

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA <i>EX REL.</i>	)
PHILLIP J. BERG,	)
	)
Plaintiff,	)
	)
v.	)
	)
BARACK HUSSEIN OBAMA, JR.,	)
	)
Defendant.	)

Civ. No. 1:08-1933 (RWR)

UNITED STATES' MEMORANDUM OF LAW IN OPPOSITION TO  
RELATOR PHILIP J. BERG'S MOTION FOR RECONSIDERATION

The United States respectfully opposes the Relator Philip J. Berg's motion for reconsideration of the Court's June 9, 2009 Order dismissing this action with prejudice under 31 U.S.C. § 3730(c)(2)(A). The Order followed the clear and binding precedent of this Circuit which recognizes the United States' "virtually 'unfettered' discretion" to dismiss a *qui tam* suit as an exercise of prosecutorial discretion. *See United States ex rel. Hoyte v. American National Red Cross*, 518 F. 3d 61, 65 (D.C. Cir. 2008); *Swift v. United States*, 318 F.3d 250, 251-54 (D.C. Cir. 2003). As the Court acknowledged: "Nothing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F. 3d at 253.

Relator points to no new fact or law that would meet his heavy burden of justifying reconsideration. He misapplies the governing conflict of interest statutes and asks the Court to

radically rewrite the False Claims Act (FCA) to permit private citizens to proceed with actions on behalf of the United States with no mechanism for government control over the litigation.

**I. Relator's Motion For Reconsideration Is Disfavored.**

"[M]otions for reconsideration under Rule 59(e) are 'disfavored' and 'should be granted only under extraordinary circumstances.'" *N.Y.C. Apparel F.Z.E. v. U.S. Customs and Border Protection Bureau*, \_\_\_ F.2d \_\_\_, 2009 WL 1464962, 1 (D.D.C. May 27, 2009) (citations omitted). Such a motion should not be granted "unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006) (internal citation and quotation marks omitted). Relator points to no change in law or new evidence and therefore must prove a clear error or manifest injustice to prevail, which he plainly has not done.

**II. Relator Cannot Use Federal Conflict Of Interest Law To Preclude Department Of Justice Attorneys From Handling Their Employer's Cases**

Relator's reliance on federal conflict of interest laws misses the mark entirely. As a threshold matter, he cites no authority giving him standing to enforce these criminal and civil rules on government employee conduct. *But see Scherer v. United States*, 241 F. Supp. 2d 1270, 1284 (D. Kan. 2003) (ruling criminal and civil conflict of interest authorities cited by relator create no private right of action). In addition, he focuses on the alleged impropriety of the Attorney General participating in this matter when the Attorney General has appeared on not one of the United States' pleadings.

More importantly, Relator fundamentally misstates the law when he argues that neither the Attorney General, nor any Department of Justice attorney, may play a role in his FCA case because all are ostensibly employed by the President of the United States, a party to the action. This novel interpretation of the law would bar any government attorney from ever participating in any lawsuit where the President (or for that matter, our true employer, the United States) was either the plaintiff or the defendant. Arguably, neither the Solicitor General, nor any Department of Justice attorney could participate, for example, in the many cases brought against Presidents Bush and Obama involving the habeas corpus rights of Guantanamo detainees. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004); *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009). Government attorneys could not defend the United States in suits against the United States, nor, bring criminal, False Claims Act, civil rights, or environmental cases on the United States' behalf. That simply is not, and cannot be, the law.

The statutory and regulatory provisions upon which Relator seems to rely, (*see* Mem. Supp. Relator's Mot. Recon. ¶¶ 44-47), do not mandate the disqualification of Department of Justice attorneys from this matter, nor from other matters involving their government employer. First, 18 U.S.C. § 205 on its face restricts government employees from certain interactions with government "other than in the proper discharge of official duties," *see* 18 U.S.C. § 205(a), but does not limit how government employees carry out their official duties, which is what Relator complains of here when he argues that Department of Justice attorneys lacked authority to dismiss his case.

Second, 18 U.S.C. § 208 restricts government employees from participating in matters in which they have "a financial interest," which again is not an issue here. As highlighted above,

only an absurd reading of the law would impute to federal employees a financial interest in a matter simply because their employer – whether conceived to be the President, their employing agency, or the United States of America – has an interest in the outcome of a particular case.

Finally, Relator's argument is likewise unsupported by 5 C.F.R. § 2635.502, which restricts government employees from participating in certain matters where a person with whom they have a "covered relationship" is a party, and specifies that government employees have a covered relationship with "any person for whom the employee has, within the last year, served as . . . an employee." 5 C.F.R. § 2635.502 (b)(iv). Again, as highlighted above, only an absurd interpretation would apply this ban to an employee's current government employer rather than to past employers who are the clear targets of such a conflict of interest rule. As a practical matter, the Department of Justice might as well be disbanded if this rule prohibited government employees from participating in any case in which their current government employer is a party.

### **III. The FCA Does Not Allow A Relator To Proceed With No Government Role**

Moreover, even if it were true that the Department of Justice, and indeed following the train of his argument, the entire Executive Branch, is barred from participating in Relator's suit because the President is our employer, it would not follow, as Relator suggests, that he could proceed with his FCA suit. The *qui tam* provisions of the FCA provide only a limited authorization for a private citizen to proceed with a lawsuit on behalf of the United States and clearly contemplate that will happen only where the government has the opportunity to make an intervention decision, 31 U.S.C. § 3730(b)(4), and even if it declines to intervene, to play a continuing role in the case.

As the Court has recognized, the FCA expressly allows for the government to dismiss unwanted *qui tam* cases as an exercise of prosecutorial discretion. 31 U.S.C. § 3730(c)(2)(A). When the United States alternatively decides not to prosecute a given *qui tam* suit but to allow the relator to proceed, the case is still brought on behalf of the United States, 31 U.S.C. § 3730(b)(1), the United States still receives at least 70 percent of the recovery, 31 U.S.C. § 3730(d), and the FCA therefore still explicitly provides numerous other mechanisms for continued government involvement and control. *See generally Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 753-57 (5th Cir. 2001) (setting forth that even when the government declines to intervene in a *qui tam* and the relator proceeds, the government may *inter alia*: veto a settlement urged by the relator, 31 U.S.C. § 3730(b)(1); settle over a relator's objections, 31 U.S.C. § 3730 (c)(2)(B); intervene for good cause and take over the prosecution of the suit, 31 U.S.C. § 3730(c)(3); elect to be served with copies of all pleadings and deposition transcripts, 31 U.S.C. § 3730(c)(3); and seek a stay of discovery where relator's prosecution of the suit would interfere with an ongoing government investigation, 31 U.S.C. § 3730(c)(4)). Thus, relator can point to no authority under the FCA that would allow him to proceed with a *qui tam* suit under his sole control, with the government effectively recused from the case.

#### **IV. Conclusion**

For all of these reasons, Relator Philip J. Berg's motion for reconsideration has no merit, and the United States respectfully requests that it be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of July a true and correct copy of the foregoing UNITED STATES' MEMORANDUM OF LAW IN OPPOSITION TO RELATOR PHILIP J. BERG'S MOTION FOR RECONSIDERATION was sent first-class mail, postage paid to:

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