THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, ex rel. Branch Consultants, LLC,	)	
Plaintiff,	)	Civil Action No. 06-4091
v.	)	Section "M," Mag. 1
ALLSTATE INS. CO., et al.	)	
Defendants.	)	

UNITED STATES' STATEMENT OF INTEREST IN OPPOSITION TO DEFENDANT STATE FARM'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiff/Relator Branch Consultants, LLC has filed a *qui tam* action pursuant to the Federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, against the defendants in this action. The defendants have filed a joint motion to dismiss ("MTD"), supported by a joint memorandum and by a supplemental memorandum submitted by defendant State Farm Ins. Co. This statement of interest ("SOI") sets forth the position of the United States on issues raised in State Farm's supplemental memorandum.

I. INTRODUCTION

Although the United States has declined to intervene and is therefore not a party to this action, the United States remains the real party in interest, entitled to share in any recovery that may be obtained in the *qui tam* action. 31 U.S.C. § 3730(d); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994). In addition, the Government is responsible for enforcement of the FCA, which plays a central role in the Government's ongoing efforts to combat fraud affecting the public fisc. The United States therefore has a substantial interest in ensuring that the FCA is interpreted correctly. Accordingly, the United States respectfully submits its position on State Farm's supplemental arguments in support of the defendants' MTD.

II. ARGUMENT

In its supplemental memorandum, State Farm cites an arbitration provision in the standard Financial Assistance/Subsidy Arrangement ("Arrangement") that an insurer executes with the Flood Insurance Authority ("FIA")[1] to become a Write-Your-Own ("WYO") carrier under the National Flood Insurance Program ("NFIP"). That provision provides, in pertinent part:

> Article VIII-*Arbitration*
> If any misunderstanding or dispute arises between the Company and the FIA with reference to any factual issue under any provisions of this Arrangement ... such misunderstanding or dispute may be submitted to arbitration for a determination [that] shall be binding upon approval by the FIA.

See State Farm's Supplemental Memorandum ("Supp. Mem.") at 3. Arbitration under this procedure is binding upon the WYO insurer but non-binding upon the FIA. *See* 42 U.S.C. § 4083. Notably, the arbitration provision makes no reference to the FCA or the Attorney General.

State Farm argues that this case should be dismissed on the grounds that this Court should find (1) that the arbitration provision applies even to claims brought under the FCA, and (2) that the Relator, although standing in the shoes of the United States to the extent permitted by the FCA and arguably bound by the restrictions of the arbitration provision, is somehow unable to invoke its procedures, such that this provision, which on its face calls for arbitration, instead mandates dismissal.[2]

The purpose of this SOI is to oppose State Farm's argument. As to point (1) thereof, this Court should find that the arbitration provision of the Arrangement has no applicability to a cause of action arising under the FCA. To the extent that State Farm asks this Court to follow the

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[1] FIA is a component sub-agency of the Federal Emergency Management Authority ("FEMA").

[2] State Farm was not joined by any other defendant in its Supplemental Memorandum, but its Supplemental Memorandum was offered in support of the joint MTD, as a basis for dismissal of the case as to all defendants.

decision of the Fourth Circuit in *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001), the United States submits, as set forth below, that that case was wrongly decided and should not guide this Court's decision.

Even if this Court chooses to find that the arbitration provision somehow applies to the FCA claims at issue in this case, point (2) of State Farm's argument is supported by no authority and no logic. It is internally inconsistent, suggesting that there both is and is not a "dispute" before this Court. The Court should alternatively reject the argument on that basis, if it chooses to reach that issue.

