IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, ex rel. ROBERT P. BAUCHWITZ, M.D., Ph.D., Plaintiffs, v. WILLIAM K. HOLLOMAN, Ph.D., CORNELL UNIVERSITY MEDICAL COLLEGE, ERIC B. KMIEC, Ph.D., and THOMAS JEFFERSON UNIVERSITY, Defendants.	)	Civil Action No. 04-2892 (TJS)

UNITED STATES'S STATEMENT OF INTEREST

The United States of America respectfully submits this statement of interest, pursuant to 28 U.S.C. § 517, in response to Defendants' motions to dismiss, filed July 11, 2007.

The United States has a significant interest in the development of False Claims Act (FCA) case law, even when generated in a declined qui tam case such as this one. The United States regularly litigates cases brought under the FCA, and case law construing or applying the statute has an impact on FCA matters initiated by the United States and *qui tam* cases in which the United States intervenes. Moreover, even in *qui tam* cases in which it declines to intervene, the United States remains a real party in interest. *See United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir. 1996). In the event the Relator prevails in the instant case, the United States is entitled to receive up to 75% of the judgment against the Defendants. 31 U.S.C. § 3730(d)(2).

The Defendants' motions to dismiss raise two erroneous arguments that this Court should reject, should the Court finds it necessary to reach these issues when resolving the Defendants'

motions to dismiss.[1] First, contrary to Defendants' position, when a relator files an amended complaint, it relates back to the original, sealed *qui tam* complaint, and nothing in the text or structure of Federal Rule of Civil Procedure 15(c) or of the FCA bars relation back or suggests that it is inapplicable in this context. Second, the statute of limitations under the FCA begins to run not when false statements are submitted to the Government, but when the grant payments themselves are disbursed. The United States takes no position on any of the other arguments raised in Defendants' motions to dismiss or in Relator's opposition thereto.

DISCUSSION

I. RELATORS' AMENDED COMPLAINTS MAY RELATE BACK TO ORIGINAL COMPLAINTS IN THE FCA CONTEXT

Citing the case of *United States v. The Baylor Univ. Med. Ctr.,* 469 F.3d 263 (2nd Cir. 2006), Defendants argue that a relator's amended complaint does not relate back (pursuant to Fed. R. Civ. P. 15) to the relator's original qui tam complaint, because the original qui tam complaint was filed under seal. Defendants' argument is not supported by *Baylor*, and is inconsistent with the text and structure of both the FCA and Fed R. Civ. P. 15, as well as with the great bulk of case law pertaining to the issue. Defendants' position should be rejected.

As a threshold matter, Defendants' reliance upon the *Baylor* decision for the proposition that a relator's amended pleadings do not relate back to the relator's original pleading in an FCA context is misplaced. The *Baylor* decision held that a complaint-in-intervention by the United States in a *qui tam* suit was time-barred because it did not, under Rule 15(c)(2), relate back to the date of the original complaint by the relator. Even the *Baylor* decision, however, recognized the

[1]Defendants' motions to dismiss put forth numerous bases for dismissing relator's complaint. The United States takes no position on the merits of any of Defendants' bases for dismissal other than those discussed in the instant Statement of Interest.

likelihood of relation back being permitted in the structure of the FCA itself. *See Baylor*, 469 F.3d at 270 ("There is a colorable argument that the FCA implicitly 'permit[s]' a form of relation back that dispenses with the requirement of notice" pursuant to Fed. R. Civ. P. 15(c)(1)). Because the Second Circuit determined that this argument (concerning the FCA's implicit sanction of relation back of amendments to an original, sealed complaint) had not been raised in that case, it decided not to address the point and did not resolve this issue. *Id.* Furthermore, *Baylor* did not address the situation in the instant case, where a Relator, as opposed to the Government, sought to relate back to his own *qui tam* complaint in amending that complaint after unsealing. *Baylor* simply does not stand for the proposition that relation back to a sealed *qui tam* complaint is wholly impermissible, nor does *Baylor* even address the specific situation presented in the instant case.

