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

THE UNITED STATES OF AMERICA,
ex rel. CANDI SIBLEY, RN, BSN — PLAINTIFFS

VS. — CIVIL NO. 4:17-CV-053-GHD-RP

DELTA REGIONAL MEDICAL CENTER — DEFENDANT

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS COUNTS I-IV OF RELATOR'S SECOND 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 fisc, 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 Sibley's FCA suit alleges false claims and reverse false claims that are primarily predicated on Defendant Delta Regional Medical Center's (Defendant or DRMC) alleged 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 threaten to interfere with agency policies and enforcement processes for EMTALA violations, 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. Though the Fifth Circuit has not decided this issue, under either standard dismissal is warranted of Counts I-IV of Relator's Second Amended Complaint (SAC) 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 monetary penalties, at OIG's

[1] The United States takes no position on the merits of Relator's claim that DRMC submitted fraudulent charges to the Medicaid program for services provided by a prohibited provider (Count V), 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 Count V. This request is in line with the Court's September 25, 2018 Order, which directed the United States to inform the Court whether it intends to seek dismissal or file a statement of interest in the matter.

discretion, 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 at DRMC in various capacities during two different time periods. Most relevant here, Relator served as DRMC's Emergency Department Trauma Program Manager/Specialist from July 2015 until May 2016. In March 2016, she became concerned that DRMC was failing to comply with Mississippi's trauma care regulations and intentionally concealing its non-compliance in order to avoid penalties and continue receiving inflated subsidies from the state's trauma fund. The next month, Relator enlisted a physician not affiliated with DRMC—Dr. Wesley Vanderlan—to review medical records of DRMC trauma patients and evaluate DRMC's compliance with the state's trauma care regulations.[3] During this review, Dr. Vanderlan and Relator identified the purported violations of EMTALA, most of which "involve[] the improper transfer of uninsured African American patients" (Doc. #45, p. 1, 6).

A year later, on April 27, 2017, Dr. Vanderlan and Relator Sibley filed the present *qui tam* action (Doc. #1). The United States declined to intervene in this case on April 24, 2018 (Doc. #13). On May 22, 2018, Relator Sibley filed both an amended complaint, as well as the SAC, dropping Dr. Vanderlan as a relator in this action (Docs. #15-16). Relator's SAC contains four counts predicated on the hospital's EMTALA violations purportedly giving rise to FCA claims relating to Medicare and Medicaid expenditures (Doc. #16).[4] The SAC cites 52 instances of purported EMTALA violations by DRMC (¶¶ 58-243). Notably, according to the SAC, only

[3] By that time, Dr. Vanderlan had filed an FCA action against a separate hospital predicated upon that hospital's alleged violations of EMTALA. *See United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-cv-00767-DPJ-FKB (S.D. Miss. Oct. 23, 2015).

[4] Counts I, II, and IV allege false claims based on purported express and implied false certifications and worthless services, respectively. Count III alleges reverse false claims. And Count V alleges false claims in connection with services provided by a prohibited provider.

Case No. 16 involved a patient insured by the Medicaid program (¶ 113).[5] Defendant moved to dismiss the entire suit on July 10, 2018 (Doc. #34). Defendant also moved for a stay pending the Court's ruling on its motion to dismiss, which the Court granted on July 30, 2018 (Docs. #36, 47).

On September 25, 2018, the Court directed the United States to inform the Court whether it intends to seek dismissal under 31 U.S.C. § 3730(c)(2)(A) within 40 days (Doc. #59).

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).

[5] In her response to DRMC's motion to dismiss, Relator asserts that five additional cases involved patients insured by Medicaid: Case Nos. 8, 19-22.

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.[6] 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,

[6] 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.

pursuant to § 3730(c)(2)(A), because a relator failed to present a colorable claim that dismissal 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). And at least one district court in this circuit has adopted the *Swift* standard:

> The Court need not, and does not today, make a determination as to whether the Government's decision in seeking dismissal of this *qui tam* action is well-founded and reasonable. That decision is not suitable for judicial review absent a finding of fraud on the court. *Swift*, [318] F.3[d] at 251-52. The Court notes that the decision to bring an action on behalf of the United States is "a decision generally committed to [the government's] absolute discretion." Nothing in the language of § 3730(c)(2)(A) suggests anything less than affording the Executive its historical prerogative to decide which cases are prosecuted in the name of the United States. Accordingly, the Court finds that the Government is permitted to exercise its prosecutorial discretion under the FCA in its request to this Court to dismiss this *qui tam* action.

United States ex rel. Gal-Or v. Northrop Gruman, No. 4:17-cv-00139-O (N.D. Tex. Oct. 26, 2017) (quoting *Swift*, 318 F.3d at 253) ECF No. 44. *See* Exhibit (Ex.) 1, at 3-4.

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-IV is not warranted, and in fact would likely prejudice the United States, 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

Notwithstanding *Riley* and *Gal-Or*, even if this Court were to apply *Sequoia Orange's* standard of dismissal, dismissing Counts I-IV has a rational relation to a valid Government purpose. In particular, dismissal is warranted because (1) this suit has the potential to interfere with the administrative enforcement process for EMTALA violations, as demonstrated by events

in a similar case involving one of the original parties to this suit, (2) this suit will impose unnecessary costs and burdens on Government resources and staff, and (3) Relator's allegations of false claims predicated upon DRMC's alleged violations of EMTALA lack merit.

