UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA *ex rel*. ROBERT A. CUTLER, Plaintiff, v. CIGNA CORP. *et al.*, Defendants.	Civil Action No. 3:21-cv-00748 District Judge Eli J. Richardson Magistrate Judge Jeffrey S. Frensley JURY DEMAND

DEFENDANTS' RESPONSE IN OPPOSITION TO THE UNITED STATES' MOTION TO PARTIALLY INTERVENE

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INTRODUCTION

Relator filed this *qui tam* action in the Southern District of New York more than four years ago. Under the False Claims Act ("FCA"), the government had 60 days to investigate and decide whether to intervene because Congress determined that in the "vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision." Judge Kenneth M. Karas—after granting more than two years of extensions—set a final intervention deadline of February 25, 2020, at which time the government declined to intervene. Now it seeks to intervene without presenting any evidence that was unavailable to the government during its investigation of Relator's claims over the 29 months prior to its declination. The government's request does not satisfy the FCA's "good cause" standard for belated intervention.

Congress amended the FCA in 1986 to permit late intervention for good cause where, at a minimum, the government presents "new and significant evidence" discovered after it decided not to intervene that "escalates the magnitude or complexity of the fraud" and causes it "to reevaluate its initial assessment." In *United States v. SouthEast Eye Specialists*, Chief Judge Crenshaw recently rejected the government's belated intervention bid for failure to make that showing. Considering much more substantial evidence than the government has identified here, Judge Crenshaw held that the government's "tepid submission [did] not come close to establishing the good cause necessary to intervene and take control of the litigation nearly three years after the original complaint was filed, and more than six months after the Court set a final deadline for intervention that was extended six times." Here the government demonstrated greater delay and no new evidence.

By any measure, the government fails to carry its burden. It identifies no new and significant evidence discovered after it declined to intervene—much less any such evidence that

escalated the magnitude of the fraud and therefore caused the government to reevaluate its decision not to intervene. Nor does it explain why, to the extent any such evidence existed, it could not have been discovered within the extended timeline the government initially enjoyed to investigate Relator's allegations and decide whether to intervene, or why such evidence could not have been acted on much sooner after it was discovered. Allowing intervention under these circumstances would prejudice Cigna by resetting the terms of this case after more than four years, and it would subvert the scheme that Congress envisioned for timely government investigations and intervention decisions.

Each of these reasons is independently sufficient to deny intervention. Together, they overwhelmingly compel that result.

BACKGROUND

A. Medicare Advantage and Cigna's 360 Program

Established by Part C of the Medicare Act, Medicare Advantage ("MA") is a public-private program that allows eligible individuals to receive government-subsidized health benefits through private insurance plans. *See* 42 U.S.C. § 1395w-21 *et seq*. Under that program, MA organizations ("MAOs") like Cigna contract with the Centers for Medicare and Medicaid Services ("CMS") to manage the care and bear the financial risk for the beneficiaries who enroll in their plans. In exchange, they receive monthly per-member payments, which are adjusted up or down based on members' demographic characteristics and health status relative to the average Medicare beneficiary. *Id*. § 1395w-23(a)(1). To perform that payment analysis—a process known as "risk adjustment"—CMS requires MAOs to submit diagnostic data from covered medical encounters that a member has with a provider. *See* 42 C.F.R. § 422.310.

This case concerns data from a narrow set of patient encounters as part of Cigna's 360 Program, through which Cigna's MA plan members receive annual comprehensive health risk

assessments conducted by their primary care provider ("PCP") in the PCP's office or, less frequently, by nurse practitioners in the patient's home. The Medicare population enrolled in MA plans includes members who are homebound and may not see their PCP in a given year for various reasons, including limited mobility or lack of transportation. In such circumstances, in-home 360 exams may help ensure that members are seen at least once a year by a licensed provider who reviews their medical history and current symptoms, conducts a physical exam, and evaluates their medications and any other information obtained during the visit. Diagnostic data from 360 exams is submitted to CMS. To promote follow-up care from in-home exams, the 360-exam form itself is also sent to the PCP.

