cv767-DPJ-FKB**

JACKSON HMA, LLC d/b/a CENTRAL MISSISSIPPI MEDICAL CENTER A/k/a MERIT HEALTH CENTRAL – JACKSON **DEFENDANT**

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING THE UNITED STATES' MOTION TO DISMISS COUNTS I-III, V & VI OF RELATOR'S FIRST AMENDED COMPLAINT PURSUANT TO 31 U.S.C. § 3730(c)(2)(A)

The False Claims Act (FCA), 31 U.S.C. § 3729 *et seq*., authorizes private persons, known as relators, to prosecute civil fraud actions in the name of the United States to recover penalties and damages based on injuries to the U.S. Treasury caused by false claims against the United States. Given that these *qui tam* suits are pursued on behalf of the United States and that the relators themselves have suffered no injury from any losses to the Federal treasury, it is not surprising that the FCA gives the United States wide prosecutorial discretion to dismiss these suits when the Government determines that they are not in the public interest, notwithstanding the objections of a relator. *See* 31 U.S.C. § 3730(c)(2)(A).

Here, Relator Vanderlan's FCA suit alleges false claims and reverse false claims that are all predicated on Defendant Jackson HMA a/k/a Merit Health Central - Jackson (Defendant or Jackson HMA) violations of the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd *et seq*. The United States seeks dismissal of these claims because they are hindering administrative settlement negotiations between the United States Department of Health and Human Services Office of the Inspector General (OIG) and Jackson HMA, will impose

unnecessary costs and burdens on Government resources and staff, and lack merit.[1] As further detailed below, some courts have held that the United States may dismiss all or part of an FCA action as of right under § 3730(c)(2)(A), while others have applied a deferential standard favoring dismissal if it has a rational relation to a valid Government purpose. While the Fifth Circuit has not decided this issue, under either standard dismissal is warranted of Counts I-III, V and VI of Relator's First Amended Complaint (AC) with prejudice as to the Relator and without prejudice as to the United States.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

EMTALA is often referred to as "the 'anti-dumping' statute," and its 1986 passage reflected Congress's "growing concern that hospitals were dumping patients who could not pay" by refusing to admit them to the emergency room or prematurely transferring them to other hospitals before their emergency conditions stabilized. *Miller v. Medical Center of SW Louisiana*, 22 F.3d 626, 628 (5th Cir. 1994). To address this problem, EMTALA requires medical screening of patients coming to a hospital emergency room. *See* 42 U.S.C. § 1395dd(a). EMTALA also requires that, if an emergency condition is found to exist in screening, then the hospital must either treat the patient until the emergency condition stabilizes or transfer the patient to another hospital under certain narrow conditions specified by the statute. *See* 42 U.S.C. § 1395dd(b)(1), (c). The statute provides for civil money penalties, at OIG's discretion,

[1] The United States take no position on the merits of Relator's retaliatory discharge claim (Count IV), which is currently the subject of a pending motion to dismiss by Defendant.

[2] The United States requests that this Court resolve the Government's motion to dismiss first, which, if granted, would obviate the need to resolve most of Defendant's dismissal motion, save for the part seeking dismissal of the retaliatory discharge claim. This request is in line with the Court's ruling to stay a decision on Defendant's motion to dismiss pending the United States' decision whether to seek dismissal of all or part of the Relator's suit. For the same prudential reasons that the Court issued the stay, it should address the United States' dismissal motion first.

for negligent violations of its requirements. *See* 42 U.S.C § 1395dd(d)(1)(A) ("is subject to" is discretionary rather than mandatory language).

Relator worked as a physician at Jackson HMA for approximately nine months in 2013. During his tenure, he became concerned that the hospital's emergency room violated EMTALA by routinely transferring African-American patients without insurance to another hospital. Relator provided information on these practices to the Centers for Medicare and Medicaid Services (CMS). On May 13, 2015, CMS informed the hospital that it had violated EMTALA (Dkt. No. 50-1). The next day, May 14, 2015, CMS sent a letter to Relator, among other things, informing him of its determination that Jackson HMA had violated EMTALA and stating "based on your individual situation, you may wish to consider the civil enforcement provisions of [Section] 1867 of the [Social Security Act] on an independent basis" (Dkt. No. 50-2). That provision provides a private right of action to "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of [EMTALA]." *See* 42 U.S.C. § 1395dd(d)(2)(A). At no time did CMS suggest that Relator initiate an FCA action.

