UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

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| UNITED STATES OF AMERICA *et al.* *ex rel.* JOHN R. BORZILLERI, M.D., | ) | |
| Plaintiffs, | ) | Civil Action No. 14-CV-031-WES-LDA |
| -v.- | ) | |
| BAYER HEALTHCARE PHARMACEUTICALS, INC., *et al.,* | ) | |
| Defendants. | ) | |

**THE UNITED STATES' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO SECTION 3730(c)(2)(A) OF THE FALSE CLAIMS ACT**

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## PRELIMINARY STATEMENT

The United States has moved to dismiss this case (and its companion case in the Southern District of New York) because, in its measured judgment, informed by four years of extensive investigation and analysis by two United States Attorney's Offices and the Fraud Section of the Justice Department's Civil Division: (1) Relator's cases remain unsupported in key respects and are unlikely to result in a recovery; (2) ongoing litigation is likely to unduly burden governmental resources, which is particularly difficult to justify in light of the Government's view of the cases' viability; and (3) Relator's conduct convinces the Government that he is not an appropriate representative of its interests in litigation.

Relator's response to the motion underscores the soundness of the Government's judgments, first by splaying across his papers an array of selectively culled, incomplete, and frequently misleading or inaccurate details about his communications with the Government -- communications that are privileged and as to which consent for disclosure was not given; second by demonstrating, despite his claimed expertise, a fundamental misunderstanding of key aspects of the conduct he alleges to be fraudulent and the difficulties of bringing a False Claims Act action based upon it; and finally, by baselessly accusing the Government of "*ad hominem*" attacks for quoting his own admissions, under oath, regarding his short selling of defendants' stock and public pronouncements in aid of that effort. For all their rhetorical fervor, none of Relator's arguments undercut the propriety of the Government's invocation of its 3730(c)(2)(A) dismissal authority, which remains either wholly committed to the United States' discretion or, should the Court disagree, rationally related to legitimate governmental interests.

At the outset, the Government notes that Relator's opposition rests largely on a fact-intensive recitation of alleged comments from, and communications with, counsel for the United States. Given the legal standards governing this motion, the United States does not intend to respond to Relator's factual assertions. The United States shared comparatively little of its investigation and analysis with the Relator and does not believe it appropriate to reveal its privileged deliberative processes or protected work product to refute his assertions in the context of this motion. This is particularly true because, even if taken at face value, Relator's assertions amount to nothing more than a vigorous disagreement with the Government over the merits of his legal theory and viability of this case. This falls far short of the showing of fraudulent, arbitrary and capricious Government action that courts have generally found necessary to deny dismissal under Section 3730(c)(2)(A). Accordingly, the Court should grant the Government's motion and dismiss this case.

## ARGUMENT

### I. THIS COURT SHOULD DISMISS UNDER THE *SWIFT* STANDARD.

In its initial moving papers, the United States articulated the reasons why Congress, in clear statutory language (*see* 31 U.S.C. § 3730(c)(2)(A)), vested the Government with complete discretion to dismiss a False Claims Act lawsuit, and why, consistent with this language and with long-established principles limiting judicial review of prosecutorial discretion, this Court should adopt the prevailing and better-reasoned *Swift* standard of review for such dismissals. Alternatively, the Government urged the Court to find that the Government's reasons for dismissal are legitimate and fully satisfy the somewhat heightened (though, in the Government's view, mistaken) "rational relationship" standard of *Sequoia Orange*. *See* United States Motion to Dismiss (Docket No. 166) ("U.S. Mot." at 4-12). Relator's opposition, which veers between

asking the Court to deny the Government's motion out of hand and to allow discovery to probe the decision-making process and evaluative judgments of the Department of Justice, seeks to impose an unprecedented standard on Section 3730(c)(2)(A) applications, while offering neither a legal nor a legitimate factual basis[1] for such a standard. *See* Relator's Response in Opposition to Motion to Dismiss (Docket No. 170) ("Rel. Opp.") at 4.) The Court should reject Relator's invitation to impose a standard that is contrary to the language of the False Claims Act and the relevant law.

