THE GOVERNMENT'S OVERLOOKED WEAPON IN PROTECTING THE PUBLIC FISC: DISMISSALS UNDER 31 U.S.C. § 3730(C)(2)(A)

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I. INTRODUCTION

For nearly 150 years, the civil False Claims Act ("FCA") has been a valuable instrument in the government's efforts to combat fraud and protect the public fisc. One feature of the FCA, its provision for *qui tam* suits, has been responsible for the most of the government's success in thwarting fraud on the government since 1986 when the FCA was rewritten. Indeed, of the $20 billion that the government has recovered pursuant to the FCA since 1986, *qui tam* suits have accounted for $12.6 billion – nearly two thirds of the total recovery.[1]

Not all *qui tam* suits, however, are created equal. The government has declined to intervene in more than 75% of the nearly 5000 *qui tam* suits in which the government has made an intervention decision.[2] Notwithstanding earlier protestations by the government that its decisions not to intervene in cases were no indication of its view of the merit of such cases, defendants have long suspected otherwise, a suspicion supported by the statistics – the 75% of non-intervened cases account for less than $282 million (1.4%) of the $20 billion recovered since 1986.[3] Further support has been provided in recent testimony by a Deputy Assistant Attorney General for the U.S. Department of Justice's Civil Division. Citing similar statistics, he testified that this "reveals that the Department has been appropriately judicious in its review of *qui tam* matters and has been highly successful in intervening in those cases that have *true merit*."[4] Notwithstanding that observation, the government has sought to dismiss as meritless only a handful of the nearly 4000 non-intervened cases.

What has to date been largely ignored is the cost – monetary and otherwise – associated with those nearly 4000 *qui tam* suits that have accounted for only 1.4% of the government's recovery. These cases have resulted in burdensome costs on defendants, some of which are eventually passed on to the taxpayer because they

are often chargeable back to the government when the defendants ultimately prevail.[5] Federal courts, in turn, bear the costs of managing these cases, sometimes for many years.

In keeping with the purpose behind the FCA, protecting the public fisc, meritless cases should be dismissed early on. The government is not only in the best position to evaluate these cases, it has the statutory power to stop them and, arguably, the *responsibility* to stop them. As part of its responsibility to protect the public fisc by enforcing the FCA, the government should utilize the authority granted it to dismiss meritless cases notwithstanding the objections of the relator.[6] Doing so creates minimal burden on the government or the courts, as the government need only notify the relator that it is filing a motion to dismiss and the court need only permit the relator an opportunity for a hearing on the motion.[7]

II. THE FCA AND THE 1986 AMENDMENTS

The FCA was originally enacted in 1863, during the Civil War, to combat Union contractor fraud. The original Act imposed civil and criminal penalties on persons who submitted a false claim for payment to the government. The original Act also provided for federal jurisdiction over civil *qui tam* actions.

Such private enforcement was necessitated by the government's inability to combat contractor fraud while its resources were tied up with the Civil War. Harsh sanctions were provided for in the original Act: double damages and a $2,000 penalty for each false claim by a government contractor. Individuals who brought successful *qui tam* suits were entitled to one half of the forfeitures and damages collected. This provided individuals with a strong incentive to bring *qui tam* suits. However, in order to discourage frivolous lawsuits, the Act required the relator to bear the cost of pursuing the suit and also allowed the government to intervene and take over the suit at its sole discretion.

