No. 21-1052

In the Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
JESSE POLANSKY, M.D., M.P.H., PETITIONER

v.

EXECUTIVE HEALTH RESOURCES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY 26, 2022
CERTIORARI GRANTED: JUNE 21, 2022

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The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they already appear on the following pages in the appendix to the petition for a writ of certiorari:

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3810

JESSE POLANSKY, M.D., M.P.H.; THE STATE OF CALIFORNIA, THE STATE OF COLORADO, THE STATE OF CONNECTICUT, THE STATE OF DELAWARE, THE DISTRICT OF COLUMBIA, THE STATE OF FLORIDA, THE STATE OF GEORGIA, THE STATE OF HAWAII, THE STATE OF ILLINOIS, THE STATE OF INDIANA, THE STATE OF IOWA, THE STATE OF LOUISIANA, THE STATE OF MARYLAND, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF MICHIGAN, THE STATE OF MINNESOTA, THE STATE OF MONTANA, THE STATE OF NEVADA, THE STATE OF NEW JERSEY, THE STATE OF NEW MEXICO, THE STATE OF NEW YORK, THE STATE OF NORTH CAROLINA, THE STATE OF OKLAHOMA, THE STATE OF RHODE ISLAND, THE STATE OF TENNESSEE, THE STATE OF TEXAS, THE COMMONWEALTH OF VIRGINIA, THE STATE OF WASHINGTON, and THE STATE OF WISCONSIN,
Plaintiffs-Appellants,

v.

EXECUTIVE HEALTH RESOURCES INC; UNITEDHEALTH GROUP INC; UNITED HEALTHCARE SERVICES INC; OPTUM INC; OPTUMINSIGHT INC; OPTUMINSIGHT

HOLDINGS LLC; COMMUNITY HOSPITAL OF THE MONTEREY PENINSULA; YALE NEW HAVEN HOSPITAL
UNITED STATES OF AMERICA,
Defendants-Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/13/2019	-	CIVIL CASE DOCKETED. Notice filed by Appellant Jesse Polansky in District Court No. 2-12-cv-04239. (LMR) [Entered: 12/13/2019 10:55 AM]
		* * * * *
05/16/2020	32	ECF FILER: UNOPPOSED Motion filed by Appellant Jesse Polansky to seal Opening Brief and Joint Appendix Volumes III and IV. Certificate of Service dated 05/15/2020. Service made by ECF. [19-3810] - SEND TO MERITS PANEL--[Edited 06/24/2020 by MS] (DLG) [Entered: 05/16/2020 12:00 AM]
05/16/2020	33	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Jesse Polansky. Certificate of service dated 05/16/2020 by ECF. [19-3810] (DLG) [Entered: 05/16/2020 12:03 AM]

DATE	NO.	PROCEEDINGS
05/16/2020	34	ECF FILER: SEALED ELECTRONIC JOINT APPENDIX on behalf of Appellant Jesse Polansky. Certificate of Service dated 05/16/2020 by ECF. [19-3810] (DLG) [Entered: 05/16/2020 12:04 AM]
05/16/2020	35	ECF FILER: CORRECTED ELECTRONIC BRIEF on behalf of Appellant Jesse Polansky. Certificate of Service dated 05/16/2020 by ECF. [19-3810] - [Entry edited by the Clerk to reflect the correct event and to unrestrict the attachment per Clerk's Order of 6/24/20]--[Edited 07/20/2020 by MS] (DLG) [Entered: 05/16/2020 02:25 AM]
		* * * * *
05/22/2020	38	ECF FILER: ELECTRONIC AMICUS BRIEF on behalf of Erwin Chemerinsky, National Whistleblower Center and Project on Government Oversight in support of Appellant/Petitioner. Certificate of Service dated 05/22/2020 by ECF. F.R.A.P. 29(a) Permission: YES. [19-3810][Edited docket text]--[Edited 05/27/2020 by MCW] (NIM) [Entered: 05/22/2020 09:38 AM]

DATE	NO.	PROCEEDINGS
		* * * * *
05/22/2020	40	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of Taxpayers Against Fraud Education Fund in support of Appellant/Petitioner. Certificate of Service dated 05/22/2020 by ECF. F.R.A.P. 29(a) Permission: YES. [19-3810] (TS) [Entered: 05/22/2020 02:18 PM]
		* * * * *
06/08/2020	44	ECF FILER: UNOPPOSED Motion filed by Appellant Jesse Polansky for withdrawal of Motion To Seal As To Plaintiff-Appellant's Opening Brief. Certificate of Service dated 06/08/2020. Service made by ECF. [19-3810] (DLG) [Entered: 06/08/2020 06:19 PM]
06/24/2020	45	ORDER (Clerk) Appellant's motion to withdraw the motion to seal as to Appellant's opening brief is granted. The Clerk's Office will unrestrict Appellant's brief so that it is publically available. The motion to seal Volumes III and IV of the joint appendix is referred to the merits panel. The Clerk will hold Volumes III and IV of the joint appendix provisionally under seal

DATE	NO.	PROCEEDINGS
		pending a ruling by the Court. (MS) [Entered: 06/24/2020 02:11 PM]
08/13/2020	46	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee Executive Health Resources Inc. Certificate of Service dated 08/13/2020 by ECF. [19-3810] - [Entry edited by the Clerk's Office to reflect the correct event]--[Edited 08/14/2020 by MS] (EMP) [Entered: 08/13/2020 05:34 PM]
08/13/2020	47	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee USA. Certificate of Service dated 08/13/2020 by ECF. [19-3810] (SRM) [Entered: 08/13/2020 05:54 PM]
		* * * * *
08/20/2020	53	ECF FILER: ELECTRONIC AMICUS BRIEF on the merits on behalf of The Chamber of Commerce of the United States of America in support of Appellee/Respondent. Certificate of Service dated 08/20/2020 by ECF. F.R.A.P. 29(a) Permission: YES. [19-3810] (JSB) [Entered: 08/20/2020 05:18 PM]

DATE	NO.	PROCEEDINGS
08/20/2020	54	ECF FILER: Request by Appellant Jesse Polansky for Oral Argument. Certificate of Service dated 08/20/2020. Service made by ECF. [SEND TO MERITS PANEL] [19-3810] (DLG) [Entered: 08/20/2020 07:25 PM]
		* * * * *
08/25/2020	58	ECF FILER: Letter dated 08/25/2020 , filed pursuant to Rule 28(j) from counsel for Appellee USA. Service made by ECF. This document will be SENT TO THE MERITS PANEL, if/when applicable. [19-3810] (SRM) [Entered: 08/25/2020 11:33 AM]
		* * * * *
08/27/2020	60	ECF FILER: Letter dated 08/27/2020 , filed pursuant to Rule 28(j) from counsel for Appellee Executive Health Resources Inc. Service made by ECF. This document will be SENT TO THE MERITS PANEL, if/when applicable. [19-3810] (EMP) [Entered: 08/27/2020 04:49 PM]
		* * * * *
10/03/2020	62	ECF FILER: CORRECTED ELECTRONIC REPLY BRIEF

DATE	NO.	PROCEEDINGS
		on behalf of Appellant Jesse Polansky. Certificate of Service dated 10/03/2020 by ECF. [19-3810] (DLG) [Entered: 10/03/2020 01:37 PM]
		* * * * *
11/18/2020	80	COURT MINUTES OF ARGUED/SUBMITTED CASES. (TLG) [Entered: 11/18/2020 08:24 AM]
11/18/2020	81	ARGUED on Wednesday, November 18, 2020. Panel: JORDAN, KRAUSE and RESTREPO, Circuit Judges. Jeffrey B. Clark arguing for Appellee United States of America; : Daniel L. Geyser arguing for Appellant Jesse Polansky; Ethan M. Posner arguing for Appellee Executive Health Resources Inc. (TLG) [Entered: 11/18/2020 08:39 AM]
07/13/2021	82	ECF FILER: Letter dated 07/13/2021 , filed pursuant to Rule 28(j) from counsel for Appellee USA. Service made by ECF. This document will be SENT TO THE MERITS PANEL, if/when applicable. [19-3810] (SRM) [Entered: 07/13/2021 04:33 PM]

DATE	NO.	PROCEEDINGS
07/25/2021	83	ECF FILER: Response filed by Appellant Jesse Polansky to Rule 28(j) letter. Certificate of Service dated 07/25/2021. Service made by ECF. This document will be SENT TO THE MERITS PANEL, if/when applicable. [19-3810] (DLG) [Entered: 07/25/2021 07:29 PM]
09/30/2021	84	ORDER (JORDAN, KRAUSE and RESTREPO, Circuit Judges) The foregoing motion to seal is denied as presented, without prejudice to renewal upon a sitisfactory showing in compliance iwht Third Circuit Local Appellate Rule 106.1(a). Pursuant to Rule 106.1(a), a party filing a motion to seal must set forth "with particularity the reasons why sealing is deemed necessary" and should consider redacting and seeking the sealing of a separate supplemental filing "[r]ather than automatically requesting the sealing of an entire brief, motion, or other filing." 3rd Cir.L.A.R. 106.1(a). A sealing request should be sufficiently tailored to ensure minimal infringment on the commom law and FIrst Amendment public right of access to judicial proceedings, which createa strong presumption

DATE	NO.	PROCEEDINGS
		against sealing a judicial record. See United States v. Thomas, 905 F.3d 276, 283 (3d Cir. 2018); In re Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001). Here, Appellant has not met his burden do demonstrate that the sealing of his entire opening brief and nearly half the record in necessary. On of before October 8, 2021, Appellant may renew his motion, filed under seal, setting forth with particularity why sealing is necessary. If upon renewal Appellant seeks to seal portions of the record, Appellant is directed to file a renewed motion to seal accompanied by a proposed redacted version of the documents, or the designation of specific documents where sealing is justified under our rules. The Opening Brief and Joint Appendix Volumes III and IV will remain under seal until the later of October 8 or, if Appelant files a renewed motion to seal, the Court's ruling on that renewed motion. Cheryl Ann Krause, Authoring Judge. (MS) [Entered: 09/30/2021 03:16 PM]
10/08/2021	85	ECF FILER: Motion filed by Appellee Executive Health Resources

DATE	NO.	PROCEEDINGS
		Inc to seal Portions Of The Record On Appeal. Certificate of Service dated 10/08/2021. Service made by ECF. [19-3810] (EMP) [Entered: 10/08/2021 12:45 PM]
10/12/2021	86	ORDER (JORDAN, KRAUSE and RESTREPO, Circuit Judges) granting Motion by Appellee, Executive Health Resources Inc, to Seal Portions of the Record on Appeal. Cheryl Ann Krause, Authoring Judge. (MS) [Entered: 10/12/2021 11:14 AM]
10/21/2021	87	ORDER (Clerk) As the Court has granted Appellee's motion to seal a portion of the record, the parties are hereby ordered to reconfigure Volumes III and IV of the appendix and refile as directed below within 10 days of the date of this order. In reconfiguring the volumes, the parties must separate the unsealed documents from the sealed documents while keeping the pagination the same, as follows: Corrected Volume III shall consist of pages JA 804-1384; Corrected Volume IV shall consist of pages JA 1385-2192; Volume V shall consist of pages JA 2193-2253. The parties must elec-

DATE	NO.	PROCEEDINGS
		tronically file the reconfigured volumes, filing Volumes III and V publicly and Volume IV under seal, and submit one hard copy of each reconfigured volumes to the Clerk's Office. (MS) [Entered: 10/21/2021 10:10 AM]
10/25/2021	88	ECF FILER: Motion filed by Appellee Executive Health Resources Inc to clarify order dated 10/21/2021. Certificate of Service dated 10/25/2021. Service made by ECF. [19-3810] (EMP) [Entered: 10/25/2021 04:30 PM]
10/27/2021	89	ORDER (Clerk) The foregoing motion is granted. The parties shall refile the affected volumes of the appendix as proposed in the motion within 7 days of the date of this order. (MS) [Entered: 10/27/2021 11:08 AM]
10/27/2021	90	ECF FILER: CORRECTED ELECTRONIC JOINT APPENDIX on behalf of Appellee Executive Health Resources Inc. Certificate of service dated 10/27/2021 by ECF. [19-3810] (EMP) [Entered: 10/27/2021 03:14 PM]

DATE	NO.	PROCEEDINGS
10/27/2021	91	ECF FILER: SEALED CORRECTED ELECTRONIC JOINT APPENDIX on behalf of Appellee Executive Health Resources Inc. Certificate of Service dated 10/27/2021 by ECF. [19-3810] (EMP) [Entered: 10/27/2021 03:19 PM]
10/27/2021	92	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellee Executive Health Resources Inc. Certificate of service dated 10/27/2021 by ECF. [19-3810] (EMP) [Entered: 10/27/2021 03:21 PM]
10/28/2021	93	PRECEDENTIAL OPINION. Coram: JORDAN, KRAUSE and RESTREPO, Circuit Judges. Total Pages: 29. Judge: KRAUSE Authoring.--[Edited 10/28/2021 by LML to attach corrected opinion] (AMR) [Entered: 10/28/2021 09:19 AM]
10/28/2021	94	JUDGMENT, AFFIRMED as to the dismissal of Appellant's Third Amended Complaint with prejudice and VACATED as to the entry of partial summary judgment. Parties to bear their own costs. (AMR) [Entered: 10/28/2021 09:28 AM]

DATE	NO.	PROCEEDINGS
		* * * * *
11/19/2021	96	MANDATE ISSUED. [RECALLED pursuant to Clerk Order entered 11/22/21] (CJG) [Entered: 11/19/2021 09:15 AM]
11/22/2021	97	ECF FILER: UNOPPOSED Motion filed by Appellant Jesse Polansky to Recall the Mandate. Certificate of Service dated 11/22/2021. Service made by ECF. [19-3810] (DLG) [Entered: 11/22/2021 12:11 AM]
11/22/2021	98	ORDER (Clerk) recalling the mandate issued on 11/19/2021 and reinstating petition for rehearing deadling until 12/13/2021. (AMR) [Entered: 11/22/2021 11:05 AM]
12/14/2021	99	ECF FILER: LETTER from Attorney Daniel L. Geyser, Esq. for Appellant Jesse Polansky regarding appellant's decision not to seek rehearing. Certificate of Service dated 12/14/2021. Service made by ECF. [19-3810] (DLG) [Entered: 12/14/2021 01:32 PM]
12/21/2021	100	Mandate Reissued. (SB) [Entered: 12/21/2021 09:02 AM]
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 12-CV-4239

JESSE POLANSKY M.D., M.P.H., et al.,
Plaintiffs

v.

EXECUTIVE HEALTH RESOURCES, INC., et al.,
Defendants

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
05/07/2014	12	SECOND AMENDED COMPLAINT. (FILED UNDER SEAL).(ahfsl) See document #101 for redacted version. Modified on 7/28/2016 (tdsl,). (Entered: 05/07/2014)
06/30/2014	19	THE UNITED STATES' NOTICE OF ELECTION TO DECLINE INTERVENTION. (emssl) (sg,). (Entered: 06/30/2014)
07/03/2014	20	ORDER THAT THE SECOND AMENDED COMPLAINT (INCLUDING ALL EXHIBITS) AND RELATOR'S MOTION TO

DATE	NO.	PROCEEDINGS
		SEAL (INCLUDING ALL EXHIBITS) BE SERVED UPON THE DEFENDANTS. IT IS FURTHER ORDERED THAT THE SECOND AMENDED COMPLAINT (INCLUDING ALL EXHIBITS) SHALL REMAIN SEALED UNTIL 30 DAYS AFTER ALL OF THE DEFENDANTS HAVE BEEN SERVED WITH THE SECOND AMENDED COMPLAINT AND RELATOR'S MOTION TO SEAL. IT IS FURTHER ORDERED THAT RELATOR'S MOTION TO SEAL (INCLUDING EXHIBITS) SHALL REMAIN UNDER SEAL AND NOT BE MADE PUBLIC. IT IS FURTHER ORDERED THAT ALL OTHER CONTENTS OF THE COURT'S FILE IN THIS ACTION REMAIN UNDER SEAL AND NOT BE MADE PUBLIC AND SERVED UPON THE DEFENDANTS, EXCEPT FOR THIS ORDER AND THE GOVERNMENT'S NOTICE OF ELECTION TO DECLINE INTERVENTION, WHICH RELATOR SHALL SERVE UPON THE DEFENDANTS

DATE	NO.	PROCEEDINGS
		SIMULTANEOUSLY WITH SERVICE OF THE SECOND AMENDED COMPLAINT. THE SEAL SHALL BE LIFTED AS TO ALL OTHER MATTERS OCCURRING IN THIS ACTION AFTER THE DATE OF THIS ORDER; ETC.. THIS ORDER SHALL SUPERSEDE IN ALL RESPECTS THE ORDER ENTERED IN THIS ACTION ON 6/27/2014. SIGNED BY HONORABLE JOHN R. PADOVA ON 7/2/2014. 7/3/2014 ENTERED AND COPIES MAILED. (emssl) (sg,). (Entered: 07/03/2014)
		* * * * *
12/30/2014	52	DEFENDANT EXECUTIVE HEALTH RESOURCES INC.'S MOTION FOR LEAVE TO FILE ITS MOTION TO DISMISS UNDER SEAL. Certificate of Service. (emssl) (Additional attachment(s) added on 12/30/2014: # 1 Exhibit A) (emssl). (Entered: 12/30/2014)
		* * * * *
03/03/2015	62	MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION TO

DATE	NO.	PROCEEDINGS
		DEFENDANTS EXECUTIVE HEALTH RESOURCES, INC.'S COMMUNITY HOSPITAL OF THE MONTEREY PENINSULA'S, AND YALE-NEW HAVEN HOSPITAL, INC.'S MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT UNDER SEAL WITH THE CLERK OF COURT filed by JESSE POLANSKY, M.D., M.P.H.. Certificate of Service, Briefs, Exhibits. (emssl) See document #97-1 and 97-2 for redacted version. Modified on 7/28/2016 (tdsl,). (Entered: 03/03/2015)
		* * * * *
03/23/2015	68	UNOPPOSED MOTION FOR LEAVE TO FILE REPLY BRIEF UNDER SEAL filed by EXECUTIVE HEALTH RESOURCES INC.. Certificate of Service. (emssl) (Entered: 03/23/2015)
03/23/2015	69	EXHIBIT A - REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS ALL COUNTS OF RELATOR'S SECOND AMENDED COMPLAINT filed

DATE	NO.	PROCEEDINGS
		by EXECUTIVE HEALTH RESOURCES INC.. Certificate of Service. (emssl) (Entered: 03/23/2015)
		* * * * *
04/01/2015	78	REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS ALL COUNTS OF RELATOR'S SECOND AMENDED COMPLAINT filed by EXECUTIVE HEALTH RESOURCES INC.. Certificate of Service. (emssl) (Entered: 04/01/2015)
		* * * * *
04/08/2015	84	SUR-REPLY IN OPPOSITION TO ALL DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT by JESSE POLANSKY, M.D., M.P.H.. Certificate of Service. (emssl) See document #97-3 for redacted version. Modified on 7/28/2016 (tdsl,). (Entered: 04/08/2015)
		* * * * *
05/11/2016	93	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE THOMAS N.