**A. Relator's Objections Come Nowhere Near The Showing of Fraud or Illegality That Justifies Denial of A Request to Dismiss Under Section 3730(c)(2)(A).**

While the Government will not retread the ground covered in its initial motion papers, courts reviewing requests to dismiss under Section 3730(c)(2)(A) have denied such requests only in truly extraordinary circumstances. Under *Swift*, those extraordinary circumstances require a credible showing tantamount to a "fraud on the court." *See Hoyte v. Am. Nat'l Red. Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008) (rejecting relator's request to apply a "manifest public interest" exception to 3730(c)(2)(A) dismissal under *Swift* and discussing the need to show a fraud on the court or its equivalent). Relator has made no such showing, and accordingly, under *Swift* the inquiry should end there. Indeed, Relator does not seriously question the applicability of the *Swift*

[1] Much of Relator's opposition based on unsupported conclusory statements. For example, he claims that his allegations are "factually well-supported and meritorious;" that his theory that administrative fee increases are "the only path for significant PBM profits" and the driver for drug price increases; and that "many American patients have lost their lives . . . from the scheme". *See* Rel. Opp. at 2-3. As discussed below, however, Relator offers nothing, apart from suppositions derived from public sources, to support these claims. These suppositions, which have the benefit of none of the fruits of the Government's extensive investigation, are hyperbolic conjecture, and should bear no weight, particularly against the strong and well-established countervailing interest in not "depriv[ing] the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States," *Swift v. United States*, 318 F.3d 240, 253 D.C. Cir. 2003), and the basic precept that courts "cannot order the Executive Branch to exercise its prosecutorial discretion to perform an investigation." *Zernik v. U.S. Dep't of Justice*, 630 F. Supp.2d 24, 27 (D.D.C. 2009) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

standard at all. Instead, he appears to argue that, regardless of the standard applied, the Court should second-guess the Government's investigation and conclusions. This argument illustrates the very separation of powers concerns that undergird *Swift*, s*ee* U.S. Mot. at 6-10, *supra* at 3, n.1. Precisely these concerns have led courts to repeatedly conclude that a *qui tam* relator may not leverage unsupported accusations to seek discovery from the Government or evade dismissal under Section 3730(c)(2)(A). *See infra* at 4-6. Thus, because Relator has offered no grounds that overcome the deference to prosecutorial discretion embedded in the statutory text as recognized in *Swift*, this Court should grant the Government's motion under this standard.

## II. IN THE ALTERNATIVE, DISMISSAL IS WARRANTED UNDER *SEQUOIA ORANGE* BECAUSE THE GOVERNMENT HAS A LEGITIMATE INTEREST IN AVOIDING THE BURDEN OF LITIGATION AND RELATOR HAS MADE NO SHOWING THAT THE GOVERNMENT'S REQUEST TO DISMISS IS "FRAUDULENT, ARBITRARY AND CAPRICIOUS, OR ILLEGAL."

Even under the *Sequoia Orange* line of cases, however, once the Government invokes a basis for dismissal that is rationally related to a legitimate government purpose, the burden shifts to the relator to establish that the Government's reason for dismissal is "fraudulent, arbitrary and capricious, or illegal." *See, e.g. United States ex rel. Toomer v. TerraPower, LLC*, No. 4:16-CV-00226-DCN, 2018 WL 4934070, at *6 (D. Idaho Oct. 10, 2018) (citing *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143 (9th Cir. 1998)). To meet that burden, a relator must offer actual evidence of impropriety, not mere speculation. *See, e.g. Toomer,* 2018 WL 4934070, at *6 (rejecting relator's speculation of improper motive as a basis to deny 3730(c)(2)(A) motion); *United States ex rel. Nasuti v. Savage Farms, Inc.*, No. 12-30121-GAO, 2014 WL 1327015, *11-12 (D. Mass. Mar. 27, 2014) (Report and Recommendation) (same, with respect to speculative allegations that the Government's decision to dismiss was motivated by nepotism or a cover up to protect politically connected individuals).