Despite the potential for huge windfalls, the end of the Civil War and the requirement that the relator bear the cost of pursuing the suit resulted in few actions under the *qui tam* provision until the 1930's. Several factors led to an increase in the number of *qui tam* suits brought in the 1930's and early 1940's. First, the military build-up prior to World War II and the enactment of the New Deal in the 1930's and early 1940's expanded opportunities for government contractors to increase profits through fraud. Second, although the Act attempted to discourage frivolous lawsuits by requiring relators to bear the costs of bringing the suit, the Act did not limit recovery to *qui tam* plaintiffs with direct knowledge of previously unknown fraud. As a result, the Act allowed for "parasitic" actions

in which individuals used information in criminal fraud indictments to bring civil *qui tam* actions and obtain a fifty percent share in any recovery.[8]

These abuses led to a significant revision of the Act in 1943 which narrowed a *qui tam* relator's ability to bring suit and reduced the potential bounty the relator could receive. In the 1980's, Congress became alarmed at the perceived level of fraud in government contracting and cases narrowly construing the relators' rights led Congress to believe that the FCA no longer served as an effective enforcement tool or as a sufficient deterrent to fraud. Therefore, Congress, in 1986, made only the second major revision of the Act since 1863 in an effort to reinvigorate the FCA. Congress took the opportunity to expand the availability of *qui tam* actions, increase the financial incentive to bring such suits and clarify statutory language which had led to conflicting judicial interpretations of the pre-1986 Act. Congress is now once again considering strengthening the *qui tam* provisions in separate House and Senate bills for a "False Claims Act Corrections Act of 2007."[9]

The goal for lawmakers evaluating the *qui tam* provisions of the FCA has always been to achieve the proper balance between encouraging and facilitating valid relator claims of fraud and discouraging and preventing meritless relator claims from clogging the system. As it is written, the Act empowers the Department of Justice to play a critical role in removing invalid cases from the system, but in most cases it has little incentive to make use of this power. Congress should take action to correct the resulting imbalance in the FCA and, in any case, the Department of Justice should exercise its authority to dismiss meritless suits.

III. THE GOVERNMENT'S POWER TO DISMISS *QUI TAM* ACTIONS

When a relator files a FCA complaint "in the name of the government," it must serve on the government "a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses."[10] The government then has sixty days (or more, if its motions for extensions are granted) to decide whether it will intervene in the action.[11] During the sixty-day period, the FCA requires that the *qui tam* complaint remain under seal.[12] The primary purpose of this requirement is to allow the government time to investigate the claim, discover whether it was already under investigation, and decide whether to intervene.[13] Indeed, the government *must* investigate: Section 3730 states that "the Attorney General diligently shall investigate a violation under section 3729 . . ."[14]

During the course of its investigation, the government not only has unfettered access to the relator and all material evidence in the relator's possession,

it has the authority to issue civil investigative demands for documents, answers to written interrogatories and oral testimony from "any person [who] may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation."[15] Often, the government also obtains documents and access to informal witness interviews through coordination with the Offices of Inspector Generals of various federal agencies. Government investigators also have access to the government itself, including access to the agency the relator alleges was victimized by fraud – evidence that neither the relator nor the defendant can readily access.

In short, the government has myriad tools at its disposal to gather facts and evaluate evidence before deciding whether to intervene in a *qui tam* case. Nonetheless, it is only on a rare occasion that the government chooses to exercise its statutory authority to dismiss actions under § 3730(c)(2)(A).[16] Decisions by the government to exercise its authority under this provision are subject to great deference. In *Swift v. United States*, for example, the Court of Appeals for the District of Columbia held that the court must grant *any* motion to dismiss a *qui tam* suit the government brings, at least where there is no allegation of fraud on the court and the defendant has not answered the complaint.[17] Other courts, following the Ninth Circuit's decision in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, simply require the government to meet the very low burden of showing that it has a "valid government purpose" for seeking to dismiss and that there is a "rational relation between dismissal and accomplishment of that purpose."[18] The government's rationale for dismissal need not be based on the merits. Among recognized "valid government purposes" are that litigation of the case threatens national security interests,[19] or that the case is too small to justify the expense associated with prosecuting it.[20] As in all cases, but especially under this standard, dismissal would of course be appropriate if the government asserted in good faith that a complaint lacked merit.[21]

Both the *Swift* and *Sequoia Orange* standards for dismissal by the government are consistent with the government's status as "the real party in interest" in *qui tam* litigation.[22] Despite the government's broad authority under § 3730(c)(2)(A), however, there appear to be only *two* reported cases in which the government has moved to dismiss a *qui tam* suit for lack of merit.[23]