In this case, Relator's amended complaint may relate back to the relator's original complaint for two reasons: (1) because the FCA, by operation of law, permits relation back of amendments to original, sealed *qui tam* complaints and therefore relation back is proper under Fed. R. Civ. P. 15(c)(1); and (2), assuming the claims in the amended complaint arise out of the same conduct or occurrences as the relator's original *qui tam* complaint, relation back is proper under Fed. R. Civ. P. 15(c)(2). We consider these reasons in turn.

A. The FCA Permits Relation Back to the *Qui Tam* Complaint Pursuant to Fed. R. Civ. P. 15(c)(1)

Under Fed R. Civ. P. 15(c)(1), "[a]n amendment of a pleading relates back to the date of the original pleading when . . . relation back is permitted by the law that provides the statute of limitations applicable to the action." The 1991 Advisory Committee Notes accompanying the adoption of the rule stated, "[w]hatever may be the controlling body of limitations law, if that

law affords a more forgiving principle of relation back than the one provided in the rule, it should be available to save the claim." Fed. R. Civ. P. 15 advisory committee's note; *see also Davenport v. United States*, 217 F.3d 1341, 1344, n.7 (11th Cir. 2000) ("the Advisory Committee Note is clear that (c)(1) was added to ensure that if the controlling body of limitations law afforded a more forgiving principle of relation back than the one provided in Rule 15, then the more forgiving principle should be available to save the claim."). The relevant law must be analyzed to determine whether it expressly or impliedly permits relation back of amendments. *See, e.g., In re Newcare Health Corp.*, 274 B.R. 307, 312 (D. Mass. 2002); *In re Art & Co., Inc.*, 179 B.R. 757, 763 n.7 (D. Mass. 1995). Such analysis must comport with the principle of statutory construction that "provisions of a statute are supposed to be read in such a way that all of them are given effect." *Stone & Webster Eng'r Corp. v. Duquesne Light Co.*, 79 F. Supp. 2d 1, 8 (D. Mass. 2000) (statutes or parts of statutes in *pari materia* are to be construed together).

The procedures set forth in the FCA clearly contemplate a relation back between the relator's original sealed *qui tam* complaint and any subsequent amendments to that complaint. The FCA authorizes a *qui tam* relator to "bring" an FCA suit on the government's behalf. 31 U.S.C. § 3730(b)(1). The relator is obliged to file his complaint under seal, in order to permit the government to investigate the relator's allegations and decide whether to intervene in the *qui tam* suit. *Id*. at § 3730(b)(2) - (4). The statute further provides that the complaint not be served on the defendant during this investigatory period. *Id*. The 60-day seal period may be extended only upon a showing of good cause to the District Court, and the Court has discretion to determine how many good cause extensions to grant. *Id*. at § 3730(b)(3). Section 3730(b)(4) of the FCA explicitly provides that the Government has until the expiration of the 60-day period or

any extensions obtained under paragraph (3) to proceed with the action. If it elects not to do so, the relator has the right to "conduct the action" and proceed with the litigation. *Id.* at 3730(c)(3).

It is well established in FCA case law that the filing of a sealed qui tam complaint tolls the FCA's statute of limitations. *See, e.g., Miller v. Holzmann*, 2006 WL 568722 (D.D.C. Mar. 9, 2006) (filing of FCA relator's complaint tolls statute of limitations); *United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160, 1170-72 (D. N.M. 2000) ("the limitations provisions of Section 3731 [of the FCA] are referring to the relator's initial act of filing the civil action, not to the later date when the complaint is unsealed"); *United States ex rel. Goodstein v. McLaren Reg'l Med. Ctr.*, No. 97-CV-72992, 2001 U.S. Dist. LEXIS 2917 at *12 (E.D. Mich. Jan. 1, 2001) (FCA suit commences for statute of limitations purposes when relator's complaint is filed); *see also* S. Rep. 99-435, 1986 U.S.C.C.A.N. 5266 at 5289 (filing of relator's *qui tam* complaint was intended to "start the judicial wheels in motion."); *see generally* Fed. R. Civ. P. 3; *Henderson v. United States*, 517 U.S. 654, 657 n.2 (1996) ("filing a complaint suffices to satisfy the statute of limitations"), *citing West v. Conrail*, 481 U.S. 35, 39 (1987). Given this fact, it is difficult to read the FCA in a manner that does not implicitly permit relators to amend their original complaint after declination. Indeed, it makes little sense to require the relator to file a complaint under seal, forbid service of the complaint, permit court-approved extensions of the 60-day seal period during the government's investigation, but also to have the statute of limitations continue to run during the investigative period for purposes of Rule 15's relation back procedures, thereby effectively prohibiting the relator from amending his complaint once the case is unsealed. The FCA authorizes relators to "conduct the action" after the United States declines to intervene. Defendants' position that relation back to sealed complaints is prohibited in the

FCA context would severely impede relators' ability to "conduct the action," as they will be forced to litigate the case to trial on the basis of their original complaint if amendment would render certain of their claims time-barred.

