TESTIMONY OF SHELLEY R. SLADE

Before the

House Committee on Oversight and Government Reform's Subcommittee on Economic Growth, Job Creation and Regulatory Affairs and the House Committee on the Judiciary's Subcommittee on Constitution and Civil Justice

Hearing on "DOJ's *Quid Pro Quo* with St. Paul: A Whistleblower's Perspective"

May 7, 2013, 10 a.m.

Background

I am testifying today in my personal capacity as an attorney with more than 20 years' experience handling *qui tam* cases filed under the federal False Claims Act. I am a partner with Vogel, Slade & Goldstein, LLP, a Washington, D.C., law firm dedicated exclusively to the representation of *qui tam* plaintiffs in such cases. I have been a partner at Vogel, Slade & Goldstein for 13 years. For the last five years, I have also served as a member of the Board of Directors of Taxpayers Against Fraud Education Fund. This organization is a non-profit, public interest organization dedicated to combating fraud against the government and protecting public resources through public-private partnerships. I currently serve on the Executive Committee of that Board.

Between 1990 and 1999, I was a Trial Attorney and then Senior Counsel for Health Care Fraud in the Commercial Litigation Branch of the Civil Division of the U.S. Department of Justice. As a Trial Attorney in the Commercial Litigation Branch, I handled dozens of False Claims Act *qui tam* cases for the United States. As Senior Counsel for Health Care Fraud for the Civil Division, I coordinated the handling of health care fraud policy and legislative matters among DOJ components, between DOJ and other government agencies and between DOJ and the private sector. Throughout my tenure at the Department of Justice, I reported to Michael F. Hertz, who at the time was

overseeing the Frauds Section as a Director of the Commercial Litigation Branch in the Department of Justice's Civil Division. Joyce Branda served as Mr. Hertz's deputy during most of my time at the Department.

I am a 1980 graduate of Princeton University and a 1984 graduate of Stanford Law School.

I will address three issues in my testimony that I hope the Committee on the Judiciary and the Committee on Government Oversight and Government Reform will find relevant to the matters at issue in this hearing: i) the law and procedures that govern the Department of Justice's decision-making process with regard to intervention in *qui tam* cases; ii) my personal experiences with regard to those intervention decisions and how they inform my view of the declination decision in *United States ex rel. Newell v. City of St. Paul*, Civil Action No. 09-1177 (D. Minn.); and iii) my perspective, as a *qui tam* practitioner, on the merits of the allegations asserted by the *qui tam* plaintiff in *United States ex rel. Newell, supra.*

Before preparing my testimony, I reviewed the April 15, 2013 Joint Committee Report entitled "DOJ's *Quid Pro Quo* with Saint Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Law," including the documents in Appendix I, the Report of the Minority, the U.S. Department of Justice's memoranda recommending intervention and recommending declination in the *United States ex rel. Newell* case, the district court's opinions in the case, and the April 22, 2013 letter from Thomas F. DeVincke to the Health, Education, Labor and Pension Committee Chairman Tom Harkin and Ranking Member Lamar Alexander.

Intervention Law and Procedures

The False Claims Act provides that a private party, referred to as a *qui tam* plaintiff or relator, may bring a False Claims Act cause of action on behalf of the United States by filing a complaint under seal and serving the complaint and disclosure of material evidence and information on the United States. 31 U.S.C. § 3730(b). The False Claims Act then provides the United States with sixty days, plus any extensions granted by the court for "good cause" shown, to investigate the

relator's allegations while the case remains under seal and decide whether to intervene in the case, or, in other words, to join the case as a party and take over the litigation. *Id*. The case remains under seal until the deadline for Government's decision on intervention. *Id.*

At the end of this period of time, the United States must notify the court whether it wishes to intervene in the lawsuit. Importantly, when the government decides not to intervene in a case, it is neither resolving the case nor dismissing the case. The False Claims Act contains a "private attorney general" provision that permits the *qui tam* plaintiff to proceed with the litigation on his or her own following a government declination. 31 U.S.C. § 3730(b).

In the False Claims Act, Congress did not dictate to the U.S. Department of Justice the criteria it should employ in making this intervention determination. This is appropriate under our Constitution. The Constitution entrusts the Executive with the duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. As the U.S. Supreme Court held in *Heckler v. Cheney*: "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Cheney*, 470 U.S. 821, 831 (1985).

