UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA, ex rel. Oberg,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 1:07-cv-960 (JFA)
NELNET, INC., et al.,	)	
Defendants.	)	

UNITED STATES' STATEMENT OF INTEREST
REGARDING DEFENDANTS' DISPOSITIVE MOTIONS

Pursuant to this Court's order, the United States is pleased to submit this statement of interest regarding the legal significance of the U.S. Department of Education's (ED) 2007 administrative resolution(s) of issues relating to disputed payments of 9.5 percent Special Allowance Payment (SAP) subsidies. Defendants have, in various motions, argued that those settlements bar the relator from proceeding with this action under the False Claims Act, 31 U.S.C. §§ 3729-33. This Court should reject those contentions and find that none of those administrative resolutions should carry any dispositive weight in this litigation.[1]

BACKGROUND

In early 2007, ED entered into an express settlement agreement with Nelnet, Inc. regarding the past and future payment of disputed 9.5 percent SAP loan subsidies. In essence, ED agreed not to seek the return of any disputed funds already paid to Nelnet, and Nelnet agreed

[1] In this brief, the United States takes no position on any other issues raised in any dispositive motions.

not to seek payment from ED of any disputed funds that were to come due in the future.[2] The U.S. Department of Justice (DOJ) was made aware of certain proposed elements of the settlement terms, but DOJ was not a party to and did not otherwise give its approval to the Nelnet Agreement. The Nelnet Agreement released claims by ED relating to the subject matter of the agreement, but it contained a provision that expressly excluded from the release any claims under the Civil False Claims Act.

Subsequently, in January 2007, ED issued regulatory guidance in the form of a Dear Colleague Letter (DCL), accompanied by a letter sent to each lender identified as a 9.5 percent SAP claimant, which in essence offered the same basic settlement terms to all other lenders for whom 9.5 percent SAP funds were at issue. In this DCL, and more particularly in the accompanying lender letter, ED stated that it would not seek to recover disputed funds already paid to a lender if that lender refrained from billing for disputed funds in the future and did not challenge the Department's position, stated in the DCL, that 9.5 percent SAP was payable only on loans that qualified as made from eligible sources defined as stated in the DCL. The January 2007 DCL stated that ED would shortly set forth a procedure for verifying that a lender's future billings were thus compliant. That procedure was published in an April 2007 DCL. No express written settlement agreements were contemplated by or executed pursuant to this DCL; the settlement was to be accepted by, and remain effective based on, conduct by the lender. The 2007 DCLs were silent as to FCA claims or liability.

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[2] Nelnet remained entitled to bill for that portion of future SAP that was not in dispute, after a compliance audit.

ARGUMENT

I. Nelnet's Administrative Settlement Agreement With ED Expressly Excluded FCA Liability From The Scope Of Its Release

As to the Nelnet defendants[3] in particular, there is no basis for asserting that the Nelnet Agreement with ED constitutes a release of FCA liability, because the plain language of that agreement expressly excluded any such release. The Court need only read one provision of the Nelnet Agreement to reject Nelnet's motion on this point:

> K. The Department does not have the authority to, and this Agreement does not, waive, compromise, restrict or settle any past, present, or future violations by Nelnet, its officers, or employees of the criminal laws of the United States or any action against Nelnet, its officers or employees for civil fraud against the United States under 31 U.S.C. §§ 3729-33.

Precisely this situation arose in *United States ex rel. Hendow v. University of Phoenix*, Case No. 03-457 (E.D. Cal.). In that declined *qui tam* suit, the defendant had earlier entered into an administrative settlement agreement with ED, and that agreement, like Nelnet's, expressly excluded any release of FCA liability. The defendant sought to dismiss the *qui tam* suit on the grounds that its administrative settlement constituted an "alternate remedy" under the FCA, 31 U.S.C. §§ 3730(c)(5). *See* Def. Mem. in Support of Mot. to Dismiss Relators' 2d Am. Compl., Docket No. 57 (March 22, 2007). The United States submitted a statement of interest in opposition to that motion, arguing that:

> Defendant's position is classic have-one's-cake-and-eat-it-too behavior. When it suited its interests to exclude FCA liability from its settlement with ED, it signed an agreement providing precisely that. Now that it suits its interests to try to defeat FCA liability, it now claims that the ED settlement agreement does not mean what

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[3] Collectively referred to herein as "Nelnet."