On October 23, 2015, Relator filed an FCA action predicated on Jackson HMA's violations of EMTALA (Dkt. No. 3). The United States declined to intervene in the case on August 31, 2017 (Dkt. No. 23). After the United States declined to intervene, on September 1, 2017, Relator filed a motion to join the United States as a party in his FCA suit and a motion for a preliminary injunction or, alternatively, a temporary restraining order seeking to enjoin settlement negotiations of administrative claims between OIG and Jackson HMA pending a decision by this Court on the merits of Relator's FCA claims (Dkt. Nos. 25 & 27). On September 12, 2017, Relator withdrew the motion seeking to join the United States as a party

(Dkt. No. 32), and a few days later, on September 15, 2017, the United States opposed the motion seeking injunctive relief (Dkt. No. 38) as did Defendant (Dkt. No. 39).

Several weeks later, Relator filed the AC, with six counts, all predicated on the hospital's EMTALA violations purportedly giving rise to FCA claims relating to Medicare, Medicaid, and/or TriCare (Dkt. No. 50).[3] The AC cited 15 cases of purported EMTALA violations by Jackson HMA (¶¶ 73-116). But only Case Nos. 11 and 15 involved patients insured by Medicare or "TriCare/Medicaid" (¶¶ 104-105, 114-115).[4] Relator, however, did not plead that either Case Nos. 11 or 15 resulted in any false claims submitted by Jackson HMA to the Government or that there was anything wrong with the medical services provided by the hospital in these cases, save for the alleged inappropriate transfers (which did not result in any false claims by the hospital for the identified patients, who were transferred to another hospital that may have submitted its own claims). Defendant moved to dismiss the entire suit on November 9, 2017 (Dkt. No. 51).

On August 31, 2018, this Court directed the parties and the United States to provide an update on whether OIG had assessed any fines or penalties against Defendant (Dkt. No. 72). On September 5, 2018, the United States informed the Court that there had not been "any changes to the *status quo*" (*i.e.*, no fines or penalties had been assessed by OIG and settlement negotiations were continuing), stated it was considering filing a Statement of Interest or motion to dismiss the Relator, and asked for 45 days in which to file its papers (Dkt. No. 73). On September 14, 2018, this Court denied Relator's motion seeking injunctive relief, granted the Government's 45-day

[3] Counts I, II, and V allege false claims based on purported express and implied false certifications and worthless services respectively. Count III alleges reverse false claims. Count IV alleges retaliatory discharge. And Count VI seeks injunctive relief based on the purported FCA violations (*i.e.*, Counts I-III and V).

[4] TriCare and Medicaid are separate Government insurance programs, and the AC does not specify which program insured the patient described in Case No. 15. *See* AC ¶¶ 114-115.

extension request, and deferred ruling on the motion to dismiss and instead opted to stay the case in light of the possibility that the United States would file a motion to dismiss all or part of the Relator's *qui tam* suit (Dkt. No. 77). On October 29, 2018, this Court granted the United States' unopposed motion to extend by seven days, until November 5, 2018, the filing deadline for a Statement of Interest or motion to dismiss (Dkt. No. 79).

II. THE FALSE CLAIMS ACT

The FCA enables the United States to recover monies lost due to the submission of false claims to the Government. *See* 31 U.S.C. § 3729. Unlike EMTALA's negligence standard for civil money penalties, the FCA's *scienter* standard is knowledge, which encompasses "actual knowledge," "deliberate ignorance," or "reckless disregard." *Id*. § 3729(b)(1)(A)(i)-(iii).

Among the unique features of the FCA is that it allows a private party, the relator, to bring an action on behalf of the United States through filing a *qui tam* suit. A *qui tam* suit is brought in the name of the United States, but the relator has a right to share in the recovery, plus receive attorneys' fees and costs. *See id*. § 3730(b), (d). The FCA includes a number of statutory mechanisms to ensure that the United States retains substantial control over these lawsuits brought on its behalf. Among other things, the FCA directs that the relator must file the complaint under seal and serve it, along with a written disclosure of evidence, on the United States. *See id*. § 3730(b)(1), (2). The United States then has a period of time (at least 60 days with extensions for good cause) to investigate and determine whether or not to intervene in the litigation. *See id*. § 3730(b)(2), (3).