DATE	NO.	PROCEEDINGS
		ONEILL, JR ON 5/10/2016. 5/11/2016 ENTERED AND COPIES MAILED. (emssl) See document #103 for redacted version. Modified on 7/28/2016 (tdsl,). (Entered: 05/11/2016)
05/11/2016	94	MEMORANDUM AND/OR OPINION ORDER THAT RELATOR'S CLAIMS UNDER THE NEW MEXICO MEDICAID FALSE CLAIMS ACT IN COUNTS XLVII AND XLVIII OF HIS SECOND AMENDED COMPLAINT (DOC. NO. 12) ARE DISMISSED WITHOUT PREJUDICE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1). EXECUTIVE HEALTH RESOURCES, INC.'S MOTION IS GRANTED TO THE EXTENT THAT RELATOR'S REMAINING STATE LAW CLAIMS AGAINST IT ARE DISMISSED WITH LEAVE TO AMEND. EXECUTIVE HEALTH RESOURCES, INC.'S MOTION IS DENIED IN ALL OTHER RESPECTS AND UNITEDHEALTH GROUP, INC., UNITEDHEALTHCARE

DATE	NO.	PROCEEDINGS
		SERVICES, INC., OPTUM, INC., AND OPTUMSIGHT, INC.'S MOTION TO DISMISS IS GRANTED AND RELATOR'S REMAINING CLAIMS AGAINST THEM ARE DISMISSED WITH LEAVE TO AMEND AND YALE-NEW HAVEN HOSPITAL, INC. AND COMMUNITY HOSPITAL OF THE MONTEREY PENINSULA'S MOTION TO DISMISS IS GRANTED AND RELATOR'S CLAIMS AGAINST THEM ARE DISMISSED WITH LEAVE TO AMEND. RELATOR JESSE POLANSKY MAY FILE AN AMENDED COMPLAINT ON ALL CLAIMS THAT HE HAS NOT VOLUNTARILY DISMISSED BY 6/13/2016 TO THE EXTENT THAT HE CAN PLEAD SUFFICIENT FACTS UPON WHICH TO DO SO. IT IS FURTHER ORDERED THAT, BECAUSE THIS ORDER AND THE ACCOMPANYING MEMORANDUM OF LAW MAY CONTAIN CONFIDENTIAL INFORMATION, THEY HAVE BEEN FILED UNDER SEAL PENDING REVIEW BY THE

DATE	NO.	PROCEEDINGS
		PARTIES TO PERMIT THE PARTIES TO MEET AND CONFER AND PROPOSE A SINGLE JOINTLY REDACTED VERSION OF THE ORDER AND THE ACCOMPANYING MEMORANDUM OF LAW. ON OR BEFORE 6/13/2016, THE PARTIES SHALL PROVIDE THE COURT WITH ANY PROPOSED REDACTED ORDER AND ACCOMPANYING MEMORANDUM OF LAW OR SHALL INFORM THE COURT THAT NO REDACTIONS ARE REQUIRED. THE PARTIES SHALL ALSO ADVISE THE COURT OF ANY FURTHER ACTION TO BE TAKEN, IF ANY, BEFORE A PUBLICLY-AVAILABLE VERSION OF THIS ORDER AND THE ACCOMPANYING MEMORANDUM OF LAW MAY BE ISSUED. SIGNED BY HONORABLE THOMAS N. ONEILL, JR ON 5/10/2016. 5/11/2016 ENTERED AND COPIES MAILED. (emssl) (Entered: 05/11/2016)

* * * * *

DATE	NO.	PROCEEDINGS
06/13/2016	96	ORDER THAT RELATOR JESSE POLANSKY MAY FILE AN AMENDED COMPLAINT BY 8/12/2016 ON ALL CLAIMS ALLEGED IN THE SECOND AMENDED COMPLAINT THAT HE HAS NOT VOLUNTARILY DISMISSED TO THE EXTENT THAT HE CAN PLEAD SUFFICIENT FACTS UPON WHICH TO DO SO; AND THE DEFENDANTS SHALL HAVE UNTIL 10/11/2016 TO ANSWER OR OTHERWISE RESPOND TO THE OPERATIVE COMPLAINT AS OF 8/12/2016. SIGNED BY HONORABLE THOMAS N. ONEILL, JR ON 6/13/2016. 6/13/2016 ENTERED AND COPIES MAILED. (emssl) (Entered: 06/13/2016)
		* * * * *
07/06/2016	101	REDACTED SECOND AMENDED COMPLAINT against COMMUNITY HOSPITAL OF THE MONTEREY PENINSULA, EXECUTIVE HEALTH RESOURCES INC., OPTUM, INC., OPTUMINSIGHT HOLDINGS, LLC,

DATE	NO.	PROCEEDINGS
		OPTUMINSIGHT, INC., UNITED HEALTHCARE SERVICES, INC., UNITEDHEALTH GROUP INCORPORATED, YALE-NEW HAVEN HOSPITAL, INC., filed by JESSE POLANSKY, M.D., M.P.H.. Certificate of Service. (emssl) (Entered: 07/06/2016)
		* * * * *
07/26/2016	103	REDACTED MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE THOMAS N. ONEILL, JR ON 5/10/2016. 7/26/2016 ENTERED AND COPIES MAILED. (emssl) (Entered: 07/26/2016)
07/26/2016	104	REDACTED MEMORANDUM AND/OR OPINION ORDER THAT RELATOR'S CLAIMS UNDER THE NEW MEXICO MEDICAID FALSE CLAIMS ACT IN COUNTS XLVII AND XLVIII OF HIS SECOND AMENDED COMPLAINT (DOC. NO. 12) ARE DISMISSED WITHOUT PREJUDICE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1). EXECUTIVE HEALTH

DATE	NO.	PROCEEDINGS
		RESOURCES, INC.'S MOTION IS GRANTED TO THE EXTENT THAT RELATOR'S REMAINING STATE LAW CLAIMS AGAINST IT ARE DISMISSED WITH LEAVE TO AMEND. EXECUTIVE HEALTH RESOURCES, INC.'S MOTION IS DENIED IN ALL OTHER RESPECTS AND UNITEDHEALTH GROUP, INC., UNITEDHEALTHCARE SERVICES, INC., OPTUM, INC., AND OPTUMSIGHT, INC.'S MOTION TO DISMISS IS GRANTED AND RELATOR'S REMAINING CLAIMS AGAINST THEM ARE DISMISSED WITH LEAVE TO AMEND AND YALE-NEW HAVEN HOSPITAL, INC. AND COMMUNITY HOSPITAL OF THE MONTEREY PENINSULA'S MOTION TO DISMISS IS GRANTED AND RELATOR'S CLAIMS AGAINST THEM ARE DISMISSED WITH LEAVE TO AMEND. RELATOR JESSE POLANSKY MAY FILE AN AMENDED COMPLAINT ON ALL CLAIMS THAT HE HAS NOT VOLUNTARILY

DATE	NO.	PROCEEDINGS
		DISMISSED BY 6/13/2016 TO THE EXTENT THAT HE CAN PLEAD SUFFICIENT FACTS UPON WHICH TO DO SO. IT IS FURTHER ORDERED THAT, BECAUSE THIS ORDER AND THE ACCOMPANYING MEMORANDUM OF LAW MAY CONTAIN CONFIDENTIAL INFORMATION, THEY HAVE BEEN FILED UNDER SEAL PENDING REVIEW BY THE PARTIES TO PERMIT THE PARTIES TO MEET AND CONFER AND PROPOSE A SINGLE JOINTLY REDACTED VERSION OF THE ORDER AND THE ACCOMPANYING MEMORANDUM OF LAW. ON OR BEFORE 6/13/2016, THE PARTIES SHALL PROVIDE THE COURT WITH ANY PROPOSED REDACTED ORDER AND ACCOMPANYING MEMORANDUM OF LAW OR SHALL INFORM THE COURT THAT NO REDACTIONS ARE REQUIRED. THE PARTIES SHALL ALSO ADVISE THE COURT OF ANY FURTHER ACTION TO BE TAKEN, IF ANY, BEFORE A PUBLICLY-

DATE	NO.	PROCEEDINGS
		AVAILABLE VERSION OF THIS ORDER AND THE ACCOMPANYING MEMORANDUM OF LAW MAY BE ISSUED. SIGNED BY HONORABLE THOMAS N. ONEILL, JR ON 5/10/2016. 7/26/2016 ENTERED AND COPIES MAILED. (emssl) (Entered: 07/26/2016)
		* * * * *
08/01/2016	110	MOTION to Dismiss /*REDACTED MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND MEMORANDUM OF LAW* filed by EXECUTIVE HEALTH RESOURCES INC..MEMORANDUM OF LAW IN SUPPORT AND CERTIFICATE OF SERVICE.(GURNEY, KAITLIN) (Entered: 08/01/2016)
08/01/2016	111	REPLY to Response to Motion re 110 MOTION to Dismiss /*REDACTED MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND MEMORANDUM OF LAW* /*REDACTED REPLY*

DATE	NO.	PROCEEDINGS
		BRIEF IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT filed by EXECUTIVE HEALTH RESOURCES INC.. (GURNEY, KAITLIN) (Entered: 08/01/2016)
08/09/2016	112	ORDER THAT RELATOR'S REQUEST FOR EXTENSION OF TIME IS GRANTED. RELATOR MAY FILE AN AMENDED COMPLAINT BY 10/11/2016. DEFENDANTS SHALL HAVE UNTIL 12/12/2016 TO ANSWER OR OTHERWISE RESPOND TO THE OPERATIVE COMPLAINT AS OF 10/11/2016. SIGNED BY HONORABLE THOMAS N. ONEILL, JR ON 8/9/2016. 8/9/2016 ENTERED AND COPIES E-MAILED.(sg,) (Entered: 08/09/2016)
		* * * * *
12/12/2016	120	*Redacted* ANSWER to 12 Amended Complaint by EXECUTIVE HEALTH RESOURCES INC..(GALLAGHER, THOMAS) (Entered: 12/12/2016)

DATE	NO.	PROCEEDINGS
12/13/2016	121	EXHIBIT A TO DEFENDANT EXECUTIVE HEALTH RESOURCES, INC.'S MOTION FOR LEAVE TO FILE ANSWER UNDER SEAL, filed by EXECUTIVE HEALTH RESOURCES INC.. (FILED UNDER SEAL).(sg,) (Additional attachment(s) added on 12/13/2016: # 1 sealed document) (lvj,). (Entered: 12/13/2016)
		* * * * *
12/22/2016	123	ANSWER TO THE SECOND AMENDED COMPLAINT, by EXECUTIVE HEALTH RESOURCES INC.. (FILED UNDER SEAL.)(sg,) (Additional attachment(s) added on 12/23/2016: # 1 answer part 2) (afm,). (Entered: 12/22/2016)
		* * * * *
05/15/2017	141	ORDER THAT THIS CASE IS REASSIGNED FROM HONORABLE THOMAS N. ONEILL, JR TO HONORABLE MICHAEL M. BAYLSON FOR ALL FURTHER PROCEEDINGS. SIGNED BY CLERK OF COURT KATE BARKMAN, CLERK OF COURT

DATE	NO.	PROCEEDINGS
		ON 5/15/2017. 5/15/2017 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 05/15/2017)
		* * * * *
06/30/2021	152	Statement *of Interest of the United States Concerning Executive Health Resources, Inc.'s Reply in Support of Motion for Phased Discovery and Expedited Summary Judgment* by UNITED STATES OF AMERICA. (Attachments: # 1 Certificate of Service)(PARKER, VIVECA) (Entered: 06/30/2017)
07/07/2021	153	Response To The Government's Statement of Interest. re 152 Statement, by EXECUTIVE HEALTH RESOURCES INC.. (SUMNER, ROBIN) (Entered: 07/07/2017)
		* * * * *
10/11/2017	191	MOTION to Dismiss *RELATORS SUPPLEMENTAL COMPLAINT* filed by EXECUTIVE HEALTH RESOURCES INC..Certificate of Service. (Attachments: # 1 Text of Proposed Order, # 2 Brief in Support, # 3 Exhibit A)(GURNEY, KAITLIN) (Attachment 2 replaced

DATE	NO.	PROCEEDINGS
		on 10/12/2017) (sg,). (Entered: 10/11/2017)
10/12/2017	192	EHR'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS RELATOR'S SUPPLEMENTAL COMPLAINT, filed by EXECUTIVE HEALTH RESOURCES INC.. (FILED UNDER SEAL.) (sg,) (Additional attachment(s) added on 10/12/2017: # 1 Sealed Document) (lisad,). (Entered: 10/12/2017)
		* * * * *
11/07/2017	198	ORDER THAT THE PLAINTIFF'S MOTION TO SUPPLEMENT THE COMPLAINT IS GRANTED IN PART AND ALLOW THE CASE TO PROCEED ON THE SUPPLEMENT COMPLAINT BUT THE COURT WILL HOLD UNDER ADVISEMENT THE REQUEST TO EXTEND DISCOVERY AND THE MOTION FOR CLARIFICATION IS DENIED AS MOOT. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 11/7/17.11/7/17 ENTERED AND COPIES

DATE	NO.	PROCEEDINGS
		MAILED AND EMAILED TO COUNSEL.(jaa,) (Entered: 11/07/2017)
11/15/2017	199	RESPONSE to Motion re 191 MOTION to Dismiss *RELATORS SUPPLEMENTAL COMPLAINT* filed by JESSE POLANSKY, M.D., M.P.H.. (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order)(MELSHEIMER, THOMAS) (Entered: 11/15/2017)
		* * * * *
11/30/2017	202	REPLY Brief in Support re 191 MOTION to Dismiss *RELATORS SUPPLEMENTAL COMPLAINT* filed by EXECUTIVE HEALTH RESOURCES INC. Certificate of Service. (GURNEY, KAITLIN) Modified on 12/1/2017 (lisad,). (Entered: 11/30/2017)
		* * * * *
03/19/2018	228	MEMORANDUM RE: MOTION TO DISMISS SUPPLEMENT COMPLAINT. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 3/19/18. 3/19/18

DATE	NO.	PROCEEDINGS
		ENTERED AND COPIES MAILED AND EMAILED TO COUNSEL.(jaa,) Modified on 3/19/2018 (jaa,). (Entered: 03/19/2018)
03/19/2018	229	ORDER THAT DEFENDANT EXECUTIVE HEALTH RESOURCES' MOTION TO DISMISS RELATOR JESSE POLANSKY'S SUPPLEMENTAL COMPLAINT IS DENIED. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 3/19/18. 3/19/18 ENTERED AND COPIES MAILED AND EMAILED TO COUNSEL.(jaa,) Modified on 3/19/2018 (jaa,). (Entered: 03/19/2018)
		* * * * *
04/26/2018	240	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 4/26/2018. 4/26/2018 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 04/26/2018)
04/26/2018	241	ORDER THAT DEFENDANT'S MOTION FOR

DATE	NO.	PROCEEDINGS
		RECONSIDERATION (DOC. 233) IS DENIED. PLAINTIFF'S MOTION TO REQUIRE RANDOMIZATION OF SELECTED CASES (DOC. 182) IS DENIED. ETC.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 4/26/2018. 4/26/2018 ENTERED AND COPIES MAILED, E-MAILED.(sg,) Modified on 4/27/2018 (lisad,). (Entered: 04/26/2018)
		* * * * *
10/23/2018	275	MOTION to Compel *THE U.S. GOVERNMENT TO RESPOND TO REQUESTS FOR PRODUCTION AND FOR DEPOSITIONS* filed by EXECUTIVE HEALTH RESOURCES INC.. Memorandum in Support and Certificate of Service and DECLARATION OF MICHAEL M. MAYA.(GURNEY, KAITLIN) (Entered: 10/23/2018)
		* * * * *
11/27/2018	302	Memorandum in Opposition re 275 MOTION to Compel *THE U.S. GOVERNMENT TO RESPOND TO REQUESTS FOR*

DATE	NO.	PROCEEDINGS
		PRODUCTION AND FOR DEPOSITIONS filed by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12)(GILL, ERIC) (Entered: 11/27/2018)
		* * * * *
12/10/2018	316	REPLY in Support re 275 MOTION to Compel *THE U.S. GOVERNMENT TO RESPOND TO REQUESTS FOR PRODUCTION AND FOR DEPOSITIONS* filed by EXECUTIVE HEALTH RESOURCES INC. Certificate of Service. (RHODES, TRACY) Modified on 12/11/2018 (lisad,). (Entered: 12/10/2018)
		* * * * *
12/11/2018	318	DEFENDANT EHR'S REPLY IN SUPPORT OF MOTION TO COMPEL GOVERNMENT TO RESPOND TO REQUESTS FOR PRODUCTION AND DEPOSITIONS, filed by

DATE	NO.	PROCEEDINGS
		EXECUTIVE HEALTH RESOURCES INC. CERTIFICATE OF SERVICE. (FILED UNDER SEAL.) (sg,) (Additional attachment(s) added on 12/11/2018: # 1 Sealed Document, # 2 Sealed Document, # 3 Sealed Document, # 4 Sealed Document, # 5 Sealed Document) (lisad,). Modified on 12/11/2018 (lisad,). (Entered: 12/11/2018)
		* * * * *
01/28/2019	373	MOTION for Sanctions *Regarding Plaintiff-Relators Late Production of a DVD Containing 14,000 CMS Documents* filed by EXECUTIVE HEALTH RESOURCES INC..Certificate of Service.(RHODES, TRACY) (Entered: 01/28/2019)
01/29/2019	374	EHR'S EXHIBITS re 373 MOTION for Sanctions *Regarding Plaintiff-Relators Late Production of a DVD Containing 14,000 CMS Documents* (FILED UNDER SEAL)(mbh,) Modified on 1/29/2019 (lisad,). (Additional attachment(s) added on 1/29/2019: # 1 Sealed Document, # 2 Sealed Document, # 3 Sealed Document,

DATE	NO.	PROCEEDINGS
		# 4 Sealed Document, # 5 Sealed Document, # 6 Sealed Document, # 7 Sealed Document, # 8 Sealed Document, # 9 Sealed Document, # 10 Sealed Document, # 11 Sealed Document) (lisad,). (Entered: 01/29/2019)
		* * * * *
02/11/2019	387	RESPONSE in Opposition re 373 MOTION for Sanctions *Regarding Plaintiff-Relators Late Production of a DVD Containing 14,000 CMS Documents* filed by JESSE POLANSKY, M.D., M.P.H.. (MELSHEIMER, THOMAS) (Entered: 02/11/2019)
02/12/2019	388	RELATOR'S RESPONSE TO EHR'S MOTION FOR SANCTIONS, filed by JESSE POLANSKY, M.D., M.P.H.. CERTIFICATE OF SERVICE, EXHIBITS, PROPOSED ORDER. (sg,) (Entered: 02/12/2019)
		* * * * *
02/15/2019	390	REPLY Brief in Support re 373 MOTION for Sanctions *Regarding Plaintiff-Relators Late Production of a DVD Containing 14,000 CMS Documents* filed by