IV. THE COSTS OF THE GOVERNMENT'S FAILURE TO DISMISS MERITLESS SUITS BEFORE THE CONCLUSION OF THE DILIGENT INVESTIGATION PERIOD

Undoubtedly, the government may, for legitimate purposes, choose to decline to intervene rather than dismiss a case. It is also without doubt that not all of the 75% of *qui tam* suits in which the government declines to intervene have "true merit." While some may view the government's reluctance to dismiss suits as costless to anyone other than relators' counsel and defendants, the failure of the government to dismiss meritless suits after the "diligent investigation" period ultimately harms the public fisc.

As already discussed, the government is obligated to investigate a relator's allegations and is well positioned to determine whether a case lacks any merit. In contrast, defendants are often at a severe disadvantage in seeking to dismiss suits on the merits at early stages in litigation. In some jurisdictions, the defendant will *not* have access to the relator's disclosure of material evidence, and/or will obtain that access only after litigating a motion compel its production;[24] in other jurisdictions, the defendant will only have access to parts of the disclosure, again after litigating motions to compel.[25] In addition, maintaining that it is not a party (only the real party in interest), the government makes it difficult for a defendant to discover documents that the government may have seen that influenced its decision to decline intervention.[26]

After the defendant has had a chance to investigate (while answering discovery requests and making its own, and undertaking the costs of litigation), it too can of course seek dismissal. But unlike the government, a defendant is judged not under the *Sequoia* or *Swift* standards described above, but by the ordinary Civil Rules of Procedure, which assess motions to dismiss in the light most favorable to the relators and which courts often interpret to disfavor motions for summary judgment prior to the opportunity for (costly) discovery.[27]

In the end, if the defendant prevails, much of the cost of litigating the suit are likely to be considered allowable costs under the FAR's cost allowability provisions.[28] As such, these costs are borne not by the relator or by the defendant, but by the taxpayer. The costs to courts of overseeing all of this are also ultimately borne by taxpayers (and parties with legitimate cases).

V. *UNITED STATES EX REL. STIERLI V. SHASTA SERVICES, INC., D/B/A TIMBERWORKS*

A recent Eastern District of California case highlights the very problem associated with the government's reluctance to dismiss suits that it knows (or believes in good faith) to lack merit. As discussed below, in *United States ex rel. Stierli v. Shasta Services, Inc., d/b/a Timberworks*, the government sought to dismiss the case – for lack of merit – only after the suit directly impinged on the government in the form of what the government perceived to be burdensome discovery requests served on it. Prior to that, however, the government was seemingly content to help the relator keep alive his meritless case, even actively participating in settlement discussions.

Relator Stierli was the president of a company that lost a bid for a California Department of Transportation ("CalTrans") contract to the defendant, Shasta Services, Inc., d/b/a Timberworks ("Timberworks").[29] In September of 2004, Stierli brought suit against Timberworks under the FCA and its California counterpart, claiming that Timberworks' bid was fraudulent.[30] Both the federal and state governments declined to intervene almost seven months later, during which time they presumably "diligently investigated" the relator's claims.[31]

When the defendant sought a stay of the action and an order compelling arbitration, the government opposed the defendant's motion, notwithstanding its decision not to intervene in the case.[32] As a result, the parties proceeded to engage in discovery.[33] When the government learned that the parties had scheduled a settlement conference, the government filed a Notice of Right to Approve Settlement on March 6, 2006.[34] In that notice, the government reminded the parties that they could "dismiss this action only with the consent of the Department of Justice."[35] The government advised that, among other things, "[t]he United States will not agree to dismissal with prejudice of False Claims Act liability (or other potential Government actions) unless the United States is receiving a recovery . . ." The government also stated that any settlement agreement it approved would provide that "the defendant may not charge back to the United States directly or indirectly any of the costs or expenses of the litigation."[36]