If the United States intervenes in the case, then "the action shall be conducted by the Government," and the United States assumes "the primary responsibility for litigating the action" and is not bound by any act of a relator. *Id*. § 3730(b)(4)(A) & (c)(1). The relator remains a

party to the suit, but the United States may settle the case over the relator's objection or limit the relator's participation in the litigation. *See id*. § 3730(c)(2)(B), (C).

Even in cases like this one in which the United States declines to intervene, the Government retains substantial control over the action. *See generally, U.S. ex rel. Vaughn v. United Biologics, LLC*, 2018 WL 5000074 **4-5 (5th Cir. Oct. 16, 2018) ("[e]ven when the Government declines to intervene, it remains a distinct entity in the *qui tam* litigation with protected interests"). For example, the Court may stay discovery in the *qui tam* if it interferes with the Government's investigation or prosecution of another matter. *See id*. § 3730(c)(4). Also, the relator cannot dismiss the action without written consent of the Attorney General. *See id*. § 3730(b)(1). And if the Attorney General initially declines to intervene in the suit, the court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id*. § 3730(c)(3).

Most importantly for purposes of this motion, the FCA authorizes the United States to dismiss a *qui tam* suit over the relator's objection:

> The 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 United States can move to dismiss a *qui tam* suit even through it did not intervene in the litigation, as it remains the real party in interest. *See Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 753 (5th Cir. 2001) (*en banc*); *Swift v. United States*, 318 F.3d 250, 251-52 (D.C. Cir. 2003), *cert. denied*, 539 U.S. 944 (2003); *U.S. ex rel. May v. City of Dallas*, 2014 WL 5454819 *2 (N.D. Tex. Oct. 27, 2014).

The Fifth Circuit has not yet addressed the standard for dismissal of a *qui tam* under 31 U.S.C. § 3730(c)(2)(A). Several other appellate courts have addressed this issue, however. The Ninth Circuit has held that the United States may dismiss an action under § 3730(c)(2)(A) so long as dismissal has a rational relation to a valid Government purpose. *See U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999). More recently, in *Swift*, the D.C. Circuit rejected the Ninth Circuit's test in *Sequoia Orange* and held that § 3730(c)(2)(A) gives the United States "an unfettered right to dismiss an [FCA] action." 318 F.3d at 252-53.

The tests set forth by the Ninth and D.C. Circuits are both extremely deferential and recognize the United States' broad prosecutorial discretion in deciding whether to dismiss a *qui tam* suit. Under the D.C. Circuit test, however, the United States has absolute discretion to dismiss and need not articulate a reason for dismissal. *See* 318 F.3d at 252-53.[5] Under this unfettered discretion standard, "the function of a hearing when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case." *Id*. at 253. Although not quite as deferential as the D.C. Circuit, in *Sequoia Orange* the Ninth Circuit limited a relator's opportunity for a hearing to instances in which the relator has a "colorable claim" that the Government's dismissal of the *qui tam* suit lacks a rational relation to a valid Government purpose. 151 F.3d at 1145 (citing S. Rep. No. 99-145, at 26 (1986), *reprinted in* 1986 U.S.C.A.N. 5266, 5291); *see also U.S. ex rel. Mateski v. Raytheon Co.*, 634 Fed. Appx. 192, 194 (9th Cir. 2015) (affirming district court's dismissal of a *qui tam* suit without a hearing, pursuant to § 3730(c)(2)(A), because a relator failed to present a colorable claim that dismissal

[5] Notably, the D.C. Circuit even questioned, but did not decide, whether the trial court would have any right to review the Government's decision to dismiss where there was an allegation of "fraud on the court." 318 F.3d at 253. No such allegation exists here.

was unreasonable or inappropriate); *U.S. ex rel. Toomer v. Terrapower*, LLC, 2018 WL 4934070 *6 (D. Id. Oct. 10, 2018) (denying relator's request for evidentiary hearing and dismissing *qui tam* suit per § 3730(c)(2)(A)).

The United States contends that the standard for dismissal under 31 U.S.C. § 3730(c)(2)(A) adopted in *Swift* is correct and would likely be adopted by the Fifth Circuit because this standard best comports with both the FCA's statutory language and the well-established deference due the Government's exercise of prosecutorial discretion. The plain language of § 3730(c)(2)(A) differs markedly from the next provision in the statute, which sets forth the Attorney General's right to settle a *qui tam* over a relator's objection: "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 under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). In marked contrast, no such requirement of fairness, adequacy, or reasonableness limits the Attorney General's authority to dismiss a *qui tam* suit pursuant to § 3730(c)(2)(A).