DATE	NO.	PROCEEDINGS
		EXECUTIVE HEALTH RESOURCES INC. Certificate of Service. (RHODES, TRACY) Modified on 2/19/2019 (lisad,). (Entered: 02/15/2019)
		* * * * *
02/19/2019	393	EXHIBITS TO REPLY BRIEF IN SUPPORT OF MOTION FOR SANCTIONS REGARDING PLAINTIFF-RELATOR'S LATE PRODUCTION OF A DVD CONTAINING 14,000 CMS DOCUMENTS, filed by EXECUTIVE HEALTH RESOURCES INC.. (FILED UNDER SEAL.) (sg,) Modified on 2/19/2019 (lisad,). (lisad,). (Entered: 02/19/2019)
02/19/2019	394	SURREPLY re 373 MOTION for Sanctions *Regarding Plaintiff-Relators Late Production of a DVD Containing 14,000 CMS Documents* filed by JESSE POLANSKY, M.D., M.P.H. Certificate of Service. (MELSHEIMER, THOMAS) Modified on 2/19/2019 (lisad,). (Entered: 02/19/2019)
02/19/2019	395	RELATOR'S SURREPLY TO DEFENDANT'S MOTION FOR SANCTIONS, filed by JESSE

DATE	NO.	PROCEEDINGS
		POLANSKY, M.D., M.P.H.. (FILED UNDER SEAL.) (sg,) (lisad,). (Entered: 02/19/2019)
		* * * * *
02/22/2019	398	Minute Entry for proceedings held before HONORABLE MICHAEL M. BAYLSONin Courtroom 3A Motion Hearing held on 2/19/2019 re 373 MOTION for Sanctions *Regarding Plaintiff-Relators Late Production of a DVD Containing 14,000 CMS Documents* filed by EXECUTIVE HEALTH RESOURCES INC. Court Reporter: ESR. (sg,) (Entered: 02/22/2019)
02/22/2019	399	ORDER APPOINTING SPECIAL MASTER AS OUTLINED HEREIN. SIGNED BY HONORABLE WENDY BEETLESTONE FOR HONORABLE MICHAEL M. BAYLSON ON 2/21/2019. 2/22/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 02/22/2019)
02/22/2019	400	ORDERED THAT DEFENDANT'S MOTION FOR RELIEF (DOC. 322) AND FOR

DATE	NO.	PROCEEDINGS
		SANCTIONS (DOC. 373) WILL BE GRANTED IN PART AND DENIED IN PART. PLAINTIFF'S MOTION TO SEAL OR FOR REDACTION OF THE RECORD (DOC. 294 AND 369) IS DENIED. DEFENDANT'S MOTION TO QUASH AS TO DEPOSITIONS (DOC. 355) IS GRANTED. ETC.. SIGNED BY HONORABLE WENDY BEETLESTONE FOR HONORABLE MICHAEL M. BAYLSON ON 2/21/2019.2/22/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) Modified on 2/25/2019 (lisad,). (Entered: 02/22/2019)
		* * * * *
02/25/2019	403	Emergency MOTION to Stay *DISCOVERY AND ADJOURN THE CASE SCHEDULE* filed by EXECUTIVE HEALTH RESOURCES INC.. Certificate of Service.(RHODES, TRACY) (Entered: 02/25/2019)
		* * * * *

DATE	NO.	PROCEEDINGS
02/26/2019	406	ORDER THAT GOVERNMENT SHALL FILE A RESPONSE STATING WHETHER AND WHEN IT PLANS TO FILE A MOTION TO DISMISS. THIS RESPONSE SHALL BE FILED BY 10:00AM ON 2/27/19. SIGNED BY HONORABLE PAUL S. DIAMOND ON BEHALF OF HONORABLE MICHAEL M. BAYLSON ON 2/26/19. 2/26/19 ENTERED AND COPIES MAILED AND E-MAILED.(rf,) Modified on 2/27/2019 (lisad,). (Entered: 02/26/2019)
02/26/2019	407	*RELATOR'S JOINDER IN EMERGENCY MOTION TO STAY* filed by JESSE POLANSKY, M.D., M.P.H..Certificate of Service.(MELSHEIMER, THOMAS) Modified on 2/27/2019 (lisad,). (Entered: 02/26/2019)

* * * * *

DATE	NO.	PROCEEDINGS
02/27/2019	409	ORDERED THAT DEFENDANT'S EMERGENCY MOTION TO STAY DISCOVERY AND ADJOURN THE CASE SCHEDULE (DOC. 403) IS GRANTED. ALL DISCOVERY AND PRETRIAL DEADLINES

DATE	NO.	PROCEEDINGS
		ARE STAYED PENDING FURTHER ORDER OF THE COURT. SIGNED BY HONORABLE PAUL S. DIAMOND FOR HONORABLE MICHAEL M. BAYLSON ON 2/27/2019.2/27/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 02/27/2019)
03/08/2019	410	AMENDED DOCUMENT by UNITED STATES OF AMERICA. Amendment to 408 Response *to Court's February 26, 2019 Order*. (GILL, ERIC) (Entered: 03/08/2019)
03/22/2019	411	Response *to Court's February 26, 2019 Order (Second Amended)* by UNITED STATES OF AMERICA. (PARKER, VIVECA) (Entered: 03/22/2019)

* * * * *

DATE	NO.	PROCEEDINGS
04/05/2019	413	Third Amended Response to the Court's February 26, 2019 Order by UNITED STATES OF AMERICA. (GILL, ERIC) Modified on 4/8/2019 (lisad,). (Entered: 04/05/2019)

* * * * *

DATE	NO.	PROCEEDINGS
04/24/2019	421	NOTICE by JESSE POLANSKY, M.D., M.P.H. *RELATOR'S PARTIAL DISMISSAL* (MELSHEIMER, THOMAS) (Entered: 04/24/2019)
04/25/2019	422	MOTION TO LIFT THE STAY AND OPPOSITION TO RELATORS PARTIAL DISMISSAL re 421 Notice (Other), 420 Notice (Other) filed by EXECUTIVE HEALTH RESOURCES INC..Certificate of Service.(RHODES, TRACY) (Entered: 04/25/2019)
		* * * * *
04/26/2019	424	ORDERED THAT PLAINTIFF'S DOCUMENT ENTITLED "PATIAL DISMISSAL" (DOC. 420) IS DENIED WITHOUT PREJUDICE. DEFENDANT'S MOTIONS (DOC. 415 and 422) ARE DENIED WITHOUT PREJUDICE. ETC.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 4/25/2019.4/26/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 04/26/2019)
		* * * * *

DATE	NO.	PROCEEDINGS
05/02/2019	428	MOTION to Amend/Correct *RELATOR'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT AND PROPOSAL FOR BELLWETHER TRIAL PROCEDURE* filed by JESSE POLANSKY, M.D., M.P.H..brief, declaration, certificate of service. (Attachments: # 1 Text of Proposed Order, # 2 Declaration Declaration of Chad Walker, # 3 Exhibit A, # 4 Exhibit 1, # 5 Exhibit 2, # 6 Exhibit 3, # 7 Exhibit 4, # 8 Exhibit 5, # 9 Exhibit 6, # 10 Exhibit 7, # 11 Exhibit 8, # 12 Exhibit 9, # 13 Exhibit 10, # 14 Exhibit 11, # 15 Exhibit B, # 16 Exhibit C, # 17 Exhibit D, # 18 Exhibit E, # 19 Exhibit F, # 20 Exhibit G, # 21 Exhibit H)(MELSHEIMER, THOMAS) (Entered: 05/02/2019)
05/06/2019	429	RELATOR'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT, filed by JESSE POLANSKY, M.D., M.P.H.. FILED UNDER SEAL..(sg,) (Additional attachment(s) added on 5/6/2019: # 1 Sealed Document, # 2 Sealed

DATE	NO.	PROCEEDINGS
		Document, # 3 Sealed Document, # 4 Sealed Document, # 5 Sealed Document, # 6 Sealed Document, # 7 Sealed Document, # 8 Sealed Document, # 9 Sealed Document, # 10 Sealed Document, # 11 Sealed Document, # 12 Sealed Document, # 13 Sealed Document, # 14 Sealed Document, # 15 Sealed Document, # 16 Sealed Document, # 17 Sealed Document, # 18 Sealed Document, # 19 Sealed Document, # 20 Sealed Document, # 21 Sealed Document) (lisad,). (Entered: 05/06/2019)
05/09/2019	430	RESPONSE to Motion re 429 MOTION for Leave to File *Third Amended Complaint* filed by UNITED STATES OF AMERICA. (GILL, ERIC) (Entered: 05/09/2019)
05/10/2019	431	RESPONSE to Motion re 428 MOTION to Amend/Correct *RELATOR'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT AND PROPOSAL FOR BELLWETHER TRIAL*

DATE	NO.	PROCEEDINGS
		PROCEDURE, 429 MOTION for Leave to File filed by EXECUTIVE HEALTH RESOURCES INC.. (RHODES, TRACY) (Entered: 05/09/2019)
05/10/2019	432	MOTION for Leave to File *Reply to EHR's Response to Relator's Motion for Leave to File Third Amended Complaint and Proposal for Bellwether Trial Procedure* filed by JESSE POLANSKY, M.D., M.P.H... (Attachments: # 1 Text of Proposed Order)(MELSHEIMER, THOMAS) (Entered: 05/10/2019)
		* * * * *
05/15/2019	437	LETTER TO COUNSEL OF RECORD FROM JUDGES CHAMBERS DATED 5/14/2019, RE: QUESTIONS. (sg,) (Entered: 05/15/2019)
05/20/2019	438	LETTER TO COUNSEL OF RECORD, FROM UNITED STATES DISTRICT COURT JUDGE MICHAEL M. BAYLSON, DATED 5/20/2019, RE: BELLWETHER TRIALS. (sg,) (Entered: 05/20/2019)
05/24/2019	439	MOTION to Dismiss *Relators Third Amended Complaint and*

DATE	NO.	PROCEEDINGS
		Responses to the Courts Questions filed by EXECUTIVE HEALTH RESOURCES INC..Brief, Exhibits,Certificate of Service.(RHODES, TRACY) (Entered: 05/24/2019)
06/03/2019	440	Memorandum in Support *of Its Assertion of the Deliberative Process Privilege for Certain Documents* by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit 1) (GILL, ERIC) (Entered: 06/03/2019)
06/07/2019	441	Memorandum in Support *of its Assertion of the Delibrative Process Privilege for Certain Documents (Supplemental)* by UNITED STATES OF AMERICA. (Attachments: # 1 Declaration Supplemental Declaration of Jennifer Main) (GILL, ERIC) (Entered: 06/07/2019)
06/07/2019	442	RESPONSE in Opposition re 439 MOTION to Dismiss *Relators Third Amended Complaint and Responses to the Courts Questions RELATOR'S RESPONSE IN OPPOSITION TO EHR'S MOTION TO DISMISS RELATOR'S THIRD AMENDED*

DATE	NO.	PROCEEDINGS
		COMPLAINT AND RESPONSES TO THE COURT'S QUESTIONS filed by JESSE POLANSKY, M.D., M.P.H.. (Attachments: # 1 Text of Proposed Order, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D - SEALED, # 6 Exhibit E - SEALED)(MELSHEIMER, THOMAS) (Entered: 06/07/2019)
06/10/2019	443	ORDERED THAT PLAINTIFF AND DEFENDANT MAY FILE A BRIEF REPLY, NO LATER THAN 6/19/2019 TO UNITED STATES' MEMORANDUM IN SUPPORT OF ITS ASSERTION OF DELIBERATIVE PROCESS PRIVILEGE. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 6/10/2019. 6/10/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 06/10/2019)
06/14/2019	444	REPLY in Support re 439 MOTION to Dismiss *Relators Third Amended Complaint and Responses to the Courts Questions* filed by EXECUTIVE HEALTH RESOURCES INC. Certificate of Service. (RHODES,

DATE	NO.	PROCEEDINGS
		TRACY) Modified on 6/17/2019 (lisad,). (Entered: 06/14/2019)
06/17/2019	445	ORDER THAT THE UNITED STATES SHALL RESPOND TO THIS ORDER AS TO WHETHER ITS LIMITATION OF THE CLAIMS AS STATED ABOVE, PRECLUDES THE ADDITIONAL CLAIMS, AS STATED IN RELATOR'S BRIEF AS SUMMARIZED ABOVE. THE COURT REQUESTS THE UNITED STATES TO RESPOND, IF POSSIBLE, BY 6/21/2019 AT 4:00 P.M., ETC. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 6/17/19. 6/17/19 ENTERED AND COPIES MAILED AND E-MAILED.(kw,) (Entered: 06/17/2019)
06/18/2019	446	*Letter to The Hon. Michael M. Baylson* by JESSE POLANSKY, M.D., M.P.H. (MELSHEIMER, THOMAS) Modified on 6/19/2019 (lisad,). (Entered: 06/18/2019)
06/19/2019	447	NOTICE by JESSE POLANSKY, M.D., M.P.H. *re Letter on Second New Argument by*

DATE	NO.	PROCEEDINGS
		EHR (WALKER, CHAD) (Entered: 06/19/2019)
06/19/2019	448	LETTER TO COUNSEL FROM MICHAEL M. BAYLSON UNITED STATES DISTRICT COURT JUDGE, DATED 6/18/2019 RE: ANSWER TO QUESTIONS. (sg,) (Entered: 06/19/2019)
06/19/2019	449	LETTER TO COUNSEL FROM MICHAEL M. BAYLSON UNITED STATES DISTRICT COURT JUDGE, DATED 6/19/2019 RE: SUBSTITUTING QUESTION SIX. (sg,) (sg,) (Entered: 06/19/2019)
06/19/2019	450	MOTION to Compel *(Defendant's Reply to the Government and Motion to Compel and to Enforce Compliance with the Governments Discovery Obligations)* filed by EXECUTIVE HEALTH RESOURCES INC..Certificate of Service.(RHODES, TRACY) (Entered: 06/19/2019)
06/19/2019	451	Response re 440 Memorandum by JESSE POLANSKY, M.D., M.P.H. Certificate of Service. (MELSHEIMER, THOMAS)

DATE	NO.	PROCEEDINGS
		Modified on 6/20/2019 (lisad,). (Entered: 06/19/2019)
06/20/2019	452	DEFENDANT'S REPLY TO THE GOVERNMENT'S DELIBERATIVE PROCESS PRIVILEGE PAPERS AND MEMORANDUM IN SUPPORT OF MOTION TO COMPEL THE GOVERNMENT TO PRODUCE WITHHELD DOCUMENTS AND TO ENFORCE COMPLIANCE WITH THE GOVERNMENT'S DISCOVERY OBLIGATIONS, filed by EXECUTIVE HEALTH RESOURCES INC. EXHIBITS. (FILED UNDER SEAL.)(sg,) (Additional attachment(s) added on 6/20/2019: # 1 Sealed Document, # 2 Sealed Document, # 3 Sealed Document, # 4 Sealed Document, # 5 Sealed Document, # 6 Sealed Document, # 7 Sealed Document, # 8 Sealed Document, # 9 Sealed Document, # 10 Sealed Document) (lisad,). Modified on 6/20/2019 (lisad,). (Entered: 06/20/2019)
06/20/2019	453	LETTER TO COUNSEL FROM MICHAEL M. BAYLSON UNITED STATES DISTRICT COURT JUDGE, DATED

DATE	NO.	PROCEEDINGS
		6/20/2019 RE: SUPREME COURT DECISION. (sg,) (Entered: 06/20/2019)
06/21/2019	454	Response *to the Court's June 17, 2019 Order for the United States to Further Explain Its Response* by UNITED STATES OF AMERICA. (GILL, ERIC) (Entered: 06/21/2019)
		* * * * *
06/27/2019	459	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 6/26/2019. 6/27/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 06/27/2019)
06/27/2019	460	ORDERED THAT DEFENDANT'S MOTION TO DISMISS THE THIRD AMENDED COMPLANT IS DENIED. DEFENDANT SHALL ANSWER THE THIRD AMENDED COMPLAINT WITHIN 21 DAYS. A PARTY MAY FILE A MOTION FOR SUMMARY JUDGMENT CONCERNING THE PHASE I CLAIMS, NO LATER THAN

DATE	NO.	PROCEEDINGS
		8/30/2019. ETC.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 6/26/2019. 6/27/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 06/27/2019)
		* * * * *
07/02/2019	462	RESPONSE to Motion re 450 MOTION to Compel *(Defendant's Reply to the Government and Motion to Compel and to Enforce Compliance with the Governments Discovery Obligations)* filed by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit 1)(PARKER, VIVECA) (Entered: 07/02/2019)
07/03/2019	463	RESPONSE in Opposition re 450 MOTION to Compel *(Defendant's Reply to the Government and Motion to Compel and to Enforce Compliance with the Governments Discovery Obligations) RELATORS RESPONSE IN PARTIAL OPPOSITION TO EHRS MOTION TO COMPEL THE GOVERNMENT TO PRODUCE WITHHELD DOCUMENTS AND TO*

DATE	NO.	PROCEEDINGS
		ENFORCE COMPLIANCE WITH THE GOVERNMENTS DISCOVERY OBLIGATIONS filed by JESSE POLANSKY, M.D., M.P.H.. (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order)(MELSHEIMER, THOMAS) (Entered: 07/03/2019)
07/03/2019	464	RELATOR'S RESPONSE IN PARTIAL OPPOSITION TO EHR'S MOTION TO COMPEL THE GOVERNMENT TO PRODUCE WITHHELD DOCUMENTS AND TO ENFORCE COMPLIANCE WITH THE GOVERNMENT'S DISCOVERY OBLIGATIONS, filed by JESSE POLANSKY, M.D., M.P.H.. CERTIFICATE OF SERVICE, PROPOSED ORDER, EXHIBITS. (FILED UNDER SEAL). (sg,) Modified on 7/3/2019 (fb). (Entered: 07/03/2019)
		* * * * *
07/12/2019	466	DEFENDANTS REPLY TO THE GOVERNMENTS OPPOSITION AND POLANSKYS PARTIAL OPPOSITION TO DEFENDANTS MOTION TO

