UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

AMERICAN CIVIL LIBERTIES UNION; OMB WATCH; and GOVERNMENT ACCOUNTABILITY PROJECT, Plaintiffs, v. MICHAEL MUKASEY, in his official capacity as Attorney General of the United States; and FERNANDO GALINDO, in his official capacity as Clerk of the Court in the United States District Court, Eastern District of Virginia, Defendants.	:	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF 08 Civ.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§ 3729-3733, was originally enacted to combat fraud in federal contracts and, from its inception, permitted private citizens, often acting as whistleblowers, to bring public lawsuits on behalf of themselves and the U.S. government. Since then, Congress has enacted various amendments to the FCA to encourage whistleblowers to file suit and to enhance the government's enforcement tools, in keeping with the goal of preventing contractor fraud.

2. In 1986, for the first time in the 123-year history of the statute, Congress passed amendments incorporating secrecy provisions. These secrecy provisions include a mandatory seal on the initial Complaint and extensions on the mandatory seal – both without any showing of a compelling need for secrecy or that the seal is the least restrictive means of advancing that need. Among other flaws, the secrecy provisions offend the values enshrined in the First Amendment.

3. According to the government, approximately 1,000 cases are under seal and hidden from the public eye. The result of the secrecy provisions is that the federal court system is home to an entire secret docket of cases that is inaccessible to the public and the press.

4. Serious allegations that the federal government has been defrauded out of billions of dollars are being hidden from the press and the public, often for years at a time. This includes fraud involving the military, Medicare and Medicaid, and other governmental programs. Many of these allegations involve ongoing threats to public welfare.

5. Plaintiffs the American Civil Liberties Union ("ACLU"), OMB Watch and the Government Accountability Project challenge the constitutionality of the secrecy provisions in the FCA, specifically §§ 3730(b)(2) and (b)(3) (together, the "FCA secrecy provisions").

6. The FCA secrecy provisions are unconstitutional on their face. Plaintiffs seek a declaration that they violate the public's First Amendment rights.

7. Moreover, plaintiffs seek a declaration that the FCA secrecy scheme violates the separation of powers. The FCA's secrecy scheme infringes on a court's inherent power to determine on an individualized basis whether a case or complaint should be sealed.

JURISDICTION AND VENUE

8. This case arises under the United States Constitution and the laws of the United States and presents a federal question under Article III of the United States Constitution and 28 U.S.C. § 1331. The Court has authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*. The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

9. Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with over 550,000 members dedicated to the constitutional principles of liberty and equality. Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. The ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty. The ACLU also disseminates information through its heavily visited web site: http://www.aclu.org. The web site addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. The ACLU sues on its own behalf and on behalf of its members.

10. Plaintiff OMB Watch was formed in 1983 (incorporated under the name Focus Project, Inc.) to lift the veil of secrecy shrouding the White House Office of Management and Budget (OMB), which oversees federal regulation, the budget, information collection and dissemination, proposed legislation, testimony by agencies, and much more. OMB Watch's mission is to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in democracy. OMB Watch concentrates on four main areas: Information for Democracy and Community; Fiscal Policy and Government Performance; Nonprofit Advocacy and Speech Issues; and Regulatory and Government Accountability.

11. Plaintiff Government Accountability Project ("GAP") is a 30-year-old nonprofit public interest group that promotes government and corporate accountability by advancing occupational free speech, defending whistleblowers, and empowering citizen activists. GAP pursues this mission through its Nuclear Safety, International Reform, Corporate Accountability, Food & Drug Safety, and Federal Employee/National Security programs. In the past three decades, GAP has represented or counseled some 5,000 whistleblowers. GAP has worked with these whistleblowers to challenge abuses of power betraying the public trust, generally involving public health or safety threats. GAP engages in legislative advocacy to strengthen whistleblower laws, monitors implementation of those that are enacted, teaches whistleblowers about their legal options, and helps whistleblowers choose a legal course of action that is customized to their objectives and risks.

12. Defendant Attorney General Michael Mukasey heads the United States Department of Justice ("DOJ"), which is the agency of the United States government responsible for the enforcement of federal laws and for defending the constitutionality of federal laws. Defendant Attorney General Michael Mukasey has responsibilities relating to the FCA as described below.

13. Defendant Fernando Galindo is the Clerk of the Court in the United States District Court, Eastern District of Virginia. The Clerk of the Court is the officer of the court that seals the complaints as required by the statute challenged in this case.

THE FALSE CLAIMS ACT

History

14. The FCA was enacted in 1863 in an effort to "combat rampant fraud in Civil War defense contracts." S. Rep. No. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266,

5273. Private citizens have been able to bring *qui tam* suits – actions brought by a private person on behalf of the government – for false claims actions since the beginning of the FCA's existence. Private citizens who bring such cases are called relators.