Importantly, even those courts that apply the *Sequoia Orange* standard have repeatedly held that "the potential merit of a *qui tam* action is insufficient to overcome the government's rational reasons for dismissing the suit." *United States ex rel. Wickliffe v. EMC Corp*., 473 F. App'x 849, 854 (10th Cir. 2012) (collecting cases); *Sequoia Orange,* 151 F.3d 1144 (whether a relator's *qui tam* claims have merit is not a basis for concluding that dismissal is not rationally related to "accomplishment of the [government purpose]."). In this case, the Government has met its threshold burden under *Sequoia Orange*, citing the resource demands that ongoing litigation and discovery would impose on the Department and the affected agency, grounds that have been repeatedly found to justify dismissal. *See* U.S. Mot. at 11-16. Relator's opposition, in contrast comes nowhere close to making the showing the *Sequoia Orange* standard would require. Instead, it effectively argues that the Government's resource concerns deserve little or no weight because Relator believes his claims have "clear case merit." Rel. Opp. at 11, and speculates that CMS may be improperly attempting to "obstruct[]" or "hinder[]" Relator's case due to "conflicts of interest." *See* Rel. Opp. at 20-21. As discussed above, this argument runs contrary to *Sequoia Orange* and its progeny, and fails to carry Relator's burden even under this more stringent standard of review.

### A. Relator's Requests To Conduct Discovery or Engage In Evidentiary Factfinding Are Inappropriate and Should Be Rejected In This Case.

Consistent with the standards previously discussed, courts have repeatedly rebuffed requests by relators to conduct discovery or to probe the factual underpinnings for the Government's decision to move to dismiss under Section 3730(c)(2)(A).[2] Indeed, as one court

[2] The great majority of decisions addressing requests for discovery or opportunity to contest facts relating to the Government's grounds for dismissal arise under the *Sequoia Orange* line of cases. *See infra* at 6. *But see*, *United States ex rel. Maldonado v. Ball Homes, LLC*, No. CV 5: 17-379-DCR, 2018 WL 3213614, at *4 (E.D. Ky. June 29, 2018) (applying *Swift* standard, but holding that relator was not entitled to an evidentiary hearing; "[a]lthough § 3730(c)(2)(A) entitles him to 'a hearing' on the government's motion to dismiss, if he requests one, there is no requirement that he be permitted to introduce evidence").

put it, "[t]he FCA does not expressly entitle the objecting *qui tam* relator to discovery at all," and therefore, allowing a relator to conduct discovery to support speculation that the government sought dismissal for improper reasons "is generally antithetical to the government's prerogative to end a *qui tam* case brought in its own name." *Toomer,* 2018 WL 4934070, at *6 (quoting *United States v. Everglades Coll., Inc.*, 855 F.3d 1279, 1291 (11th Cir. 2017)). *See also United States ex rel. Nicholson v. Spigelman*, No. 10 C 3361, 2011 WL 2683161, at *3 (N.D. Ill. July 8, 2011) (holding that relator's argument that she was entitled to an evidentiary hearing and discovery was "patently [] wrong" and explaining that permitting the relator to conduct discovery would "allow[] what the Government was trying to avoid in moving to dismiss the action—costly and time-consuming . . . discovery with little prospect of significant recovery" (citation omitted)); *United States ex rel. Stephanie Schweizer v. Oce North America, Inc.*, 956 F. Supp.2d 1, 9 (D.D.C. 2013) ("[A]llowing full-blown discovery as of right would risk transforming the § 3730(c)(2)(A) hearing into a trial on the merits of plaintiff's claims and the government's estimations of the litigation risks."); *cf. Everglades Coll.,* 855 F.3d at 1290 (affirming the district court's denial of relator's request for an evidentiary hearing and discovery, construing the statutory right to a hearing, even in the arguably more deferential circumstance where the Government seeks to consummate a settlement over relator's objection under 31 U.S.C. § 3730(c)(2)(B), "to include no more than a right to highlight existing evidence and make arguments, based on that evidence").