CMS has long scrutinized diagnostic data from in-home exams and expressly permits MAOs to submit it for risk-adjustment purposes. Well before Relator filed this *qui tam* action, the same allegations he makes here had been leveled by others against the entire MA industry. *See* Medicare Payment Advisory Commission, Report to Congress 347-50 (Mar. 2016) (describing concerns that in-home exams are performed by "nurse practitioner[s]" hired by "third-party vendors" "solely as a diagnosis-collection vehicle," including for conditions that "cannot be accurately identified with equipment brought into the patient's home"). In the face of those public allegations, CMS has extensively considered and repeatedly rejected proposals to exclude data from in-home exams for risk-adjustment purposes. To the contrary, it has recognized that such exams "can have significant value as care planning and care coordination tools," and has explained that "[i]n the home setting, the provider has access to more information than is available in a clinical setting." CMS, Announcement of Calendar Year (CY) 2016 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter 145 (April 6, 2015), https://go.cms.gov/3rNlwL9. Indeed, as recently as July 2020, in response to a report highlighting payments for diagnoses of the very conditions at issue

from in-home health risk assessments, CMS reiterated that it accepts those diagnoses "for risk adjustment" and that such assessments "are a tool for early identification of health risks to improve beneficiaries' health outcomes." CMS Comments 38-40, https://oig.hhs.gov/oei/reports/OEI-03-17-00471.pdf.

B. This *Qui Tam* Action and the Government's Investigation from October 2017 through February 2020

On October 2, 2017, Relator filed this *qui tam* action under seal in the Southern District of New York, and it was assigned to Judge Karas. Dkt. 94. Under the FCA, that triggered the 60-day period for the government to investigate and determine whether to take control of the litigation or allow Relator to prosecute the case on the United States' behalf. *See* 31 U.S.C. § 3130(b)(2), (4). At that time, Relator was general counsel of a former 360 Program vendor that had initiated a contentious arbitration action against Cigna involving a dispute about contractual payment terms. Relator's Amended Complaint repackages generic concerns CMS has long heard and rejected with respect to in-home exams, asserting three discernable FCA theories: (1) the diagnoses that Cigna reported to CMS for payment were allegedly identified during home visits designed to be "a data-gathering exercise rather than a legitimate medical encounter," where the provider was "prohibited" from "providing medical care"; (2) the diagnoses allegedly were for certain conditions that "could not have been treated or assessed during 360 visits"; and (3) the diagnoses allegedly "lacked medical-record support or otherwise violated CMS coding rules." Dkt. 12, ¶ 47.

The government, then represented only by the U.S. Attorney's Office for the Southern District of New York, was granted more than 26 months' worth of extensions beyond the 60-day statutory period—the better part of two and a half years altogether—to conduct its investigation. During that time, Cigna cooperated fully, producing more than 110,000 documents totaling more

than 2.6 million pages. Those materials covered, among other things: Cigna's contracts with its vendors; 360 Program policies, presentations, training materials, and exam forms for use in connection with in-home exams by vendors; documents and communications regarding the Program's structure and design; and communications within Cigna and with vendors regarding the Program. Those productions were made on a rolling basis beginning in October 2018 and were completed by August 2019. In addition, Cigna made three witnesses available for depositions, including a 30(b)(6) representative whom the government deposed in June 2019. Although Cigna scheduled two other employees for requested depositions in September 2019, the government asked to reschedule them for a month later and then, shortly after that request, postponed the remaining depositions indefinitely.