DATE	NO.	PROCEEDINGS
		COMPEL by EXECUTIVE HEALTH RESOURCES INC.. (RHODES, TRACY) (Entered: 07/12/2019)
07/15/2019	467	DEFENDANT'S REPLY TO THE GOVERNMENT'S OPPOSITION AND POLANSKY'S PARTIAL OPPOSITION TO DEFENDANT'S MOTION TO COMPEL, filed by EXECUTIVE HEALTH RESOURCES INC. Certificate of Service. (FILED UNDER SEAL.) (sg,) (Additional attachment(s) added on 7/15/2019: # 1 Sealed Document, # 2 Sealed Document) (lisad,). Modified on 7/15/2019 (lisad,). (Entered: 07/15/2019)
		* * * * *
07/17/2019	470	Answer To Third Amended Complaint by EXECUTIVE HEALTH RESOURCES INC.. (RHODES, TRACY) (Entered: 07/17/2019)
07/18/2019	471	ANSWER TO THIRD AMENDED COMPLAINT, by EXECUTIVE HEALTH RESOURCES INC. Certificate of Service. (FILED UNDER SEAL.)(sg,) (lisad,). Modified on

DATE	NO.	PROCEEDINGS
		7/18/2019 (lisad,). (Entered: 07/18/2019)
		* * * * *
07/22/2019	473	ORDERED THAT RELATOR'S MOTION TO AMEND/CORRECT HIS MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT (DOC. 428), RELATOR'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT (DOC. 429), AND RELATOR'S MOTION FOR LEAVE TO FILE A REPLY TO EHR'S RESPONSE TO REALTOR'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT (DOC. 432) ARE DENIED AS MOOT. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 7/19/2019.7/22/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 07/22/2019)
		* * * * *
08/08/2019	510	REPORT AND RECOMMENDATIONS OF SPECIAL MASTER, THE GOVERMENT BE ORDERED

DATE	NO.	PROCEEDINGS
		TO PRODUCE ALL DOCUMENTS WITHHELD ON THE BASIS OF THE DELIBERATE PROCESS PRIVILEGE THAT ARE DATED 2015 OR EARLIER FOR WHICH THERE HAS BEEN NO ASSERTION OF ATTORNEY CLIENT OR WORK PRODUCT PRIVILEGES. SUCH DOCUMENTS SHOULD BE PRODUCED AS "CONFIDENTIAL DISCVOERY MATERIAL" UNDER THE TERMS OF THE PROTECTIVE ORDER IN THIS CASE. EHR'S REQUEST THAT THE GOVERNMENT PRODUCE DOCUMENTS RESPONSIVE TO EHR'S 12/22/2017 DOCUMENT REQUESTS EVEN IF THE DOCUMENTS DO NOT EXPRESSLY REFER TO EHR OR POLANSKY IS DENIED. THE GOVERNMENT BE ORDERED TO SEACH FOR AND PRODUCE RESPONSIVE DOCUMENTS FROM THE FILES OF CONNIE LEONARD, WILLIAM GOULD, AND LATESHA WALKER BASED ON THE SAME SEARCH

DATE	NO.	PROCEEDINGS
		TERMS USED FOR THE PREVIOUSLY SEARCHED COUSTODIANS. THE GOVERMENT BE ORDERED TO PRODUCE THE PREVIOUSLY PREPARED HARD COPY DOCUMENTS AND APPROXIMATELY 228 MEGA BYTES OF ELECTRONIC DATA PREPARED BY CMS. EHR'S REQUEST FOR DISCOVERY FROM DOJ BE DENIED.(sg,) (Main Document 510 replaced on 8/8/2019) (sg,). (Entered: 08/08/2019)
		* * * * *
08/15/2019	516	Objections by UNITED STATES OF AMERICA *to the August 8, 2019 Report and Recommendations of the Special Master*. (PARKER, VIVECA) (Entered: 08/15/2019)
		* * * * *
08/16/2019	519	Opposition re 516 Objections by EXECUTIVE HEALTH RESOURCES INC. Certificate of Service. (Attachments: # 1 Text of Proposed Order) (RHODES,

DATE	NO.	PROCEEDINGS
		TRACY) Modified on 8/16/2019 (lisad,). (Entered: 08/16/2019)
08/16/2019	520	ORDERED THAT THE GOVERNMENT'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER ARE OVERRULED AS TO THE PHASE 1 DOCUEMNTS. AS TO THE OBJECTIONS PERTAINING TO DEPOSITIONS, COUNSEL FOR THE GOVERNMENT AND THE PARTIES SHALL DISCUSS THE ISSUE. AS TO THE OBJECTION TO DOCUMENTS AFTER THE "TWO MIDNIGHT RULE" BECAME EFFECTIVE, EHR SHALL FILE A BRIEF, LIMITED TO TEN PAGES, BY 8/21/2019, EXPLAINING THE RELEVANCY. RELATOR MAY FILE A REPLY BY 8/28/2019 ALSO LIMITED TO TEN PAGES. SIGNED BY JOSHUA D. WOLSON FOR MICHAEL M. BAYLSON ON 8/15/2019. 8/16/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 08/16/2019)

DATE	NO.	PROCEEDINGS
		* * * * *
08/20/2019	526	MOTION to Dismiss *Relator's Third Amended Complaint* filed by UNITED STATES OF AMERICA.Memorandum of Law, Certificate of Service. (Attachments: # 1 Exhibit A)(PARKER, VIVECA) (Entered: 08/20/2019)
		* * * * *
08/22/2019	529	ORDER THAT PLAINTIFF/RELATOR SHALL RESPOND TO THE MOTION TO DISMISS THE THIRD AMENDED COMPLAINT BY 9/6/19. ANY OBJECTIONS TO THE REPORT AND RECOMMENDATION SHALL BE STAYED PENDING RESOLUTION OF THIS MOTION OR FURTHER ORDER OF THE COURT. ALL DISCOVERY AND DATES FOR FILING DISPOSITIVE MOTIONS NAD OTHER EVENTS SHALL BE STAYED PENDING THE RESOLUTION OF THIS MOTION OR FURTHER ORDER OF THE COURT. ORAL ARGUMENT IS SCHEDULED FOR 9/25/19 AT

DATE	NO.	PROCEEDINGS
		10:00 A.M. IN COURTROOM 3A. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 8/22/19. 8/22/19 ENTERED AND COPIES MAILED AND E-MAILED.(lisad,) (Entered: 08/22/2019)
		* * * * *
09/06/2019	533	RESPONSE in Opposition re 526 MOTION to Dismiss *Relator's Third Amended Complaint RELATOR'S OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS RELATOR'S THIRD AMENDED COMPLAINT* filed by JESSE POLANSKY, M.D., M.P.H.. (Attachments: # 1 Declaration Shackelford, # 2 Declaration Walker, # 3 Exhibit 1, # 4 Exhibit 8, # 5 Exhibit 9, # 6 Exhibit 10, # 7 Exhibit 11, # 8 Exhibit 12, # 9 Exhibit 13, # 10 Exhibit 14, # 11 Exhibit 15, # 12 Exhibit 16, # 13 Exhibit 17, # 14 Exhibit 18, # 15 Exhibit 19, # 16 Exhibit 20, # 17 Exhibit 21, # 18 Exhibit 22, # 19 Exhibit 23, # 20 Exhibit 24, # 21 Exhibit 25, # 22 Exhibit 26, # 23 Exhibit 27, # 24 Exhibit 28, # 25 Exhibit 29, # 26 Exhibit 30,

DATE	NO.	PROCEEDINGS
		# 27 Exhibit 31, # 28 Exhibit 32, # 29 Exhibit 33, # 30 Exhibit 34, # 31 Exhibit 35, # 32 Exhibit 36, # 33 Exhibit 37, # 34 Exhibit 38, # 35 Exhibit 39, # 36 Exhibit 40, # 37 Exhibit 41, # 38 Exhibit 42, # 39 Exhibit 43, # 40 Exhibit 44, # 41 Exhibit 45, # 42 Exhibit 46, # 43 Exhibit 47, # 44 Exhibit 48, # 45 Exhibit 49, # 46 Exhibit 50, # 47 Exhibit 51, # 48 Exhibit 52, # 49 Text of Proposed Order)(MELSHEIMER, THOMAS) (Entered: 09/06/2019)
09/09/2019	534	RELATOR'S OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS RELATOR'S THIRD AMENDED COMPLAINT, filed by JESSE POLANSKY, M.D., M.P.H.. (FILED UNDER SEAL.) (sg,) (Additional attachment(s) added on 9/10/2019: # 1 Sealed Document, # 2 Sealed Document, # 3 Sealed Document, # 4 Sealed Document, # 5 Sealed Document, # 6 Sealed Document, # 7 Sealed Document, # 8 Sealed Document, # 9 Sealed Document, # 10 Sealed Document, # 11 Sealed Document, # 12 Sealed Document,

DATE	NO.	PROCEEDINGS
		# 13 Sealed Document, # 14 Sealed Document, # 15 Sealed Document, # 16 Sealed Document, # 17 Sealed Document, # 18 Sealed Document, # 19 Sealed Document, # 20 Sealed Document, # 21 Sealed Document, # 22 Sealed Document, # 23 Sealed Document, # 24 Sealed Document, # 25 Sealed Document, # 26 Sealed Document, # 27 Sealed Document, # 28 Sealed Document, # 29 Sealed Document, # 30 Sealed Document, # 31 Sealed Document, # 32 Sealed Document, # 33 Sealed Document, # 34 Sealed Document, # 35 Sealed Document, # 36 Sealed Document, # 37 Sealed Document, # 38 Sealed Document, # 39 Sealed Document, # 40 Sealed Document, # 41 Sealed Document, # 42 Sealed Document, # 43 Sealed Document, # 44 Sealed Document,

DATE	NO.	PROCEEDINGS
		# 45 Sealed Document, # 46 Sealed Document, # 47 Sealed Document, # 48 Sealed Document) (lisad,). (Entered: 09/09/2019)
		* * * * *
09/13/2019	539	Memorandum IN SUPPORT OF THE GOVERNMENTS MOTION TO DISMISS re 526 MOTION to Dismiss *Relator's Third Amended Complaint* filed by EXECUTIVE HEALTH RESOURCES INC.. (RHODES, TRACY) (Entered: 09/13/2019)
09/16/2019	540	DEFENDANT EHR'S MEMORANDUM IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS, filed by EXECUTIVE HEALTH RESOURCES INC.. (FILED UNDER SEAL.) (sg,) (Additional attachment(s) added on 9/16/2019: # 1 Sealed Document, # 2 Sealed Document) (lisad,). (Entered: 09/16/2019)
		* * * * *
09/17/2019	543	REPLY Memorandum of Law in Support re 526 MOTION to Dismiss *Relator's Third Amended Complaint (Memorandum of*

DATE	NO.	PROCEEDINGS
		Law) filed by UNITED STATES OF AMERICA. Certificate of Service. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(PARKER, VIVECA) Modified on 9/18/2019 (lisad,). (Entered: 09/17/2019)
09/19/2019	544	ORDERED THAT PRIOR TO THE HEARING ON 9/25/2019, DEFENDANT MAY FILE A MOTION FOR PARTIAL SUMMARY JUDGMENT. IN THE EVENT DEFENDANT DOES NOT FILE SUCHA MOTION, THE COURT WILL SET A SCHEDULE FOR ADDITIONAL BRIEFS AT THE HEARING ON 9/25/2019. ETC.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 9/18/2019. 9/19/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 09/19/2019)
		* * * * *
09/26/2019	549	Minute Entry for proceedings held before HONORABLE MICHAEL M. BAYLSON Motion Hearing held on 9/25/19 re 526 MOTION to Dismiss *Relator's Third Amended Complaint* filed by UNITED

DATE	NO.	PROCEEDINGS
		STATES OF AMERICA Court Reporter: ESR. (jl,) (Entered: 09/26/2019)
09/26/2019	550	ORDER THAT COUNSEL FOR PLAINTIFF/RELATOR AND DEFENDANT SHALL SUBMIT BRIEFS LIMITED TO HOW THE CLAIMS BY PLAINTIFF/RELATOR IN THIS CASE MAY BE AFFECTED BY THESE DECISIONS. THE COURT WILL CONSIDER THE MATERIAL FACTS AS STATED IN PLAINTIFF'S THIRD AMENDED COMPLAINT CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF. PLAINTIFF/RELATOR AND DEFENDANT SHALL SUBMIT A BRIEF LIMITED TO THESE ISSUES, LIMITED TO 20 PAGES, DOUBLE SPACED, BY 4:00 P.M. ON 10/11/19; ETC.. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 9/26/19. 9/26/19 ENTERED AND E-MAILED, MAILED.(jl,) (Entered: 09/26/2019)

* * * * *

DATE	NO.	PROCEEDINGS
10/11/2019	554	Memorandum in Support re 526 MOTION to Dismiss *Relator's Third Amended Complaint (Supplemental)* filed by UNITED STATES OF AMERICA. (PARKER, VIVECA) (Entered: 10/11/2019)
10/11/2019	555	*RELATOR'S BRIEF IN RESPONSE TO THE COURT'S SEPTEMBER 26, 2019 ORDER ANNOUNCING ITS CONSIDERATION OF JUDGMENT INDEPENDENT OF THE MOTION PURSUANT TO FED. R. CIV. P. 56(f)* filed by JESSE POLANSKY, M.D., M.P.H..Brief, Declaration, Certificate of Service. (Attachments: # 1 Declaration of Chad Walker, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E)(MELSHEIMER, THOMAS) Modified on 10/15/2019 (lisad,). (Entered: 10/11/2019)
10/11/2019	556	*(Defendants Brief in Support of Summary Judgment Pursuant to the Courts September 26, 2019 Order)* by EXECUTIVE HEALTH RESOURCES INC.. (RHODES, TRACY) Modified on 10/15/2019 (lisad,). (Entered: 10/11/2019)

DATE	NO.	PROCEEDINGS
		* * * * *
10/15/2019	559	DEFENDANT EHR'S BRIEF IN SUPPORT OF SUMMARY JUDGMENT PURSUANT TO THE COURT'S 9/26/2019, filed by EXECUTIVE HEALTH RESOURCES INC. CERTIFICATE OF SERVICE. (FILED UNDER SEAL.) (sg,) (lisad,). Modified on 10/15/2019 (lisad,). (Entered: 10/15/2019)
10/15/2019	560	RELATOR'S BRIEF IN RESPONSE TO THE COURT'S 9/26/2019 ORDER ANNOUNCING ITS CONSIDERATION OF JUDGMENT INDEMPENDENT OF THE MOTION PURSUANT TO F.R.C.P. 56(f), by JESSE POLANSKY, M.D., M.P.H. CERTIFICATE OF SERVICE. (FILED UNDER SEAL.) (sg,) (lisad,). Modified on 10/15/2019 (lisad,). (Entered: 10/15/2019)
11/06/2019	561	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 11/5/2019. 11/6/2019 ENTERED AND COPIES MAILED AND E-

DATE	NO.	PROCEEDINGS
		MAILED.(sg,) (Entered: 11/06/2019)
11/06/2019	562	ORDERED THAT PLAINTIFF'S THIRD AMENDED COMPLAINT IS DISMISSED WITH PREJUDICE. SIGNED BY HONORABLE MICHAEL M. BAYLSON ON 11/5/2019. 11/6/2019 ENTERED AND COPIES MAILED AND E-MAILED.(sg,) (Entered: 11/06/2019)
12/04/2019	563	NOTICE OF APPEAL re 561 Memorandum/Opinion, 562 Memorandum/Opinion Order by JESSE POLANSKY, M.D., M.P.H.. Filing fee $ 505, receipt number 0313-13965155. Copies to Judge, Clerk USCA, Appeals . Certificate of Service. (MELSHEIMER, THOMAS) Modified on 12/5/2019 (lisad,). (Entered: 12/04/2019)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 12-CV-4239

THE UNITED STATES OF AMERICA, *EX REL.*
JESSE POLANSKY, M.D., M.P.H.,
Plaintiffs

v.

EXECUTIVE HEALTH RESOURCES, INC.,
Defendant

Filed: August 20, 2019

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS RELATOR'S THIRD AMENDED COMPLAINT

The United States moves to dismiss this action brought under the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729–3733. The FCA authorizes a private party, known as a "relator," to file suit on behalf of the United States to recover damages suffered solely by the United States Government as a result of fraud or false claims submitted. 31 U.S.C. § 3730(b)(1). Because of the unique nature of the FCA, Congress included several protections in the statute to ensure that the United States retains substantial control over *qui tam* lawsuits filed on its behalf. Among these protections is the right of the United

States to "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). Courts have recognized that this provision confers broad discretion on the United States to dismiss claims that it determines are detrimental to the public interest. *See Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003); *see also United States ex rel. Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 935–36 (10th Cir. 2005); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145–46 (9th Cir. 1998).

As explained further below, while all of the appellate courts to address the issue have concluded that the standard for dismissal is highly deferential, these courts have posited two different standards for dismissal. The D.C. Circuit has held that the United States has an unfettered right to dismiss a relator's *qui tam* complaint, *Swift*, 318 F.3d at 252-53, while the Ninth and Tenth Circuits have held that the government must identify a valid government purpose for dismissal and a rational relationship between dismissal and accomplishment of that purpose. *Ridenour*, 397 F.3d at 935–36; *Sequoia Orange*, 151 F.3d at 1145-46. The United States submits that the D.C. Circuit's holding in *Swift* is the correct interpretation of the FCA, and best comports with the United States Constitution and separation of power principles. The Court, however, need not choose between these standards because both are readily satisfied here.

While the United States does not take lightly the exercise of its inherent dismissal authority under § 3730(c)(2)(A), here the United States has determined

that dismissal of this *qui tam* suit furthers the valid government purpose of conserving federal resources by avoiding further litigation costs and preserving government privileges. Following considerable investigation and evaluation, the United States previously determined not to intervene in this action. And as the United States has previously informed the Court and the parties, it has continued to evaluate the matter and to consider whether dismissal is appropriate based on developments in the case, "including arguments raised by the parties, further factual and evidentiary developments, and associated discovery burdens." Dkt. No. 454 at 4. In light of additional developments, the United States has now determined that dismissal of this matter is warranted. As discussed in more detail below, the United States' decision is based on its overall evaluation of the matter and in light of recent discovery orders that impose an additional burden on the United States requiring the production of sensitive and privileged government material, as well as relator's actions (including those for which the Court imposed sanctions) that may curtail his ability to prove certain aspects of the case and that could require the commitment of additional government resources. The United States thus has determined that the potential benefits of permitting relator's case to proceed are outweighed by both the actual and potential costs to the United States and therefore that dismissal of this matter is appropriate. As further demonstrated below, the United States' considerations are rationally related to dismissal of this matter and thus, under either standard of dismissal, the motion to dismiss should be granted.

BACKGROUND

Relator filed this action pursuant to the *qui tam* provisions of the FCA on July 26, 2012, alleging, *inter alia*, that

defendant Executive Health Resources (EHR) is perpetrating a fraudulent scheme to generate higher Medicare and Medicaid reimbursements for its client hospitals by advising hospitals to admit patients as "inpatients," and to bill Medicare or Medicaid accordingly, when outpatient observation care would have been more appropriate and less costly.