15. The FCA has only been substantially amended on two occasions – in 1943 and 1986.

16. In 1943, the Act was amended in response to so-called parasitic actions, *i.e.*, to FCA actions filed by individuals based entirely on public allegations found in criminal indictments against World War II contractors. *See* 1986 U.S.C.C.A.N. at 5275. The Act was amended such that jurisdiction over FCA claims was barred if the claims were based on information in the government's possession. *Id.* at 5277.

17. In 1986, as a result of a decline in FCA suits, Congress amended the FCA to encourage private individuals to bring more FCA suits. The legislation increased incentives, financial and otherwise, for private individuals to bring suits on behalf of the government. Congress also set out to right a number of overly restrictive court interpretations of the FCA that were making it difficult for whistleblowers to succeed in FCA suits. Finally, to encourage more whistleblowers to file FCA suits, Congress enacted an anti-retaliation provision to protect whistleblowers from reprisal for initiating or aiding an FCA disclosure and lawsuit.

18. As part of the amendments in 1986, Congress enacted the secrecy provisions at issue. Thus, for the first 123 years of the existence of the FCA, *qui tam* complaints were not filed under seal and were accessible to the public. Only in the last 22 years have all FCA *qui tam* complaints filed by relators been automatically placed under seal and inaccessible to the public.

19. When the secrecy provisions were being debated before the Senate Judiciary Committee, DOJ argued that the secrecy provisions were needed to prevent the potential

defendant from being tipped off that there might be a parallel criminal investigation. 1986 U.S.C.C.A.N. at 5288-89. DOJ stated that the FCA civil suit "*might* overlap with allegations already under criminal investigation." *Id*. at 5289 (emphasis added). Thus, neither DOJ nor any other entity expected that every FCA case would be accompanied by a parallel criminal investigation. Even if an ongoing criminal investigation alone was a sufficient governmental interest, not every case should be subjected to secrecy.

Statutory Framework

20. A relator who brings a *qui tam* action on behalf of the government must abide by certain procedures. Section 3730(b)(2) provides that the "complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2) ("mandatory secrecy provision").

21. The mandatory secrecy provision requires the Clerk of the Court to seal the complaint upon its filing. Neither the relator nor the government is required to show that there is a compelling need to deny the public access to this information. The mandatory secrecy provision prohibits a court from making an individualized, case-by-case determination as to whether the sealing of the complaint serves a compelling interest and is narrowly tailored.

22. During this time, the public has no knowledge that a civil action has been filed in federal court alleging that the U.S. government has been defrauded. Nor does the public have any other means of acquiring this knowledge or accessing information relating to these cases because the relator is gagged from speaking about the case.

23. While the complaint is under seal, the statute requires the government to investigate the allegations and to determine whether it will intervene in the action. 31 U.S.C. § 3730(b)(2).

24. Before the 60-day period is over the government must either inform the court (1) that it is intervening and will be proceeding with the action, or (2) that it is not intervening. If the government has not yet decided whether or not it will intervene, then § 3730(b)(3) provides that the government "may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal." 31 U.S.C. § 3730(b)(3) ("secrecy extension provision"). The statute authorizes the government to move for such an extension with supporting "affidavits or other submissions in camera." *Id*.

25. The secrecy extension provision does not define "good cause," nor is the term defined elsewhere in the FCA statute. 31 U.S.C. § 3730(b)(3).

26. The secrecy extension provision does not require that the relator or the government demonstrate a compelling need for the action to remain inaccessible to the public, or that keeping the complaint under seal is narrowly tailored to that need. The secrecy extension provision therefore permits the complaint to remain under seal for an indefinite period of time.

27. Together, §§ 3730(b)(2) and (b)(3) make up the "FCA secrecy provisions."

ALLEGATIONS

The FCA Secrecy Provisions Hide Allegations of Fraud from the Public.

28. Prior to an FCA case being filed, an individual who has knowledge of government fraud may speak freely – to any member of the public or press – about the details of the fraud. Upon filing an FCA case, the individual is now gagged from speaking – to anyone – about the details of the fraud and about the fact that the individual has filed an FCA case. The individual is further prohibited from showing or speaking about any supporting documents or materials that the individual possesses relating to the fraud.

29. According to DOJ, as of July 2007, there were approximately 1,000 *qui tam* cases that were under seal pending the government's decision on whether to intervene. The average length of time between when an FCA case is filed and when the government notifies the court of its election to intervene is approximately 13 months. FCA cases, however, are usually sealed for a much longer period of time than 13 months. Cases typically remain sealed for 2 to 3 years, and have been sealed for as long as 9 years.

30. The FCA secrecy scheme has hidden from public purview allegations of military contractor fraud in the Iraq War. *See, e.g.*, David Rose, *The People vs. the Profiteers*, Vanity Fair (Nov. 2007) (asserting that military contractor fraud is rampant but unknown to the public at large because the allegations remain under seal).

