IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA and STATE OF ILLINOIS ex rel. JACKIE GRANDEAU,	)	
Plaintiff-Relator,	)	
v.	)	No. 99 C 8287
CANCER TREATMENT CENTERS OF AMERICA, et al.,	)	Judge James B. Moran
Defendants.	)	

THE UNITED STATES' MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF RELATOR'S MOTION TO DISMISS THE COUNTERCLAIMS OF DEFENDANT MIDWESTERN REGIONAL MEDICAL CENTER, INC.

The United States respectfully moves this Court for leave to file the attached *Amicus Curiae* Brief in Support of Relator's Motion To Dismiss The Counterclaims of Defendant Midwestern Regional Medical Center, Inc.

Although the United States declined to intervene in this *qui tam* action and therefore is not a formal party in the case, the United States is the real party in interest. *See, e.g., United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 867-68 (8th Cir. 1998); *United States ex rel. Kreindler and Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993). The Department of Justice, as the agency charged with enforcing the False Claims Act, 31 U.S.C. § 3729 *et seq.*, retains an interest in how the precedent set by the Court may shape future enforcement of the statute. *See* 28 U.S.C. § 517 (providing for Department of Justice participation in any federal court litigation to attend to the interests of the United States). Thus, the United States has prepared the attached

Amicus Curiae brief.[1]

Therefore, the United States respectfully requests leave to file the attached *Amicus Curiae* Brief in Support of Relator's Motion To Dismiss The Counterclaims of Defendant Midwestern Regional Medical Center, Inc.

Respectfully submitted,

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[1] The United States wishes to preserve its argument that 28 U.S.C. § 517 may authorize the United States to file *Amicus Curiae* briefs without leave.

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CANCER TREATMENT CENTERS OF AMERICA, et al.,	)	Judge James B. Moran
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SUBMISSION OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RELATOR'S MOTION TO DISMISS COUNTERCLAIMS

In this *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, the United States, as *amicus curiae*, respectfully submits this brief in support of the motion of Relator, Jackie Grandeau, to dismiss three counterclaims filed by defendant Midwestern Regional Medical Center, Inc. ("MRMC").

INTRODUCTION

MRMC has asserted three common law counterclaims seeking to hold a *qui tam* relator civilly liable for cooperating with the federal government's investigation of MRMC's activities. Each of the claims springs from a single contention of fact: that Relator, while employed by MRMC, responded to a federal subpoena for MRMC documents within her personal possession and control without telling the company about the subpoena, or her response to it. MRMC claims that in so doing, Relator breached her duty of loyalty to the company, breached a confidentiality agreement forbidding her to disclose confidential or proprietary company information, and converted ***the subpoena*** (not the documents produced pursuant to the subpoena) to her own benefit for the purpose of pursuing a *qui tam* action against MRMC.

Although MRMC goes to some effort to avoid explicitly saying so, its counterclaims effectively seek to hold Relator civilly liable for confidentially disclosing to the government evidence of MRMC's alleged fraud. Such allegations fail to state a claim upon which relief may be granted because the statute authorizing the subpoena expressly immunizes document custodians who, acting in good faith, comply with the subpoena and/or choose not to disclose their compliance to the owners of the documents. Further, the counterclaims also fail because they are based on conduct that the *qui tam* provisions of the FCA were designed to encourage and protect, and because such claims run afoul of long-established public policy encouraging citizens to report unlawful activity to law enforcement.