After an exhaustive investigation, the United States declined to intervene in the action on June 27, 2014. Following the declination, relator, pursuant to 31 U.S.C. § 3730(c)(3), elected to pursue the claims in this matter. The parties then litigated motions to dismiss, which the Court granted in part and denied in part. Dkt. Nos. 94, 228. The parties subsequently filed motions regarding the appropriate scope of the litigation and discovery, including the appropriateness of statistical sampling and the extent of discovery from the government regarding the government's knowledge of the alleged conduct in light of the Supreme Court's ruling in *Universal Health Services, Inc. v. Escobar*, 136 S. Ct. 1989 (2016). Dkt. No. 140. The Court deferred ruling on the appropriateness of statistical sampling and instead ordered a bellwether trial on a sample of 440 claims. Dkt. No. 240. The claims subject to the bellwether trial cover the time period between 2009 and 2012, prior to the implementation of the "Two-Midnight Rule" on October 1, 2013, which clarified the standard governing inpatient admissions. *See* 42 C.F.R. § 412.3. The Court indicated that initial discovery in the case would focus on the time period preceding the Two-Midnight Rule. Dkt. No. 228 n. 1.

Subsequently, between December 2017 and September 2018, EHR issued a series of subpoenas and corresponding *Touhy* requests[1] for documents and deposition testimony to several federal agencies: the Department of Health & Human Services (HHS) Office of Inspector General (HHS-OIG); the HHS Centers for Medicare and Medicaid Services (CMS); the Department of Justice (DOJ); and the U.S. Attorney's Office for the Eastern District of Pennsylvania (USAO-EDPA). The requests sought, among other information, the government's internal communications and investigative files prior to declination, tens of thousands of potentially responsive documents from CMS – many of which include sensitive and deliberative information – and testimony from current and former government employees. CMS, the only agency component that makes Medicare payment determinations, produced responsive documents and withheld certain documents as privileged, while the other agencies objected on the basis of privilege and other grounds. *See* Attachments to the United States' Opposition to EHR's Motion to Compel the United States to Respond to Requests for Production and For Depositions. Dkt. No. 302.

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[1] In *Touhy v. Ragan*, 340 U.S. 462 (1951), the Supreme Court upheld federal agencies' authority in 5 U.S.C. § 301 to promulgate regulations governing "the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers and property." These regulations include the methods by which non-party federal agencies will comply with or oppose subpoenas for documents or testimony issued under Rule 45, commonly referred to as "*Touhy* requests." *See Davis Enter. v. EPA*, 877 F.2d 1181, 1186 (3d Cir. 1989) (private litigants seeking documents from government agencies when the United States is not a party must comply with each agency's *Touhy* regulations). The *Touhy* regulations at issue here are 45 C.F.R. §§ 2.1 *et seq*. (HHS) and 28 C.F.R. §§16.21-16.29 (DOJ).

Following the government's objections and production, EHR filed a motion to compel. The government – a third-party for discovery purposes, *see United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009) – opposed the motion, arguing, *inter alia*, that (1) the agencies' *Touhy* decisions, reviewable under the standards of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06, were neither arbitrary nor capricious; (2) EHR failed to comply with the proportionality limitations and protections afforded non-parties under Rule 45; (3) EHR's request sought privileged information; and (4) CMS – the government agency that makes payment decisions at issue in the case – appropriately produced material and otherwise responded to the requests, consistent with the applicable *Touhy* regulations. The Court ultimately allowed EHR to obtain additional discovery from CMS, including depositions of current and former CMS officials, while deferring a decision on EHR's remaining requests to other government entities. Dkt. No. 325.

Additionally, in December 2018, the United States learned that relator had retained approximately 14,000 CMS documents on a DVD following his separation from CMS. EHR filed a motion to compel production of these documents. Dkt. No. 322. During a telephonic hearing on December 21, 2018, the United States requested the opportunity to review the 14,000 CMS documents and assert any applicable privilege or protection prior to relator producing them to EHR. The Court granted EHR's motion to compel over the government's objection and ordered relator to immediately produce the documents to EHR, subject to a clawback agreement between the government

and EHR.[2] Dkt. 337. In the interim, however, EHR identified a limited number of documents from the 14,000 CMS documents that EHR intended to use at a January 15, 2019 evidentiary hearing regarding relator's discovery conduct. After reviewing these documents, the United States notified EHR that several documents contained information that was protected by the deliberative process privilege. EHR contested the government's claim of privilege during the January 15, 2019 evidentiary hearing, and the Court subsequently issued an order finding that the documents were no longer privileged because the documents were at least eight years old. Dkt. No. 354.[3]

Following relator's testimony at a hearing on January 15, 2019, about the circumstances and legality of his retention of the 14,000 CMS documents, including when he informed EHR and the government about the existence of these documents, EHR, on January 28, 2019, filed a motion for sanctions against relator regarding the relator's belated production of these CMS documents. Dkt. No. 373. Another evidentiary hearing was held on February 13, 2019, after the Court directed Jessica Bowman, an attorney with the HHS Office of the General Counsel (HHS-OGC) to testify. Ms. Bowman appeared in person to testify in Court about the declaration she submitted on January 11, 2019. Ms. Bowman testified about her recollection of the events relating to when relator informed the

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[2] EHR and the United States executed a claw back agreement limited only to the documents relating to the DVD on March 7, 2019.

[3] As explained in the Government's Memorandum in Support of its Assertion of the Deliberative Process Privilege for Certain Documents (hereinafter "Gov't Memorandum") and the reply memorandum (Dkts. No. 440-41 & 462), the United States respectfully disagrees with the Court's reasoning and decision.

government and EHR about the existence of the DVD with the 14,000 CMS documents.

During a hearing on February 19, 2019, the Court addressed defendant's motion for sanctions regarding relator's late disclosure of the DVD documents and noted:

> I don't see a need, for purposes of this case at this point, to make a finding as to whether what [relator] did was proper or improper. I will say that I don't find his recollection or as [sic] explanations credible. But I'm not prepared to find that he's committed perjury or lying about it.

Transcript, Feb. 19, 2019 hearing, at 5, Dkt. No. 404. The Court imposed sanctions against relator for EHR's attorney fees and costs relating to the late production of the DVD documents. During the February 19, 2019 hearing, the Court questioned the government about its review of the DVD documents and again expressed skepticism concerning the applicability of the deliberative process privilege to the documents based on their age. Dkt. No. 404, p. 13. Prior to issuing a stay of proceedings in this case, the Court gave the government until March 8, 2019, to brief its claim of deliberative process privilege over any documents. Dkt. No. 400.

On February 21, 2019, the United States notified the parties by email of its intention to file a motion to dismiss pursuant to 31 U.S.C. § 3730(c)(2)(A), but stated that it was willing to consider any additional information the parties wished to share bearing on that decision. EHR then filed a motion to stay further proceedings of this case, which the Court granted on February 27, 2019. Dkt. No. 409.

Over roughly the next month, the government received multiple written submissions and oral presentations from

both parties pertaining to the bellwether claims. While the United States ultimately disagreed with many of the arguments articulated by both parties in these various submissions, the government engaged in a lengthy evaluation of the information provided by the parties to ensure that its evaluation whether to dismiss this case would be fully informed.

On April 5, 2019, the day the Court had requested that the United States advise the Court if it intended to file a motion to dismiss, relator informed both the government and the Court that he intended to dismiss part of his case. He subsequently notified the Court that he intended to pursue only the following claims:

> For all EHR inpatient certifications between January 1, 2009 and October 1, 2013, Relator will seek to prove liability and recover damages and penalties against EHR only for certifications that meet all of the following criteria:
>
> (i) For beneficiaries whose length of stay after the inpatient admission was one (1) day or less;
>
> (ii) The medical record does not demonstrate that there was a reasonable basis at the time of the inpatient order for the treating physician to expect a medically necessary hospital stay of 24 hours or longer.

Dkt. No. 428.

During a conference call on April 25, 2019, the government informed relator, EHR, and the Court that it would not at that time exercise its Section 3730(c)(2)(A) dismissal authority over the narrowed case that relator had proposed, but that it reserved the right to seek dismissal at a

later date depending on the course of the ongoing proceedings. The Court subsequently lifted the stay on discovery and, on May 10, 2019, instructed the United States to complete its production of outstanding CMS documents and file a brief relating to any CMS document withheld based on the assertion of the deliberative process privilege by June 3, 2019. Dkt. No. 433.

The government complied with the Court's directive. As of June 3, 2019, CMS, in total, produced over 42,000 pages of documents and submitted a memorandum and CMS declaration supporting the withholding of certain documents pursuant to the deliberative process privilege. Dkt. 440. EHR opposed the government's assertion of the deliberative process privilege and also filed a motion seeking to compel further discovery from the government, specifically: (1) non-privileged documents from CMS hitting on search terms proposed by EHR, from the files of additional custodians selected by EHR; (2) documents related to a settlement agreement concerning relator's prior employment with CMS; and (3) discovery from DOJ. Dkt. 450.

By Order dated June 26, 2019, the Court denied EHR's most recent motion to dismiss the relator's Third Amended Complaint. Dkt. No. 459. Noting concerns about certain actions by relator, however, the Court also ordered discovery relating to claims submitted after implementation of the Two-Midnight Rule to begin on an expedited basis. *Id.* Thereafter, on July 11, 2019, EHR submitted a letter to government counsel seeking extensive discovery regarding the Two-Midnight Rule from numerous CMS custodians and proposing numerous search terms to run for each custodian. Exhibit A. EHR and the government have exchanged correspondence regarding

the scope of this request, but have not reached agreement as of the date of this motion.

By its June 26, 2019 Order, the Court directed the Special Master to undertake consideration of the pending motions related to discovery from the government. Dkt. No. 459 at 6. Following a telephonic hearing on July 19, 2019, the Special Master issued a Report and Recommendation on August 8, 2019, recommending, *inter alia*, that the government be ordered to: (1) produce all documents withheld on the basis of the deliberative process privilege that are dated 2015 or earlier for which there has been no assertion of attorney client or work product privileges and that such documents should be produced as "Confidential Discovery Material" under the terms of the Protective Order in this case; (2) search for and produce responsive documents from the files of three additional CMS custodians based on the same search terms used for the previously searched custodians; and (3) produce information relating to relator's settlement agreement and prior employment with CMS, including approximately 228 megabytes of electronic data. Dkt. No. 510. The United States filed its objections to the Special Master's Report and Recommendation. On August 16, 2019, the Court issued an Order overruling the United States' objections relating to the United States' assertion of the deliberative process privilege pertaining to Phase I discovery (*i.e.*, claims subject to the bellwether trial), "which stops at approximately October 1, 2013," and directing the United States to begin producing these documents "forthwith on a rolling basis" subject to the Protective Order and not including any documents for which the government claims attorney client privilege. Dkt. No. 520. The Court's Order did not address the United States' objection to the search and production of documents for the three additional CMS custodians.

To date, the United States has had to devote considerable resources to this declined case. HHS-OGC has dedicated at least two attorneys, one almost full-time, and the Department of Justice has dedicated up to four attorneys to this case. In addition, the United States has incurred substantial costs responding to discovery requests in this matter.

ARGUMENT

A. The FCA Statutory Framework

The FCA enables the United States to recover monies lost due to the submission of false claims. *See* 31 U.S.C. § 3729. Among the unique features of the FCA is that it allows private parties, known as relators, to bring an action on behalf of the United States through the filing of a *qui tam* action. *See id.* § 3730(b).

Among other things, the FCA directs that the relator must file his or her complaint under seal and serve it, along with a written disclosure of evidence, on the United States. *See id.* §§ 3730(b)(1) and (2). The United States has 60 days (and any extensions granted by the district court) to investigate the allegations and elect whether or not to intervene in the litigation. *See id.* §§ 3730(b)(2) and (3). If the United States intervenes in the case, "the action shall be conducted by the [g]overnment," and the government assumes "the primary responsibility for prosecuting the action" and is not bound by an act of the relator. *Id.* at §§ 3730(b)(4)(A) and (c)(1). The relator remains a party to the suit, but the government may settle the case over his objection, *see id.* § 3730(c)(2)(B), or may seek to limit his participation in the litigation, *see id.* § 3730(c)(2)(C).

If the United States declines to intervene in the case, the relator has "the right to conduct the action." *See id.* § 3730(c)(3). However, that right is *not* absolute; rather, it

is circumscribed by a number of limitations designed to ensure that the United States retains control over the declined action. For example, the relator cannot dismiss the action without the written consent of the Attorney General. *See id.* § 3730(b)(1). The court may stay discovery in the *qui tam* action if it would interfere with the government's investigation or prosecution of another matter. *See id.* § 3730(c)(4). Moreover, even when the Attorney General initially declines to intervene in the suit, the district 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 Attorney General to dismiss a *qui tam* action over a 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.

Id. § 3730(c)(2)(A). The United States is authorized to dismiss even where, as here, it has opted not to intervene. *See Hoyte v. Am. Nat. Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008) (following *Swift* and noting "the usual deference we owe the Government's determination whether an action should proceed in the Government's name"); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n.10 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994), *citing Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992) (table).

B. <u>Standard of Review</u>

The United States possesses broad authority to dismiss a *qui tam* action under section 3730(c)(2)(A), and appellate courts have adopted two independent, highly deferential standards to guide the application of the government's dismissal authority. In *Swift*, 318 F.3d at 252, the District of Columbia Circuit interpreted the FCA to grant the United States "an unfettered right to dismiss" a *qui tam* action. The Ninth Circuit requires a "rational relationship" for dismissal, but recognizes in assessing that relationship that the United States has broad prosecutorial discretion to dismiss even meritorious *qui tam* cases if the reasons for dismissal are rationally related to a legitimate government interest. *See Sequoia Orange Co.*, 151 F.3d at 1145. Building on *Sequoia Orange*, the Tenth Circuit has recognized the deference due the government and has concluded that ". . .['] it is enough that there are plausible, or arguable, reasons supporting the agency decision [to move for dismissal].'" *Ridenour*, 397 F.3d at 937 (citing the district court decision in *Sequoia Orange*, 912 F. Supp. 1325, 1341 (E.D. Cal. 1995)).

The Third Circuit has yet to adopt a standard for dismissal under section 3730(c)(2)(A). However, in *United States ex rel. Surdovel v. Digirad Imaging Solutions,* No. 07–0458, 2013 WL 6178987, at *2 (E.D. Pa. Nov. 25, 2013) (Stengel, J.), before granting the government's motion to dismiss, the district court observed that both tests are "extremely deferential" to the United States. Most recently, on April 3, 2019, Judge Savage, applying the *Sequoia Orange* standard, granted the government's motion to dismiss a *qui tam* matter, *United States ex rel. SMSPF v. EMD Serono, Inc.,* 370 F.Supp.3d 483, 491 (E.D. Pa. 2019), holding that the government is "entitled to do a

cost/benefit analysis to decide whether to pursue a case, even a meritorious one."

As explained below, the more recent *Swift* standard better comports with the FCA's statutory text and framework, as well as the well-established deference due to the government's exercise of prosecutorial discretion. Under either standard, however, dismissal is warranted in this case.

C. The Court Should Recognize the Government's Unfettered Right to Dismiss a Declined *Qui Tam* Action

Consistent with *Swift*, this Court should find that the United States has an unfettered right to dismiss a *qui tam* suit and defer to the United States' decision to dismiss this action.

As the *Swift* court explained, the FCA operates against the backdrop of the general principle of separation of powers, in which the Executive Branch exercises control over whether to pursue litigation for the United States. *Swift*, 318 F.3d at 251-52. The court concluded that full deference to the Executive Branch is particularly appropriate, observing that "we cannot see how § 3730(c)(2)(A) gives the judiciary general oversight of the Executive's judgment in this regard," given that "'[t]he Government'—meaning the Executive Branch, not the Judicial—'may dismiss the action,' which at least suggests the absence ofjudicial constraint." 318 F.3d at 252. The *Swift* court further held that the government's decision not to prosecute a case that is brought in its name is "unreviewable," including decisions to dismiss under section 3730(c)(2)(A). *Id.*

As the D.C. Circuit concluded in *Swift*, imposing judicial review on the Executive's litigation determinations is

inconsistent with the general principle of separation of powers: "decisions not to prosecute, which is what the government's judgment in this case amounts to, are unreviewable." *Id.* Thus, the appellate court concluded, under § 3730(c)(2)(A), the Attorney General has an "unfettered right to dismiss an action." *Id.*; *see also id.* at 253 ("The decision whether to bring an action on behalf of the United States is therefore 'a decision generally committed to [the Government's] absolute discretion' for the reasons spelled out in *Heckler v. Chaney,* 470 U.S. [821,] 831 [1985]").

Swift also rejected the notion that a relator's right to a hearing, as provided in section 3730(c)(2)(A), was intended to confer authority on the court to review the government's reasons for dismissal. *Id.* at 253. It explained that nothing in the FCA "purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Id.; see also United States ex rel. Sibley v. Delta Reg. Med. Ctr.*, Civ. No. 4:17 cv-53-GHD-RP, Mem. Op. (N.D. Miss. Mar. 21, 2019), at 8-13 (agreeing with *Swift* rationale and citing *Riley v. St. Luke's Episcopal Hosp.*, 262 F.3d 749 (5th Cir. 2001) (*en banc*)) (attached hereto). Instead, *Swift* concluded that the function of a hearing, if requested by relator, "is simply to give the relator a formal opportunity to convince the government not to end the case." *Id.*

The *Swift* standard is also more consistent with the plain language of section 3730(c)(2)(A), which differs markedly from the provision in the statute authorizing the Attorney General to settle a *qui tam* case 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) (emphasis added). Significantly, section 3730(c)(2)(A) imposes no similar limitation on the Attorney General's authority to dismiss a *qui tam* case.

The Attorney General's broad dismissal authority in the statute also sharply contrasts with the ability of a relator to dismiss a *qui tam* case. The FCA specifically states that the relator has no such power unless "the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.* at § 3730(b)(1). No such restrictions appear in section 3730(c)(2)(A).

It is not surprising that Congress gave unfettered discretion to the Attorney General to determine whether a *qui tam* case should be prosecuted. A *qui tam* relator has been authorized by Congress to sue solely to seek recovery of injuries suffered by the United States, not by the relator. As the Supreme Court made clear in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), a relator has Article III standing because he or she can be regarded as having received a "partial assignment from Congress of the Government's damages." *Id.* at 773, 772-774. Specifically, a relator has standing "to assert the injury in fact suffered by the assignor [United States]." *Id.* Thus, a relator himself or herself has suffered no cognizable injury warranting the continuation of a suit opposed by the United States. *See id.* at 773. And, as observed in *Swift*, the United States' decision to dismiss the action terminates the assignment. 318 F.3d at 254, fn. *. Accordingly, relator's power to file suit comes from an assignment by the United States, and the United States has a right to withdraw that assignment at any time.

Here, the United States has determined that dismissal of this case is in the best interest of the United States. Thus, pursuant to *Swift*, the Court should enter the proposed Order of dismissal.