There is nothing in the FCA or its legislative history that suggests that relators' rights to amend their complaints pursuant to the Federal Rules of Civil Procedure were to be limited in any way due to the existence or length of the investigatory seal period. Indeed, there is no suggestion in text or structure of the statute that the investigatory seal period is meant to be limited in any way by the FCA's statute of limitations provisions. As one court has noted:

> It must be recalled that the government secured extensions of time within which to notify the court of its intervention in relator's action upon a showing that this court concluded presented good cause . . . It would be irrational to impute to Congress the intention to permit such enlargements yet bar the government's ultimate intervention on statute of limitations grounds when such enlargement sought received express judicial approval.

Miller v. Holzmann, 2006 WL 568722 at *5 (D.D.C. Mar. 9, 2006). An identical rationale applies to amendments of a relator's complaint after intervention; it would be illogical to suggest that Congress intended to permit enlargements of the seal period, yet then bar the relator from subsequently amending the complaint on statute of limitations grounds after those requests for enlargement received explicit court approval.

Defendants' arguments are based on the notion that, because sealed *qui tam* complaints do not provide notice to the defendants of the allegations against them, amendments cannot relate back to the sealed pleadings under Rule 15(c). This argument is incorrect. Congress clearly determined that notice is not required for an FCA suit to be initiated by requiring relator's complaint be first filed under seal. If the statute of limitations can be initially tolled without notice to defendant, then it makes no sense to preclude the relator from filing an amended

complaint relating back to it based on lack of notice.[2] Accordingly, should it reach this issue, this court should hold that relation back of amendments to the date of the original qui tam filing is clearly implied by the structure of the FCA, and is thus proper under Rule 15(c)(1).

B. The United States' Complaint Relates Back to the Relator's *Qui Tam* Complaint Under Fed. R. Civ. P. 15(c)(2)

In addition to the arguments presented above, the Relator's complaint also relates back under Fed. R. Civ. P. 15(c)(2), if it "[arises] out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading."[3] It is well settled that Rule 15(c) should be construed liberally to allow amended complaints that add new factual details or new examples of misconduct that fall within the scheme originally alleged.[4] Rule 15 also permits the addition of new legal theories in a subsequent complaint as long as they are based on the same "conduct, transactions, and occurrences" as the original complaint.[5]

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[2] This concept is not unique. The courts have routinely held that a sealed indictment tolls statutes of limitations in criminal cases. *See, e.g., United States v. Maling*, 737 F. Supp. 684, 693 (D. Mass. 1990)("For the purposes of the statute of limitations, a properly sealed indictment is found on the date of return to the magistrate, not on the date of the unsealing."), *aff'd by United States v. Richard*, 943 F.2d 115 (1st Cir.1991).

[3] The parties dispute whether the allegations in the amended complaint do in fact "arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The United States takes no position on the merits of that dispute. The government's position is limited to the proposition that the relator's amended complaint should relate back to his original qui tam filing if the court finds that the amended complaint is in fact based on the same "conduct, transactions, and occurrences" as the original complaint.

[4] *Siegel v. Converter Transp., Inc.*, 714 F.2d 213 (2d Cir. 1983)(allowing amended complaint seeking recovery for shipments that were not identified in original complaint, where new claims fell within general scheme alleged in original complaint); 6A Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d*, § 1497 at 74 (1990) ("[A]mendments that merely . . . expand or modify the facts alleged in the earlier pleading meet the Rule 15(c) test and will relate back.").

