No. A-___

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.* MAX BENNETT,

Petitioner,

vs.

BIOTRONIK, INC.

Respondent

APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Anthony M. Kennedy, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner Max Bennett respectfully requests that the time to file a petition for a writ of certiorari in this case be extended for forty-five days, from May 14, 2018, to and including June 28, 2018. The court of appeals issued its opinion on December 1, 2017. *See* App. A, *infra.* The court denied a timely petition for rehearing and rehearing *en banc* on February 13, 2018. *See* App. B, *infra*. Absent an extension of time, the petition would be due on January 25, 2018. Petitioner files this application more than ten days before the due date. See Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case.

BACKGROUND

This case presents a significant question of national importance relating to the False Claims Act and one of its statutory bars – the Government Action bar, 31 U.S.C. §3730(e)(3). Under this provision, no relator is permitted to bring a *qui tam* action based on allegations which "*are* the subject of" a civil suit or administrative civil proceeding in which "the Government *is already* a party" (emphasis supplied). Despite use of present tense verbs, a majority of the Ninth Circuit panel, in a 2-1 published opinion, held the Government Action bar precludes *qui tam* actions even when the prior Government suit has concluded. Under the majority's view, the Government Action bar – without an original source exception – lingers even after the Government enters into a limited settlement which reserved its rights to pursue subsequent legal actions against the defendant under the Act.

Senior Circuit Judge Eugene E. Siler dissented. Sitting by designation from the Sixth Circuit, Judge Siler agreed with the view of the Government – as stated in its *amicus* brief filed in this case – that a lingering Government Action bar is contrary to the statutory text, and is inconsistent with this Court's decision in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. ___, 135 S. Ct. 1970 (2015).

Petitioner Max Bennett brought a False Claims Act suit on March 31, 2010, against Biotronik, Inc., an Oregon Corporation and German affiliate that sells cardiac devices such as pacemakers and implantable defibrillators. Working as a "Business Development Specialist" with responsibility for marketing and scientific studies in 28 Western states, Bennett learned Biotronik deliberately engaged in unlawful conduct to market its devices, by paying kickbacks to physicians under the pretext of Biotronik-sponsored scientific/clinical studies. Prior to the filing of his action, a relator named Brian Sant had, on December 31, 2009, filed a similar action against Biotronik alleging various kickback schemes. Bennett dismissed his initial action without prejudice in light of the "first-to-file" bar at §3730(b)(5).

On May 14, 2014, the Government intervened in part in the *Sant* litigation, for purposes of entering a partial settlement. Pursuant to a common practice, the Government limited its intervention and settlement to specified claims ("covered conduct" claims), and it agreed to a waiver only as to them. The scheme to pay kickbacks to physicians through sham clinical studies was *not* included in the Government's waiver. On October 14, 2014 – four months after the *Sant* litigation was dismissed – Bennett filed this action against Biotronik focused on the claims that were not waived as a result of the *Sant* settlement.

The district court eliminated petitioner's claims under the Government Action bar, even though the statute employs two separate present-tense verbs, and the Government was no longer pursuing claims against Biotronik after the *Sant* settlement. On appeal to the Ninth Circuit, petitioner and the Government as *amicus* argued that a lingering bar was contrary to the text, the intent of Congress and this Court's holding in *Kellogg Brown & Root/Carter.* There, this Court asked: "Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?" 135 S. Ct. At 1979.

In the panel's 2-1 published decision, the majority did not discuss *Kellogg,* or articulate a reason for Congress to have enacted a perpetual Government Action bar containing no exception for original sources. Dissenting Judge Siler and the Government in its *amicus* found this to be dispositive. *See* App. A, at 23 ("The government's position is that there is no reason to read the government-action bar to preclude a relator who is an original source, not parasitic, from proceeding on claims that were not resolved before the government was dismissed as a party").

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended for forty-five days, to June 28, 2018, for several reasons.

First, petitioner has been consulting with practitioners experienced in the Supreme Court for purposes of preparation of a petition in this case. Due to scheduling conflicts with those practitioners, petitioner has not had an opportunity to complete those consultations. Additional time is necessary in order to prepare a clear and concise petition for the Court's review.

Second, the press of other matters makes the submission of the petition difficult absent an extension. Petitioner's counsel has been preparing for a trial scheduled to commence on May 7, 2018, in the District of Massachusetts. United States *ex rel.* Morgan-Lee v. Whittier Health Network, No. 1:13-cv-11997-DPW. In connection with that trial, counsel had significant responsibilities to prepare and submit pleadings on March 26, April 9 and April 23. Trial is expected to last until May 11. In addition, counsel is or has been responsible for numerous other pending matters. These include:

- Amended complaint and opposition to motions, Gamble v. Kaiser Foundation Health Plan, No. 4:17-cv-06621-YGR (N.D. CA);
- Petition for panel rehearing and rehearing *en banc*, Hill v. Kaiser Foundation Health Plan, No. 3:10-cv-2833-LB (9^{th} Cir.);
- Reply brief, United States *ex rel.* Bingham v. HCA, Inc., No. 16-17059-GG (11^{th} Cir).

Third, while petitioner would ordinarily request a 30-day extension, counsel has several due dates 30 days out that would prohibit completion of the work by June 13. These include the reply brief in *Bingham*, due June 11; a mediation scheduled to take place in the District of Columbia on June 4, in United States *ex rel.* Savage vs. Washington Closure Hanford, No. 10-CV- 5051-SMJ (District of Washington); and further oppositions to dispositive motions in *Gamble* expected in late May or early June. A 45-day extension is therefore warranted in this unusual case.

Finally, no prejudice would result from the extension. Whether the extension is granted or not, the petition will be considered during this Term – and, if the petition were granted, the case would be heard and decided in the Court's next Term.

CONCLUSION

For the foregoing reasons, the time to file a petition for a writ of certiorari should be extended for 45-days to and including June 28, 2018.

Respectfully submitted,

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