D. Dismissal is Also Warranted Under *Sequoia Orange's* Rational Relationship Test

While the United States submits that *Swift's* "unfettered discretion" standard reflects the appropriate construction of 3730(c)(2)(A), dismissal is also warranted under the rational relationship test articulated in *Sequoia Orange*. Under this standard, the United States need only (1) identify a "valid government purpose" for dismissing the case, and (2) show a "rational relation between dismissal and accomplishment of the purpose." *Sequoia Orange*, 151 F.3d at 1145 (quotations omitted). If the United States satisfies this two-step test, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.*

In developing this test, the Ninth Circuit observed that "the decision to dismiss has been likened to a matter within the government's prosecutorial discretion in enforcing federal laws," and the dismissal provision in the FCA should not be construed to grant the judiciary an impermissible power to approve or disapprove the Executive's exercise of prosecutorial discretion. *Id.* at 1143. Consequently, the Ninth Circuit reasoned that when a court considers a motion by the government to dismiss a *qui tam* case, it should "respect[] the Executive Branch's prosecutorial authority by requiring no greater justification of the dismissal motion than is mandated by the Constitution itself." *Id.* at 1146. As a result, even where the *Sequoia* standard is applied, courts are careful not to create barriers to the government's exercise of such discretion. Even under the *Sequoia* standard, the government

"need only show that its decision to dismiss the case is neither arbitrary nor irrational." *United States ex rel. Surdovel*, 2013 WL 6178987 at *2.

Numerous courts, including the Ninth Circuit in *Sequoia*, have acknowledged that litigation costs represent a valid government interest justifying dismissal. *See Sequoia Orange*, 151 F.3d at 1146 (approving of district court's consideration of "the burden imposed on the taxpayers by its litigation" and "internal staff costs" the government would incur with relator's litigation); *Swift*, 318 F.3d at 254 ("[T]he government's goal of minimizing its expenses is still a legitimate objective, and dismissal of the suit furthered that objective."); *United States ex rel. Borzilleri v. Abbvie, Inc.*, No. 15-CV-7881(JMF), 2019 WL 3203000 (S.D.N.Y. July 16, 2019) (government costs are a valid justification for dismissal even where the claims may have merit); *United States ex rel. Stovall v. Webster Univ.*, No. 3:15-CV-03530-DCC, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018) (granting the government's motion to dismiss because "dismissal will further its interest in preserving scarce resources by avoiding the time and expense necessary to monitor this action"); *see also United States ex rel. Levine v. Avnet, Inc.*, No. 2:14-cv-17, 2015 WL 1499519, at *5 (E.D. Ky. Apr. 1, 2015) (same); *United States ex rel. Nicholson v. Spigelman*, No. 10-cv-3361, 2011 WL 2683161, at *2 (N.D. Ill. July 8, 2011) (same).

In *United States ex rel. SMSPF*, in which the court applied the Ninth Circuit test, the court held that the government is "entitled to do a cost/benefit analysis to decide whether to pursue a case, even a meritorious one." 370 F.Supp.3d at 491. Specifically, in finding that the government had acted rationally in seeking dismissal, the court noted, "like any other plaintiff in a civil case, the government has the option to end litigation it determines is too

expensive or not beneficial. Preserving litigation costs is a valid interest even where the claims may have merit." *Id.* at 490. "Decisions concerning the allocation of resources to individual programs . . . and to particular aspects of those programs . . . involve a host of policy choices" not susceptible to resolution "by federal judges interpreting the basic charter of Government for the entire country." *Id.* at 128-29. As the Supreme Court has summarized, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (collecting cases). Such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," and require the agency to assess "whether agency resources are best spent on this violation or another . . . and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* (noting that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing").

The discovery demands in this case have imposed a tremendous, ongoing burden on the government. The government already had committed significant resources to this matter to address the numerous subpoenas and *Touhy* requests prior to the Court's ruling on EHR's first motion to compel in December 2018. The government opposed that motion, arguing that discovery against the government agencies in this declined *qui tam* matter should be limited. The Court disagreed and authorized further extensive document production and depositions of present and former CMS employees. Although the United States has produced the documents previously ordered by the

Court, the Special Master recommended that CMS perform additional searches of three more CMS custodians. The search, collection, review, and production of documents relating to these additional custodians would add to the ongoing burden on the government.[4]

Further, even though EHR has access to a vast amount of public information relating to the Two-Midnight Rule – a regulation that has gone through extensive notice and comment public rulemaking over several years – it has requested that CMS perform additional searches for numerous CMS custodians. In its August 16, 2019 Order, the Court requested that EHR file a brief explaining the relevancy of this discovery and provided relator with an opportunity to respond. Depending on the outcome of that briefing, it is entirely possible that the United States will be required to produce discovery of Two-Midnight claims. Given the procedural history of this case, it is also quite possible that the Two-Midnight Rule discovery may become the subject of further motions practice. At the time the United States previously refrained from seeking dismissal based on relator's decision to narrow his case, the United States anticipated that any discovery on Two-Midnight Rule claims would not begin, if at all, until *after* the bellwether trial. As the Court previously stated, the bellwether trial would "assist the parties in possible settlement, and probably . . . achieve jury verdicts which may have res judicata and/or collateral estoppel impact on additional, or possibly all other claims." Dkt. No. 228, n. 1. The United States also did not anticipate the scope of EHR's requested discovery on the pre-Two-Midnight claims.

[4] The August 16, 2019 Order does not address the three additional CMS custodians.

As a result of the discovery demands in this matter, as noted, the case has required almost full-time attention of one attorney in the HHS Office of the General Counsel (HHS-OGC), as well as frequent assistance from other HHS-OGC and HHS-OCIG attorneys and paralegal staff. This burden will only continue, as EHR and relator intend to depose multiple current and former CMS employees, taking CMS personnel away from other important job responsibilities to prepare for and attend the depositions.

The United States is also concerned that material it regards as privileged has been and will be produced and used in this case. While it is certainly the province of the Court to make decisions with respect to the government's claims of privilege over documents before it, it is and should be the United States' right to decide whether it wishes to allow those documents to be disclosed and whether the potential harm of any such disclosure outside the government outweighs any benefits. Some sensitive and deliberative material already was exposed because relator possessed a DVD containing CMS documents, and the Court ordered relator to produce the DVD to EHR. And now, the Court has ordered the United States to produce numerous additional documents that the United States asserts are privileged. While the recommendation allows production pursuant to the Protective Order in the case, the documents will still be produced outside of the agency and potentially used in this litigation.

Moreover, other actions by relator have caused additional burden on and concern for the government. For example, relator has indicated that he intends to re-address issues relating to his prior employment at CMS that were resolved through a previous settlement agreement if documents relating to that agreement are produced. The

Special Master has now recommended that these documents be produced and relator has not filed objections to this recommendation. Issues relating to this previous settlement agreement and prior employment also arose during relator's recent deposition on August 7 and 8, 2019. These issues will likely require the government to devote yet more resources to this matter and require certain CMS personnel to defend prior decisions and actions that they believed were resolved.

If this litigation were to go forward, the United States would also need to continue devoting considerable resources to monitoring the case to ensure that the United States' interests are protected and not harmed by the ongoing litigation. Two Civil Division attorneys and two Assistant U.S. Attorneys have been assigned to this matter, and all four have devoted a considerable amount of time to this case at the expense of other important matters.

For the reasons discussed above, courts have recognized that the types of costs the United States faces in this case justify dismissal under the rational basis test even if the relator's claims are assumed to have merit. This is because the government is entitled to prioritize how to allocate its scarce resources, and may rationally conclude that its resources can better be used for another purpose. *See Heckler*, 470 U.S. at 831. Nevertheless, and beyond these significant concerns, the United States also remains concerned about relator's ability to prove a FCA violation. For example, relator lacks medical records to determine whether all of the narrowed bellwether claims are false and the Court has now precluded further discovery of those records due to the lateness of relator's motion to compel those records. Relator has also failed to identify to the United States evidence that EHR caused the submission of false claims to CMS following implementation of

the Two-Midnight Rule. Finally, the United States is concerned about relator's credibility in light of relator's actions in this case.

Accordingly, for these various reasons, the United States has determined that the significant discovery and other costs the United States will incur if this case continues outweigh any benefits. The United States is entitled to engage in this type of cost/benefit analysis and to conclude in light of such an analysis, as it has, that dismissal of this case best serves the public interest.

CONCLUSION

For the reasons set forth above, this Court should dismiss all claims brought on behalf of the United States with prejudice as to relator and without prejudice as to the United States.

Respectfully submitted,

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Dated: August 20, 2019

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 12-CV-4239

THE UNITED STATES OF AMERICA, *EX REL.*
JESSE POLANSKY, M.D., M.P.H.,
Plaintiffs

v.

EXECUTIVE HEALTH RESOURCES, INC.,
Defendant

Filed: September 17, 2019

UNITED STATES' REPLY MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS RELATOR'S THIRD AMENDED COMPLAINT

After lengthy and careful consideration of this matter, the United States has determined that the actual and potential costs to the United States outweigh the potential benefits of permitting relator's case to proceed in the United States' name. The United States' decision to dismiss this *qui tam* case pursuant to 31 U.S.C. § 3120(c)(2)(A) is rationally related to its consideration of the claims in light of the valid government purpose of conserving federal resources by avoiding further litigation costs and preserving important government privileges. *See United States ex rel. Chang v. Children's Advocacy*

Ctr. of Delaware, 2019 WL 4309516, No. 18-2311, at *2 (3rd Cir. Sept. 12, 2019) ("The government has an interest in minimizing unnecessary or burdensome litigation costs.") (attached as Exhibit 1). Under the False Claims Act (FCA) and a substantial body of case law interpreting it, the United States is entitled to considerable deference to decide which claims should be prosecuted on its behalf. Courts have viewed this deference as either giving the government unfettered discretion to dismiss an action, *Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003), or allowing the government to dismiss if it articulates a rational basis for the decision, *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1144-46 (9th Cir. 1998) (noting that "the government's power to dismiss or settle an action is broad"). The United States has demonstrated that its motion meets both standards.

In response, relator largely ignores the plain language of section 3730(c)(2)(A) and the substantial body of case law reaffirming the highly deferential standard for reviewing the United States' decisions regarding which claims should be prosecuted on its behalf. None of relator's arguments in opposition undercuts the propriety of the United States' invocation of its statutory dismissal authority under either of the two standards articulated by courts of appeals. Relator claims that nothing has changed in this case since the government's previous decision not to seek dismissal, but this is simply not true. Relator also attempts to minimize the resource demands that this case already has imposed and will continue to impose on the government, but the history of this case plainly demonstrates the continuing burden on the government as well as the risks presented by potential adverse rulings should this case proceed. Lastly, as the

Court has now ruled, relator is not entitled to an evidentiary hearing and has not adequately demonstrated the need for one in any event.

ARGUMENT

A. **Dismissal is Appropriate Under Both Standards of Review**

A significant amount of the briefing has addressed whether the *Swift* standard or the *Sequoia Orange* standard is the correct one to apply. While the United States maintains that the *Swift* standard better comports with the FCA's statutory text and framework, this Court need not decide this question here as both standards are "extremely deferential to the government," *United States ex rel. Surdovel v. Digirad Imaging Solutions,* No. 07–0458, 2013 WL 6178987, at *2 (E.D. Pa. Nov. 25, 2013) (Stengel, J.), and the government satisfies both. *See Swift,* 318 F.3d at 253 (discussing the Executive's exercise of discretion in deciding which cases proceed in its name and stating that "courts presume the Executive is acting rationally and in good faith") (citations omitted); *Sequoia Orange*, 151 F.3d at 1143 (noting that "the decision to dismiss has been likened to a matter within the government's prosecutorial discretion in enforcing federal laws"). This approach would be consistent with that of the Third Circuit, which just last week in *Chang*, declined to choose between these two standards because it concluded that both were satisfied. 2019 WL 4309516, No. 18-2311, at *2 ("We need not take a side in this circuit split because [relator] fails even the more restrictive standard.").

Nevertheless, the United States addresses a few points raised by the relator in his opposition brief regarding the applicable standard of dismissal. In its motion, the United States explained the reasons why Congress, in the clear

statutory language of 31 U.S.C. § 3730(c)(2)(A), vested the government with complete discretion to dismiss a False Claims Act lawsuit. Gov't Mem.13-15 (discussing the *Swift* standard). In response (Opp. at 7-8), relator acknowledges that "this is at bottom a question of statutory construction," but gives short shrift to the clear and plain language in 31 U.S.C. § 3730(c)(2)(A), which mandates dismissal over relator's objections where relator has been notified of the dismissal (which occurred here) and the court has provided an opportunity for a hearing (which is scheduled for September 25, 2019). Without examining the actual statutory language in section 3730(c)(2)(A), relator questions if Congress meant to provide the government with broad discretion to dismiss this action under section 3730(c)(2)(A). Without any analysis, relator compares section 3730(c)(2)(A) to other sections of the False Claims Act that explicitly provide for judicial oversight and findings by the court. *See* 31 U.S.C. § 3730(c)(3) (government can intervene at later stage, following prior declination, "upon a showing of good cause") and § 3730(c)(2)(B) (government can settle case over relator's objection if the court determines "that the proposed settlement is fair, adequate, and reasonable under all the circumstances"). But this point cuts against the relator. As the United States previously explained, section 3730(c)(2)(A) includes *no* similar limitation or standard of review for the Attorney General's authority to dismiss a *qui tam* case. Consistent with general principles of statutory construction, Congress's omission of a standard of review or required showing in section 3730(c)(2)(A), while including such standards in the other subsections of 3730(c), suggests that Congress did *not* intend to limit the government's discretion to dismiss an action brought in the United States' name for injuries allegedly suffered by the government (and not by relator, who has no personal

claim at stake and suffered no injury). The plain language of section 3730(c)(2)(A) demonstrates that Congress contemplated that the government be given broad authority for dismissal, and relator's assertion to the contrary is unpersuasive.

The United States' decision to exercise its authority to dismiss this case is based on its assessment of the claims and its interest in conserving federal resources for more meritorious matters and in preserving important government privileges. Last week, the Third Circuit joined numerous other courts that have accepted preservation of government resources as a valid government interest justifying dismissal even under the rational basis test for dismissal under section 3730(c)(2)(A). *Chang*, 2019 WL 4309516, at *2, *citing Sequoia Orange*, 151 F.3d at 1146 ("[T]he government can legitimately consider the burden imposed on the taxpayers by its litigation[;]. . ."); *see also Swift*, 318 F.3d at 254 ("[T]he government's goal of minimizing its expenses is . . . a legitimate objective, and dismissal of the suit furthered that objective."); *United States ex rel. SMSPF v. EMD Serono, Inc.*, 370 F.Supp.3d 483, 491 (E.D. Pa. 2019) (Savage, J.); *United States ex rel. Sibley v. Delta Regional Med. Ctr.*, No. 4:17-cv-00053, 2019 WL 1305069, at *7 (N.D. Miss., March 21, 2019); *United States ex rel. Davis v. Hennepin County*, No. 18-cv01551 (ECT/HB), 2019 WL 608848, at *7 (D. Minn. Feb. 13, 2019); *United States ex rel. Toomer v. TerraPower*, 4:16-cv-00226, 2018 WL 4934070 (D. Idaho Oct. 10, 2018); *United States ex rel. Stovall v. Webster Univ.*, No. 3:15-CV-03530-DCC, 2018 WL 3756888, at *3 (D. S.C. Aug. 8, 2018); *United States ex rel. Maldonado v. Ball Homes*, LLC, 5:17-cv-379, 2018 WL 3213614, at *3 (E.D. Ky. June 29, 2018); *United States ex rel. Levine v. Avnet, Inc.*, No. 2:14-cv17, 2015 WL 1499519, at *5 (E.D. Ky. Apr. 1, 2015);

United States ex rel. Nasuti v. Savage Farms, Inc., 12-301210-GAO, 2014 WL 1327015, at *11 (D. Mass. Mar. 27, 2014), aff'd on other grounds, 2015 WL 9598315 (1st Cir. 2015). As demonstrated in the United States' motion and below, the relator misconstrues the *Sequoia Orange* standard in asserting that the government has failed to meet its burden under this standard.

B. **Relator Misconstrues the *Sequoia Orange* Standard and Fails to Meet His Burden**

Relator argues that *Sequoia Orange* requires the government's analysis to "include meaningful consideration" of the "potential recovery" in the suit, which he claims is "a central factor" in a cost analysis. Opp. at 9 (citations omitted). To support his assertion, relator relies almost exclusively on the only two cases that denied a government motion to dismiss under section 3130(c)(2)(A)– *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 3:17-cv-00765, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019), 2019 WL 2409576 (June 7, 2019) (reconsideration denied), *appeal docketed*, No. 19-2273 (7th Cir. July 11, 2019) and *United States ex rel. Thrower v. Academy Mortgage Corp.*, No. 16-cv-02120, 2018 WL 3208157 (N.D. Cal. June 29, 2018), *appeal docketed*, No. 18-16408 (9th Cir. July 27, 2018). The application of *Sequoia Orange* in both of these cases was, in the government's view, fundamentally flawed; the government has appealed the district court decisions denying the government's motions to dismiss, and the district court proceedings are stayed pending those appeals. Nothing in section 3730(c)(2)(A) or *Sequoia Orange* requires the government to calculate the "potential proceeds" of a case or precludes it from dismissing a

case even if it has possible merit.[1] Indeed, in *Sequoia Orange* the court explicitly recognized the government's right to dismiss even assuming the relator's claims were meritorious because "the government would continue to incur enormous internal staff costs." *Sequoia Orange,* 151 F.3d at 1146. Here, the United States has thoroughly reviewed this case and determined that any potential benefits of permitting relator's case to proceed are outweighed by both the actual and potential costs to the United States.

The Court's recent approach in *SMSPF* is instructive. There, in applying the *Sequoia Orange* standard to the government's motion to dismiss a *qui tam* case, Judge Savage found that the government is "entitled to do a cost/benefit analysis to decide whether to pursue a case, *even a meritorious one*." *SMSPF,* 370 F. Supp. 3d at 491 (emphasis added). In finding that the government had acted rationally in seeking dismissal, the court noted, "like any other plaintiff in a civil case, the government has the option to end litigation it determines is too expensive or not beneficial. Preserving litigation costs is a valid interest even where the claims may have merit." *Id.* at 490.

The United States also disagrees with relator that it can only consider recent developments in deciding to dismiss the case. To be clear, and as previously explained to the Court, *relator* approached the government about wanting to dismiss part of his case if that changed the government's consideration of its intention to seek dismissal of the case. The government did not require relator to do so and made no promises that it would not seek to dismiss

[1] Relator's claim here that the government is "leaving billions of dollars of potential recovery on the table" is pure speculation. Indeed, if relator truly narrowed his case, it is unclear how he still views his case to be worth "billions of dollars."

the case at a later time. Indeed, the United States has previously informed the Court and the parties that it has continued to evaluate the matter and to consider whether dismissal is appropriate based on further developments in the case, "including arguments raised by the parties, further factual and evidentiary developments, and associated discovery burdens." *See* Dkt. No. 454 at 4. In any event, contrary to relator's claim, there have been several significant developments over the past several months that cast further doubt on the relator's likelihood of a recovery and magnify the likely costs that will be incurred by the government.