[5] *See Tiller v. Atlantic Coast Line R.R.*, 323 U.S. 574, 580-81 (1945) (claim under Federal Boiler Inspection Act relates back to original complaint for negligence); *Villante v. Dept. of Corrections*, 786 F.2d 516, 520 (2d Cir. 1986) (claim for wrongful confinement relates back to original claim under 42

Contrary to the *Baylor* decision, numerous courts have concluded that Fed R. Civ. P. 15(c)(2) applies to FCA actions. *See United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324, 1336 (M.D. Fla. 2003) (Government's non-FCA claims relate back to relator's complaint); *United States ex rel. Purcell v. MWI Corp.*, 254 F. Supp. 2d 69, 75-76 (D.D.C. 2003) (Government's common law claims relate back to relator's complaint); *United States ex rel. Jordan v. Northrop Grumman Corp.*, CV 95-2985 ABC, slip op. at p. 14, n.1 . D. Cal. Aug. 5, 2002) (Att. 1) (in dicta, noting that the Government's common law claims would relate back to relator's complaint); *United States ex rel. Mueller v. Eckerd Corp.*, 95-2030-CIV-T-17C, slip op. at p. 8 (M.D. Fla. Oct. 2, 1998) (Att. 2) (Government's breach of contract claim relates back to relator's complaint); 6A Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d*, § 1497 at 94-99 (1990).

Fed. R. Civ. P. 15(c)(2) states only that the claim in the subsequent pleadings needs to arise out of same conduct, transaction or occurrence, and does not contain any notice requirement such as is found in Rule 15(c)(3). Rather, notice typically arises as the means to determine whether the proposed amendment is based on the same allegations as the original pleading. *See, e.g., O'Loughlin v. National R.R. Passenger Corp.*, 928 F.2d 24, 27 (1st Cir. 1991) ("We have scoured the original complaint and can find no allegation of facts that could be said to give Amtrak fair notice of the general fact situation out of which the claim in the amended complaint arose."). Defendant's lack of notice of the original complaint (which Relator, as was noted previously, was obligated to file under seal) in no way affects Relator's ability to file an amended

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U.S.C. § 1983); *Miller v. American Heavy Lift Shipping*, 231 F.3d 242, 248 (6th Cir. 2000) ("a court will permit a party to add even a new legal theory in an amended pleading as long as it arises out of the same transaction or occurrence.").

complaint that relates back to the original complaint pursuant to Rule 15(c)(2).

II THE FCA STATUTE OF LIMITATIONS BEGINS TO RUN WHEN PAYMENTS ARE MADE, NOT WHEN FALSE STATEMENTS ARE SUBMITTED

Defendants Cornell University Medical College and William Holloman also contend that the FCA's statute of limitations in the instant case began to run on the dates that the allegedly false grant applications were submitted to the government, as opposed to the dates on which the government actually disbursed the grant funds to the defendants. This is an erroneous contention. The correct reading of the FCA, and the approach to this issue embraced by a majority of courts, is to hold that the FCA's statute of limitations begins to run "on the date the claim is made *or, if the claim is paid, on the date of the payment*."[6] *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986), aff'd, 817 F.2d 1007 (2d Cir. 1987) (emphasis added). *See also Jana, Inc. v. United States*, 41 Fed. Cl. 735 (1998); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp*., 777 F. Supp. 195, 200 (N.D.N.Y. 1991) (quoting *Blusal Meats*), aff'd, 985 F.2d 1148, 1157 (2d Cir. 1993); *United States ex rel. Duvall v. Scott Aviation*, 733 F. Supp 159, 161 (W.D.N.Y. 1990) ("It is the payment and not the request that triggers the statute."). This approach better reflects the language and purposes of the FCA, and also is consistent with several well-established legal principles concerning judicial construction of statues of limitation. For these reasons, it should be adopted by this court, and the Defendants' proffered interpretation rejected.

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[6] In the instant case, it is not clear whether submission of the grant application itself could even be considered submission of a false "claim" under the FCA, as opposed to a "false record or statement to get a false or fraudulent claim paid or approved by the government." 31 U.S.C. § 3729(a)(2). The submission of "false claims" would be the subsequent drawdowns of NIH funds after the grant was approved. Regardless, as a matter of interpretation, the correct approach is that the triggering date for the running of the statute of limitations is the date the claim was paid, as opposed to the date the claim was submitted.