Just one month later, and despite its active involvement in maintaining this case in federal court, despite having allowed the case to proceed to discovery, and despite its claim to settlement proceeds on March 6, the government joined the State of California and the defendant in filing motions to dismiss the case.[37]

In its motion, the government stated that one of its reasons for seeking dismissal was that "*the United States has found no evidence that defendant defrauded either real party in interest, the federal government or the State of*

California."[38] Elaborating, the government argued that the relator's claim amounted to no more than a claim that defendant failed to use best efforts to meet certain disadvantaged business goals.[39] The government added that it had "diligently investigated relator's claims . . . but found no evidence that defendant had submitted a false claim to either the State of California or the federal government, i.e. no lie was involved in this case."[40]

The government's motion also adopted the State of California's point that the relator's suit not only did not preserve the public fisc, but rather created significant additional expenses for the state "and simultaneously punish[es] a company that CalTrans does not contend harmed the state."[41]

Finally, the government noted, almost in passing, that "this case involves no loss to the federal government . . . [yet] this office has been required to respond to frivolous discovery requests from relator for investigative files compiled by the U.S. Attorney's office, documents that are privileged under a variety of recognized privilege."[42] It also noted that "[r]elator's counsel has even threatened to seek sanctions against undersigned counsel if she refuses to turn over privileged documents..."[43] This, the government argued, was a "waste of the government's resources that are being diverted from significant cases *with merit* . . ."[44]

The Court eventually agreed with the government that the facts alleged did not amount to a claim that the defendant "knowingly presented a false or fraudulent claim for payment" as the FCA requires.[45]

The timing of the government's motion and the force of its arguments that the case lacked absolutely any merit call into question whether the government would have been willing to seek dismissal of the suit had the State of California not first filed a motion to dismiss and had the government not itself faced the burden of discovery requests.

VI. CONGRESS SHOULD AMEND THE FCA TO CLARIFY THAT BY DECLINING TO INTERVENE AND NOT MOVING TO DISMISS A QUI TAM SUIT, THE GOVERNMENT IS SUPPORTING THE RELATOR'S REPRESENTATIONS TO THE COURT

The government may already have an obligation, ethical or otherwise, to seek to dismiss suits that it knows to be meritless either through its own mandatory diligent investigation or some other source. Nonetheless, since Congress is already considering Senate and House bills to amend the FCA, it should also consider an amendment to section 3730 to make explicit the requirement that the government may not turn a blind eye to, and thereby condone, meritless suits.

To do this, Congress could take a page from the Federal Rules of Civil Procedure, specifically Rule 11. The rule provides that by "signing, filing, submitting, or later advocating" pleadings and other papers in federal court, parties are "certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances," its representations, in short, are not abusive and do not frustrate the purpose of the civil rules, which is "to secure the just, speedy, and inexpensive determination of every action."[46]

Specifically, Congress could amend either subsection (b)(4) or (c)(2)(A) of section 3730 to provide that the government:

> " . . .shall dismiss any claim that it knows:
>
> (i) is unwarranted by either existing law or by a nonfriviolous argument for the extension, modification, or reversal of existing law or the establishment of new law; or
>
> (ii) arises from allegations or other factual contentions that lack evidentiary support and that are not likely to have evidentiary support
>
> within 21 days of receiving notice that the relator has made the relevant representation, unless the relevant representation is in a complaint, in which case, the government shall have 60 days from the date it receives a copy of that complaint.[47]

The government can be expected to respond to this proposal by claiming it would unduly infringe on its Constitutional and historical discretion over the decision to prosecute, citing Article II, section three of the U.S. Constitution, which entrusts the Executive with duty to "take Care that the Laws be faithfully executed."[48] In *Swift,* D.C. Circuit relied on this in rejecting the *Sequoia* "rational relation" test for review of government motions to dismiss.[49] The government would likely argue that if a court cannot question its decision to dismiss, surely a court cannot question its decision *not* to dismiss.