C. The Government's Declination

On December 27, 2019, presumably after granting numerous prior extensions, Judge Karas gave the government a final 60-day extension to conclude any necessary investigation. Judge Karas expressly told the government that he would grant "no more extensions" and set a deadline of February 25, 2020 for the government to decide once and for all whether to intervene. On that date, nearly 29 months after Relator filed this case, the government declined to intervene. *See* Dkt. 13. The FCA provides that the government shall either "proceed with the action" or "notify the court that it declines to take over the action." 31 U.S.C. § 3730(b)(4). Accordingly, the government's Notice stated that it had "decline[d]" Relator's first theory that Cigna violated the FCA by submitting data from "nurse home visits" that "did not involve the provision of medical treatment." Dkt. 13, at 1-2. But as to Relator's remaining "allegations and claims," the government said it had "decided not to intervene at this time." *Id.* at 2. Following that decision, Judge Karas the same day ordered that the government's Notice and Relator's

Amended Complaint be unsealed and served on Cigna so that proceedings between the parties to the case—Relator and Cigna—could move forward. *See* Dkt. 11.

D. Subsequent Proceedings

Notwithstanding Judge Karas's February 2020 deadline, the government waited until that very month to issue new document requests and schedule further depositions, including for one that had previously been scheduled for September 2019 before the government postponed it indefinitely. Cigna again cooperated fully: Two individual depositions went forward in May and June 2020, and Cigna completed its further productions by June 26, 2020. After that time, the government did not request additional documents or ask to interview additional witnesses.

Consistent with Judge Karas's practices and the Southern District of New York's local rules, Cigna in the meantime, on September 8 and 15, 2020, filed pre-motion requests to transfer Relator's case to this District and to dismiss Relator's Amended Complaint. *See* Dkts. 44, 56. A week after Cigna filed the latter request, the government told Cigna it was preparing to make a final intervention decision and asked Cigna to consent to a stay of the litigation as a condition of giving Cigna an opportunity to explain why the government should not intervene. The government and Cigna then jointly sought to adjourn a pre-motion conference, set for October 8, 2020, until December 2020 or January 2021, so that they could "discuss the Government's position as to the remaining claims." Dkt. 64. Judge Karas partially granted that request, resetting the conference for November 12, 2020, and stating that "[t]his gives counsel plenty of time to discuss this very old case." Dkt. 65, at 2.

In October 2020, Cigna and the government exchanged presentations conveying their views of the case. Cigna's objective in those discussions was to explain to the government why it should not intervene. The government did not make an initial settlement demand until January 7, 2021, and it did not present its full theory underlying that demand until March 25, 2021. From

March 2021 to September 2021, Cigna and the government then negotiated in good faith to see whether the case could be voluntarily resolved. On September 17, 2021, Judge Karas ordered that the case be transferred to this District no later than September 30, 2021. *See* 9/17/21 Minute Entry. The parties' negotiations accordingly ended on September 24, 2021—a deadline set by the government expressly to allow sufficient time if the case did not settle to intervene prior to transfer.

Yet the government did not intervene prior to transfer. Nor did it intervene prior to December 7, 2021, the date this Court set for an initial case management conference after the case was transferred. Instead, just prior to that conference, the government notified the parties that it intended to ask for a continuance to January 2022 to seek authorization from Main Justice to partially intervene. Cigna objected to that request, explaining that the parties—Relator and Cigna—had already met and conferred regarding the upcoming conference and were in the process of agreeing on a briefing schedule for Cigna's forthcoming motion to dismiss, a motion Cigna had requested leave to file in September 2020. *See* Dkt. 56. But rather than allow the parties to proceed, the government indicated that it believed it was important to inform the Court that a recommendation regarding intervention had been made to the Civil Division of the Department of Justice, which was still "deciding how to proceed." Dkt. 152, at 1. The Court granted the government's request. Dkt. 154.