31. Although the exact number of Iraq contractor fraud cases under seal remains unknown, there is evidence that more than a handful of these cases exist. Stuart Bowen, the Special Inspector General for Iraqi reconstruction, reports on Iraq reconstruction issues to the Pentagon and State Department. In 2006, Mr. Bowen reported that he knew of 79 sealed FCA Iraq contractor fraud cases, some of which have multiple plaintiffs. *Id*. As of August 2007, allegedly 66 remained under seal. *Id*.

32. In November 2007, Vanity Fair reported on allegations of contractor fraud from Bud Conyers, who formerly worked in Iraq as a driver for Kellogg, Brown & Root ("KBR"), a former Halliburton subsidiary. According to Vanity Fair: On June 16, 2003, Bud Conyers fixed a broken refrigerated truck at the Baghdad airport. Inside the refrigerated truck were 15 human bodies. Pursuant to civilian and U.S.-military regulations once a trailer has been used to store corpses it can never again be loaded with food or drinks that are intended for human consumption. Conyers, however, allegedly saw the same truck that he had fixed a month later

packed with bags of ice that was going into drinks served to American troops. Conyers documented the improper use of the truck and in September 2003 reported the contaminated ice. Others also witnessed and documented the improper uses. Three months after he reported the contaminated ice, he was fired. Conyers' supervisors accused him of refusing to work, an allegation Conyers denies. In fall 2006, Conyers informed a writer for Hustler Magazine and reporter David Rose that he intended to file a claim against KBR under the False Claims Act. When Rose re-approached Conyers to discuss the claim, Conyers refused to discuss the claim. *Id*. The FCA secrecy scheme placed a gag over the relator. In doing so, it denied the public and press their First Amendment rights to hear.

33. Two Iraq contractor cases were kept under seal for more than 400 days – far more than the initial 60-day seal. This information became available only because DOJ decided not to intervene, thus leading to the cases being unsealed. *See U.S. ex rel. McBride v. Halliburton Co.*, No. 05-cv-828, 2007 WL 1954441 (D.D.C. July 5, 2007); *Godfrey v. Kellogg, Brown & Root, Inc.*, Docket No. 1:05-cv-1418 (E.D. Va.).

34. *McBride* involves a False Claims Act case against KBR. In *McBride*, the relators alleged that KBR managers billed the government for meals not served at dining halls, sold housing containers at exorbitant prices to the military, increased revenues by inflating headcounts of soldiers using services at a KBR facility in Camp Fallujah, and made requisitions for supplies on behalf of the troops and then siphoned those supplies to KBR employees. One of the clients in the case – McBride – also alleged that she was falsely imprisoned. McBride claims that she was placed under armed-guard until she was flown back to the U.S. from Iraq. The case remained under seal for over 400 days when on July 24, 2006, the case was unsealed after the DOJ declined to intervene.

35. *Godfrey* is a False Claims Act case against KBR as well. Godfrey alleged that KBR was overcharging for its dining facilities and was engaging in blatant accounting inflation. Godfrey asserted that he had documented these irregularities and reported them to his superiors. According to Godfrey, he was ignored time after time, and eventually resigned from his job at KBR. He then filed a False Claims Act complaint on December 6, 2005. The case remained under seal for over 500 days when on May 1, 2007, the case was unsealed after the DOJ declined to intervene.

36. There are other potential cases of defense contractor fraud that the press has reported, but there is no way for the press or the public to verify the existence of the case while it is under seal. For example, on June 7, 2007, the Wall Street Journal reported that there was a sealed False Claims Act case pending against First Kuwaiti – the military contractor charged with building the U.S. Embassy in Iraq. Yochi J. Dreazen, *U.S. Investigates Firm Building Embassy in Iraq*, Wall St. J., June 7, 2007. According to the article, First Kuwaiti allegedly told workers that they were being sent to Dubai, only to end up in Iraq. Upon arrival in Iraq, the workers' passports would allegedly be confiscated. The DOJ refused to confirm or deny the existence of the case. An FCA complaint filed on December 11, 2006 by John Owens, one of the whistleblowers named in the Wall Street Journal article, was unsealed on May 19, 2008 after DOJ declined to intervene. *Owens v. First Kuwaiti General Trading & Contracting Co.*, Docket No. 1:06-cv-1386 (E.D. Va.). This suit remained under seal for over 500 days before DOJ declined to intervene.

The FCA Secrecy Provisions Prevent Whistleblowers From Using the Act to Protect the Public Welfare.