Moreover, relying upon Supreme Court precedent, *Swift* emphasized that the FCA reflects the general principle of separation of powers, which affords broad discretion to the Executive Branch to decide whether to pursue a claim on behalf of the United States. *See* 318 F.3d at 252-53 (citing *Heckler v. Chaney*, 470 U.S. 821, 831-33, (1985)).

Notably, the Government's retention of significant control over *qui tam* suits provided one of the key bases for the Fifth Circuit to conclude that the *qui tam* provisions are constitutional. *See Riley*, 252 F.3d at 753-54. Citing to § 3720(c)(2)(A), the Fifth Circuit stated that "the government retains the unilateral power to dismiss an action notwithstanding the objections of the [relator]." *Id*. at 753 (quotation and citations omitted).

III. ARGUMENT

A. Dismissal As Of Right Under Section 3720(c)(2)(A)

The *en banc* opinion in *Riley* strongly suggests that the Fifth Circuit would follow the *Swift* test and hold that the Government has "the unilateral power" to dismiss a *qui tam* suit. 252 F.3d at 753. Under this standard, where, as here, the United States has made a considered decision that further prosecution of Counts I-III, V & VI is not warranted, this Court should defer to the Government's prosecutorial discretion and dismiss those counts pursuant to the Government's motion.

B. Good Cause Exists To Dismiss Relator's FCA Claims

This Court need not decide which standard to apply, however, because, even if it were to apply *Sequoia Orange's* standard of dismissal, dismissing Counts I-III, V & VI has a rational relation to a valid Government purpose. In particular, dismissal is warranted because (1) this suit has hindered and will continue to hinder settlement negotiations of administrative claims between OIG and Jackson HMA, (2) this suit has imposed and will continue to impose unnecessary costs and burdens on Government resources and staff, and (3) Relator's allegations of false claims and reverse false claims lack merit.

1. Relator's FCA suit has hindered and will continue to hinder the prospect of administrative settlement between OIG and Jackson HMA

Shortly after learning about administrative settlement negotiations between OIG and Jackson HMA, on September 1, 2017, Relator filed a motion seeking injunctive relief to halt those negotiations and preserve his purported "entitlement to participate in the proceeds of any recovery made by the Government" (Dkt. No. 28, at 3). The United States and Jackson HMA

opposed this motion (Dkt. Nos. 38-39), and this Court denied it on September 14, 2018 (Dkt. No. 77).

Nevertheless, Relator's motion seeking an injunction hindered these administrative settlement negotiations for over a year based on the uncertainty it created among the Government and the hospital. Also, notwithstanding the Court's denial of the injunction, Jackson HMA has stated in a letter to the United States, dated September 27, 2018, that despite wanting to resolve the administrative EMTALA issues with OIG, "Jackson HMA cannot do that if a resolution would lead to a disadvantage in Vanderlan's FCA litigation, where the potential liability is much greater." *See* Exhibit (Ex.) 1, at 3. In short, Jackson HMA is unlikely to settle the administrative matter with OIG so long as the threat of FCA damages and penalties looms over it, and, thus Relator's *qui tam* suit interferes with OIG's ability to complete its administrative enforcement proceedings. That circumstance alone provides good cause to dismiss Relator's FCA claims relating to the hospital's EMTALA violations (*i.e.*, Counts I-III, V & VI).[6] *See, e.g.*, *Sequoia Orange*, 151 F.3d at 1142, 1146 (concluding that "legitimate government interest" justifying dismissal of *qui tam* suit pursuant to § 3730(c)(2)(A) included the Department of Agriculture's desire "to end the divisiveness in the citrus industry" by promulgating new citrus marketing regulations).

[6] As noted in n.1 *supra*, the United States is not seeking to dismiss Relator's retaliatory discharge claim (Count IV) and takes no position on the merits of Jackson HMA's pending motion to dismiss that claim. The United States does so because (1) retaliatory discharge is a personal claim of the Relator, (2) the relief for retaliatory discharge does not overlap with the relief for EMTALA violations or raise the prospect of multiple recoveries against Jackson HMA for the same underlying misconduct, and (3) the scope of discovery in a retaliatory discharge action should focus on the reasons for Relator's termination by the hospital and should not involve the Government to any significant degree.