FACTUAL BACKGROUND

Before this *qui tam* action was filed, the United States Attorney's Office opened an investigation of MRMC for health care offenses, as defined in 18 U.S.C. § 24(a). *See* Subpoena (Exhibit B, Counterclaim). As part of that investigation, and pursuant to 18 U.S.C. § 3486, federal prosecutors issued a subpoena duces tecum, bearing a return date of March 8, 1999, to Relator, who was then known as "Jacqueline Schultz," using her business title and business address, and requiring that she produce certain specified company documents in her "personal custody and control." Counterclaim ¶ 10 (hereinafter "Ctrclm"). Among other records, the subpoena required Relator to produce "[m]edical records and billing records related to suspected billing discrepancies." *Id.* At the time, Relator was employed by MRMC as a quality assurance coordinator and business manager. Ctrclm ¶¶ 6 & 8. As an employee of MRMC, Relator had signed a confidentiality agreement with the company promising that she would "not knowingly or negligently under any circumstances or at any time . . . disclose in any way . . . any Proprietary and Confidential Information for any reason or purpose whatsoever." Ctrclm ¶ 7. Relator filed this *qui tam* action against MRMC on December 20, 1999.

MRMC alleges that Relator responded to the subpoena without disclosing to MRMC the fact that she had received the subpoena and had produced, in response to it, company documents that were confidential and proprietary business information or confidential patient medical records. Ctrclm ¶¶ 11-14. In so doing, MRMC alleges, Relator violated her duty of loyalty to the company, breached the confidentiality agreement, and converted the subpoena to her own benefit. Ctrclm ¶¶ 19, 26, 35. These violations – MRMC claims – would have given MRMC cause to fire Relator had it only known of her activities, and entitles it to recover the compensation it paid to Relator after she complied with the government's subpoena and the "substantial litigation expenses" MRMC has incurred to defend against the *qui tam* action. *See* Ctrclm ¶¶ 20, 22, 28, 30, 37, 39.

STATUTORY BACKGROUND

The FCA imposes civil liability upon any person who, *inter alia*, "knowingly presents, or causes to be presented, to . . . the United States . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). The United States may initiate a FCA action on its own. 31 U.S.C. § 3730(a). Alternatively, the FCA's *qui tam* provisions permit private citizens, *i.e.*, relators, to bring an action for themselves and the United States. 31 U.S.C. § 3730(b)(1). If the *qui tam* suit results in a recovery for the United States, the relator may receive up 30 percent of that recovery, plus attorney fees and costs. 31 U.S.C. § 3730(b), (d). A *qui tam* suit is brought in the name of the United States, and the United States is always the real party in interest, entitled to receive the greatest share of any recovery under the FCA. *See id.*

Qui tam complaints must be filed initially under seal and served upon the United States, along with relator's written disclosure of "substantially all material evidence and information the person possesses" to support the allegations. 31 U.S.C. § 3730(b)(2). The United States then has 60 days –

subject to extension -- to investigate the allegations and determine whether to intervene and take over the suit. 31 U.S.C. §§ 3730(b)(2), 3730(b)(3). If the United States declines to intervene, "the person bringing the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B). Notwithstanding an initial decision against intervention, the United States may still intervene at a later date upon a showing of good cause. 31 U.S.C. § 3730(c)(3).

The FCA expressly protects relators from retaliation for "lawful acts" taken "in furtherance of" an action under the FCA. 31 U.S.C. § 3730(h). Specifically, the statute provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer *because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section*, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h) (emphasis added).

ARGUMENT

I. RELATOR IS IMMUNE FROM CIVIL LIABILITY FOR GOOD FAITH COMPLIANCE WITH THE SUBPOENA.

The statute authorizing the administrative subpoena at issue here grants immunity from civil liability to any person who receives and complies in good faith with an administrative subpoena issued under the authority of that section, or who chooses not to disclose their compliance with the subpoena. 18 U.S.C. § 3486(d). The statute provides in pertinent part that:

> Notwithstanding any Federal, State, or local law, any person, including . . . employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

18 U.S.C. § 3486 (d) (2000)[1]. Here, MRMC seeks to hold Relator liable for conduct this subsection protects – failure to disclose production pursuant to the subpoena. The only impetus MRMC assigns to Relator's conduct is a desire to further an action under the *qui tam* provisions. As detailed more fully in the following section, because the FCA encourages and protects such conduct, these allegations cannot as a matter of law amount to bad faith, and therefore, are insufficient to deprive Relator of immunity under Section 3486(d).