Stripped of its hyperbole, Relator's opposition, rests on the assertion that the Government's investigation of his claims was somehow inadequate, or that the United States corroborated either all, or key aspects, of his claims, but nonetheless declined to intervene and now moves to dismiss, which he surmises, must be pretextual and improper. *See* Rel. Opp. at 18-21. These assertions are factually incorrect, legally inconsistent with the Government's authority to control litigation in its

name under the FCA, and insufficient to establish a basis for denying dismissal. As such, the Court should not permit Relator to delve into the Government's deliberative processes on the basis of mere speculation.

Indeed, in contrast to the substantial body of authority cited by the Government, Relator's opposition rests almost exclusively on two cases, both of which he mischaracterizes, particularly in light of subsequent proceedings in each case, history that Relator disingenuously omits. First, Relator cites *United States ex rel. Thrower v. Academy Mortgage Corp.*, No. 16-cv-2120-EMC, 2018 WL 3208157 (N.D. Cal. Jun. 29, 2018), for the proposition that a request for 3730(c)(2)(A) dismissal should be denied based on the Government's alleged failure to fully investigate a relator's allegations. Rel. Opp. at 7. In that case, the court (which was bound by *Sequoia Orange*) denied a Section 3730(c)(2)(A) motion, based on the apparently unrefuted contention that the investigation "of the original complaint consisted only of interviewing the Relator and examining documents produced by her." *Id.* at *1. Relator also emphasizes that after denying the Government's motion to dismiss, the district court also denied the government's motion to stay the case pending appeal. *See* Rel. Opp. at 7. Relator neglects to mention, however, the subsequent proceedings in the *Thrower* case. The Government appealed the district court's denial of its motion to dismiss to the Ninth Circuit, which did in fact grant the Government's motion to stay all proceedings in the District Court pending resolution of the appeal. *See United States v. Thrower*, No. 18-16408, Order (9th Cir. Dec. 21, 2018) (attached as Exhibit A).

The district court's decision in *Thrower* is thus an outlier of dubious vitality that the Government respectfully submits was wrongly decided on the law and fully distinguishable on the facts. Whereas the investigation in *Thrower* was alleged to have been cursory, the Government's investigation in this case, as described below (*see infra* at 9-11), was lengthy, detailed, wide-

ranging, and resource intensive. The fact that Relator takes issue with the Government's conclusions following that investigation does not (under either *Swift* or *Sequoia Orange*) provide a basis for him to probe or second guess its judgment.

Relator's reliance on *United States ex rel. Stovall v. Webster University*, No. 15-cv-3530, 2018 WL 3756888 (D.S.C. Apr. 4, 2018) (*See* Rel. Opp. At 8), a recent district court case from South Carolina, is equally misplaced. Relator cites this decision from *Stovall* for the proposition that discovery into the Government's investigation and basis for dismissal should be permitted to probe for evidence of improper decision making. Here again, however, Relator neglects to mention relevant subsequent proceedings in the case. In particular, after initially authorizing discovery, the district court in *Stovall* granted the Government's motion for reconsideration and vacated its prior order, finding "that discovery is not appropriate in this case at this time." *See United States ex rel. Stovall v. Webster*, Civ. No. 3:15-cv-03530-DCC, Order * 4 (D.S.C. May 30, 2018) (attached as Exhibit B). Instead, the district court provided the relator with a hearing (for the limited purpose of allowing *the relator* to offer evidence) "in order to attempt to persuade [the Government] not to end this case." *See id.* Following the hearing, the district court granted the Government's motion to dismiss concluding that:

> [h]ere, the Court finds that dismissal is appropriate under either the *Swift* or *Sequoia Orange* standard. As stated, under *Swift* and its progeny, the government has a virtually unfettered right to dismiss a case brought under the FCA, and Plaintiff has chosen to exercise that right in this case. Moreover, the Court concludes that Plaintiff has made the requisite showing articulated in *Sequoia Orange*. Plaintiff asserts that dismissal will further its interest in preserving scarce resources by avoiding the time and expense necessary to monitor this action. Relator argues that the anticipated financial gain outweighs the anticipated time and money to be expended on this case; however, Plaintiff's interest in allocating its resources as it sees fit has been validated on several occasions. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (stating that an agency is "better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities" and to determine "whether the agency has enough resources to undertake the action at all); *U.S. ex rel. Levine v. Avnet, Inc.*, C/A No. 2:14-17-WOB, 2015 WL 1499519

> (E.D. Ky. Apr. 1, 2015) (collecting cases). As Relator has put forth no evidence that Plaintiff's decision is "fraudulent, arbitrary and capricious, or illegal," dismissal is appropriate.

*See United States ex rel. Stovall v. Webster*, Civ. No. 3:15-cv-03530-DCC, 2018 WL 3756888 *3 (D.S.C. Aug. 8, 2018). Thus, rather than supporting his position, the subsequent history of these two district court cases cited by Relator undermines his request for discovery to probe the Government's judgments and work product.

**B. The United States' Investigation Was Thorough and Extensive, And Its Decision That Dismissal is Appropriate Following that Investigation More Than Meets Even Heightened Standards of Review of a Section 3730(c)(2)(A) Dismissal.**

The Government's bases for dismissal in this case are valid and, far from being "fraudulent, arbitrary and capricious, or illegal," *Toomer,* 2018 WL 4934070, at *6 (citations omitted), rest on judgment and analysis informed by a thorough and detailed investigation. Upon receipt of Relator's complaint in the District of Rhode Island, this Office assembled an investigative team consisting of two Assistant United States Attorneys, a Senior Trial Counsel from the Fraud Section of Department of Justice Civil Division's Commercial Litigation Branch, a Special Agent from the Department of Health and Human Services Office of Inspector General (HHS-OIG), and a Special Agent from the Federal Bureau of Investigation.[3] Between February 27, 2014 and November 5, 2014, this Office issued eight subpoenas pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 18 U.S.C. § 3486, to four Pharmacy Benefit Managers (PBMs), three pharmaceutical manufacturers, and an industry consulting firm believed to have been involved in providing advice and opinion on administrative fee structures and fair market

[3] The Government is not required to make a factual showing under any applicable standard of review under 31 U.S.C. § 3730(c)(2)(A), particularly where, as here, Relator has not presented any evidence showing that dismissal would be tantamount to a fraud upon the Court, nor averred any knowledge that would provide him with a basis to challenge the scope of the Government's investigation. The United States believes it is appropriate to provide this recitation of its investigative activities solely to rebut any suggestion that those decisions were somehow ill-considered or based on anything other than the facts as found after extensive inquiry. Should the Court require it, the Government is prepared to attest to these facts regarding its investigative efforts in a declaration pursuant to 28 U.S.C. § 1746.

value. These subpoenas resulted in the production (and review) of approximately 90,000 responsive files comprising over 11 gigabytes of data, which were uploaded and reviewed by the investigative team. The process of production of these files, unsurprisingly for a case of this size, was protracted and involved repeated discussion and negotiation with counsel for each subpoena recipient, followed by rolling productions of material.