On January 11, 2022, the government moved to partially intervene on what its motion describes as a "narrower" theory than Relator's—namely, that Cigna violated the FCA by submitting "invalid diagnoses of certain serious medical conditions" made during in-home exams allegedly "without conducting the testing, imaging, or other clinical steps necessary to diagnose those conditions," and where "the beneficiaries did not receive any medical treatment for these conditions during the home visits or from any other medical provider during the year of

the home visit." Dkt. 157 at 1. By the time of the government's motion to intervene, this case had been pending more than four years and three months, and nearly two years had passed since the government's election not to intervene in February 2020.

LEGAL STANDARD

The FCA allows the government to assume control of the litigation within 60 days (and any Court-authorized extension) after a *qui tam* action is filed. *See* 31 U.S.C. § 3730(b)(2), (3). Where, as here, the government declines to do so, intervention "at a later date" requires the Court's permission "upon a showing of good cause." *Id*. § 3730(c)(3). Although the FCA does not define "good cause," courts have repeatedly held that the government must show, at a minimum, "new and significant evidence … which escalates the magnitude or complexity of the fraud and causes it to reevaluate the decision not to intervene." *U.S. ex rel. Odom et al. v. SouthEast Eye Specialists, PLLC*, No. 3:17-cv-689, 2020 WL 4431464, at *4 (M.D. Tenn. July 31, 2020) (quotation marks omitted), *report and recommendation vacated*, 2021 WL 790889 (M.D. Tenn. Feb. 24, 2021) (denying government's motion to intervene). In addition, "the good-cause standard … 'requires balancing the government's justifications for an untimely intervention against any possible prejudice to the relators and defendants caused by such intervention.'" *U.S. ex rel. Ross v. Independent Health Corp.*, No. 1:12-cv-299, 2021 WL 3492917, at *2 (W.D.N.Y. Aug. 9, 2021). Finally, courts assess whether intervention is in the public interest. *See id*. None of these considerations supports intervention here.

ARGUMENT

I. THE GOVERNMENT HAS NOT CARRIED ITS BURDEN TO SHOW "GOOD CAUSE"

In deciding whether to permit later intervention, courts have long interpreted "good cause" to require an affirmative showing that the government discovered, after the statutory deadline for deciding whether to intervene, new evidence of fraud that led it to reverse its prior

decision not to intervene. *See, e.g.*, *U.S. ex rel. Hall v. Schwartzman*, 887 F. Supp. 60, 62 (E.D.N.Y. 1995); *U.S. v. AseraCare, Inc.*, 2012 WL 5289475, at *2-3 (N.D. Ala. Oct. 24, 2012). Indeed, before 1986, the government was never permitted to intervene after the statutory deadline. The Senate Report accompanying the 1986 amendments to the FCA, which introduced the precursor to § 3730(c)(3) allowing late intervention in specific circumstances, explains that this provision was added specifically to permit intervention in "situations where new and significant evidence is found" that "escalate[s] the magnitude or complexity of the fraud, causing the Government to reevaluate its initial assessment." S. Rep. No. 99-345, at 26-27. It also makes clear that Congress envisioned that in "the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision" with respect to intervention. *Id.* at 24-25.

Here, the government seeks to intervene more than four years after Relator filed this case, and long after the government declined to intervene, with no explanation for the length of time it spent or how, why, or even whether it ultimately changed its mind or simply failed to reach a decision sooner. That does not come close to satisfying the FCA's "good cause" standard.[1]

First, the government fails to identify any "new and significant" evidence that came to light after February 2020 that "escalate[d] the magnitude or complexity of the fraud and cause[d]

[1] The government stresses that, at the time of Judge Karas's February 2020 deadline, it "had *not declined* to intervene" with respect to the narrower theory on which it now seeks to intervene, but only with respect to Relator's "broad allegation that all diagnosis codes generated by nurse practitioner in-home assessments resulted in 'per se' violations of the FCA." Dkt. 158, at 4-5. But that is a distinction without a difference for purposes of the good cause analysis for late intervention. The FCA provides that the government shall, by the statutory or Court-imposed deadline, either "proceed with the action" or "notify the court that it declines to take over the action." 31 U.S.C. § 3730(b)(4). It does not permit the government to reserve decision. *See Searcy v. Philips Electronics North America Corp.,* 117 F.3d 154, 156 (5th Cir. 1997) ("The [FCA] forces the government to decide at the outset whether it wants to become an active litigant or to let the relator represent its interests.").