II. RELATOR CANNOT BE HELD CIVILLY LIABLE FOR CONDUCT THAT THE FCA ENCOURAGES AND PROTECTS.

MRMC's counterclaims fail to state a claim upon which relief may be granted because they are based on actions Relator took "in furtherance of" an FCA action "to be filed," and thus, are protected by the FCA's *qui tam* provisions. 31 U.S.C. § 3730(h). MRMC has tried to avoid this conclusion by insisting that it is not suing Relator simply because she responded to the subpoena, but because she did so without telling MRMC that she had received a subpoena and was responding to it by producing proprietary and confidential MRMC documents to the government. But the emphasis defendant places on Relator's non-disclosure of the subpoena is just a gloss on the true nature of the counterclaims. Relator's non-disclosure of the subpoena is irrelevant to any injury MRMC claims where, as here, MRMC has not alleged that (1) it could have refused to produce the documents demanded by the subpoena had it known about it, or (2) that Relator could not have provided the documents to federal agents on her own without a subpoena, and done so without disclosing that fact to MRMC.

In actuality, the counterclaims are about the fact that Relator cooperated with federal prosecutors

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[1] This subsection was amended in 2000 to substitute the term "subpoena" for "summons" in each place where it appeared. 18 U.S.C. § 3486 notes. Although the subpoena was issued prior to the 2000 amendments, we quote the amended text in the interest of clarity, and because it does not appear that the amendment was intended to alter the protections provided by the original enactment.

and agents to investigate the alleged fraud that is now the subject of Relator's *qui tam* action. This conclusion is supported in the first instance by the fact that Relator turned the documents over to federal prosecutors and agents investigating the company for fraud. That Relator's whistleblowing is the crux of the counterclaims is further supported by the very nature of the injury MRMC claims to have sustained. The only detriment MRMC claims to face as a result of Relator's non-disclosure of the subpoena and production of documents is its exposure to potential liability under the FCA. More specifically, in its counterclaim for conversion, MRMC alleges that Relator, by failing to disclose the subpoena or her response to it, "and by engaging in this conduct *for the purposes of pursuing her [FCA] claims against MRMC* . . . converted the Subpoena for her own benefit." Ctrclm ¶ 35 (emphasis added); *see also* Def. Resp., page 10 (Relator accomplished conversion by "(ii) using the subpoena to collect MRMC's confidential and proprietary documents in furtherance of her case against MRMC ....")

Further, in each of its three counterclaims, MRMC avers that had it known about the subpoena when it was issued, "MRMC could have explained to the federal government and to Grandeau the factual errors in Grandeau's suspicions of fraud, and could have provided the federal government and Grandeau with documentation refuting those suspicions," and, MRMC implies, avoided the *qui tam* action altogether. Ctrclm ¶¶ 21, 29 and 38. That MRMC's potential exposure to FCA liability is the gravamen of the counterclaims is apparent by the way it measures its damages. MRMC claims that it has sustained "substantial money damages" of two types: (a) "substantial litigation expenses ... incurred in the defense of this lawsuit..." (Ctrclm ¶¶ 22, 30 and 39); and (b) the compensation MRMC paid to Ms. Grandeau after learning that she had responded to the subpoena.[2] Ctrclm ¶¶ 20, 28 and 37.