By means of other investigative process and requests, this Office also obtained and reviewed documents from seventeen individual Part D plans, including those plan's contracts with PBMs, contract negotiation correspondence and emails, communications regarding administrative fee reporting and accounting, manufacturer fee information, and draft and final reports for submission to CMS reflecting accounting for the administrative fees that are the centerpiece of this case. From these various sources, in the Rhode Island investigation alone, the United States was able to obtain and examine a more-than-representative array of contracts and administrative fee pricing provisions (including, in the case of one of the largest PBMs, the fee provisions of its Part D contracts with more than eighty individual drug manufacturers).

In late 2014, the United States (specifically the District of Rhode Island in conjunction with the Fraud Section of the Department's Commercial Litigation Branch) also engaged the services of a nationally prominent firm of expert consultants. The Government ultimately paid $44,000 for 190 hours of consultation, analysis, and data modeling by this consulting firm between 2014 and 2017, in support of its investigation. The Government also consulted extensively and repeatedly with internal regulatory experts within the Department of Health and Human Services.[4]

[4] Relator implies impropriety in the fact that, in evaluating the case, the United States consulted CMS, as the allegedly impacted federal agency. *See* Rel. Opp. at 21. Other than speculating that CMS is somehow compromised, Relator fails to explain why this is improper, or why the agency's views should not be considered and given significant weight when evaluating claims based on that agency's programs.

Moreover, as referenced previously, District of Rhode Island branch of the investigation was not the whole of the Government's inquiry: the S.D.N.Y investigative team issued a substantial number of administrative subpoenas as well; between the two investigations, the Government secured more than 20 gigabytes of data, including more than 7,000 contracts and communications concerning contract negotiations and how to report administrative fees to CMS. As the investigations progressed, both Districts shared information and findings, and ultimately arrived at a collaborative and simultaneous decision, together with the Civil Division's Fraud Section, regarding these cases.

While Relator highlights the fact that only one witness was deposed in the course of the Government's investigation, that witness was deposed because the United States sought testimony under FED. R. CIV. P. 30(b)(6) from an organization, and largely as a capstone to other, previously completed, investigative efforts.[5] In the District of Rhode Island investigation alone, interviews with over thirty witnesses were conducted or reviewed by the U.S. Attorney's Office and Special Agents from the FBI and HHS-OIG. These interviews, combined with the Government's examination of the documents described above, sufficed to provide the United States with a thorough factual understanding of the various players, their relationships, and their charging, handling, and reporting of administrative service fees in the Part D space, and to reach the decision to decline and then to dismiss these matters.[6]

[5] The witness was formally deposed by process issued in the S.D.N.Y. investigation, upon agreement of all involved that the testimony was for use in both investigations.

[6] Relator also appears to attribute some impropriety to the fact that multiple components of the Department of Justice worked collaboratively so as to avoid duplication and share the fruits of inquiry into overlapping if not identical allegations. It is not clear why, apart from Relator's displeasure that both Offices reached the same conclusion, such collaboration should be frowned upon.

While the United States does not waive privilege over its deliberations, judgments and work product, it notes that its investigative findings differ in key factual respects from the allegations of Relator's complaints, in ways that undercut, rather than corroborate, the theories he advances. For example, the Government's investigation determined that at least one major PBM simply does not charge the type of cost-based percentage fee that is the centerpiece of Relator's complaints. This fact was communicated to Relator's counsel on more than one occasion, but appears nowhere in his opposition papers. While other PBMs do charge such fees, that fact alone does not answer the question of whether a given fee represents fair market value, or whether it was reported inappropriately. *See* U.S. Mot. at 13-14. First, even the threshold issue of whether an individual fee structure satisfies the standard of fair market value within the meaning of the relevant regulatory framework is a fact and opinion intensive inquiry, potentially requiring expert testimony. Moreover, even assuming that a given fee does not meet the fair market value standard, that fact does not answer the question of whether the fee results in submission of a false claim for payment, or a false statement material to such a claim. Far from providing "corroboration," the Government's investigation found important aspects of the Relator's allegations to be unsupported; difficult, if not impossible, to serve as the predicate for a False Claims Act violation; and unlikely to result in a recovery.[7] While Relator's allegations have not inconsiderable surface appeal (as attested to by the fact that two Districts, the Fraud Section of DOJ, and multiple federal investigators were sufficiently intrigued that they invested substantial time and resources