Relator's Narrowed Case: First, in narrowing the case, the government expected that, in the Phase I bellwether trial, relator would only pursue one-day inpatient hospital claims where there was no reasonable expectation that a patient would require 24 hours or more of inpatient hospital care and that relator would dismiss all other bellwether claims. To date, relator has dismissed no bellwether claims and does not appear to have narrowed how he is pursuing this case, thereby leaving the case vulnerable to the same concerns the United States previously had about the basis for relator's legal theory.

Evidence for Bellwether Claims: Second, in its motion, the government noted its concerns regarding relator's ability to prove his FCA case and noted the lack of medical records for all the bellwether claims, even the narrowed ones, as an example. Relator responds that he does not need all of the medical records but then also says that "any cases for which no medical records were produced cannot be part of the bellwether trial." Opp. at 12. Relator thus seems to acknowledge the difficultly he will have in proving liability for the bellwether claims. Similarly, relator sought to obtain third party discovery from hospitals

for documents relating to interactions with Executive Health Resources (EHR), and filed motions to compel these materials, because they are "highly relevant to the core elements of this fraud case against EHR." *See*, *e.g.*, Relator's Motion to Compel Production of Documents and supporting Memorandum, filed against Owensboro Health Regional Hospital, Civil Action No. 19-MC-0002, on July 23, 2019 (W.D. Ky.), Dkt. No. 1. However, by Order dated August 5, 2019, the Court denied all of relator's third-party hospital discovery motions, finding that relator unduly delayed the initiation of these subpoenas and unilaterally attempted to avoid the Phase I discovery schedule, without good reason. Dkt. No. 506. This is additional evidence relator lacks which, by relator's own admission, is "highly relevant" to proving his FCA case.

Government counsel also attended relator's August 7-8, 2019 deposition telephonically and considered his testimony in light of other evidence and positions he has taken in this case, including the relator's expert reports and the materials that relator included with his opposition brief. *See* Opp. at 26-33. Thus, the government's decision to dismiss this case took into consideration the evidence provided to the government by the relator.

Discovery Demands and Deliberative Process Privilege: Third, the continuing discovery demands in this case are not speculative, as relator claims. The attached declaration from Janet Nolan, Deputy Associate General Counsel for the Program Integrity Group, in the Office of the General Counsel at the U.S. Department of Health and Human Services, describes the burden that the discovery demands in this case have imposed on the agency as well as the continuing burden if this case were to continue. Declaration of Janet Nolan, attached hereto as Exhibit 2 ("Nolan Declaration"). Contrary to relator's claim that

the three new CMS custodians "should result in a perfectly manageable set of documents to review"—a claim he has no personal knowledge of — the Nolan Declaration describes the significant burden that these additional searches and productions would impose. *Id.* ¶15-16. The government did not expect this additional discovery production when it previously decided not to file the motion to dismiss.

Further, as previously explained, the government did not expect any Two-Midnight rule discovery until after summary judgment briefing on Phase I or the bellwether trial, and thus did not take this additional burden into consideration when it previously decided not to file the motion to dismiss. Had Two-Midnight rule discovery been previously anticipated, it would have likely altered the government's previous view of the case. While the scope of that discovery for the government remains unclear at this time in light of the Report and Recommendation just issued by the Special Master, Dkt. No. 542, it is not irrational, as relator claims, for the government to consider the likely possibility of dealing with additional litigation and production on this issue, given the history of the discovery in this case. *See* Nolan Decl. ¶17.

Finally, the government can certainly consider the potential production of privileged information in this case as part of its overall consideration to dismiss this case. While the timing of the order to begin producing the deliberative process privilege material affected the timing of the government's motion, it was not, as demonstrated, the primary factor for this decision, as relator claims. The Nolan Declaration explains why the Protective Order is not sufficient to protect documents covered by the deliberative process privilege. Nolan Decl. ¶ 13. Specifically, Ms. No-

lan explains that the repercussions of releasing the documents go beyond the physical release of them to the parties in this case:

> A fundamental aspect of the work performed by CMS employees developing CMS policy and procedure is the freedom to discuss, debate, hypothesize, and otherwise engage in communications that lead to a decision or statement that the agency deems appropriate for dissemination outside the agency. Inhibiting that freedom by a threat of disclosure – no matter how remote in time – does not serve the agency's interest in preserving an environment where the best policies and procedures can rise through the deliberative process and ultimately be implemented for the public good.
>
> The release of the DPP documents – even under a protective order – will send a message to CMS employees that their previously free and frank discussions and notes about proposed or pending regulations and other policy changes, regardless of the age of the release of deliberative documents, are subject to disclosure in an adversarial setting.

Id. ¶ 13.a-b; *see also, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." (internal quotation marks and citations omitted)); *Bayliss v. New Jersey State Police*, 622 F. App'x 182, 185

(3d Cir. 2015) (same). Moreover, if this case were to continue, the Special Master has already recommended that the government produce any deliberative process privilege material with the production for the three additional custodians. This would likely be the case as well for any Two-Midnight rule discovery. None of this additional potential production of deliberative process privilege material was contemplated when the government opted not to dismiss previously.[2]

Issues Regarding Relator's Prior Employment in this Case: Finally, the government's concern about an additional burden relating to issues involving relator's prior employment at CMS is not a "red herring," as relator claims. In response to the portion of EHR's motion to compel documents relating to relator's employment at CMS, relator opposed any production of relator's personnel documents that did not pertain to "the inpatient/outpatient issue," stating:

> Prior to Relator's voluntary separation from CMS, he and the Agency were involved in an adversarial personnel-related dispute which Relator contends negatively and inaccurately skewed any supervisory evaluations and comments against him. To the extent EHR seeks to use such information to impugn Relator's honesty or character, Relator would be required to counter by putting on his own contrary evidence or call-

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[2] The Nolan Declaration also describes the additional burden of preparing the material covered by the deliberative process privilege for production, including the burden of redacting nonresponsive deliberative process privilege material from the material ordered to be produced. Nolan Decl. ¶14.

> ing witnesses to show the falsity of the information in the employment files. This would result in a "mini-trial" over the reliability or lack thereof of the allegations in the employment files. This "mini-trial" would essentially be the same trial that would have been held in the underlying personnel dispute had it not been resolved by settlement. Therefore, not only would this burden Relator, it would also unduly and unnecessarily burden CMS by requiring the Agency to establish that *its position* in its underlying personnel dispute with Relator was correct.

Dkt. No. 464, at 4 (italics in original; underline emphasis added) (footnote omitted). The Special Master has now recommended that the government produce these personnel records, and relator did not file any objections to this portion of the Special Master's recommendation. Thus, it is not a "red herring," nor in any way irrational, for the government to have considered, as part of the decision to dismiss this case, the extraordinary burden that would be placed on the agency by relator's attempt to re-litigate his personnel issues.[3]

Accordingly, the United States' continued concerns about relator's ability to prove a False Claims Act case,

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[3] Relator's settlement agreement became an issue again when his counsel contacted government counsel the afternoon prior to his deposition to seek an immediate waiver of the confidentiality provision in the settlement agreement. When the agency was unable to do so, relator's counsel argued at the deposition that government counsel was preventing relator from answering questions about his prior CMS employment. Previously in this litigation, relator opposed any release of the settlement agreement.

along with the ongoing discovery, monitoring, and litigation burdens to the government in this case,[4] justify the government's decision to dismiss. The United States has appropriately considered the potential costs and benefits and has concluded that dismissal of this case best serves the public interest. Nothing in relator's opposition demonstrates that the government's decision here "is fraudulent, arbitrary and capricious, or illegal."

Relator asserts that the timing of the United States' motion is unprecedented and supports his claim that the decision is arbitrary and capricious. Opp. at 16. While the United States is mindful that this motion comes at an advanced stage of the litigation, relator is incorrect that this is unique. There have been numerous instances in which courts have granted motions to dismiss that were filed at advanced stages of the litigation in a declined case. *See, e.g.*, *Sequoia Orange Co.*, 151 F.3d at 1143 (granting government's motion to dismiss filed "several years after the litigation began"); *see also United States ex rel. Wright v. Agip Petroleum Co.*, No. 5:03-cv00264-DF, 2005 WL 8167952 (E.D. Tex. Feb. 2, 2005) (granting government's motion to dismiss filed more than eight years after qui tam filed and more than four years after declination in part); *United States ex rel. Piacentile v. v. Amgen Inc., et al.*, No. 04-cv-3983, 2013 WL 5460640, at *1-3 (E.D. Pa. Sept. 30, 2013) (granting government's motion to dismiss filed more than nine years after action commenced); *United States ex rel. Stierli v. Shasta Services, Inc.*, 440

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[4] The attorneys in the Civil Division of the Department of Justice alone have logged over 1,500 hours of work on this case since discovery was first served on the government in December 2017. This does not include the hours from the Assistant U.S. Attorneys. The Nolan Declaration describes the amount of work on this case to date by agency counsel.

F. Supp. 2d 1108, 1115 (E.D. Cal. 2006) (granting government's motion to dismiss filed after close of discovery while cross-motions for summary judgment were pending); *United States ex rel. Stierli v. Shasta Services, Inc.*, 440 F. Supp. 2d 1108, 1115 (E.D. Cal. 2006) (granting government's motion to dismiss filed after close of discovery while cross-motions for summary judgment were pending). Moreover, while the government afforded this relator every opportunity to demonstrate his case, it is now clear that he will have difficulty proving liability, given, in part, by his failure to secure certain evidence, and therefore, it is not in the government's interest to allow this matter to proceed.

Relator's last minute insinuation that the government's decision to dismiss this case was affected by impermissible conflicts of interest by several individuals at CMS and the Department of Justice is without merit. *See* Opp. at 16-17. The ultimate decision to exercise the government's authority under section 3730(c)(2)(A) was made by the Assistant Attorney General for the Civil Division, who is not described by relator as being affected by a conflict of interest and indeed has none. Other than seeking factual and Medicare policy information from one individual (George Mills) for the purpose of assessing the merits of relator's claims,[5] the Department of Justice did not involve any of the individuals identified by relator in the decision-making related to the dismissal. Mr. Mills is one of the three CMS witnesses that both parties want to depose

[5] Government counsel also spoke to several other agency personnel, who were not identified by relator to have any purported conflict, to seek factual and Medicare policy information for the purpose of assessing the merits of relator's claims.

in this case. Thus, government counsel needed to ascertain his knowledge of the issues in the case regardless of any decision to dismiss.

Finally, the relator seeks to ascribe an improper motive to the government seeking dismissal without prejudice to the government. In declined cases, the United States routinely seeks dismissal with prejudice to the relator and without prejudice to the government. *See, e.g., United States ex rel. Charte v. Am. Tutor, Inc.*, 934 F.3d 346, 350 (3d Cir. 2019) (government did not oppose dismissal of declined *qui tam* case on summary judgment "'so long as such dismissal is without prejudice' to the Government."); *see also* Memorandum of Law in Support of United States' Motion to Dismiss filed in *United States ex rel. SMSPF, LLC v. EMD Serono, Inc.*, 2018 WL 720224 (E.D. Pa. Dec. 17, 2018). The government has no nefarious intent in doing so here.

In sum, the United States has easily justified its dismissal decision under section 3720(c)(2)(A) even under a rational basis standard. Indeed, as the Tenth Circuit explained when following *Sequoia Orange*, "there need not be a tight fitting relationship" between the government's stated reason and dismissal; rather, "it is enough that there are plausible, or arguable, reasons supporting the agency decision." *Ridenour*, 397 F.3d at 930 (citations and internal quotation omitted). Stated another way, "even when the legitimate interest articulated by the Government is only incidentally advanced, the rational relationship test has been satisfied." *United States ex rel. Fay v. Northrop Grumman Corp., et al.*, No. 06-cv-00581, 2008 WL 877180 , at *19 (D. Colo. Mar. 27, 2008) (quoting *United States ex rel. Ridenour v. Kaiser-Hill Co.*, 174 F. Supp. 1147, 1155 (D. Colo. 2001), aff'd, , 397 F.3d 925).

C. **The Court Does Not Need to Consider *Escobar, Allina,* or *PDR Networks* in ruling on the United States' Motion to Dismiss**

In its August 22, 2019 Order, the Court stated that the "parties may also brief the significance, to this case, of the following recent Supreme Court cases": *Universal Health Servs. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); *Azar v. Allina Health Servs*., 139 S. Ct. 1804 (2019); and *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2015 (2019). The Court need not consider these cases, however, in deciding the United States' motion to dismiss. Indeed, the United States' right to dismiss a *qui tam* case includes the right to avoid rulings on the merits of the case that could harm its ability to bring future cases. Accordingly, the Court should first address the United States' motion to dismiss, and if the Court concludes that this motion should be granted, the United States respectfully submits that the Court's analysis should end and that it should refrain from ruling on the merits of arguments raised by the defendant in this case.

D. **An Evidentiary Hearing is Not Warranted**

Relator has requested that the Court permit the testimony of Dr. Jeff Trost, "one of relator's four experts on the ECGs at issue for the bellwether trial." Relator fails to explain why this testimony is necessary or what he intends to accomplish by putting it on. The Court has now ordered that the hearing scheduled on September 25, 2019, be confined to argument on the government's motion to dismiss and that the Court does not contemplate taking any testimony, Dkt. No. 541. The Court's order is consistent with the Third Circuit's recent decision in *Chang* that section 3730(c)(2)(A) does "not guarantee an automatic in-person hearing in every instance." 2019 WL 4309516, at *2. *Chang* found that a hearing is appropriate

only when a relator "opposes dismissal and request[s] a hearing," or "makes a colorable threshold showing of arbitrary government action." *Id., citing Swift,* 318 F.3d at 251 and *Sequoia Orange*, 151 F. 3d at 1145.

Moreover, the legislative history makes clear that Congress expressly rejected the notion that an evidentiary hearing is automatically or even generally required, but that it may be appropriate in those instances where relator has demonstrated a "substantial and particularized need." *Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925, 935 (10th Cir. 2005) (citing S. Rep. 99 345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291); *see also United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 854 (10th Cir. 2012) (explaining that, under the *Sequoia Orange* standard, an evidentiary hearing is not necessary for relator to address his disagreement with the United States' proffered reasons for dismissal). Relator has not articulated any need for an evidentiary hearing to present Dr. Trost's testimony, let alone a "substantial and particularized need." Consistent with *Chang*, the Court has appropriately found that testimony by Dr. Trost is not needed. Nevertheless, the Court has indicated that it may consider written declarations or other materials submitted by the parties. The United States has reviewed Dr. Trost's expert report, which is available to the Court as well. The United States has also heard from Dr. Trost during one of relator's presentations to the government. Hearing Dr. Trost again will not change the government's position. *See Swift,* 318 F.3d at 253 ("the function of a hearing [under § 3730(c)(2)(A)] when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case").

E. **Relator's Request for Alternative Relief**

Relator has requested that the Court postpone any ruling on the government's motion to dismiss until after the parties have briefed Phase I summary judgment motions and the Court has ruled on them. For the reasons supporting the government's motion to dismiss, the United States objects to relator's request to postpone consideration of the motion.

CONCLUSION

For the reasons set forth above as well as in the United States' memorandum supporting its motion to dismiss, this Court should dismiss all claims brought on behalf of the United States with prejudice as to relator and without prejudice as to the United States.

Respectfully submitted,

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Attorneys for the United States of America

Dated: September 17, 2019

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 12-CV-4239

JESSE POLANSKY M.D., M.P.H. ET AL.,
Relator,

v.

EXECUTIVE HEALTH RESOURCES, INC., ET AL.,
Defendant

Filed: September 17, 2019

DECLARATION OF JANET NOLAN

I, Janet Nolan, declare as follows:

1. My name is Janet Nolan. I am over 21 years of age, and I have personal knowledge of the matters stated herein. My statements in this declaration are based upon my experience supervising work related to the above-referenced *qui tarn* case and my experience and general knowledge gained during my employment at the Office of General Counsel ("OGC").

2. I am an employee of OGC, which is a component of the Department of Health and Human Services ("HHS"). I am also the Deputy Associate General Counsel for the Program Integrity Group. As Deputy, I oversee approximately 16 attorneys who provide legal advice and counsel

to agency personnel, which includes the Centers for Medicare and Medicaid Services ("CMS"). The OGC Program Integrity Group provides counsel on issues relating to combating fraud and abuse in Medicare and Medicaid programs. We also work as agency counsel for the Department of Justice in False Claims Act cases brought by relators on behalf of the United States against Medicare and Medicaid providers.

3. Of the 16 attorneys within the Program Integrity Group, only 6 are dedicated full time to work on False Claims Act investigations and lawsuits.

4. I have been employed by HHS-OGC for 9 years, 6 of those years I have served in the supervisory Deputy role.

5. Jessica Bowman and Dawn Popp are attorneys in the Program Integrity Group of HHS-OGC. I directly supervise both Jessica Bowman and Dawn Popp.

6. As the supervisor of both Ms. Bowman and Ms. Popp, I have been actively engaged on this declined *qui tam* case, in particular since certain discovery issues arose in approximately January of 2018. This declaration describes the agency's work on discovery in this case as well as the ongoing burden should the case not be dismissed.

7. Since approximately June of 2018, Ms. Bowman has worked on this declined *qui tam* almost exclusively, primarily on discovery issues, including travel to Philadelphia to attend and testify at a hearing in this case, further straining the office's limited financial resources.

8. Since approximately June of 2018, I have not been able to assign any significant new False Claims Act cases to Ms. Bowman and indeed have had to reassign some of her existing matters to other OGC attorneys.

9. As the resource requirements of the case increased over time, I assigned Ms. Popp to the case in February of 2019. She has worked on this declined *qui tam* between 50-80% of her time since assignment.

10. To date, the time and resources spent by Ms. Bowman and Ms. Popp on the case have been to the exclusion of other important matters and thus has placed a strain on the Program Integrity Group, requiring me to reassign cases and ask my supervisees to take on additional work. I am concerned that this forced reallocation of resources may be detrimental to the conduct of other matters, which in some cases may have more potential merit than this one. Continuing this litigation would continue to take limited OGC attorney resources away from other affirmative litigation, and — in OGC's and CMS's view -- would outweigh any potential benefit to CMS.

BURDEN AND CONCERNS RELATING TO COMPELLED PRODUCTION OF DELIBERATIVE MATERIALS

11. I understand that Special Master Jeskie has recommended that the court order the production of a large number of CMS documents over which the agency claims the Deliberative Process Privilege (collectively, "DPP documents").

12. I understand that Special Master Jeskie has suggested that a Protective Order would be sufficient to protect the DPP documents and the agency's interest in protecting its internal, predecisional deliberations, from outside viewing and from claims by third parties that CMS has waived the privilege.