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[2] This second category of damages rests on the premise that MRMC would have fired Relator had it only known she was providing the government with MRMC documents to assist the government in its investigation of her allegations against MRMC. Ctrclm ¶¶ 20, 22, 28, 30, 37, 39. Of course, that is the very

The conduct upon which MRMC's counterclaims are based is the very type of activity the FCA was designed to protect and encourage -- the disclosure to the United States of false or fraudulent claims by persons with knowledge of fraud. It has long been understood that "the purpose of the qui tam provision of the Act is to encourage those with knowledge of fraud to come forward." *Neal v. Honeywell*, 826 F. Supp. 266 (N.D. Ill. 1993), *aff'd*, 33 F.3d 860 (7th Cir. 1994) (citing H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986)). The statute assumes that individuals who become *qui tam* relators possess and are willing to disclose to the government inside evidence of fraud – whether in the form of documents or other information – that their employers or other potential FCA defendants would rather that relators not disclose to the government. In fact, in order for relator to proceed with an FCA action, the FCA requires that relators disclose to the United States alone "substantially all material evidence and information the person possesses," 31 U.S.C. § 3730(b)(2), and ties relator's share to the importance of her participation in the action and the relevance of the information she provided. *United States ex rel. Green v. Corporation*, 59 F.3d 953, 964 (9th Cir. 1995).

Not only does the FCA contemplate that relators will share evidence with the government, but also that they will do so in secrecy. The FCA requires relators to file their complaints under seal and not to serve the complaint "until the court so orders." 31 U.S.C. § 3730(b). The complaint must remain under seal for at least 60 days, and the seal is subject to extension for good cause shown by the United

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thing the FCA says that MRMC cannot do – it cannot retaliate against an employee for "lawful acts . . . in furtherance of an action under the [FCA.]" 31 U.S.C. § 3730(h). By way of clarification, the United States takes no position with respect to the merits of Relator's wrongful termination claim. Rather, our point is directed to MRMC's own allegation that it would have fired Relator had it known of her response to the subpoena.

States. *Id.* "The purpose of these provisions is to 'protect the Government's interest in criminal matters,' by enabling the government to investigate the alleged fraud without 'tip[ping] off investigation targets' at 'a sensitive stage.'" *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 743 (D.C. Cir. 1998) (quoting S. Rep. No. 99-345, at 24, *reprinted in* 1986 U.S.C.C.A.N. at 5289). Requiring a prospective relator to tell her employer that she has filed or is contemplating filing a *qui tam* action would violate the FCA's sealing provisions. *Id.* (holding that relator was not required to disclose the action to defendant to obtain the whistleblower protections of Section 3730(h)). Certainly there is nothing in the text of the FCA that requires Relator to disclose to defendant that she is investigating a potential FCA action, or assisting a government investigation; in fact, the FCA assumes the contrary. If individuals such as Relator were entitled – indeed encouraged by the FCA – to provide voluntarily to law enforcement information relating to fraud against the taxpayers, surely the fact that Relator provided such information pursuant to a subpoena does not give MRMC greater rights than it had before the subpoena was issued.

As a further incentive to whistleblowers, the FCA offers relators protection from retaliation for lawful acts they commit "in furtherance of" an action filed or "to be filed" under the statute. 31 U.S.C. § 3730(h); *see Neal v. Honeywell*, 33 F.3d at 861; *Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140, 1144 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997). Consistent with the "overwhelming precedent" for giving broad construction to federal whistleblower statutes, *Neal v. Honeywell*, 826 F. Supp. at 270-72, Section 3730(h) has been construed to protect a broad category of persons engaged in a wide range of activities, including the types of investigatory activity engaged in by Relator even before she filed her *qui tam* action.

The protections offered under Section 3730(h) of the FCA extend not only to persons who file