A. FCA Claims Against A WYO Carrier Are Not Subject To The Arbitration Provision Of The Arrangement, Because They Do Not Arise Pursuant To Contract

In *Bankers Insurance*, the United States brought both contract claims and FCA claims against the defendant, and the defendant moved to compel arbitration. The district court denied the motion, but the Fourth Circuit reversed. The Fourth Circuit found, in pertinent part, that the arbitration provision of the Arrangement applied both to the Government's contract claims and to its FCA claims.[3] 245 F.3d at 325. Judge Seymour wrote a separate opinion dissenting in part as to this holding, concluding that the arbitration provision had no applicability to the Government's claims under the FCA.[4] *Id.* In this SOI, the Government submits that Judge Seymour's partial dissent was correct, and that the holding by the *Bankers Insurance* majority applying the arbitration provision to FCA claims was incorrect decided and should not be adopted by this Court. *Id.* at 326. This Court instead should find that the arbitration provision of the

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[3] The *Bankers Insurance* majority also held that sovereign immunity did not bar the applicability of the arbitration provision in the WYO agreement, 245 F.3d at 320; and, despite being written in language that on its face was permissive, the arbitration provision was mandatory and enforceable even though it was non-binding on the Government. *Id.* at 322. The Government does not concede the correctness of the other holdings in *Bankers Insurance*, although it has opted not to address them in this SOI.

[4] Judge Seymour also opined that the doctrine of sovereign immunity should be found to bar the applicability of the arbitration provision to FCA claims. *Id.* at 326.

Arrangement does not extend to claims under the FCA and for that reason alone cannot constitute a basis for dismissal of Relator's FCA claims.

The Fourth Circuit erred in holding the arbitration provision applicable to FCA claims against a WYO insurer, because it incorrectly based that holding upon "ordinary principles of contract law." *Id.* at 323. The fact that FIA and the WYO carriers enter into an agreement, and the agreement relates to the WYO carriers' alleged violation of the FCA, does not mean that the FCA claim is founded on that agreement. Rather, the FCA claim is founded on the defendants' alleged violation of a federal statute which prohibits a person, like the defendants, from acting with appropriate scienter to submit false or fraudulent claims to the government or make false statements in order to avoid an obligation to the government. Further, the FCA provides for relief treble damages and penalties that is not available under the Arrangement but that arises instead by statute. Thus, it was inappropriate for the *Bankers Insurance* majority to characterize the United States' position as seeking "to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision contained therein," 245 F.3d at 323, because the FCA claim was not an action to enforce any contract provisions.

Judge Seymour's partial dissent in *Bankers Insurance* rested on these principles:

> The FCA claim does not arise pursuant to the Arrangement and consequently is not subject to the arbitration provision at issue.

Id. at 325 (Seymour, J., concurring in part and dissenting in part). Other courts have also squarely held that claims under the FCA do not arise pursuant to a contract. This point was clearly articulated in *United States ex rel. Roby v. Boeing Co.* ("*Roby I*"):

> Claims under the FCA do not arise pursuant to a contract. *See United States v. Woodbury*, 359 F.2d 370, 377 (9th Cir. 1966) (finding that the legal basis of claims is an intentional violation of the FCA and is not a mere breach of contract); *see also Ueber*, 299 F.2d at 313 (finding that the FCA was violated not by merely entering into a contract, but by the submission of fraudulent vouchers for payment). Claims under the FCA arise when a person knowingly presents or causes to be presented a false or fraudulent claim, or knowingly makes, uses or causes to be made or used a false record or statement to get a false or fraudulent claim paid. *See, e.g.*, Title 31 U.S.C. § 3729(a)-(c) (defining a "claim" as "any

> request or demand, whether under contract or otherwise, for money or property ..."); *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) ("This remedial statute reaches beyond 'claims' which might be legally enforced to [include] all fraudulent attempts to cause the government to pay out sums of money."); *McLeod*, 721 F.2d at 284-85 (concluding that a "knowing endorsement" of a mistakenly issued Treasury check is a false claim). As we concluded above, the appropriate reading of the [High Value Items Clause] is one that is consistent with the plain language of both the HVIC itself and the FCA. Since claims brought under the FCA are not contract-based claims or dependent upon the degree of negligence involved, the claims are unimpaired by contractual limitations on liability.

73 F. Supp.2d 897, 910-11 (S.D. Ohio 1999).[5] It was therefore erroneous for the *Bankers Insurance* majority to apply principles of contract to apply the arbitration provision of the Arrangement to claims arising under the FCA.