In the False Claims Act context, the U.S. Court of Appeals for the District of Columbia has ruled that "[the decision whether to bring an action on behalf of the United States is . . therefore 'a decision generally committed to [the government's] absolute discretion.'" Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003). In the case at issue in this hearing, U*.S. ex rel. Newell v. City of Saint Paul*, *supra*, the district court likewise ruled that: "[t]here is nothing in the FCA which requires the government to intervene, even if it has sufficient information to justify intervention." *Id*., Doc. No. 75, Memorandum and Order, November 26, 2012, at 3.

The federal courts have addressed the question of what it means for the Department of Justice to have virtually "unfettered discretion" over a prosecutorial decision in a False Claims Act case. When addressing the legality of a Department of Justice motion to dismiss a *qui tam* case over the objections

of the relator -- a decision of greater consequence than the Department's decision whether to intervene or decline in a case, since a case may still go forward without the Department's participation -- courts that have looked at the issue have emphasized the broad discretion vested in the Department of Justice to decide what is in the best interests of the United States in making its enforcement decisions. *See, e.g., Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65, 380 U.S. App. D.C. 185 (D.C. Cir. 2008); *Ridenour v. Kaiser-Hill Co.*, L.L.C., 397 F.3d 925, 936 (10th Cir. 2005); *Swift v. United States*, 318 F.3d 250, 252, 355 U.S. App. D.C. 59 (D.C. Cir. 2003); *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *United States ex rel. Stevens v. State of Vt. Agency of Natural Resources*, 162 F.3d 195, 201 (2d Cir. 1998), *rev'd on other grounds*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). The D.C. Circuit held that § 3730(c)(2)(A) "give[s] the government an unfettered right to dismiss an action," rendering the government's decision to dismiss essentially "unreviewable." *Swift v. United States, supra*, 318 F.3d at 252.

Several courts have elaborated on this general principle. Those courts, which include the U.S. Courts of Appeals for the 2nd, 9th and 10th Circuits, have ruled that the dismissal decision need bear only a rational relationship to a legitimate government purpose. *See Ridenour v. Kaiser-Hill Co., L.L.C., supra; United States ex rel. Stevens v. State of Vt. Agency of Natural Resources, supra; United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., supra*.

The courts have upheld government dismissals of *qui tam* cases when the government agency purpose that is furthered by the dismissal falls within the mission of the government agency. For example, in the False Claims Act context, they have found legitimate purposes to include: achieving peace among competitors and regulators in the citrus industry; preventing the release of classified information; protecting national security; and, conserving scarce law enforcement resources.

Far short of deciding whether to dismiss a case over the objection of a relator, the Department of Justice must first decide whether to intervene in and conduct the case as the

primary plaintiff. The Department of Justice generally makes this determination after it has completed its investigation of the Relator's allegations, a process that can take several years.

The first step in the Department's decision with regard to intervention is the formulation of a recommendation by the line attorneys that have handled the case. In cases above a specified monetary threshold, these attorneys typically draft a memorandum for the Director of the Commercial Litigation Branch to submit to the Assistant Attorney General for the Civil Division. In doing so, they solicit the recommendation of the program agency affected by the alleged fraud and the U.S. Attorney for the judicial district in which the case has been filed. Only in rare cases would a Commercial Litigation Branch attorney submit a recommendation in favor of intervention without the support of both the program agency and the U.S. Attorney's Office. The program agency generally is in the best position to assess whether it has been a victim of false claims and whether broader programmatic concerns and priorities argue for or against pursuit of the *qui tam* case. The U.S. Attorney's Office would necessarily be closely involved in litigating the matter before the court.

During my tenure at the Department of Justice, the time period that might elapse between the line attorney's submission of a recommendation on intervention and the decision by the Assistant Attorney General on that recommendation was typically between 10 and 14 days. My experience is that this period of time now may have lengthened given the scarcity of resources at the Department, and can sometimes exceed three weeks. As noted above, the trial attorneys on the case generally to not prepare their memorandum seeking authority to intervene or decline until the Government has completed its investigation of the Relator's allegations.

The Department of Justice intervenes in only about 20 percent of filed *qui tam* cases. My experience has been that, in making its intervention decisions, the Department of Justice frequently considers recommendations from affected program agencies that take into account the broad programmatic interests

of the agencies, rather than focusing solely on the possibility of achieving a monetary recovery in the specific case at hand.

