

GURBIR S. GREWAL, ATTORNEY	:	SUPERIOR COURT OF NEW JERSEY
GENERAL OF NEW JERSEY, on behalf	:	MIDDLESEX COUNTY
of the STATE OF NEW JERSEY ex	:	
rel. RUSSELL MOLLICA,	:	Docket No. L-2520-16
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
ADALEX ENTERPRISES CORP., d/b/a	:	
ADALEX COMMUNICATIONS, ADALEX	:	
COMMUNICATIONS INC., and ADALEX	:	
ENTERPRISES, INC.; ADVANCE	:	
TELECOM RESOURCES, INC.; JANE &	:	
JOHN DOES; and XYZ CORPORATIONS	:	
1-10,	:	
	:	
Defendants.	:	

**MEMORANDUM OF LAW IN SUPPORT OF**  
**PLAINTIFF ATTORNEY GENERAL OF THE STATE OF NEW JERSEY'S**  
**MOTION FOR LEAVE FOR PARTIAL INTERVENTION**

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Plaintiff Gurbir S. Grewal, Attorney General of New Jersey ("Attorney General"), on behalf of the State of New Jersey ("State"), moves for leave to partially intervene in this qui tam action for good cause and file the attached Complaint in Partial Intervention under N.J.S.A. 2A:32C-6(f). The State seeks to intervene on two of the five counts in Relator's complaint against Adalex Enterprises Corp. d/b/a Adalex Communications, Adalex Communications Inc., and Adalex Enterprises, Inc., and Advance Telecom Resources (collectively, "Adalex"), alleging violations of the New Jersey False Claims Act, N.J.S.A. 2A:32C-1 to -18 ("FCA") and a common-law claim of unjust enrichment.

When contractors, such as Adalex, receive New Jersey taxpayer dollars for their work on public projects, they must pay prevailing wages to their employees pursuant to the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 to 34:11-56.57. The State seeks to intervene in this action to redress the harm caused by Adalex, who cheated its workers out of their hard-earned wages by failing to pay them the prevailing wage rate and kept New Jersey public funds for their own enrichment.

Good cause exists for the State to partially intervene for at least four reasons. First, Relator Russell Mollica ("Relator") and Adalex sought to settle the litigation with a dismissal of the State's FCA claims with prejudice and without any payment to the State, and otherwise foreclosed options for the State to protect

its interests in the case. Second, the State learned new information after it initially declined to intervene, further evidencing Adalex's FCA violations. Third, the State's intervention will not cause undue prejudice to the Relator, who consents to this Motion. Fourth, the State's intervention will not cause undue prejudice to Adalex at this early stage of the litigation.

#### **BACKGROUND**

Relator filed this qui tam action under seal on April 26, 2016. Relator alleged that Adalex (and others)<sup>1</sup> violated the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 to -56.57 ("Prevailing Wage") in connection with a contract with the University of Medicine and Dentistry of New Jersey ("UMDNJ"), a State-run public health sciences university hospital,<sup>2</sup> and that Adalex terminated his employment unlawfully because he voiced concerns about the prevailing wage violations with management.

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<sup>1</sup> Relator's qui tam named two defendants who are also named in the State's Complaint in Partial Intervention - Defendants Adalex Enterprises, Inc. (named as a d/b/a for Defendant Adalex Enterprises Corp.) and Advance Telecom Resources, Inc. Relator also named three defendants who are not named in the State's Complaint: Adalex Holdings, LLC, Anthony Parisella, and Joseph Notarangelo.

<sup>2</sup> On July 1, 2013, all units of UMDNJ integrated with Rutgers University except University Hospital in Newark and the School of Osteopathic Medicine in Stratford. See N.J.S.A. 18A:64M-1 to 18A:64M-43. After the 2013 integration of UMDNJ with Rutgers University, Adalex continued to perform work for Rutgers University and University Hospital in Newark (collectively with UMDNJ, "the State Entities").

Relator asserted two claims on behalf of the State of New Jersey: (i) that Adalex violated the FCA by submitting or causing to be submitted false statements to the State Entities, impliedly representing that Adalex was complying with the Prevailing Wage laws when, in fact, it was not (Levine Cert. ¶ 3, Ex. A (Relator's Complaint) Count I);<sup>3</sup> and (ii) an Unjust Enrichment common law claim, alleging that Adalex was "unjustly enriched at the expense of the State of New Jersey" (Count V, ¶ 147). Relator also asserted personal claims, seeking recovery solely for himself for retaliation under the FCA (Count II); the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to 34:19-14 ("CEPA") (Count III); and the New Jersey Wage and Hour Law (Count IV).<sup>4</sup>

On March 29, 2018, the Attorney General declined to intervene by filing a Notice of Declination. (Levine Cert. ¶ 4, Ex. B). On that same date, the Court issued an order stating in part:

ORDERED that Relator may maintain this action in the name of the State of New Jersey; **provided, however, that the action may be dismissed only if the Court and**

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<sup>3</sup> The Certification, sworn to on September 10, 2020, by Deputy Attorney General Kenneth S. Levine ("Levine Cert."), is submitted with this Motion for Partial Intervention.