> it says. In other words, having accepted the benefit of the ED settlement by concluding ED's administrative proceeding, Defendant has now flipped its position in order to escape the burden expressly imposed on it by that agreement, namely unresolved liability risk under the FCA.

See Statement of Int. in Opp'n to Mot. to Dismiss Relators' 2d Am. Compl., Docket No. 74 (June 6, 2007). The Court denied the defendant's motion in that case, finding that the settlement did not amount to an alternate remedy. *See* Order, Document 86 (August 20, 2007).

The same result should obtain here as to Nelnet. The Nelnet Agreement explicitly carves out an FCA release, and there is no defensible reading of that agreement that can make it mean the opposite thereof. Nelnet acted advisedly in entering into its settlement agreement. It could have negotiated for a release that included DOJ as a signatory releasing FCA liability, but it opted not to do so, and it should not now be permitted to change the terms of that bargain.

The fact that the Government declined to intervene in this litigation, and it is being pursued by the relator, is of no significance to this point. As Nelnet itself states, Congress has seen fit to afford a relator standing to pursue FCA claims as a limited assignee of the Government, and relator has acceded to the right to pursue the FCA claims in this case.[4] *See, e.g.*, *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993).

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[4] It should be noted that a relator is not authorized to pursue any other claims on behalf of the United States, such as common-law breach of contract. *United States ex rel. Laucirica v. Stryker Corp.*, 2010 WL 1798321 (W.D. Mich. May 3, 2010) *and cases cited therein*; *United States ex rel. Bender v. North American Telecommunications, Inc.*, 686 F.Supp.2d 46 (D.D.C. 2010); *United States ex rel. Phipps v. Comprehensive Community Development Corp.*, 152 F. Supp. 2d 443, 452 (S.D.N.Y. 2001)("While the FCA gives a relator the right to bring an action for a violation of the FCA, the FCA "does not give relators the right to assert common law claims on behalf of the United States.") No such claims are at issue in this case, however.

II. Under The Law, Only The Attorney General Has Authority To Resolve Claims Of Fraud On Behalf Of The United States

A. ED Cannot, And Did Not Intend To, Release FCA Liability Via Its Administrative Resolutions

Neither the Nelnet Agreement nor the settlements by conduct pursuant to ED's 2007 DCLs can have any dispositive effect on this litigation, because it is clear from statutory and other authority that Congress has committed exclusive authority to settle claims of fraud, including FCA claims, to the Attorney General. Under the Act, authority is expressly granted to the Attorney General to investigate and to file a civil action alleging the submission of false claims, 31 U.S.C. § 3730(a), and only the Attorney General may compromise such claims. *See, e.g.*, *Martin J. Simko Constr., Inc. v. United States*, 852 F.2d 540, 547 (Fed. Cir. 1988); *United States ex rel. Haskins v. Omega Inst.*, 11 F. Supp. 2d 555, 561 (D.N.J. 1998). An agency cannot terminate a False Claims Act case by unilaterally entering into an administrative settlement or issuing guidance on regulations. *See also* 31 U.S.C. § 3730(b) ("The action may be dismissed only if the court and the *Attorney General* give written consent to the dismissal") (emphasis added); Executive Order 6166, June 10, 1933 ("Only the Attorney General has authority to initiate, compromise or close claims involving fraud against the United States").

Defendants' arguments contravene the Attorney General's exclusive authority over such matters. Whether the administrative resolution is through a negotiated settlement agreement or by conduct consistent with procedures set forth in a DCL, it would permit ED to accomplish indirectly what it cannot accomplish directly. To the best of Government counsel's knowledge, no court has dismissed an FCA suit (intervened or declined) on the basis of an administrative

settlement not approved by the Attorney General, and defendants are asking this Court to become the first to do so.[5]

Furthermore, defendants have presented no evidence that ED intended the settlements contemplated by its DCLs to release FCA liability.[6] Plainly, its settlement with Nelnet did not release FCA claims, and defendants have offered no explanation as to why ED would have intended the DCLs to offer other lenders a broader release than what ED had negotiated with Nelnet. And even if that were ED's intention, or even just defendants' misunderstanding of ED's intention, the inescapable fact remains that any such attempted release by ED would be *ultra vires* and void. *Cf. Federal Crops Ins. Corp*. v. *Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 3 (1947) ("[A]nyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority").

