

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *EX REL.*)
 PHILLIP J. BERG,)
)
 Plaintiff,)
)
 v.)
 BARACK HUSSEIN OBAMA, JR.,)
)
 Defendant.)

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

UNDER SEAL

UNITED STATES' REPLY IN SUPPORT OF SUGGESTION OF DISMISSAL

The United States of America, through its undersigned counsel, respectfully submits this reply in support of its suggestion of dismissal under 31 U.S.C. § 3730(c)(2)(A). Relator's opposition simply ignores the binding precedents of *United States ex rel. Hoyte v. American National Red Cross*, 518 F.3d 61 (D.C. Cir. 2008) and *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003). Although it is easily met here, the rational basis test of *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998) does not apply in this Circuit, where the Court of Appeals has recognized that the United States has virtually unfettered discretion to dismiss claims under 31 U.S.C. § 3730(c)(2)(A) as an exercise of prosecutorial discretion. *See Hoyte*, 518 F.3d at 65; *Swift*, 318 F.3d at 251-54. Mr. Berg is entitled to the hearing he has now requested – to give him an opportunity to try to convince the Department of Justice to change its mind – but he is entitled to nothing more, and certainly not to discovery into the United States' investigation or decision-making process. *See Swift*, 318 F.3d at 254 (rejecting relator's plea for discovery, explaining "the Supreme Court has stated that a party is

not entitled to discovery of information relating to prosecutorial decisions absent a substantial threshold showing") (citing *United States v. Armstrong*, 517 U.S. 456, 463 (1996)). Accordingly, the United States respectfully requests that the relator be afforded the hearing he has now requested and this action then be dismissed.

Respectfully submitted,

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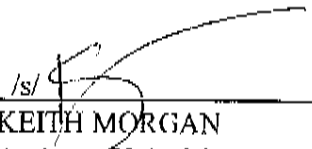
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2009, a true and correct copy of the above and foregoing United States' Suggestion of Dismissal and its proposed order were mailed by first-class mail to counsel for the pro se relator in this action:

**Philip J. Berg, Esq.
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Because this action is under seal pursuant to 31 U.S.C. § 3729, *et seq.*, defendant has not been served with a copy of the foregoing.

/s/ 

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