But as the *Sequoia* case and those that have adopted its test make clear, many courts consider the government's discretion in this area not absolute. Thus the discretion is limited in at least most circuits by the explicit FCA requirement for a hearing before the government dismisses, and, in turn, the Due Process Clause.[50] In *Sequoia,* the district court ruled that the hearing requirement in section 3730(a)(2) would not "place an additional burden on the executive's exercise of prosecutorial discretion, because the constitution itself prohibits

arbitrary or irrational prosecutorial decisions," and the Ninth Circuit affirmed.[51] This reasoning applies equally well to the government's *failure* to dismiss an obviously meritless claim. Even in *Swift,* the court only disagreed with the *Sequoia* statement of constitutional law "with respect to the government's judgment *not* to prosecute," and the court noted that even the government had conceded "there may be an exception" to its claim of absolute discretion to prosecute "for '*fraud on the court*,'" no evidence of which was presented in that case.[52]

Although not all meritless cases will rise to the level of "fraud on the court," the point is that there are recognized limits on even the Article II power to "take Care that the Laws be faithfully executed."[53] The purpose of the *qui tam* provisions is to supplement the government's resources to aid in the discovery, punishment and discouragement of *fraud* against the government. Section 3730 cannot be fairly interpreted to give the government the discretion to pursue, or allow others to pursue in its name, claims that do not promote this goal and, worse, often do so at the expense of taxpayers.

VII. CONCLUSION

Consistent with the purposes of the FCA, and regardless of what action Congress may take, the government should exercise its authority under § 3730(c)(2)(A) to dismiss meritless suits. As former Attorney General Taney so eloquently stated:

> An attorney of the United States, except insofar as his powers may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting [as a private lawyer has over a private party's suit]. The public interest and the principles of justice require that he should have this power; for, why should the public be put to the expense of preparing a suit for trial, and procuring evidence, when the attorney knows that, on principles of law, it *cannot be supported*? Why should he be required, on behalf of the United States, to harass a defendant with a prosecution, which, pending the suit, he discovers to be *unjust and groundless?*[54]

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1 *See* DOJ Civil Division Fraud Statistics – Overview, October 1, 1986-September 30, 2007 ("DOJ Overview statistics"), *available* at www.taf.org/STATS-FY-2007.pdf.

[2] *See* DOJ Civil Division Fraud Statistics – *Qui Tam* Intervention Decisions & Case Status as of September 30, 2007, *available* at www.taf.org/STATS-FY-2007.pdf.

[3] *See* DOJ Overview statistics.

[4] Statement of Michael F. Hertz, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Before the United States Senate Committee on the Judiciary, Concerning "The False Claims Corrections Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century" (Feb. 27, 2008), at 7 (emphasis added) ("Hertz testimony").

[5] *See* Federal Acquisition Regulation ("FAR") 31.205-33 "Professional and consultant service costs" and FAR 31.205-47 "Costs related to legal and other proceedings.

[6] *See* 31 U.S.C. § 3730(c)(2)(A).

[7] *Id.*

[8] For example, in 1941, an opportunistic relator allegedly instituted a civil action under the FCA which incorporated allegations copied from a criminal indictment under the FCA. Although the relator brought no new information to the government's attention, the Supreme Court held that the relator was entitled to half of any money judgment resulting from the civil action under the *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, *reh'g denied*, 318 U.S. 799 (1943).

[9] H.R. 4854, 110th Cong. (2007); S. 2041, 110th Cong. (2007).

[10] 31 U.S.C. § 3730(b)(1) & (b)(2).

[11] *Id.* § 3730(b)(2) & (b)(3).

[12] *Id.* § 3730(b)(2) & (b)(3).

[13] *See, e.g., United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998 (2d Cir. 1995).

[14] 31 U.S.C. § 3730(a).

[15] 31 U.S.C. § 3733.

[16] *Id.* § 3730(c)(2)(A).