[the government] to reevaluate the decision not to intervene." The government claims that it "received additional documents and information" and conducted further data analyses that "helped the government determine the scope of the alleged fraud." Dkt. 158, at 10. But the government makes no effort to explain how any of that material revealed anything "new" compared to information already in its possession—let alone how it was "significant." Nor does the government show that any such information "cause[d] it to reevaluate its decision not to intervene" by "escalat[ing] the magnitude or complexity of the fraud." *SouthEast Eye*, 2020 WL 4431464, at *4. The government instead offers no more than its say-so that evidence discovered after February 2020 was "new" and "significant." As Chief Judge Crenshaw explained, the government cannot "simply expect" the court to trust that the late-discovered evidence is, in fact, new or material. 2/24/21 Hr'g Tr. at 39, 41.[2]

Indeed, the circumstances here closely parallel *SouthEast Eye*, in which Judge Crenshaw recently denied the government's motion for good-cause intervention in a *qui tam* action after the government similarly failed to identify new or significant evidence from its investigation. *See* 2021 WL 790889, at *1 (M.D. Tenn. Feb. 24, 2021); 2/24/21 Hr'g Tr. 37. In that case, Judge Crenshaw concluded, the evidence that the government alleged was discovered after its non-intervention decision did "not come close to establishing the good cause necessary to intervene and take control of the litigation nearly three years after the original complaint was filed, and more than six months after the court set a final deadline for intervention that was extended six times." *Id*. at 37. But the showing by the government here—which consists of no more than the conclusory assertion that it "received additional documents and information" that "helped [it]

[2] This transcript, although restricted on the *SouthEast Eye* docket, is publicly available as an exhibit in another case. *See* Dkt. 216-4, *U.S. ex rel. Liebman v. Methodist LeBonheur Healthcare*, No. 3:17-cv-902 (M.D. Tenn.).

determine the scope of the alleged fraud," Dkt. 158, at 10—is even less compelling than the "tepid submission" of "unremarkable" witness interviews that Judge Crenshaw held "fall way short" of constituting new evidence of fraud, 2/24/21 Hr'g Tr. 37-38.

Second, the government's unsupported claim that it discovered new and significant evidence after February 2020 is belied by the record. As discussed, Cigna produced the vast majority of responsive documents (over 110,000 documents, or over 85% of the total material produced) by August 2019, well before the government declined to intervene. And that material covered every conceivable aspect of Cigna's 360 Program—from vendor contracts, training materials, and sample 360 forms, to all documents regarding the structure and design of the Program and related internal and external communications. *See supra* pp. 4-5. In June 2019, eight months before the government decided not to intervene, the government also received testimony from Cigna's 30(b)(6) representative regarding tests and equipment used by vendors during home visits. And starting with 2014 dates of service, CMS has required MAOs to flag diagnoses derived from in-home exams in the data submitted to CMS. *See* CMS, Announcement of Calendar Year (CY) 2014 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter 36 (April 1, 2013), https://go.cms.gov/3G13hHh. While the government now seeks to intervene on the theory that licensed clinicians acting in good faith made medical diagnoses for certain conditions without clinically required tests, that theory appears to depend upon whether Cigna reported in the same year the same condition from a medical encounter other than the in-home exam—data the government has long had access to because it was all submitted to CMS years ago.