Under 31 U.S.C. § 3731(b), the FCA's limitations periods begin to run on "the date on which the violation of section 3729 is committed." 31 U.S.C § 3729(b). Therefore, the relevant interpretative question is what constitutes a "violation" of section 3729 sufficient to trigger the running of the limitations period when damages are sought, and not just penalties. In addressing this question, the Court in *Jana Inc. v. United States*, cited above, noted that section 3729 penalizes the submission of a false claim, "whether or not the claim is paid." 41 Fed. Cl. At 743. However, the court also noted that "since section 3729 provides for the false claimant to be liable for actual damages, this suggests that when payment is made on the false claim, the violation of section 3729 encompasses not only the false claim but also the payments on that claim." *Id.* The *Jana* court's analysis of this issue is consistent with the well-established principle that "under federal law governing statutes of limitation, a cause of action accrues when all of the events necessary to state a claim have accrued." *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830, 834 (Fed. Cir. 1991); *Mack Trucks, Inc. V. Bendix-Westinghouse Automotive Air Brake Co.*, 372 F.2d 18, 20 (3d Cir. 1966) ("[a] statute [of limitations] begins to run when the cause of action arises, as determined by the occurrence of the final significant event necessary to make a claim suable."). In a cause of action seeking damages pursuant to the FCA, the events necessary to state a claim do not accrue until the claim is paid. The date of payment, not the date of the prior false submission, should be considered the "triggering" event for statute of limitations purposes under the statute.

Another basic principle concerning judicial construction of statutes of limitation is that "under federal law, a cause of action generally accrues when the plaintiff knows or has reason to know of the injury that is the basis of the cause of action." *See M.D. v. Southington Bd. Of*

Educ., 334 F.3d 217, 221 (2d Cir. 2003) (internal quotation marks omitted). Under this principle, it is the injury to the plaintiff, as opposed to the misconduct of the defendant, that generally begins the running of the statute of limitations. In the instant case, any damages to the United States occurred on the date the United States disbursed funds it (allegedly) should not have, as opposed to on the dates the defendants submitted their (allegedly) false grant applications. Therefore, to be consistent with this principle, the Court should hold that the limitations period began to run on the dates the grant funds were disbursed, as opposed to on the dates the purportedly false applications were submitted.

CONCLUSION

The United States takes no position on any of the issues raised in Defendants' motions to dismiss, or in the Relator's opposition thereto, other than the two issues discussed above. Should the Court reach these issues, and should the Court address Defendants' arguments that: (1) amended complaints do not relate back to original *qui tam* complaints because the original complaint was filed under seal; and/or (2) that the FCA statute of limitations begins to run when a false application is submitted to the Government, not when grant payments are made, the United States respectfully requests that Defendants' motions be denied.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
Civil Division

PATRICK L. MEEHAN
United States Attorney
Eastern District of Pennsylvania

GERALD SULLIVAN
Assistant United States Attorney
615 Chestnut Street, Suite 1215
Philadelphia, PA 19106
(215) 861-8716

/s/John K. Neal
JOYCE R. BRANDA
ALAN E. KLEINBURD
JOHN K. NEAL
Attorneys
Commercial Litigation Branch, Civil Division
U.S. Department of Justice
Post Office Box 261
Washington, D.C. 20044
Telephone: (202) 307-0405

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I, John K. Neal, hereby certify that I caused a copy of the foregoing Statement of Interest to be served on counsel of record by overnight delivery on this the 6th day of September, 2007.

Service List:

Ronald A. Sarachan, Esq.
Diana L. Spagnulo, Esq.
John C. Grugan, Esq.
Julia M. Scharff, Esq.
Ballard, Spahr, Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 864-8333

Alexandra C. Gaugler, Esq.
Mark S. Raspanti, Esq.
Michael A. Morse, Esq.
Miller, Alfano & Raspanti, P.C.
1818 Market Street, Suite 3402
Philadelphia, PA 19103
(215) 972-6400

Stephen R. Bolden, Esq.
Fell & Spalding
100 S. Broad Street
Philadelphia, PA 19110
(215) 563-6161

Thomas S. McNamara, Esq.
Indik & McNamara
100 S. Broad Street, Suite 2230
Philadelphia, PA 19110
(215) 567-7125

/s/ John K.Neal
John K. Neal
U.S. Department of Justice