a *qui tam* suit, but also to any other person who initiates, investigates, testifies or otherwise assists in connection with a potential action under the FCA. *Neal v. Honeywell*, 826 F. Supp. at 269; *see also Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999), *cert. denied*, 528 U.S. 1038 (1999) (Section 3730(h) protects "investigation, testimony, and litigation"); *United States ex rel. Schuhardt v. Washington University*, 228 F. Supp.2d 1018, 1035 (E.D. Mo. 2002) ("Protected conduct" includes "investigation for, initiating of, testimony for, or assistance in" a FCA suit). To gain the protections of Section 3730(h), there is no requirement that an employee "already have discovered a completed case. To the contrary, § 3730(h) expressly includes 'investigation for . . . an action filed or to be filed' within its protective cover. This manifests Congress' intent to protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together." *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d at 740. Indeed, in *Neal v. Honeywell*, the Seventh Circuit held that Section 3730(h) protects individuals from retaliation for internal whistleblowing even if the internal disclosure never culminates in the filing of a *qui tam* action provided that such litigation was a "distinct possibility" at the time. 33 F.3d at 864; *accord Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d at 1146; *U.S. ex rel. Ramseyer v. Century Healthcare*, 90 F.3d 1514 (10th Cir. 1996). As stated by the district court in *Neal*, "'[t]he intent of the statute is to provide early assurance to employees that their jobs will not be endangered by looking into and reporting possible misconduct by government contractors, regardless of the informality or nascent status of the proceeding.'" 826 F. Supp. at 272 (citations omitted).

As the foregoing authorities establish, the FCA invites prospective relators to investigate and disclose evidence of fraud to the government without alerting the defendant, and offers relators protection for activities "in furtherance of" an action filed or to be filed. Because MRMC does not

allege that Relator has done anything more than what the *qui tam* provisions contemplate and protect. MRMC has failed to state a claim upon which relief may be granted.[3]

III. AS A MATTER OF PUBLIC POLICY, RELATOR MAY NOT BE HELD CIVILLY LIABLE FOR ASSISTING A FEDERAL INVESTIGATION.

Under the circumstances presented here, MRMC cannot state a claim against Relator for breach of the confidentiality agreement or breach of fiduciary duty. The obligations of confidentiality and loyalty owed by an employee to an employer – whether arising by operation of an express confidentiality agreement or a common law fiduciary duty – are not absolute, and must yield to the public interest. For public policy reasons, agreements that purport to limit the right of a party to cooperate with a criminal investigation or to disclose matters of public importance are unenforceable. *Town of Newton v. Rumery*, 480 U.S. 386, 392, 207 S. Ct. 1187, 1191 (1987) ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"); *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1377 (Fed. Cir. 2001) ("[T]he public policy interest at stake [in] the reporting of possible crimes to the

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3 Several courts have considered whether counterclaims may be asserted against *qui tam* relators under any circumstance. The outcome of these cases tends to turn upon the nature of the damages sought. Counterclaims for contribution and indemnification against *qui tam* relators have been barred outright, in part, because such claims undermine the purpose and operation of the FCA. *See, e.g., United States ex rel. Rodriguez v. Weekly Publications*, 74 F. Supp. 763, 769 (S.D.N.Y. 1947) (construing FCA prior to 1986 amendments); *Mortgages, Inc. v. United States Court for the District of Nevada (Las Vegas)*, 934 F.2d 209, 212-213 (9th Cir. 1990); *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248, 264 (S.D.N.Y. 1996). But efforts to bar categorically all counterclaims, including compulsory counterclaims for independent damages (*i.e.*, claims that do not depend on whether defendant is found liable under the FCA, as would claims for contribution and indemnification), have been rejected by some courts on procedural due process grounds. *See, e.g., United States ex rel. Burch v. Piqua Eng'g, Inc.*, 145 F.R.D. 452 (S.D. Ohio 1992); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 831 (9th Cir. 1993) (rejecting a "blanket rule" forbidding counterclaims in *qui tam* actions). Although due process concerns prompted these courts to reject a categorical rule barring *qui tam* defendants from ever asserting compulsory counterclaims for independent damages, such counterclaims may be dismissed nonetheless if, as here, they fail in other respects to state a claim upon which relief may be granted.

authorities is one of the highest order and is indisputably 'well defined and dominant' in the jurisprudence of contract law."); *X Corp. v. John Doe*, 805 F. Supp. 1298, 1310 n.24 (E.D.Va. 1992), *aff'd*, 17 F.3d 1435 (4th Cir. 1994) (observing in an FCA case brought by defendant's attorney that confidentiality agreements that prevent an individual from disclosing evidence of fraud to the government are void as against public policy); *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 129, 421 N.E.2d 876 (1981) ("[p]arties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public").