13. I am concerned that a Protective Order is not adequate to protect those interests.

a. The repercussions of releasing these DPP documents go beyond the physical release of the documents to the parties in this case. A fundamental aspect of the work performed by CMS employees developing CMS policy and procedure is the freedom to discuss, debate, hypothesize, and otherwise engage in communications that lead to a decision or statement that the agency deems appropriate for dissemination outside the agency. Inhibiting that freedom by a threat of disclosure — no matter how remote in time — does not serve the agency's interest in preserving an environment where the best policies and procedures can rise through the deliberative process and ultimately be implemented for the public good.

b. The release of the DPP documents — even under a protective order — will send a message to CMS employees that their previously free and frank discussions and notes about proposed or pending regulations and other policy changes, regardless of the age of the release of deliberative documents, are subject to disclosure in an adversarial setting. I personally have observed and discussed this perception with CMS employees in other contexts when the agency has been asked to produce DPP documents and has asserted the deliberative process privilege.

14. I am familiar with the DPP documents that Special Master Jeskie has recommended be produced. Many of the DPP documents are draft versions of omnibus regulations that contain a large variety of policies related to the payment of inpatient and outpatient services, but unrelated to the allegations in this case.

a. I understand that the court has overruled the government's objections to Special Master Jeskie's recommendation regarding the deliberative process privilege

and ordered the government to begin production of the material for the time period prior to October 1, 2013. In order to prepare these documents for production so that the agency's real interest in preserving the deliberative process privilege for other non-related topics is best protected, the deliberations regarding the unrelated policies that are included within the draft omnibus regulations would need to be redacted. This would entail a document-by-document review of each produced document. Many of the DPP documents are over one thousand pages long.

b. Based on OGC's experience initially reviewing these documents and other custodial documents requested by the defendant, Executive Health Resources ("EHR"), I estimate that it would take approximately thirty-two attorney hours to redact the unrelated portions of the DPP documents.

BURDEN RELATING TO ADDITIONAL PRODUCTION IN THIS CASE

15. I understand that Special Master Jeskie has recommended that the court direct CMS to search for and produce documents for three additional CMS custodians using search terms provided by EHR.

I am familiar with the search terms that were used for previous CMS custodians, including, for example, Melanie Combs-Dyer, and that those searches each produced thousands of documents. Ms. Bowman and Ms. Popp reviewed those documents for responsiveness prior to production. By way of example, the documents for just one custodian, Melanie Combs-Dyer, required a combined 100 hours of attorney review by Ms. Bowman and Ms. Popp. After that review, 90% of the documents were found to be unresponsive.

16. Accordingly, based upon this experience and the directive to apply the same search terms to additional custodians, I anticipate that a search for documents for the additional three custodians using the EHR search terms is likely to result in several thousand documents to be reviewed for responsiveness and privilege.

a. Based upon prior experience, I anticipate that this review will require approximately 100 attorney hours per custodian, for a total of 300 hours. In other words, one-third of the lawyers in my group who are dedicated full-time to False Claims Act work would each spend nearly one month solely doing document review for just these three custodians.

b. I understand that Special Master Jeskie has also recommended that CMS be required to produce any DPP documents contained in any responsive documents for the additional three CMS custodians. Thus, Ms. Bowman and Ms. Popp will need to undergo a similar redaction process for these documents, as described above.

17. I further understand that if this case continues, CMS will likely be required to produce additional discovery related to the Two Midnight Rule, which will involve more custodians and additional document review, including the laborious review of omnibus regulations for later years, Such work threatens to monopolize Ms. Bowman and Ms. Popp for not only much of the remainder of this year, but also well into 2020.

18. In addition to document production issues, I anticipate that CMS personnel will be deposed, necessitating preparation and representation in connection with those depositions. I will assign Ms. Bowman to these tasks, despite the fact that she is fully occupied by the document

productions, which will in turn place greater burden on Ms. Popp and possibly other personnel who I will be forced to re-direct from other matters to this case.

19. I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

/s/ Janet Nolan
Janet Nolan

Executed this 17th day of September, in 2019 in Washington D.C.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CIVIL ACTION NO. 12-CV-4239

THE UNITED STATES OF AMERICA, *EX REL.*
JESSE POLANSKY, M.D., M.P.H.,
Plaintiffs

v.

EXECUTIVE HEALTH RESOURCES, INC.,
Defendant

Filed: October 11, 2019

THE UNITED STATES' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS RELATOR'S THIRD AMENDED COMPLAINT

In an unprecedented move, the Court, by order dated September 26, 2019, postponed ruling on the United States' motion to dismiss its own claims pursuant to 31 U.S.C. § 3730(c)(2)(A) and instead ordered simultaneous briefing by the Relator and Defendant on whether to grant summary judgment based on *Universal Health Servs. v. United States ex rel. Escobar,* 136 S. Ct. 1989 (2016), *Azar v. Allina Health Servs.,* 139 S. Ct. 1804 (2019), and *PDR Network. LLC v. Carlton & Harris Chiropractic, Inc.,* 139 S. Ct. 2051 (2019). The Court also re-

quested additional briefing from the Government regarding its views on the merits of the case in connection with its pending motion to dismiss.

As set forth in the United States' previous memoranda and at oral argument, the United States requests that the Court rule on its motion to dismiss prior to deciding whether to grant summary judgment. The Government's motion to dismiss is fully briefed and ripe for a decision. As discussed in the United States' prior briefs and emphasized below, the body of case law interpreting section 3730(c)(2)(A) supports granting the Government's motion to dismiss. More importantly, a ruling by this Court on the merits of a complex summary judgment motion undermines the Government's legitimate interests of controlling litigation brought on behalf of the United States and protecting its ability to administer the vital Medicare funds, and would increase the drain on government resources. Thus, as a threshold matter, the Court should rule on the Government's motion before reaching the merits of this case. *United States ex rel. Wickliffe v. EMC Corp.,* 473 F. App'x 849, 852 (10th Cir. 2012) ("Dismissal under § 3730(c)(2)(A) avoids a decision on the merits," and the court may dismiss "without deciding the complicated first-impression issue.").

DISCUSSION

I. The United States Has the Clear Discretion to Seek Dismissal of its Own Claims

As explained in the Government's prior memoranda in support of its motion to dismiss, the False Claims Act permits private individuals to enforce its provisions by filing civil actions on behalf of the United States, as Relator has done here, alleging that a defendant has defrauded the

federal government and seeking redress for the Government's injuries. But the Act does not leave such suits entirely in the hands of these private persons, who may not make litigation choices consistent with the United States' larger interests. Rather, Congress reserved to the Attorney General several important powers, including the ability to "dismiss the action notwithstanding the objections" of the Relator where only two requirements are met: (1) notice of the motion to the Relator, which the Government has done here, and (2) an opportunity for a hearing on the Government's motion, which occurred on September 25, 2019. 31 U.S.C. § 3730(c)(2)(A).

Section 3730(c)(2)(A) includes *no* standard of review for the Attorney General's decision to dismiss a *qui tam* case. This lack of a standard of review in 3730(c)(2)(A) stands in stark contrast to neighboring provisions that do contain a standard of review. For example, section 3730(c)(2)(B), the very next section, allows the Government to settle a case over Relator's objection if the court determines "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *See also §* 3730(c)(2)(C) (government can restrict relator's participation "upon a showing that unrestricted participation . . . would interfere with or unduly delay the Government's prosecution of the case"; § 3730(c)(3) (government can intervene following prior declination "upon a showing of good cause"; § 3730(c)(4) (government can stay discovery by relator "upon a showing that such discovery would "interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts").

Consistent with principles of statutory construction, Congress's omission of any required showing in section 3730(c)(2)(A) is evidence that Congress did *not* intend to limit the Government's discretion to dismiss an action

brought in the Government's name for injuries allegedly suffered *by the Government* — and not by Relator. This broad authority is also consistent with the Supreme Court's decision in *Heckler v. Chaney,* 470 U.S. 821 (1985), which held that the Government's decision "not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831. In *Heckler,* the Court outlined the "many" reasons why such nonenforcement decisions are "general[ly] unsuitab[le] for judicial review," the first of which is that these decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within the agency's] expertise," and require the agency to assess "whether agency resources are best spent on this violation or another." *Id.*

Given that the claims at issue in this case belong to the Government, it is not surprising that Congress gave unfettered discretion to the Attorney General to determine whether alleged *qui tam* claims brought in the Government's name should be prosecuted. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000), the Supreme Court made clear that a relator has Article III standing in a *qui tam* suit because he or she can be regarded as having received a "partial assignment *of the Government's damages claim." Id.* at 773, 772-774 (emphasis added) (a relator has standing "to assert the injury in fact suffered by the assignor [United States]"). The United States' decision to dismiss the action terminates this assignment to Relator, *Swift v. United States,* 318 F.3d 250, 254, fit * (D.C. Cir. 2003), which the United States has a right to do at any time prior to final judgment and is doing so now in this case.

As explained, courts have viewed the deference in section 3730(c)(2)(A) as either giving the Government unfettered discretion to dismiss an action, *Swift,* 318 F.3d at 252-53, or allowing the Government to dismiss if it articulates a rational basis for the decision, *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1144-46 (9th Cir. 1998) (noting that "the government's power to dismiss or settle an action is broad"). While the Third Circuit has yet to adopt a standard for dismissal under section 3730(c)(2)(A), it has recognized the Government's broad authority under section 3730(c)(2)(A). *See United States ex rel. Bookwalter v. UPMC,* No. 18-1693, 2019 WL 4437732, at *16 (3d Cir. Sept. 17, 2019) ("The government can dismiss over the Relator's objection. 31 U.S.C. §3730(c)(2)(A). . . . . While our Court has not yet specified the standard of review for a §3730(c)(2)(A) dismissal, our sister circuits defer a great deal to the Justice Department.") (citing *Swift* and *Sequoia Orange).* This Court need not decide which standard to apply here as both standards are "extremely deferential to the government," *United States ex rel. Surdovel v. Digirad Imaging Solutions,* No. 07-0458, 2013 WL 6178987, at *2 (E.D. Pa. Nov. 25, 2013) (Stengel, J.), and already satisfied here.

After lengthy and careful consideration of this matter, the Government has exercised its section 3730(c)(2)(A) authority here by filing its motion to dismiss. In its motion and supporting memoranda, the United States provided a number of legitimate reasons for the dismissal: (1) significant concerns regarding shortcomings in the evidence amassed by the Relator, including Relator's deposition testimony; (2) the drain on government resources caused by the need to monitor the case, comply with discovery

obligations, and re-litigate the Relator's past employment; (3) protection of privileged information; and (4) choosing the posture in which to litigate open questions relating to *Escobar, Allina,* and *PDR Network.*

Here, there is no dispute that continued litigation of this case will drain government resources.[1] The Third Circuit and numerous other courts have recognized that such costs represent a valid government interest justifying dismissal under section 3730(c)(2)(A), even under the rational basis test. *United States ex rel. Chang v. Children's Advocacy Ctr. of Delaware,* No. 18-2311, 2019 WL 4309516, at *2 (3d Cir. Sept. 12, 2019) ("The government has an interest in minimizing unnecessary or burdensome litigation costs.") *citing Sequoia Orange,* 151 F.3d at 1146 ("[T]he government can legitimately consider the burden imposed on the taxpayers by its litigation[;]. . ."); *see also, e.g., Swift,* 318 F.3d at 254 ("[T]he government's goal of minimizing its expenses is . . . a legitimate objective, and dismissal of the suit furthered that objective."); *United States ex rel. Borzilleri v. Abbvie, Inc.,* No. 15-CV-7881(JMF), 2019 WL 3203000 (S.D.N.Y. July 16, 2019) (government costs are a valid justification for dismissal even where the claims may have merit). Judge Savage

[1] The Government has closely monitored, and often participated in, this litigation, including by, for example: (1) filing a Statement of Interest; (2) searching, collecting, reviewing a large volume of documents from CMS and other custodians, and producing over 42,000 pages of documents and other material; (3) briefing and arguing issues in response to the Court's questions concerning the scope of discovery; (4) meeting and conferring with counsel for Defendant regarding discovery issues, such as depositions of former government employees and the Government's deliberative process privilege assertions; (5) opposing motions to compel and briefing issues related to the Government's deliberative process privilege; and (6) telephonically attending Relator's deposition in August 2019.

reached a similar conclusion in *United States ex rel. SMSPF v. EMD Serono, Inc.,* 370 F. Supp. 3d 483, 489 (E.D. Pa. 2019), where he found that the Government had acted rationally in seeking dismissal. In reaching that decision, he observed: "[L]ike any other plaintiff in a civil case, the government has the option to end litigation it determines is too expensive or not beneficial. Preserving litigation costs is a valid interest even where the claims may have merit." *Id.* at 490. "Decisions concerning the allocation of resources to individual programs . . . and to particular aspects of those programs . . . involve a host of policy choices" not susceptible to resolution "by federal judges interpreting the basic charter of Government for the entire country." *Id.* at 128-29. Thus, the undisputed and significant drain on resources caused by this case justifies dismissal, particularly in light of the Government's concerns about Relator's ability to prevail and the other costs that would result from this case proceeding.

II. Government's Decision Is Informed by Well-Developed Evidence

As noted above, the Government has substantial concerns about the Relator's ability to prevail in this case. Nevertheless, the United States has authority to dismiss a case under section 3730(c)(2)(A) even if the case may have merit. And nothing in section 3730(c)(2)(A) or any case law applying that statute requires a mini-trial, or any showing, by the Government that a case lacks merit to justify dismissal under section 3730(c)(2)(A). Indeed, the rational basis test does not require the Court to evaluate the Government's conclusions regarding the merits of the case. The outlier cases that have denied the Government's motion to dismiss did so on the basis that the Government did not evaluate the merits. *See United States v. Acad. Mortg. Corp.,* No. 16-cv-02120-EMC, 2018 U.S. Dist.

LEXIS 109489, at *11 (N.D. Cal. June 29, 2018) (denying the motion on the basis that "the Government did not fully investigate the amended complaint"); *United States v. UCB, Inc.,* No. 17-CV-765-SMY-MAB, 2019 U.S. Dist. LEXIS 64267, at *10 (S.D. Ill. Apr. 15, 2019) (noting that the Government "did not review any additional materials from the Relator relevant to this case"). While the United States believes these decisions are in error, this case is not analogous as the Government has spent considerable time and resources evaluating the claims and defenses raised in this case since 2018, including:

> (1) a total of approximately seven meetings in person or by Webex with the parties separately to receive presentations on whether the government should dismiss this case, including on the merits (the Government met with Relator at his request again on October 4, 2019);
>
> (2) conducting approximately seventeen telephone conferences — about eight with Relator and nine with Defendant — to discuss issues regarding the government's decision, including the developed evidence;
>
> (3) receiving and reviewing approximately 43 productions of documents and other information from the parties regarding the Government's decision, including developed evidence that the parties wanted the Government to consider in evaluating whether dismissal of this action was appropriate, including length of stay analysis; and
>
> (4) reviewing the initial and supplemental reports from all of the Relator's experts, discussing those reports with the Relator's counsel, and

reviewing information from Defendant's counsel regarding its response to the Relator's experts' conclusions.

At the hearing on the United States' motion, the Court voiced concern that the Government had intended to move to dismiss earlier this year but then allowed Relator to proceed with what was believed to be a narrowed case for the Phase I bellwether claims. Setting aside that Relator, in the Government's view, has not significantly narrowed his case, the Government has now determined, as set forth in its motion to dismiss filed on August 20, 2019, that dismissal is appropriate based on the totality of information before it, including the extensive information presented by both Relator and Defendant, as outlined above, and a number of additional developments in this case, including:

(1) the ongoing discovery burden for Phase I discovery;

(2) required production of the Government's deliberative process privilege material and the additional burden of producing those documents;

(3) consideration of Relator's testimony at his deposition;

(4) the denial of Relator's discovery motions seeking "'critical documents" from third-party hospitals;

(5) the Court's intended consideration of summary judgment briefing based on the impact of the Supreme Court cases of *Escobar, Allina, PDR Network,* which is described in more detail below;

(6) Relator's representation that he will create an additional burden on the Government by trying to re-litigate his past employment issues as part of this case; and

(7) Likely additional discovery burdens and privilege issues relating to the Two-Midnight Rule and need to monitor that phase of the litigation.

Although the ostensible narrowing of the case delayed the Government's final decision on whether to dismiss, the Government never decided it was not going to dismiss. Indeed, the Government has stated numerous times to the Court and the parties that it continued to monitor the litigation for potential dismissal. While the United States has concerns about the Relator's ability to prove the merits of his case, under a *Sequoia Orange* analysis, the Court need not decide whether the Government is right or wrong regarding this assessment, merely that the sum of all the Government's interests is rationally related to its decision to dismiss.

III. A Ruling on Summary Judgment Undermines the Government's Ability to Protect Legitimate Government Interests

In addition to the reasons discussed above, the Court's decision to consider granting summary judgment based on the Supreme Court's rulings in *Allina, PDR,* and *Escobar* provides an additional rational basis for the Government's motion to dismiss this case. In particular, such a ruling would consider a number of critical issues of first impression, and the Court need not and should not reach these issues. It should be the prerogative of the Government to decide when and under what circumstances such

important issues are litigated. The Government has decided here not to litigate; this decision is rational and supports dismissal under either the *Sequoia Orange* or *Swift* standards. By addressing these issues on summary judgment, the Court would be undermining the Government's ability to control claims brought on its behalf when the Government has elected to dismiss those claims. The Relator should not be allowed to overturn the Government's "proper ordering of its priorities." *Heckler,* 470 U.S. at 831-32. Accordingly, this Court should grant the Government's motion to dismiss without reaching the merits. *Wickliffe,* 473 F. App'x at 852 ("Dismissal under § 3730(c)(2)(A) avoids a decision on the merits," and the court may dismiss "without deciding the complicated first-impression issue.").

Moreover, as the Government has previously noted and the Third Circuit agreed, preserving government resources has been uniformly recognized as a rational basis for exercising its dismissal authority. *Chang,* 2019 WL 4309516, at *2 ("The government has an interest in minimizing unnecessary or burdensome litigation costs."). As discussed above, this case already represents a significant and continuing resource drain. *See Supra* Part II. This drain would only be magnified by any decision by this Court on the applicability of *Allina, PDR,* and *Escobar.* Most directly and as contemplated by the September 26 Order, such a decision is likely to be appealed by Relator, Defendant, or both. Such an appeal would likely require the participation of the Government, which would further increase the government resources ensnared by this case. Avoiding these additional costs is yet another reason the Government's dismissal of this case is justified. *Chang,* 2019 WL 4309516, at *2. Under these circumstances, the

Government's decision not to litigate is rational, and supports dismissal under either the *Sequoia Orange* or *Swift* standards.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that this Court rule on the United States' motion and dismiss all claims brought on behalf of the United States with prejudice as to Relator and without prejudice as to the United States.

Respectfully submitted,

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