<sup>4</sup> The State seeks to partially intervene on Counts I and V. The State does not, however, seek to intervene on Counts II, III, and IV because they allege claims and seek damages solely on behalf of Relator personally, and not on behalf of the State. The State reserves all rights under the FCA with respect to those non-intervened parts of this action, including, where warranted, to seek intervention for good cause or dismissal of claims, and receive all pleadings and motions filed in the action and copies of all deposition transcripts.

**Attorney General give written consent to the dismissal and their reasons for consenting;** and it is further

ORDERED that pursuant to N.J. Stat. ann. 2A:32C-6(f) all subsequent pleadings and motions, including supporting memoranda, filed in this action, must be served upon the Attorney General by Relator's counsel; and it is further

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ORDERED **that New Jersey may intervene in this action, for good cause, at a later date,** and may seek dismissal of Relator's action or claim; and it is further

ORDERED that, **should either the Relator or Adalex propose that this action be dismissed, settled, or otherwise discontinued, the Court will require the Relator to obtain the written consent of the Attorney General before ruling or granting its approval.**

(Levine Cert. ¶ 5, Ex. C (emphasis added).)

After the State initially declined to intervene, and unbeknownst to the State at the time, instead of litigating the FCA claims, Relator and Adalex entered into settlement negotiations and attended a settlement mediation on April 11, 2019. The State was not notified about the mediation, was not invited to participate in the mediation, and was not notified of any settlement negotiations. (Levine Cert. ¶ 6.)

At the mediation, Relator and Adalex apparently reached an agreement and signed "Settlement Terms," dated April 11, 2019 (the "Settlement Terms"). Under those Settlement Terms, which contemplated the later execution of a "Final Settlement Agreement with additional terms and conditions," Adalex agreed to pay Relator

to settle his CEPA and other personal claims. In exchange, Relator agreed to release "all past, present, and future claims related to the allegations contained in the Complaint filed by the State of New Jersey, and maintained in the name of Releasor as relator." This release would include not only Relator's CEPA and other personal claims, but also the State's FCA claims. Under a section in the Settlement Terms entitled, "New Jersey False Claims Compliance," Relator and Adalex also agreed to "jointly seek settlement approval from the requisite entities." (Levine Cert. ¶ 7.)

After attending the mediation and entering into a tentative agreement, Relator and Adalex each separately sought the State's consent to the settlement, as required by the FCA, see N.J.S.A. 2A:32C-5(c), the Settlement Terms, and the Court's March 29, 2018 order. Relator explained that in exchange for resolution of the entire FCA qui tam, as well as Relator's CEPA and other personal claims, Adalex would pay Relator a settlement amount, and Relator would seek a dismissal of the FCA claims with prejudice. (Levine Cert. ¶ 8.)

In response, the State first suggested to the parties that they agree to dismiss the FCA claim without prejudice to the State, and otherwise proceed with their settlement regarding the Relator's personal claims. Relator told the State he was willing to agree to the State's proposal and had no intention of pursuing



the FCA claims without the State's intervention. But Adalex rejected the proposal, insisting on a with-prejudice dismissal of the State's claims. (Levine Cert. ¶ 9.)

Next, on April 25, 2019, the State notified the parties that "the Attorney General does not consent to any dismissal of any False Claims Act claims in this action." (Levine Cert. ¶ 10, Ex. D.) The State cited N.J.S.A. 2A:32C-5(c) of the FCA, which provides that the parties cannot dismiss the FCA claim with prejudice without the Attorney General's consent. Ibid.

Also in April 2019, in addition to learning of the mediation and settlement terms between Adalex and Relator, the State learned for the first time that on September 19, 2018, Adalex had settled with the New Jersey Department of Labor and Workforce Development ("LWD"), without admitting or denying guilt, for \$104,000, plus a \$10,000 administrative fee, to resolve allegations that it had violated the Prevailing Wage laws for two of Adalex's former employees, Michael Chirico ("Chirico") and Juan Benavides ("Benavides"), for work they performed in 2015 and 2016 in connection with the contract for the State Entities. (Levine Cert. ¶ 11, Ex. E (LWD settlement agreement).) Relator's qui tam complaint specifically named Chirico and Benavides as employees to whom Adalex failed to pay Prevailing Wages. (See Levine Cert., Ex. A (Relator's Complaint), ¶¶ 54, 57.)

After learning of the LWD settlement, the State communicated with LWD, received and reviewed the LWD file, and spoke to the LWD attorney who handled the matter. The State then conducted additional review and analysis, including re-evaluating its existing file. The State also communicated with Relator's counsel and learned that Relator did not intend to pursue the FCA claims on his own. These requests for information were all voluntary - the State has not issued any subpoenas in this matter since it declined to intervene on March 29, 2018. (Levine Cert. ¶ 12.)