The FCA articulates a clear public interest in the detection and exposure of potential fraud against the United States. Private agreements that would thwart that interest are not enforceable for reasons of public policy. In *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996), the Ninth Circuit considered whether a private settlement agreement releasing Relator's claims against the company was enforceable if to do so would interfere with the goals of the FCA. The court refused to honor the release because enforcing the release "would impair a substantial public interest. Specifically, [enforcement] would threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986." 59 F.3d at 963. As the court explained,

> If the prevailing legal rule were that prefiling releases entered into without the government's consent or knowledge were enforceable, then it stands to reason that Green never would have filed his qui tam complaint in the first place. And, . . . both the structure of the Act and the legislative history reveal that it is the filing of more private suits that Congress sought to encourage, both to increase enforcement and deterrence as well as to spur the government to undertake its own investigations.

Id. at 966.

Courts also have refused to honor private agreements prohibiting individuals from disclosing

matters of public interest protected by other federal statutes. For example, in *Connecticut Light & Power Co. v. Secretary of the United States Department of Labor*, 85 F.3d 89 (2d Cir. 1996), the court found that a proposed settlement purporting to restrict a former employee's cooperation with the Nuclear Regulatory Commission violated section 210 of the Energy Reorganization Act of 1974 ("ERA"), "a remedial statute intended to shield employees from adverse action taken by their employers in response to employees' complaints of safety violations." 85 F.3d at 96. "[T]his kind of discriminatory action . . . can represent a significant threat to the statutory purpose of ensuring clear lines of communication between employees and regulatory agencies." 85 F.3d at 95, n.5. The court went on to say that "[a]lthough the act of inducing an employee to relinquish his rights as provided by the ERA through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet." 85 F.3d at 95.

The Tenth Circuit also has refused to enforce a non-disclosure agreement against a whistleblower where enforcement of the provision might have allowed a civil wrong against a third party to go undetected. *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972). After observing that "[t]he distinction between a crime and a mere tort can often, and as here, be a difference brought about by time, and knowledge," the Tenth Circuit explained that:

> By holding that appellee breached its contract we would in effect, be placing others similarly situated in a precarious position. A party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed.

457 F.2d at 853-854.

Public policy concerns also have been cited to preclude enforcement of private agreements that interfere with the government's ability to investigate violations of law. For example, in *EEOC v. Astra*

U.S.A., Inc., 94 F3d 738 (1st Cir. 1996), the court enjoined defendant on public policy grounds from enforcing provisions in its settlement agreements with employees prohibiting those individuals from assisting the EEOC to investigate discrimination. The court reasoned that "if victims of or witnesses to sexual harassment are unable to approach the EEOC or even answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered." *Id.*, at 744.

Thus, the confidentiality agreement at issue here, to the extent it can be construed to prevent Relator from disclosing evidence of potential fraud to the United States, offends the clear purpose of the FCA, and, therefore, cannot be enforced as a matter of public policy.[4]

The same public policy concerns that preclude enforcement of the confidentiality agreement require dismissal of MRMC's claim for breach of fiduciary duty. The duty of loyalty owed by an employee to an employer is a qualified duty. The agent may reveal confidential information "in the protection of a superior interest of himself or a third person." Restatement (Second) of Agency , Section 395 cmt. F (1957). Thus, an agent may disclose current or planned criminal conduct by the principal in service of the public interest. *Id.* In *Niebur v. Town of Cicero*, 212 F. Supp.2d 790, 826 (N.D. Ill. 2000), the court upheld a jury verdict that the Town had retaliated against plaintiffs for cooperating with a federal investigation. The court observed that there exists "a clear public policy favoring investigation and prosecution of criminal offenses," and that "the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy." *Id.*

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[4] MRMC's theory even would hold a cooperating witness liable for failing to disclose a subpoena that, if revealed, might reveal a confidential grand jury investigation and potentially expose the cooperating witness to obstruction of justice charges, a circumstance that jeopardizes the confidentiality of any ongoing investigation, and discourages witnesses from cooperating in the first instance.

