

The Granston Memo Strikes Again, but the Standards for Dismissal Remain Unclear

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As has been emphasized with the disclosure of the “Granston Memo” in January 2018 and several cases since, the government may request dismissal of a *qui tam* action filed under the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.*, in certain circumstances, and even over the relator’s objection and when the government has declined to intervene. Recently, the Southern District of New York evaluated the underlying merits of such a request. At issue was the Government’s motion to dismiss whistleblower claims alleging that Standard Chartered Bank engaged in banking practices that violated U.S. sanctions against Iran. *United States ex rel. Brutus Trading, LLC v. Std. Chartered PLC*, No. 18 Civ. 11117 (PAE), 2020 U.S. Dist. LEXIS 116728 (S.D.N.Y. July 2, 2020). The court decided in favor of the government and dismissed the suit. *Id.* at *13.

Review of the decision is helpful to better understand (1) some of the factors that support dismissal of *qui tam* claims filed under the FCA, and (2) the two approaches relating to the appropriate standard of review courts should apply when evaluating the government’s request to dismiss *qui tam* actions.

The FCA allows a private party (also known as a relator or whistleblower) to bring a civil suit on behalf of the government in order to enforce the law against entities submitting fraudulent claims to the government. 31 U.S.C. at § 3730(b)(1). The FCA not only imparts significant control to the Government over such suits, but also permits the Government to intervene (or not) and move to dismiss (or not). *Id.* at § 3730(b)–(c).

Historically, the government’s power to dismiss *qui tam* actions has been exercised sparingly, largely because the statute expressly provides that “relators can proceed with certain *qui tam* actions following the government’s declination.” See Granston Memo (Jan. 10, 2018). The initial DOJ guidance related to dismissal cautioned that:

[A] decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government’s limited resources. Accordingly, [the government has been] circumspect with the use of this tool to avoid precluding relators

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from pursuing potentially worthwhile matters, and to ensure that dismissal is utilized only where truly warranted.

Id. at 1–2. The Granston Memo, however, encouraged DOJ trial attorneys to use its power to dismiss relator’s claims more often. We have previously reported on the Granston Memo, and readers can learn more about it [here](#).

Government motions to dismiss have been scrutinized under two different standards. The first approach articulated by the Ninth Circuit requires the government to identify “a valid government purpose” and “a rational relation between dismissal and accomplishment of the purpose.” *United States ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998). Next, the burden shifts to the whistleblower “to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.” *Id.*

The D.C. Circuit, however, has articulated a more deferential test, recognizing that dismissal is the government’s “unfettered right” and is unreviewable by the court absent fraud. *Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003).

Here, the court declined to definitively adopt either standard, recognizing that the government had already met the more rigorous standard set forth in the Ninth Circuit. *Brutus Trading*, 2020 U.S. Dist. LEXIS 116728 at *8. The court reasoned that the whistleblower was not responsible for uncovering the fraud in the earlier investigation (dating back to 2013), and furthermore, had not aided the government in discovery of any new FCA violations since. Secondly, the court accepted the “well-established basis” set forth by the government: that were the case to proceed to discovery, the Government would be “required to expend resources on a matter that it has found meritless.” *Id.* at *10. The court also found particularly compelling that the government had already recovered hundreds of millions of dollars from the defendants over the previous decade without relator’s help. *Id.*

The Government’s asserted reasoning not to spend additional resources was accepted as a “valid government purpose.” The whistleblower was then unable to meet its burden that dismissal would nonetheless be “fraudulent, arbitrary and capricious, or illegal.” *Id.* at *10–11 (internal quotations omitted). The court dismissed the relator’s “subjective disagreement with the Government’s investigative strategy and ultimate decision” as ineffectual reasoning and rejected relator’s characterization of the investigation as wasteful simply “because it did not reach the conclusion that relator deems correct.” *Id.* at *11–12.

Because the government had met either standard, the claims against defendants were dismissed. The final takeaway here for parties to *qui tams*: the government continues to exercise its priorities under the Granston Memo to dismiss *qui tams*, and whether such a case is dismissed can depend on the approach taken by the particular circuit.