2. The continuation of Relator's FCA suit based on EMTALA violations will divert scarce Government resources and staff

Relator's FCA action has already consumed substantial Government resources. Among other things, the United States has been forced to oppose Relator's motion seeking an injunction and draft this motion to dismiss. The Government's burdens will almost certainly increase if this suit continues. The United States will need to monitor closely this suit and will also likely need to file one or more Statements of Interest clarifying the United States' FCA legal positions in response to the arguments of both parties and participate in burdensome Government depositions and document discovery.[7] Highlighting this latter concern, Relator's initial disclosures reveal the intention to seek depositions of CMS and OIG personnel and Government documents, while Jackson HMA's initial disclosures indicate that the hospital will likely seek similar discovery from CMS. *See* Ex. 2, at 11, 16; Ex. 3, at 2.

Preserving scarce Government resources has consistently been upheld by courts as good cause for dismissal of FCA claims pursuant to § 3730(c)(2)(A). *See, e.g.*, *Swift*, 318 F.3d at 252, 254 (although upholding dismissal of FCA actions as of right by the United States, holding in the alternative that under the Ninth Circuit's *Sequoia Orange* standard preserving the Government's "scarce resources" and "minimizing its expenses" are "legitimate objective[s]" justifying dismissal of an FCA action); *Sequoia Orange*, 151 F.3d at 1146 (upholding Government's right to dismiss an FCA suit under § 3730(c)(2)(A) for good cause based upon the Government expenses and staffing resources that would be consumed if the action continued); *Toomer*, 2018 WL 4934070 *5 (dismissing FCA suit under *Sequoia Orange* standard for, among other reasons,

[7] Although beyond the scope of this memorandum, the United States disagrees with several FCA legal positions set forth in Jackson HMA's motion to dismiss, including the narrow interpretation of "materiality" and the suggestion that the presence of administrative remedies may by themselves preclude FCA actions.

"that continued litigation will waste substantial government time and resources"); *U.S. ex rel. Levine v. Avnet, Inc.*, 2015 WL 1499519 *5 (E.D. Ky. Apr. 1, 2015) (dismissing FCA suit under the *Swift* standard, but also finding that the result would be the same if the court applied *Sequoia Orange* in light of "the Government's interest in allocating its resources as it sees fit"). Here, the burdens imposed on the Government if this case continues deserve special consideration given that both Relator and Jackson HMA have indicated the intention to seek depositions and potentially substantial amounts of documents from CMS and OIG.

3. Relator fails to allege any legally viable false claims or reverse false claims (Counts I-III, V-VI)

To justify dismissal even under the *Sequoia Orange* standard, it is not necessary for the United States to prove that the Relator's allegations lack merit. *See Sequoia Orange*, 151 F.3d at 1134 (affirming dismissal of action despite Government's concession, for purposes of motion to dismiss, that the action was meritorious). Indeed, the Ninth Circuit found cost and other non-merits based considerations, such as those articulated here, to be legitimate grounds for dismissal. That is consistent with Supreme Court precedent reserving to the Executive Branch, as a matter of its prosecutorial discretion, the right not only to "assess whether a violation has occurred, but whether the agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, and 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." *See Heckler*, 470 U.S. at 31. Nevertheless, the Government has a rational basis in this case for concluding that relator's allegations also should be dismissed because they lack merit.

In particular, Relator does not adequately allege any overbilling of the Government. Instead, he sets forth two FCA theories of false claims and one FCA reverse false claim theory

predicated on EMTALA violations. First, Relator cites 15 "representative" cases of inappropriate transfers violating EMTALA and contends that Jackson HMA could and should have performed the emergency services. *See* AC ¶¶ 53, 73-116. Only two of those cases involve Government insureds (as noted above, Cases Nos. 11 and 15). *See* AC ¶¶ 104-05, 114-15. Second, Relator broadly alleges that any violations of EMTALA, whether or not involving Government insureds, taints every one of Jackson HMA's claims to Medicare, Medicaid, and TriCare (*i.e.*, all of the hospital's healthcare claims involving Government insureds, whether for emergency or non-emergency services). *See* AC ¶¶ 3-4, 39-40, 122, 131. In support of these sweeping allegations, Relator argues that perfect compliance with EMTALA is a condition precedent to Jackson HMA billing the Government for any healthcare services. *See id*. Without such perfect compliance, Relator contends that he is entitled to "ALL funds/program payments which would not have been paid from the subject health care programs" as a result of the hospital's EMTALA violations. *See* AC ¶¶ 122, 131 (capitalization in original). Finally, separate and apart from the allegations of false claims, Relator also alleges reverse false claims based on Jackson HMA's purported failure to repay the Government fines and penalties arising from the EMTALA violations. *See* AC, ¶¶ 134-138.