[7] While Relator clearly disagrees, his opposition amounts to little more than the assertion that his theory is so obviously correct that any request for dismissal must be improper. This *ipse dixit* fails to satisfy his burden even under *Sequoia Orange*. Moreover, any disagreement between the Government and Relator as to the merits is neither relevant to, nor dispositive of, this motion, since, as discussed above, the United States can permissibly exercise its authority to dismiss even meritorious cases under Section 3730(c)(2)(A) (*see supra* at 5).

investigating them), the Government's investigation ultimately concluded that, on close examination based on actual evidence obtained through investigation, they lack substantial merit.[8]

The breadth of the Government's investigation and the resources it consumed is itself evidence that ongoing litigation of these matters would require substantial additional investment of Government resources to monitor extensive discovery, which the United States seeks to avoid. This is precisely one of the rationales that Courts have repeatedly found to justify dismissal even under the higher standard of *Sequoia Orange*. *See* U.S. Mot. at 11-12 At bottom, Relator asks this Court to apply a higher level of scrutiny to the Government's invocation of Section 3730(c)(2)(A) than even the most expansive cases utilizing the *Sequoia Orange* standard, based on a far lower threshold showing than in any of those decisions. Relator points to nothing, however, beyond naked conjecture and his disagreement with the Government on the merits, to oppose what courts have repeatedly found to be legitimate bases for Government dismissal under 3730(c)(2)(A), and this Court should reject his efforts to stave off dismissal.

[8] As noted, the United States does not believe it is appropriate to discuss its investigative conclusions in detail beyond these fact-based generalities, and declines to waive privilege over materials protected by the deliberative process, work product, and attorney-client doctrines, because, notwithstanding its views regarding the lack of merit in Relator's claims, the Government believes it important to retain the ability to pursue factually supported, legal viable theories of False Claims Act liability with respect to the Part D program in the future. Indeed, the desire to preserve that option is a significant reason why the United States believes that dismissal is warranted here, lest a factually unsupported complaint burden the government in third-party discovery and in the process make law that could compromise the Government's ability to bring worthy cases. *See* U.S. Mot. at 15-16. This is yet another reason why 3730(c)(2)(A) should be interpreted in favor of full government discretion, as the United States' valid interest in preventing disclosure of its legal analysis and investigative approach is compromised if it must litigate the validity of that analysis to win dismissal over a relator's objections.

## III. RELATOR'S DISCLOSURE OF PRIVILEGED COMMUNICATIONS IN HIS OPPOSITION PAPERS PROVIDES ADDITIONAL EVIDENCE THAT HIS PRIMARY INTERESTS IN LITIGATION ARE NOT THOSE THE FCA EXISTS TO VINDICATE.

Finally, the United States notes that its original concerns about Relators' fitness to represent the Government's interests in litigation rested primarily on two factors: his refusal to agree to the transfer and consolidation of his New York and Rhode Island lawsuits, and his admitted market activities with respect Defendants' stock and public statements regarding his allegations. The Government has been clear that it takes no position, and makes no allegations, regarding whether these actions constituted a violation of the securities laws, a breach of his employment agreement, or any other impropriety that is the subject of litigation between Relator and his former employer. *See* U.S. Mot. at 17-18. The Government has made no *ad hominem* attacks. It has merely noted that Relator's interests in financial self-dealing point to differing financial incentives for litigation from those of the United States. To these prior concerns, however, Relator has added a third by means of his opposition: an unwarranted unilateral breach of the common interest privilege under the joint-prosecution doctrine.