My Perspective on the Declination Decision in the *Newell* Case

Although this hearing is focused on Mr. Perez, this hearing is also implicitly examining whether it was improper or unprecedented for the Civil Division of the Department of Justice to consider broad programmatic interests of the United States in deciding not to intervene in the Newell qui tam action. I see nothing the least bit untoward or unusual about that action. As I have already noted, in my experience, the Civil Division's decisions on intervention often take into account another agency's broader policy concerns or interests outside the four corners of the case.

It is worth noting that the Department's action in the *Newell* case - declining to join the case – was neither a dismissal of the case nor a settlement of the underlying claims. It was not a dismissal because following a declination by the Government, pursuant to the False Claims Act, the relator may proceed with the False Claims Act on his or her own pursuant to the False Claims Act's "private attorney general" provision. The declination was not a settlement of the claims because the underlying claims of the plaintiff were not released by the Government. This is worth emphasizing as the Majority Report shows some confusion on this part: the Department of Justice did NOT agree with the request of the City of St. Paul to settle this case. To the contrary, the Department of Justice allowed the case to proceed with the relator litigating on behalf of the Government.

I would also like to comment on the exceptional ethics and professionalism of the career management that oversees False Claims Act cases within the U.S. Department of Justice. While working at the Department, and in the years since, I have been repeatedly struck by the exceptional level of integrity and extraordinary, selfless dedication to the public interest of the career managers. They have not only been apolitical and highly ethical in their decision-making; they also have been intelligent and careful. These characteristics translate into consistently well-reasoned decisions on furthering the public interest and on complying with professional responsibility and

ethical obligations. I am confident that the actions taken by the Civil Division officials with regard to the *Newell qui tam* case, including the factors that were considered in the declination decision, were fully consistent with the law, as well as ethical and professional obligations.

I also see nothing unusual or improper about career managers rejecting the staff's recommendation with regard to a significant action in a *qui tam* case. The career managers in the False Claims Act area are particularly experienced in their field and closely oversee the work of the line attorneys. They have never, in my experience, operated as a "rubber stamp" on staff recommendations. They review the relevant considerations closely and, when they disagree with the recommendations coming from below, they make their own decisions.

My Perspective on the Merits of the Newell *Qui Tam* Action

Given False Claims Act case law, it is somewhat surprising to me that the line attorneys handling the *Newell* qui tam case originally recommended intervention in the case. If my law firm had been contacted about taking on this case, we would have rejected it. Notwithstanding the apparent strong evidence that the City of St. Paul engaged in repeated and egregious violations of Section 3 of the Housing & Urban Development Act of 1986, the *qui tam* case presents serious litigation risk on a number of fronts.

To be successful, a *qui tam* plaintiff must establish much more than the violation of a regulation. When a False Claims Act case is based on the defendant's violation of a regulation, a number of courts have held the plaintiff must demonstrate that the agency considered compliance with the regulation to be a prerequisite for the defendant to be entitled to receive the funds, *see, e.g.*, *United States v. Southland Management Company*, 326 F.3d 669, 676 (5th Cir. 2003) (*en banc*); or, as stated by other courts, the regulatory noncompliance must be "material" to the government's payment decision. *See, e.g., U.S. ex rel. Vigil v. Nelnet*, 639 F.3d 791, 796 (8th Cir. 2011); Another important factor is whether the defendant "knew" that its' claims were false under the regulations and program instructions governing the agency program.

Significantly, the facts at issue in *Southland Management, supra* - facts which caused the 5th Circuit to uphold the district court's summary judgment in favor of the defendants - are similar to the facts in the *Newell* case. As in the *Newell* case, the plaintiff alleged in the *Southland Management* case that the defendants, owners of low income housing projects, had submitted claims for financial assistance to the U.S. Department of Housing & Urban Development (HUD) at a time when they were out of compliance with conditions imposed by HUD. In the *Southland Management* case, the recipients of the funds were required to keep housing properties that benefitted from HUD assistance in a decent, safe and sanitary condition pursuant to the recipients' Housing Assistance Payment (FAP) agreement with HUD. As in the *Newell* case, however, HUD learned of the non-compliance and elected to work with the defendants to address the problems while continuing to provide financial assistance. The Court of Appeals consequently found that the facts did not give rise to a cause of action under the False Claims Act because:

> [A]ccording to the HAP [Housing Assistance Payment] Contract, if the property is not decent, safe, and sanitary and HUD chooses to work with the Owners to remedy the property's condition, the Owners remain entitled to housing assistance payments until HUD provides written notice, prescribes a time for corrective action, and notifies the Owners that they have failed to take the necessary corrective action within the specified time period.