Similar policies to those expressed by the courts in Illinois have led the Ninth Circuit, applying California law, to reject claims for fraud, breach of fiduciary duty and antitrust violations based on a party's cooperation with a government investigation. In *Caesar Electronics, Inc. v. Andrews*, 905 F.2d 287 (9th Cir. 1990), *cert. denied*, 498 U.S. 984 (1998), the Ninth Circuit held that a party who cooperated with the federal government in a covert criminal investigation was immune from subsequent civil liability in an action by the target. *Id.* at 289; *see also Forro Precision, Inc. v. International Business Machines, Corp.*, 673 F.2d 1045, 1053 (9th Cir. 1982) (IBM could not be held civilly liable for cooperating with a police investigation and search of a competitor).[5]

IV. MRMC HAS FAILED TO STATE A CLAIM FOR CONVERSION.

Even if a subpoena constitutes "property" of a type subject to conversion (which we dispute), MRMC has not stated a claim for conversion because the means by which Relator allegedly "converted" the subpoena was by filing this *qui tam* action. MRMC's intent to hold Relator liable for this protected conduct is stated in unmistakable terms. MRMC alleges that Relator, by failing to disclose the subpoena or her response to it, and by "engaging in this conduct *for the purposes of pursuing her [FCA] claims against MRMC*, ... converted the Subpoena for her own benefit." Ctrclm.¶ 35; Def. Resp., at 10 ("using the subpoena to collect MRMC's confidential and proprietary documents *in furtherance of her case* against MRMC"). MRMC seeks to turn a statutorily protected act – the filing of a *qui tam* action

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[5] *McLaughlin v. Chicago Transit Authority*, Case No. 01-C 4606, 2003 U.S. Dist. LEXIS 2175 (N.D. Ill. 2003), does not help MRMC. There is no allegation here that Relator did not have legitimate possession and custody of the documents that she turned over to the government, unlike *McLaughlin*, where an employee took the confidential files of other employees. Moreover, no claim of public interest was considered in *McLaughlin*, where the employee used purloined company documents to pursue a purely personal claim against the company. In contrast, Relator provided the United States with copies of documents in support of a government fraud investigation against the company. The public interest plainly is served in allowing citizens to disclose evidence of potential fraud against the United States without facing civil liability for doing so.

– into tortious conduct.

The parties do not cite, and we could not find, a single case recognizing a cause of action for conversion of a subpoena. Although documents may qualify as a type of property subject to an action for conversion, a subpoena has none of the usual hallmarks of "property." A subpoena is a type of legal process that imposes on its recipient non-transferable obligations and rights incident to those obligations concerning their compliance with its demands. The subpoena's recipient cannot state an exclusive, unconditional "ownership" or possessory interest in the subpoena because the party that issued the subpoena may withdraw it at its discretion. If there is any ownership interest in an administrative subpoena, it resides in the United States. Moreover, because Relator did not need a subpoena to turn over documents to the United States, she did not somehow "convert" the subpoena by doing so.

Finally, a claim for conversion of documents cannot be stated if the owner retains either originals or copies of the documents. *FMC Corp. v. Capital Cities/ ABC, Inc.*, 915 F.2d 300, 303 (7th Cir. 1990); *Furash & Co., Inc. v. McClave*, 130 F. Supp.2d 48, 58 (D.D.C. 2001); *Pearson v. Dodd*, 410 F.2d 701, 706 (D.C.Cir. 1969), *cert. denied*, 395 U.S. 947, 89 S. Ct. 2021 (1969). MRMC attached a copy of the subpoena to its counterclaims.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant Relator's motion to dismiss all three counterclaims.

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