B. Application Of The Arbitration Provision Of The Arrangement To FCA Claims Violates The Exclusive Authority Of The Attorney General To Direct FCA Litigation And Resolve Claims Thereunder

The Government submits that the Fourth Circuit further erred in *Bankers Insurance* by failing to give effect to the Attorney General's unquestionably exclusive authority to resolve claims arising under the FCA. Under the FCA, Congress has committed the authority to administer and prosecute claims arising under this act to the Attorney General:

> The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person violated or is violating section 3729, the Attorney General may bring a civil action under this section against that person.

31 U.S.C. § 3729. The Attorney General's authority over FCA matters is exclusive. In *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 547 (Fed. Cir. 1988), the court held that "No other agency is empowered to act under [this] statute." That Court found further that, under

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[5] The Sixth Circuit affirmed the trial court's decision in *Roby* after *Bankers Insurance* was issued. *United States ex rel. Roby v. Boeing Co.* ("*Roby II*"), 302 F.3d 637 (6th Cir. 2002). Interestingly, while it did not specifically reiterate the district court's finding that FCA claims do not arise pursuant to contract, the Sixth Circuit did hold that a provision in a Government contract cannot wholly extinguish FCA liability. *Id.* at 645. Indeed, the Sixth Circuit rejected Boeing's attempt to rely on *Bankers Insurance*, on the grounds that the Fourth Circuit's decision at most "deferred" the FCA litigation, rather than extinguishing it. *Id.*

the FCA: "Congress could not have stated more clearly its intent to give the Attorney General specific authority to 'administer, settle, or determine' claims or disputes under the False Claims Act." *Id*. at 548 (quoting the Contracts Disputes Act, 41 U.S.C. § 605(a)). The ability of a Relator to pursue litigation of FCA claims when the Government does not intervene in a *qui tam* suit does not alter or constrain this exclusivity.[6]

Here, FEMA and FIA have no authority to include an arbitration provision in the Arrangement that would require the Attorney General to pursue arbitration of FCA claims. FEMA and FIA have no authority to litigate FCA claims or to seek treble damages and penalties, and so they cannot draft a contractual provision that requires arbitration of such claims. Without specific authority to do so, no other agency can compromise FCA actions or waive the Attorney General's authority to administer such actions. *See Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997) ("Generally, a provision in a government contract that violates or conflicts with a federal statute is invalid or void"). Thus, another federal entity has no authority to compromise a FCA claim by the United States. *United States v. Woodbury*, 359 F.2d at 376-77 (assuming *arguendo* that the Government was a party to an agreement that compromised contractual claims, such agreement could not be construed as compromising, settling, or releasing claims under the FCA and it is "doubtful" that a contracting agency has any authority to compromise those claims); *United States ex rel. Mayman v. Martin Marietta*, 894 F. Supp. 218 (D. Md. 1995) (accord and satisfaction did not waive Government's fraud and FCA claims; "an accord and satisfaction is enforceable only to the extent that the parties have authority to settle disputes . . . The Government's contracting office for this contract had no authority to settle fraud claims").

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[6] As the FCA makes clear, a Relator brings suit on behalf of the United States and the Attorney General then decides whether it will intervene and take over the litigation. Further, when the Attorney General does not take over the litigation, the Relator can proceed with the litigation. However, the Relator still acts on behalf of the Attorney General and can compromise, settle, and release FCA claims only with his approval. 31 U.S.C. § 3730. Further, the United States still recovers the bulk of any judgment obtained by that Relator.

The *Bankers Insurance* court incorrectly minimized the Attorney General's unique role in FCA litigation, mischaracterizing the Government's position as suggesting that the Fourth Circuit "rely on the Attorney General's presence as counsel in this litigation to allow him to ignore the arbitration agreement." 245 F.3d at 323. The Government was not asking the *Bankers Insurance* court to "ignore [the arbitration provision] simply because the Attorney General serves as counsel for the Government." *Id.* Rather, the Government was asking that court to recognize that Congress has given the Attorney General substantive and exclusive statutory authority to direct the conduct of FCA litigation, which cannot be overridden by a contractual arbitration provision. Hence, this Court should reject the Fourth Circuit's holding and instead properly conclude that arbitration is not available for claims arising under the FCA.