Southland Management, supra, 326 F. 3d at 677. In the circumstances present in the case, the Court determined that, under the governing contract, compliance with the "decent, safe and sanitary" provision was not a prerequisite to a person's entitlement to HUD financial assistance and, accordingly, there was no valid cause of action under the False Claims Act.

The "materiality" standard set forth in the 8th Circuit Court of Appeals' decision in *U.S. ex rel. Vigil, supra*, is controlling precedent in the *Newell* case, since the latter case is filed in the 8th Circuit. Given the fact that the City of St.

Paul's noncompliance with Section 3 should have been readily apparent to HUD's reviewers, according to the Department of Justice line attorneys who handled the case, and given the fact that HUD elected to enter into voluntary compliance agreements with the City St. Paul, and to continue providing financing, even after it apparently learned that the City had been out of compliance with Section 3 for many years, there is a significant question in this case as to whether HUD truly considered St. Paul's compliance with the requirements of Section 3 to be material to HUD's payment decisions.

Indeed, even the original Civil Fraud Section memorandum that recommended intervention in the case recognized significant litigation risk for the government, including the following challenges to establishing that compliance with Section 3 was a condition of payment and that the City of St. Paul "knowingly" submitted false claims that caused damage to the federal government:

- "HUD will have to admit, and has publicly acknowledged, that for a significant period of time it was not focused on Section 3 compliance anywhere in the country."
- "HUD employees conducted annual reviews of St. Paul and regularly approved the City's Action Plans and Consolidated Annual Performance and Evaluation Reports, and conducted on site performance reviews, but did not notice or flag the City's Section 3 deficiencies."
- "Even a cursory examination of the City's practices would have revealed the City's non-compliance."
- "The City has already noted that previous federal administrations were not concerned with Section 3 (a position with support in recent HUD public comments)";
- "We will have to admit that the City was failing to comply with Section 3 in ways that should have been apparent to HUD";
- Given the various procedures available to HUD besides exclusion from the program to address non-compliance with Section 3 requirements, such as time lines and procedures for the cure of identified deficiencies, "there is a risk a trial court in the Eight Circuit will consider the annual

certifications in this case conditions of participation that will not support an FCA claim."

- Under the governing case law, the Government's damage theory admittedly was "aggressive" and the line attorneys had not developed an alternative theory.

These conclusions by the staff – which ironically are set forth in the original memorandum recommending intervention – in-and-of-themselves would have been more than an adequate basis to recommend declination during the ten years during which I handled *qui tam* cases and health care fraud policy matters for the United States in the Civil Division of the U.S. Department of Justice.

If this case had come to our firm, we also would have been concerned about the potential public disclosure problem. At the time this case was filed, the applicable provision of the False Claims Act provided that the court lacked jurisdiction over a *qui tam* case if the allegations of fraud had been disclosed publicly, unless the relator had "direct and independent knowledge" of the allegations and had provided that information to the Government before filing his case. My opinion is that there were many public disclosures relating to the allegations at issue in the case; and, given the fact that the relator was not an insider within the City of St. Paul government, it would have been unclear to our firm whether a court would consider him to have had direct and independent knowledge of the facts underlying his lawsuit. Given the additional difficulty of establishing liability and significant damages, we would not have taken on this case.

During the Congressional investigation of this matter, former Deputy Assistant Attorney General Michael F. Hertz, who was widely considered at the time to be the Government's preeminent expert on the False Claims Act, was quoted as having said that this case "sucks." His opinion does not surprise me, given the litigation risks set forth above.

Learning of the factors that the U.S. Department of Justice took into account in deciding whether to intervene in this case does not in any fashion deter me or the other members of my law firm from bringing *qui tam* cases. I doubt very much that it

will deter any of my colleagues in the *qui tam* bar or potential whistleblowers either. Given the legal challenges in the case, the equities, and the broader programmatic concerns of HUD and the Civil Rights Division, the Department of Justice's ultimate decision was fully consistent with its usual policies and practices. Moreover, it bears emphasizing that in the *Newell* case, the Department did not do anything to limit the rights of the *qui tam* relator to go forward with the case; the Department decided only that it was not in the interest of the Department to intervene in the case and pursue it as the primary plaintiff. If, under the law, the relator were eligible to pursue the case and could prevail on the merits, the Department of Justice did not prevent the relator from doing so.