[17] *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003) ("Nothing in §3730(c)(2)(A) purports to deprive the Executive Branch of its historical

prerogative to decide which cases should go forward in the name of the United States [and] the section merely provides the relator with a formal opportunity to convince the government not to end the case."); *id.* at 253, 254 (declining to rule on whether allegations of fraud on the court or the defendant's having answered relator's complaint might alter the outcome).

[18] *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139, 1145 (9th Cir. 1998).

[19] *See Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 936-37 (10th Cir. 2005) (holding that the "Government demonstrated that classified documents required in the litigation would present a risk of inadvertent disclosure, implicating national security").

[20] *See Swift*, 318 F.3d at 254 ("Even if Sequoia set the proper standard, the government easily satisfied it [where the] asserted governmental interests were that the dollar recovery was not large enough to warrant expending resources monitoring the case, complying with discovery requests, and so forth, and that spending time and effort on this case would divert scarce resources from more significant cases. . .").

[21] *See United States v. Fiske*, 968 F. Supp. 1347, 1354-55 (E.D. Ark. 1997) ("[T]he Court concludes that the Government's proffered reason for urging dismissal-that the allegations are without merit-is a legitimate governmental reason and that dismissal is rationally related to the Government's desire to clear from the Court docket a meritless claim," and "has determined that the United States has neither failed to investigate [relator's] claims nor arbitrarily rejected them.").

[22] *See, e.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993). Note, however that the Supreme Court has indicated that the United States may not always be the real party in interest in a *qui* tam suit where the government and the relator have conflicting interests. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (noting that a relator's and the government's interests "do not necessarily coincide" and that "the statute specifies [that] *qui tam* actions are brought both 'for the person and for the United States Government'").

[23] *See United States ex rel. Stierli v. Shasta Servs., Inc., d/b/a Timberworks,* 440 F. Supp. 2d. 1108 (E.D. Cal. 2006); *Fiske*, 968 F. Supp. at 1354-55.

[24] *See, e.g., United States ex rel. Hunt v. Merck-Medco Managed Care LLC,* No. 00-CV-737, 2004 WL 868271, at * 2 (E.D. Pa. April. 21, 2004) (holding that disclosure statements were work product and defendant had not satisfied requirement of Fed. R. Civ. P. 26 to show substantial need for the disclosure and undue burden in absence of the disclosure where the relator's claims were already known "*or should certainly become known as discovery proceeds* . . . over the course of the *next several months* . . . ") (emphasis added).

[25] *See e.g., U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 231 F.R.D. 378, 384 (N.D. Ill. 2005) ("Regarding the disclosure statements in the instant case, this Court finds that the ordinary work product is discoverable and the opinion work product is not discoverable.").

[26] See*, e.g., United States ex rel Walker v. R&F Properties of Lake County, Inc.*, No. 5:02-cv-131-Oc-10GRJ, 2008 WL 906734, at *2 (M.D. Fla., Apr. 2, 2008) (denying that portion of plaintiff's discovery request that was not moot for failure to exhaust administrative appeals of government's refusal to provide discovery based on HHS's so-called "*Toughy* regulations," and noting that, in any case, objection to final administrative action was to be made not by motion to compel in the underlying FCA action, but in a separate action).

[27] *See, e.g., White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) for proposition that "a grant of summary judgment is improper if the non-movant is given an insufficient opportunity for discovery").

[28] *See* Federal Acquisition Regulation ("FAR") 31.205-33 "Professional and consultant service costs" and FAR 31.205-47 "Costs related to legal and other proceedings.

[29] *United States ex rel. Stierli v. Shasta Servs., Inc., d/b/a Timberworks,* 440 F. Supp. 2d. 1108, 1108 (E.D. Cal. 2006).

[30] *Id.*

[31] Joint Notice of Election to Decline Intervention, No.2:04-CV-1955-MCE-PAN (JFM), Dkt. 15. (Apr. 7, 2005); *see* 31 U.S.C. § 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.")