Third, even if the government had uncovered "new and significant" evidence after February 2020—which it has not shown—it fails to explain why it could not have timely discovered such information well in advance of the final deadline set by Judge Karas, who had

already granted more than 26 months' worth of extensions before admonishing the government that there would be "no more extensions." Indeed, the only discovery that occurred *after* Judge Karas's deadline was a limited production of documents by Cigna and two depositions. But it was the government's own dilatory investigation that caused that timing. Although Cigna offered dates in September 2019 for some additional depositions, the government pushed them off indefinitely and did not reach out to Cigna to reschedule any additional depositions until February 2020—shortly before the Court's final deadline. Nothing precluded the government from taking those depositions earlier.

Fourth, the government does not explain why it could not easily have sought to intervene on the basis of any new evidence long ago. By June 2020, the government had all of Cigna's documents, and the depositions were completed. The government provides no justification for any delay after that point apart from extended settlement negotiations and the pandemic. Neither justification explains the government's inaction for several months after it had received all potentially relevant evidence.

Moreover, while Cigna agrees that time spent actively negotiating a settlement should not be counted, the government's assertion that the parties spent "approximately a year" in settlement negotiations is incorrect. The timeline of active settlement negotiations is properly calculated from the government's initial settlement demand in January 2021 until negotiations ended in September 2021. In any event, nothing turns on that difference because even the government's timeline leaves at least six months after every piece of evidence had been produced, during which the government could have intervened in this more than four-year-old case. In fact, even subtracting a *full year* from the period between Relator's commencement of this action on October 2, 2017, and the government's motion to intervene on January 11, 2022,

the delay here is *at least* 39 months—significantly more than the 34 months that led Judge Crenshaw to deny intervention in *SouthEast Eye*.[3]

The government asserts that the global pandemic "affected the pace of the investigation and settlement discussions." Dkt. 158, at 12. But it points to no specific delay that the pandemic caused. Even after the government belatedly requested additional discovery in February 2020, Cigna continued to promptly produce documents in April, May, and June 2020, and made the two witnesses requested available for depositions in May and June 2020. Simply pointing to the pandemic is insufficient to explain the investigation's glacial pace. And had the government timely undertaken its investigation in the first instance, it would not have been propounding investigative discovery weeks before the pandemic took hold in February 2020.

Perhaps recognizing the lack of any evidentiary basis to support intervention, the government instead relies on its intervention in other FCA matters involving Medicare Advantage. Dkt. 158 at 9. But that is irrelevant to whether intervention is warranted in *this* case. The government buries *SouthEast Eye* in a footnote, dismissing it as "unpublished" and "inapposite" authority and faulting the Court for not addressing the "prejudice" prong of the good-cause standard. Dkt. 158 at 10 n.3. A close analysis of the *SouthEast Eye* hearing and decision does not bear out those conclusory assertions. The Court there heard all the same arguments the government advances in this case—including that the government continued its investigation after the Court's final deadline, and there was no prejudice to the defendants. The Court simply rejected those arguments.

Nor do the government's cases support good cause under these circumstances. To the contrary, its principal authorities undermine any argument for granting intervention here. In

[3] In *SouthEast Eye Specialists*, the *qui tam* complaint was filed on April 7, 2017, and the motion to intervene was filed on February 10, 2020.

United States ex rel. Ross v. Independent Health Corp., for example, the court granted intervention only after the government demonstrated that defendants had produced seven years of previously undisclosed data that was material to the alleged fraud's scope. *See* No. 1:12-cv-299, 2021 WL 3492917, at *3 (W.D.N.Y. Aug. 9, 2021). Similarly, in *United States ex rel. Fry v. Guidant Corp.*, the court granted intervention based on a detailed showing that newly discovered evidence—including five specific examples of alleged fraud and corroborating documents produced by the defendants—addressed the concerns that had previously caused the government to decline to intervene. No. 3:03-cv-842, 2008 WL 11510790, at *2 (M.D. Tenn. Jan. 11, 2008); *see id.,* Dkts. 132, 137. The government has made no comparable showing of new evidence in this case.