The Government's position does not result in duplicative litigation of the matters settled by ED. ED's settled claims and any claims that DOJ or a relator may have under the FCA are separate causes of action with different elements and different provisions for recovery. Defendants note that then-Secretary of Education stated at the time that ED's position is that neither individual taxpayers nor DOJ had the authority to police the decision issued via the 2007

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[5] Defendants' citation to *United States ex rel. Englund v. Los Angeles County*, 2006 WL 3097941 (E.D.Cal. Oct. 31, 2006) is not to the contrary. That case merely stands for the proposition that an affected agency's conduct may be of evidentiary significance in proving elements of the FCA, such as scienter or materiality, not that it can eliminate DOJ's exclusive authority over the FCA.

[6] Notably, the provision in the Nelnet Agreement carving out FCA claims from ED's release expressly stated that ED lacked the authority to release FCA liability.

DCLs, and DOJ does not dispute this. *See, e.g.*, Nelnet Mem. at 28 n.16. Instead, DOJ or a relator must pursue a claim for violation of the FCA, which requires proof of different elements such as scienter and materiality. The fact that there may be a common nucleus of fact with ED's actions is not relevant to the disposition of the FCA litigation; Congress made the decision to apportion governmental authority in this manner, and neither ED nor DOJ can override or ignore that mandate.

B. ED Cannot Bar DOJ Or A *Qui Tam* Relator From Pursuing FCA Damages

As a fallback position, defendants assert that even if ED's administrative resolutions did not extinguish FCA liability, they somehow extinguish the right to recover damages. This variation of defendants' argument should be rejected for the same reasons set forth above. Any FCA claims available to DOJ or a relator are separate causes of action, and carry their own right of recovery. If defendant's argument were accepted, it would provide a back-door way for an agency to achieve what it cannot do openly – extinguish FCA rights committed to the exclusive authority of the Attorney General.

Most importantly, the FCA expressly provides for the recovery of triple damages, 31 U.S.C. § 3729(a). This is a remedy that is not available to ED under any circumstances and that ED has no authority to release.

C. Under Some Circumstances, An Offset Of Prior Payments Against FCA Triple Damages May Be Appropriate, But No Such Circumstances Appear To Exist In This Case

While the FCA provides for triple damages, it does not permit a recovery of duplicative damages. If, as part of an administrative settlement, a defendant has paid some or all of the single damages sought in the *qui tam* suit, it is therefore appropriate to credit that amount against

an FCA judgment. *United States v. Bornstein*, 423 U.S. 303, 316 (1976). However, that offset properly takes place *after* the trebling of damages, in order to "maximize[] the deterrent impact." *Id.* at 316-17. Therefore, it cannot under any circumstances be dispositive of FCA claims against a defendant or eliminate all of the Government's damages. Also, payments made in an administrative settlement that constitute fines or penalties are separate and apart from damages and would not be offset.

In the instant case, however, there does not appear to be any basis for an offset. Neither Nelnet nor any other defendant has repaid any of the amounts sought by relator as damages in this action (indeed, this was a central element of the administrative settlements). If, hypothetically, Nelnet (or the other defendants) had agreed in settlement to pay back some percentage of disputed funds already paid to it, that amount would, by contrast, be offset against an FCA judgment of triple damages, but that is not the case here.

It is true that Nelnet and the other defendants agreed to forgo billing for future claims not demonstrated as qualifying under prescribed standards. However, since the defendants did not bill for those claims, relator is not seeking to recover any damages for those claims. Hence, there is nothing to offset with respect those future claims. Moreover, if relator proves as part of this litigation that the disputed billings at issue here were not authorized, then the defendants would have no claim to any future billings and therefore could not be said to have relinquished anything entitling them to an offset.

CONCLUSION

For the reasons stated above, the United States hereby suggests that the defendants' motions should be denied, to the extent they seek to afford dispositive significance to the 2007 resolutions of 9.5 percent SAP subsidy issues by ED.

Dated: July 12, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on the 12th day of July, 2010, I electronically filed the foregoing UNITED STATES' STATEMENT OF INTEREST REGARDING DEFENDANTS' DISPOSITIVE MOTIONS using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

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