This doctrine arises because of the unique nature of *qui tam* litigation in which a relator files allegations under seal to permit government inquiry into claims of fraud, frequently necessitating "the sharing of work product." *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 26-27 (D.D.C. 2002). Specifically, the Government and a *qui tam* relator have "a common interest in the prosecution of common defendants" when the relator has filed a *qui tam* case and the Government has "commenced its investigation." *Miller v. Holtzman*, 240 F.R.D. 20, 21 (D.D.C. 2007). In such circumstances, the "joint-prosecution doctrine [] allows both [the Government and the relator] to avoid waiver [of work-product protection] when they make disclosure to one another." *United States ex rel. Samandi v. Materials & Electrochemical*

*Research Corp*., No. CV 05-124 TUC, 2009 WL 10690273, at *8 (D. Ariz. July 14, 2009). Finally, privilege over communications made pursuant to common-interest "cannot be waived without the consent of all parties who share the privilege." *In re: Grand Jury Subpoenas 89-3*, 902 F.2d 244, 248 (4th Cir. 1990); *accord United States v. BDO Seidman*, 492 F.3d 806, 817 (7th Cir. 2007) ("the privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all the parties"); *United States v. Napout*, No. 15 CR 252, 2017 WL 980323, at *2 (E.D.N.Y. Mar. 10, 2017). In this case, Relator's opposition papers are suffused with specific communications between himself or his counsel and attorneys for the Government both here and in the Southern District of New York. Relator did not request the Government's permission before divulging communications protected by the common interest privilege, and the United States did not grant such permission.[9] Accordingly, his declarations and opposition should be stricken, and Relator directed to file revised versions, without privileged material. *See, e.g. Sims v. Roux Labs., Inc.*, No. 06–10454, 2007 WL 2571941, at *1 (E.D. La. Aug. 31, 2007) ("when considering a motion to strike, those portions of a complaint that make use of privileged [information] may be removed"). *See also Otero v. Vito*, No. 5:04CV211DF, 2005 WL 1429755, at *1–2 (M.D. Ga. Jun. 15, 2005) (striking information from complaint on grounds of privilege).

More importantly, the fact that Relator has chosen to cavalierly discard well-established prohibitions on the disclosure of privileged material is yet more evidence of the fact that his interests are fundamentally divergent from those of the Government. Relator's decision to rebuff the Government on the straightforward procedural request to transfer and consolidate his S.D.N.Y case and this matter, his disregard for the sanctity of privileged communications, and his trading and related press statements all suggest that he is pursuing interests separate and apart from the

[9] The United States did request, after receiving Relator's papers, that he voluntarily withdraw the privileged components of his filings; Relator, through counsel, declined to do so.

interest that the FCA exists to vindicate: fraud on Government programs. Accordingly, Relator's behavior (including in this most recent instance) leads the Government to conclude that the already significant burden of monitoring ongoing litigation and participating in discovery will likely be heightened by Relator's demonstrated disregard for basic procedural principles where doing so will further his personal interests. Rather than attempt to address further procedural violations by relator, either in real time or after the fact, this behavior only provides an additional basis, beyond the already sufficient grounds for dismissal addressed above, on which to conclude that Relator's litigation on behalf of the Government should be brought to a close.

## CONCLUSION

For the reasons set forth above, as well as in its initial moving papers, the United States respectfully requests that this Court grant its motion to dismiss this case pursuant to Section 3730(c)(2)(A) of the False Claims Act.

Dated: Providence, Rhode Island
February 6, 2019

Respectfully submitted,

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**CERTFICATE OF SERVICE**

I hereby certify that, on February 6, 2019, I caused the foregoing document to be filed by means of this Court's Electronic Case Filing (ECF) system, thereby serving it upon all registered users in accordance with Federal Rules of Civil Procedure 5(b)(2)(E) and 5(b)(3) and Local Rules Gen 304 and 305.

Dated: February 6, 2019

By: */s/ Zachary A. Cunha*
Zachary A. Cunha
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