37. The FCA allows whistleblowers to take direct legal action against fraud that allegedly threatens the public interest, including in cases where the government decides not to

take enforcement action on its own. The secrecy provisions of the Act, however, prevent whistleblowers from taking effective action where the alleged fraud may pose an ongoing threat to public health or safety. The FCA is counterproductive for non-pecuniary goals, because the seal gags whistleblowers for months, or even years, while DOJ decides whether to take over the lawsuit. By that point, the alleged public harm may have already occurred.

38. GAP, in its role as a legal advisor to whistleblowers, urges whistleblowers not to file suit under the FCA unless financial recovery is their only goal. Otherwise, because of the FCA secrecy provisions, the alleged misconduct will remain secret to the public and Congress indefinitely, until DOJ takes action that lifts the automatic seal and allows the public to know about the allegations.

39. DOJ has chilled whistleblowers' speech through its enforcement of the seal. An illustrative example occurred in a case where the whistleblower Richard Parks accused L.S. Starrett Co. of defrauding government agencies and corporate customers by selling them faulty calibration and measurement devices. Parks alleged that Starrett's faulty devices were used to confirm the measurements and calibration of numerous products, such as planes, trains, automobiles, computers and heart valves, and that the alleged fraud could render such products unsafe for public use. Parks filed a False Claims Act lawsuit detailing his allegations against the company.

40. Before Parks' *qui tam* suit was filed, GAP disclosed the alleged fraud to the Wall Street Journal, with the intent of generating public discussion of the alleged public safety risk. The Journal ran a story about the allegations and government investigation several months before the seal was lifted. *See* Andy Pasztor, *U.S. Investigates Charges Starrett Defrauded Clients*, Wall St. J., Sept. 12, 2002.

41. DOJ objected to this public disclosure, and threatened to criminally prosecute any violations of the FCA secrecy provisions. GAP's legal director was threatened with criminal prosecution, and questioned for several hours to make sure he had not released anything to the media or public after the lawsuit was filed. This threat of prosecution chills protected speech by deterring whistleblowers from speaking with the press and the public in cases where a False Claims Act suit is likely to be filed.

42. When DOJ sought the FCA secrecy provisions during the 1986 revisions to the Act, DOJ's stated goal was to prevent *qui tam* defendants from being tipped off to an ongoing criminal investigation. *See* 1986 U.S.C.C.A.N. at 5289. Once a whistleblower's allegations have been publicly disclosed, however, the defendant is aware of the accusations against it and the potential for government investigation. Therefore, DOJ no longer has any interest, much less a compelling interest, in preventing discussion of the alleged fraud after such public disclosure has occurred.

The FCA Secrecy Provisions Violate the First Amendment.

43. The FCA secrecy provisions are content-based restrictions that gag the relator and prohibit public access to any and all information relating to FCA actions. The secrecy provisions therefore violate the First Amendment.

44. The prohibition against governmental secrecy is particularly important where the allegations pertain to the fraudulent use of government funds, as these are funds obtained through taxation of U.S. persons and relate to the proper functioning of our country.

45. The prohibition against governmental secrecy is also particularly important in cases which allege an ongoing fraud, or which allege an ongoing threat to the public welfare.

46. Under the First Amendment, there is a presumption of open access to civil and criminal proceedings, the accompanying documents, and other information relating to cases filed in federal court. This presumption extends to, for instance, docket sheets, complaints, and documents in connection with dispositive motions, trials and other civil proceedings.

47. Under the First Amendment, an individual who wishes to file a case under seal and hidden from the public must demonstrate that there is a compelling interest, and further, that filing the case under seal is the least restrictive means of advancing that compelling interest. No such showing can be made to justify the statutory provisions being challenged.

48. Plaintiffs the ACLU and its members, OMB Watch and the Government Accountability Project are being denied access to information of paramount public interest because of the FCA secrecy provisions.

The FCA Secrecy Provisions Violate the Separation of Powers.

49. The federal judiciary is an independent and co-equal branch of government under the Constitution of the United States.

50. Federal courts have the inherent authority to perform certain functions that are fundamental and essential to the judicial power as defined by Article III of the U.S. Constitution.

51. The decision whether a case or complaint should be sealed and concealed from the general public is essential to the judicial power.

52. The FCA secrecy scheme infringes on the court's inherent authority to decide on a case-by-case basis whether a particular FCA action should be hidden from public scrutiny and thus violates the separation of powers.

CAUSES OF ACTION

53. Sections 3730(b)(2) and (b)(3) violate the First Amendment.

54. Sections 3730(b)(2) and (b)(3) violate separation of powers.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that the Court:

1. Declare that §§ 3730(b)(2) and (3) violate the First Amendment.

2. Declare that §§ 3730(b)(2) and (3) violate separation of powers.

3. Permanently enjoin the defendants from enforcing the provision.

4. Award plaintiffs fees and costs.

5. Grant such other and further relief as the Court deems just and proper.

Dated: January __, 2009

Respectfully submitted,

/s/ Rebecca Glenberg

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