The *Bankers Insurance* court further erred in opining that "this arbitration process will not in any way dilute the Attorney General's authority," because it is ultimately non-binding upon the Government. *Id.* at 324. Arbitration involves significant expense and delay, even if non-binding. Whether or not to pursue arbitration is a significant case-handling decision: in some instances, it may be in the interest of the Government to proceed directly with litigation, while in others, the Government may benefit from taking the case onto the side track of arbitration. Congress has chosen to commit these decisions to the exclusive discretion of the Attorney General in FCA cases, and holding the Arrangement's arbitration provision applicable to those cases, even if non-binding, is still an infringement thereof.

C. Even If This Court Does Find The Arbitration Provision Of The Arrangement To Be Applicable To FCA Claims, Dismissal Of The Relator's Claims On That Basis Is Inappropriate

Even if this Court does choose to apply the arbitration provision of the Arrangement to the FCA claims at issue in this case, there is absolutely no basis to dismiss the Relator's claims for lack of standing. State Farm appears to be suggesting that (1) because there is a "dispute" giving rise to FCA claims, those claims must be subject to the arbitration provision of the

Arrangement, but (2) there is no "dispute" sufficient to invoke the arbitration provision here, because the Government has not intervened in this case.

Point (1) of that argument is erroneous, for all of the reasons set forth above. Point (2) is internally inconsistent asserting simultaneously that there both is and is not a dispute and entirely untenable, and it is not surprising that State Farm is unable to cite to any authority to support it. Presumably, State Farm must concede that if the United States *had* intervened, a dispute under the FCA unquestionably would exist.[7] When, as here, the Attorney General does not intervene, that dispute does not *disappear*. Rather, the Relator stands in the shoes of the Attorney General, to the extent provided in 31 U.S.C. § 3730, and is empowered to litigate (or arbitrate, if the Court so requires) those FCA claims on behalf of the United States. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) ("The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim").

State Farm essentially mischaracterizes the nature and effect of the Government's decision not to intervene. The Government's election decision is not in any way a determination of the substantive merits of a Relator's case, and a decision not to intervene is not in itself any sort of determination or indication that a Relator's case necessarily *lacks* merit. This is especially true in a case such as this one, where the Government neither intervened nor declined, but simply stated that it was unable to make an election decision by the time specified by the Court.

Taken to its logical conclusion, State Farm's argument that no dispute exists if the Government does not intervene leads to an absurd result: it would bar any Relator in any FCA case from proceeding with litigation when the Government does not intervene. Obviously, this is directly contradictory to the express terms of the FCA which provides that a Relator shall be

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[7] State Farm's statement in its brief that "Ostensibly, the *FIA* has no dispute with State Farm at this time," Supp. Mem. at 4 (emphasis added), is somewhat misleading in this regard. The "dispute" at issue in this case arises under the FCA, and as noted above, litigation under the FCA is committed not to the FIA but to the Attorney General or, in proper circumstances, a *qui tam* Relator on behalf of the United States.

entitled to proceed with an action if the United States does not intervene. *See* 31 U.S.C. § 3730(c)(3); *see also* § 3730(d)(2) (awarding Relator a share even where the United States declines to intervene). Pursuant to that express statutory authority, Relators in FCA cases routinely proceed with litigation in cases where the Government has not intervened, and in many of those cases the Relator successfully obtains a settlement or judgment on behalf of the Government.

At bottom, there is no clearer way to say it: a dispute exists here. Were there no arbitration provision (and assuming no other basis for dismissal existed), the Relator and the defendants would inevitably move forward into litigation over the merits of Relator's FCA claims. State Farm would have no basis in that circumstance for arguing that the Government's decision not to intervene meant that there was no dispute between the parties. The arbitration provision may require the parties to put this litigation temporarily on hold, if the Court chooses to impose that obligation on the Relator's FCA claims, but it does not in any way require dismissal of the Relator's claims.

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court, in ruling upon defendants' joint MTD, deny the joint MTD insofar as dismissal is sought based on the arbitration provision of the Arrangement, and issue an order holding in pertinent part that the arbitration provision of the Arrangement is not applicable to claims arising under the False Claims Act, or in the alternative, that the arbitration provision, even if applicable to FCA claims, does not bar a Relator from litigating FCA claims in cases where the Government has not intervened. A form of proposed order is attached.

Respectfully submitted,

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