II. BELATED INTERVENTION WOULD PREJUDICE CIGNA

Even if the government had proffered a legitimate justification for its delay—which it has not—the determination of "'good cause' requires balancing the government's justifications for an untimely intervention against any possible prejudice to the relators and defendants caused by such intervention." *Griffith v. Conn*, 7:11-cv-157, 2016 WL 3156497, at *3 (E.D. Ky. Apr. 22, 2016). The balance here tips sharply in Cigna's favor.

Courts have repeatedly held that lengthy and unexcused delays in prosecuting a claim prejudice a defendant's "ability to defend [itself] as the events recede further into the past and evidence becomes more stale." *U.S. ex rel. Pervez v. Maimonides Med. Ctr.*, No. 1:06-cv-4989, 2010 WL 890236, at *3 (S.D.N.Y. Mar. 9, 2010); *see also Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 195 (2d Cir. 1999) ("[D]elay by one party increases the likelihood that evidence in support of the other party's position will be lost and that discovery and trial will be made more difficult."). As discussed, excluding settlement negotiations, the government had more than 39 months to investigate, develop, and intervene on its theory of FCA liability before filing the

instant motion—far more time than the period that Judge Crenshaw found unduly lengthy in *SouthEast Eye*. Moreover, the investigation itself has cast a shadow over Cigna and its operations during that time. In addition to the cost of complying with the government's multiple civil investigative demands ("CIDs"), Cigna had to disclose the government's investigation in its securities filings and has therefore had to compete against other MAOs in the market, saddled with the uncertainty of both a potential government enforcement action and a pending *qui tam* action for years due to the government's inability to complete its investigation. As with any business, the months spent under investigation and responding to the government's requests made it more difficult for Cigna to engage in its regular business—the provision of high-quality, low-cost health care to hundreds of thousands of Medicare beneficiaries.

Permitting intervention now would only compound the years of delay in this case by effectively changing the terms of the litigation just as the matter was finally poised to proceed toward case-dispositive briefing on Relator's Amended Complaint. As noted, Cigna's pre-motion request for leave to file a motion to dismiss that complaint has been pending for more than sixteen months, since September 2020. *See* Dkt. 56. Yet Relator and Cigna have not been allowed to brief and resolve any of those potentially dispositive issues simply because the government could not come to ground on whether it should intervene in this suit after years of deliberation.

The government tries to spin this in its favor, arguing that no prejudice will arise because this case is in "a very early stage," and no discovery has occurred. Dkt. 158 at 1. But simply pointing to the fact that proceedings were not further along does not address the prejudice that has *already* occurred from the government's failure to swiftly decide whether to intervene. The government has affirmatively thwarted Cigna's efforts to move the case forward at every turn in order to buy itself more time to make an intervention decision. After the case was transferred to

this Court, the parties met and conferred and were in the process of agreeing upon a briefing schedule for Cigna to file its long-delayed motion to dismiss. The government's insistence on continuing the case management conference preempted those efforts and effectively halted the litigation for another month, simply to accommodate further internal decision-making by the government, after the four years that the case has already been pending. And if its motion is granted, the government asks for another 30 days to file its complaint-in-intervention.

Finally, although the government notes that Relator has consented to its intervention, this does not change the good-cause inquiry. "Good cause" is not assured where the Relator consents to the intervention. *See, e.g.*, *SouthEast Eye*, 2021 WL 790889, at *1 (denying government's motion even though "relators strongly consent[ed] to government intervention" (2/24/21 Hr'g Tr. 14)); *U.S. ex rel. Drennen v. Fresenius Med. Care Holdings, Inc.*, No. 1:09-cv-10179, 2017 WL 1217118, at *5 n.2 (D. Mass. Mar. 31, 2017). And neither of the cases the government cites found good cause solely because the Relator consented to intervention—both courts found good cause based on other circumstances, and Relator happened to consent. *See U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 950 F. Supp. 1046, 1049 (D. Colo. 1996) (finding that government showed new evidence and there was no risk of prejudice to defendants); *U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002, 2011 WL 4480846, at *2 (M.D. Fla. Sept. 27, 2011) (finding no prejudice to defendants).