a. No viable false claims (Counts I-II & V-VI)

The FCA imposes liability for presenting a false claim for payment to the Government or making or using a false record or statement material to a false claim. *See U.S. ex rel. King v. Solvay Pharmaceuticals, Inc*., 871 F.3d 318, 323-24 (5th Cir. 2017) (quotation and citation omitted), *cert. denied*, __ U.S. __, 138 S. Ct. 2030 (2018). Relator fails to allege any false claims concerning any of the 15 cases of EMTALA violations cited in the AC, including the two cases involving Government insureds.

This is not surprising. EMTALA violations typically involve turning patients away from a hospital emergency room rather than treating them and, thus do not lead to the submission of any false claims to the Government.

In addition, Relator fails to allege any deficiencies in the screening or other healthcare services that Jackson HMA provided to the emergency room patients that Relator concedes did receive some medical treatment prior to their transfer to another hospital. *See* AC ¶¶ 73, 79, 81-82, 86, 89-90, 92, 104, 106, 109-110. The closest Relator comes to alleging deficient medical services is in Count V, setting forth the worthless services claim. Here Relator alleges "upon information and belief" and without any factual support that Jackson HMA's emergency department "provided sub-standard and deficient services to the Government . . . by providing and charging for inadequate medical screening . . . for tests and procedures that had to be repeated after patients were unlawfully transferred" to another hospital. AC ¶ 144. In addition to the lack of facts, Relator does not allege that any of these purported deficient services involved the two Government insureds or any of the other 15 cases. Nor does he allege that the transferee hospital receiving the emergency room patients from Jackson HMA billed the Government for any of the tests or procedures that allegedly had to be repeated. *See id.*

Relator's other theory of false claims contends that compliance with EMTALA is a condition precedent to submitting healthcare claims to the Government and that Jackson HMA's EMTALA violations tainted every healthcare claim that the hospital submitted thereto. But Relator fails to cite any statutory, regulatory, or contractual language supporting that assertion. Moreover, this theory is overbroad. Absent perfect EMTALA compliance by the hospital, Relator's theory would potentially turn a single EMTALA violation (perhaps based simply on

negligence) into a predicate for FCA treble damages and penalties (with a *scienter* requirement of knowledge) for every one of the hospital's healthcare claims to the Government.

b. No viable reverse false claims (Count III)

The FCA's reverse false claims provision sets forth a cause of action in cases in which a defendant, among other things and as applicable to this case, conceals or avoids an "obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a) (1)(G). The FCA states in § 3729(b)(3) that "the term obligation means an established duty . . ." In Count III, however, Relator fails to plead any "obligation" owed by Jackson HMA to the United States and does not even use the term "obligation" in the AC. *See* ¶¶ 134-38. Instead, Relator generally pleads that Jackson HMA concealed facts "that would have resulted in substantial repayment of fines and penalties" and "avoided payment of civil fines and penalties" (¶¶ 135-36), without identifying any established Government obligations owed by the hospital. A long line of Fifth Circuit precedent supports the proposition that unassessed fines and penalties (such as those pled by Relator) are not "obligations" under the FCA. *See Simoneaux v. E.I. DuPont*, 843 F.3d 1033, 1035-36 (5th Cir. 2016); *U.S. ex rel. Marcy v. Rowan Companies*, 520 F.3d 384, 391-92 (5th Cir. 2008); *U.S. ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657-58 (5th Cir. 2004).

For the foregoing reasons, at a minimum, the United States has a rational basis to conclude that the relator's claims lack merit and that this circumstance also justifies dismissal of Relator's claims.

Date: November 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 5, 2018, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the Court's ECF system, which sent notice to all counsel of record.

/s/Angela Givens Williams
ANGELA GIVENS WILLIAMS