1. Relator's FCA suit threatens to interfere with agency policies and enforcement processes for EMTALA violations

A brief discussion of a similar case brought by one of the original relators here illustrates the manner in which this suit threatens to interfere with agency policies and enforcement prerogatives. In October 2015, Dr. Vanderlan filed a similar FCA action in the Southern District of Mississippi also predicated upon a hospital's violations of EMTALA. *See United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-cv-00767-DPJ-FKB (S.D. Miss. Oct. 23, 2015). Shortly after learning about administrative settlement negotiations between HHS-OIG and the defendant hospital, Dr. Vanderlan filed a motion seeking to enjoin those negotiations and preserve his purported "entitlement to participate in the proceeds of any recovery made by the Government." *Vanderlan*, No. 3:15-cv-00767-DPJ-FKB, ECF No. 28, at 3. The court denied that motion on September 14, 2018. *Id.* ECF No. 77. *See* Exhibit (Ex.) 2.

Nevertheless, Dr. Vanderlan's motion seeking injunctive relief hindered the administrative settlement negotiations for over a year based on the uncertainty it created among the Government and the hospital. Also, notwithstanding that court's denial of the injunction, the defendant hospital stated in a letter to the United States, dated September 27, 2018, that despite wanting to resolve the administrative EMTALA issues with HHS-OIG, "[the hospital] 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.) 3, at 3. In short, that hospital has been unwilling to settle the administrative matter with HHS-OIG so long as the threat of FCA damages and penalties looms over it.

While the United States is not presently aware of any administrative enforcement proceedings related to DRMC's alleged violations of EMTALA, the Government's experience in the *Vanderlan* case demonstrates that this *qui tam* threatens to similarly interfere with the agency's policies and enforcement process should the Government determine action is warranted. This circumstance alone provides good cause to dismiss Relator's FCA claims relating to DRMC's EMTALA violations (*i.e.*, Counts I-IV).[7] *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).

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

Allowing Relator to proceed with this *qui tam* action also furthers the legitimate interest in preserving scarce Government resources. First, should Relator proceed, the United States will need to monitor this suit closely 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. Second, the Government faces the prospect of burdensome discovery should the Court deny DRMC's motion to dismiss, as the parties are likely to seek both documents and testimony from the Centers for Medicare and Medicaid Services and HHS-OIG in connection with the purported EMTALA violations.[8]

[7] As noted in n.1 *supra*, the United States is not seeking to dismiss Relator's claim that DRMC submitted fraudulent charges to the Medicaid program for services provided by a prohibited provider (Count V) and takes no position on the merits of DRMC's pending motion to dismiss that claim. The United States does so because that claim does not raise the same concerns warranting dismissal of Counts I-IV.

[8] Indeed, in its order granting DRMC's request for a stay, this Court noted that the "effort and expense of discovery" could be "quite significant in this case" (Doc. #47, p. 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, "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 the likelihood that the parties will 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-IV)

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, she sets forth two FCA theories of false claims and one FCA reverse false claim theory predicated on EMTALA violations. First, Relator cites 52 cases of inappropriate transfers violating EMTALA and contends that DRMC could and should have performed the emergency services. *See* SAC ¶¶ 58-243. Only a handful of those cases involve Government insureds (Doc. #45, p. 37).[9] Second, Relator broadly alleges that any violations of EMTALA, whether or not involving Government insureds, taints every one of DRMC's claims to Medicare and Medicaid (*i.e.*, all of the hospital's healthcare claims involving Government insureds, whether for emergency or non-emergency services). *See* SAC ¶¶ 3-4, 36-37, 249, 262. In support of these sweeping allegations, Relator argues that perfect compliance with EMTALA is a condition precedent to DRMC billing the Government for any healthcare services. *See id*. Without such perfect compliance, Relator contends that she 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* SAC ¶ 262 (capitalization in original). Finally, separate and apart

[9] The SAC only alleges one patient insured by Medicaid. *See* SAC ¶ 113. However, in her response to DRMC's motion to dismiss Relator identifies five additional Medicaid patients. The United States does not address the propriety including additional facts included in Relator's briefing.

from the allegations of false claims, Relator also alleges reverse false claims based on DRMC's purported failure to repay unassessed Government fines and penalties arising from the EMTALA violations. *See* SAC, ¶¶ 251-255.

a. No viable false claims (Counts I, III-IV)

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 plausibly allege any false claims resulting from any of the 52 cases of EMTALA violations cited in the SAC, including those few 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 plausibly allege that the services DRMC provided to emergency room patients were so deficient as to support her worthless services claim (Count IV). Relator alleges "upon information and belief" and without any factual support that DRMC's emergency department "provided sub-standard and deficient services to the United States Government . . . by providing and charging for inadequate medical screening through its emergency department for tests and procedures that had to be repeated after patients were inappropriately transferred" to another hospital. SAC ¶ 266. In addition to the lack of facts, Relator does not allege that any of these purported deficient services involved a Government insured. Nor does she allege that the transferee hospital receiving the emergency room patients from DRMC billed the Government for any of the tests or procedures that allegedly had to be repeated. *See id*. Relator candidly acknowledges the complete absence of facts supporting this

claim, arguing she is entitled to discovery to "in order to support her claim for worthless services." (Doc. #45, p. 35).

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 DRMC'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 (even those 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 DRMC to the United States and does not even use the term "obligation" in the SAC. *See* ¶¶ 134-38. Instead, Relator generally pleads that DRMC 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 set forth in Counts I-IV of Relator's SAC.

This the 5th day of November, 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/ Feleica L. Wilson
FELEICA L. WILSON