III. PERMITTING INTERVENTION AFTER YEARS OF INVESTIGATION WOULD UNDERMINE CONGRESSIONAL INTENT AND THUS IS NOT IN THE PUBLIC INTEREST

Allowing intervention under these circumstances would subvert Congress's choice to limit when the government may participate in a *qui tam* action and the length of time it may engage in investigation before intervening. The "paramount importance" of the public interest in evaluating whether there is "good cause" to grant a belated intervention request means

enforcing—not eliminating—the FCA's limits on government investigations and intervention in *qui tam* cases. *Rockwell Int'l*, 950 F. Supp. at 1049. As courts have repeatedly held in other contexts, "[i]t is in the public interest for courts to carry out the will of Congress." *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000); *see also, e.g.*, *Davis v. Lukhard*, 106 F.R.D. 317, 319 (E.D. Va. 1984) ("The public interest will be served by having the will of Congress worked," and not substituting the view of other government actors "for that of the Congress.").

A finding that the government has good cause to intervene on a narrow theory of liability after years of investigation, based purely on conclusory allegations about "new evidence," would be squarely at odds with the expressed intent of Congress. The drafters of the FCA limited the scope of "good cause" intervention under § 3730(c)(3) to situations where the government has discovered new evidence during its investigation that materially alters the scope or magnitude of the underlying fraud. *See* S. Rep. No. 99-345, at 26-27. Necessarily, this requires a showing of specific evidence that the Court can assess. Allowing intervention without any such showing would eviscerate Congress's considered choice to circumscribe "good cause" intervention to a limited set of circumstances.

Permitting intervention would also contravene the purpose of a CID under the FCA, which is "to provide the Department of Justice with a means to assess quickly, and at the least cost to the taxpayers or to the party from whom information is requested, whether grounds exist for initiating [or intervening in] a false claim suit." *U.S. v. Markwood*, 48 F.3d 969, 979 (6th Cir. 1995); *see* 31 U.S.C. § 3733(a)(1). The government can hardly contend that allowing it to sit for years on evidence obtained via CID is a "quick[]" means of determining whether grounds exist for an FCA suit, particularly here where its theory is not wide-ranging but admittedly narrow in scope. Indeed, the "practice of conducting one-sided discovery for months or years while the

case is under seal was not contemplated by Congress and is not authorized by the [FCA]." *U.S. ex rel. Martin v. Life Care Centers of Am.*, Inc., 912 F. Supp. 2d 618, 624 (E.D. Tenn. 2012) (quoting *U.S. ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1191 (S.D. Cal.1997)). Here, not only did the government engage in years of one-sided discovery before deciding not to intervene; it asks the Court to endorse lengthy additional investigation after Judge Karas gave the government a final deadline of February 2020 to learn what it needed in order to reach a decision on intervention. Granting intervention under these circumstances, after a federal judge gave the government clear notice that it would receive "no more extensions," will only encourage the government to treat the statutory and Court-imposed deadlines for investigating a *qui tam* complaint as light suggestions, with little or no force.

The government's sole argument as to why intervention is in the public interest is that the action involves alleged fraud on Medicare, which is a taxpayer-funded program. Dkt. 158, at 10-11. But *all* actions brought under the FCA involve allegations of fraud on taxpayer-funded programs. That alone cannot mean that it is invariably in the public interest to allow the government to intervene; if it did, it would nullify the requirement to establish good cause. Congress provided for FCA enforcement by *qui tam* relators and set a statutory deadline with limited exceptions for the government to intervene. Endorsing government FCA investigations of indeterminate length disserves the public interest and sets a dangerous precedent.

CONCLUSION

For all of these reasons, the Court should deny the government's motion to intervene.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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