[32] Opposition to Motion to Stay, No.2:04-CV-1955-MCE-PAN (JFM), Dkt. 32 (Aug. 29, 2005) (arguing that the government could not be forced to arbitrate because it was not a party to the defendant's arbitration agreement and that the relator's complaint *sounded in fraud* as opposed to contract, making arbitration improper) (emphasis added).

[33] *See* Discovery Orders, Dkt. Nos. 38 (Oct. 5, 2005), 40 (Nov. 18, 2005), 42 (January 9, 2006), No.2:04-CV-1955-MCE-PAN (JFM).

[34] Notice of Right to Approve Settlement, No.2:04-CV-1955-MCE-PAN (JFM), Dkt. 44 (Mar. 6, 2006).

[35] *Id.* at 1-2; *see* 31 U.S.C. § 3730(b)(1) ("The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.")

[36] Notice of Right to Approve Settlement, *supra*, at 2, 3.

[37] Joinder in Motions to Dismiss filed by the State of California and Defendant and Motion to Dismiss Federal False Claims Act Claims (hereinafter "U.S. Attorney's Joinder"), No.2:04-CV-1955-MCE-PAN (JFM), Dkt. No. 52 (April 17, 2006).

[38] *Id.* at 2 (emphasis added).

[39] *Id.* at 3.

[40] *Id.*

[41] *Id.* at 3, 4; California's Motion, *supra*, at 9.

[42] U.S. Attorney's Joinder, *supra*, at 4.

[43] *Id.*

[44] *Id.* California did not mention any discovery requests from the relator and its motion seems to have been motivated chiefly by a fear that if the relator's suit were condoned, "every award process could potentially be converted into a CFCA action with the winning bidder facing the specter of civil penalties and treble damages when the state—the real party in interest—contends no false claim was committed," threatening the state's access to the most competitive services. *See, e.g.,* California's Motion, *supra*, at 10.

[45] *Stierli*, 440 F. Supp. 2d. at 1114.

[46] Fed. Rs. Civ. P. 11 & 1; *see also* Fed. R. Civ. P. 11 advisory committee's note ("The rule," after amendment in 1993, "retains the principle that

attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1.").

[47] This period takes into consideration the fact that the government often may not learn of its relator's claims, allegations, denials and other representations until after they are made. The exception for complaints reflects the rule in § 3730(a)(2).

In this article, we do not address how such an amendment should be enforced, and what sanction would attach to the government should it fail to comply. One possible means of enforcement would be by defendant motion or *sua sponte* court order for government reimbursement of defendants' fees and costs incurred after the close of the diligent investigation period if the court later finds the claims lack merit and that the government should have concluded that upon a reasonable investigation of the claims and evidence presented to it.

[48] U.S. CONST., art. II, § 3.

[49] *Swift*, 318 F.3d at 253.

[50] *See* 31 U.S.C. § 3730(c)(2)(A); *Sequoia*, 151 F.3d at 1145-46.

[51] *Sequoia*, 912 F. Supp. at 1338, 1340, *aff'd by Sequoia,* 151 F.3d. 1139, 1145-46 (9th Cir. 1998) (stating that section requiring a hearing required "no greater justification of the dismissal motion that is mandated by the Constitution itself").

[52] *Swift*, 318 F.3d at 253 (emphasis added). Amending the FCA as proposed above would address the concern (expressed by the court in *Swift*) that the statute itself does not give the court any power to review government dismissals under the False Claims Act. *Id.* ("Nothing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States. The provision neither sets 'substantive priorities' nor circumscribes the government's 'power to discriminate among issues or cases it will pursue.'") (internal citations omitted).

[53] U.S. CONST., art. II, § 3. One example of prosecutorial discretion is found in the probable cause requirement (for criminal prosecution). *See, e.g., Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978) *("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute*, the decision whether or not to prosecute, and what

charge to file or bring before a grand jury, generally rests entirely in his discretion.") (emphasis added).

[54] 38 U.S. Op. Atty. Gen. 98 (1934) (citing 2 U.S. Op. Att'y Gen. 486).