Based on this new information and re-analysis of the existing file, the State concluded that Adalex had violated the Prevailing Wage laws during its performance of a public contract in ways that caused material damage to the State and in violation of the FCA. The State also concluded that because (i) Relator was unwilling to pursue the FCA claims on his own, (ii) Relator had also attempted to bargain away the value of the State's FCA claims for his own personal benefit, and (iii) the parties were unwilling to dismiss the FCA claims without prejudice to the State, then the State should step in and seek to intervene to protect the State's interests, or reach an appropriate settlement prior to its intervention.

On June 18, 2019, the State advised the Court that it "does not consent to the dismissal of any State FCA claim with prejudice in this action," and sought an adjournment to attempt to resolve

the matter. (Levine Cert. ¶ 13, Ex. F.) The State again stated its objection to the dismissal of the FCA claims with prejudice during a court conference on June 24, 2019.

On January 21, 2020, the Court ordered the parties to engage in mediation. The mediation, initially scheduled for March 26, 2020, and then delayed until June 10, 2020, because of the COVID-19 outbreak, was unsuccessful.

Adalex has not yet answered or otherwise responded to Relator's complaint, and no party has served any discovery.

#### **ARGUMENT**

#### **GOOD CAUSE EXISTS FOR THE ATTORNEY GENERAL TO INTERVENE TO PURSUE THE STATE'S FCA CLAIMS**

The New Jersey FCA provides that even when the State declines to intervene in a qui tam action, as was the case here, the State may "intervene and take over the action on behalf of the State at a later date upon a showing of good cause." N.J.S.A. 2A:32C-6(f). There is "good cause" for the State to intervene, file a Complaint in Partial Intervention, and pursue the FCA and Unjust Enrichment claims in this matter for four primary reasons.

First, the State learned, after it initially declined to intervene, that the parties sought to bargain away its claims and to otherwise preclude the State from protecting its interest. Specifically, the State learned that (i) rather than pursue the FCA cause of action, Relator attempted in a settlement to direct

the value of the FCA claims solely to himself, with no money in the proposed settlement going to the State for the FCA and Unjust Enrichment claims; (ii) Relator had no intention of litigating the FCA claims for the State on his own; and (iii) Adalex refused to dismiss the FCA claim without prejudice to the State to allow the State the option of pursuing the FCA claims on its own.

"[Q]ui tam claims belong to the Government, not the relators[.]" U.S. ex rel. Charte v. Am. Tutor, Inc., 934 F.3d 346, 535 (3rd Cir. 2019). And the State remains the real party in interest in any FCA claim, even where it declines to intervene, as the party entitled to recover at least 70% of the damages in any successful FCA judgment or settlement. See N.J.S.A. 2A:32C-6(f); N.J.S.A. 2A:32C-7(d); U.S. ex rel. Eisenstein v. City of N.Y., 556 U.S. 928, 930 (2009) ("United States is a 'real party in interest' in a case brought under the FCA[.] "). Thus, when the State declines to intervene, the relator pursues the FCA claim on behalf of the State. If, after the State's declination, the relator decides it does not wish to pursue the FCA cause of action on its own, then the relator must seek the State's consent to dismiss the FCA claims without prejudice, leaving it to the State to pursue the claim if it so wishes. What the relator cannot do is leverage the State's FCA claim for his own personal benefit, as the Relator appears to have attempted to do here.

Further, the parties attempted to foreclose the State's

ability to protect its interests. Relator made clear it had no intention of pursuing the FCA claim and Adalex refused to dismiss the FCA claim without prejudice, depriving the State of the option to pursue its FCA claim at a later time.

The State should therefore be permitted to intervene based on this new information to allow it to protect its interest in the FCA and Unjust Enrichment claims, pursue Adalex for the fraud it committed on the State, and prevent Relator from bargaining away the State's interest for his own benefit. See United States v. Health Possibilities, P.S.C., 207 F.3d 335, 342 (6th Cir. 2000) ("The government's status as the real-party-in-interest renders a relator's unilateral attempt to settle akin to impermissibly bargaining away the rights of a third party."); Searcy v. Philips Electronics North America Corp., 117 F.3d 154, 160 (5th Cir. 1997) ("[T]here is a danger that a relator can boost the value of a settlement by bargaining away claims on behalf of the United States. . . . If the government decides the settlement isn't worth the cost [of the lost ability to pursue future claims against the defendant], [the federal FCA] allows the government to resist [the relator's] tactics and protect its ability to prosecute matters in the future.").

Second, good cause exists for the State to intervene because the State also learned new information regarding the merits of the FCA and Unjust Enrichment claims after it declined to intervene.

See U.S. ex rel. Tyson v. Amerigroup Ill., Inc., No. 02 C 6074, 2005 WL 2667207, at \*3 (N.D. Ill. Oct. 17, 2005) ("In light of new and significant evidence obtained by the relator during discovery, and brought to the attention of the United States subsequent to its original decision declining intervention, the Court finds that good cause exists for the United States to intervene at this time without undue prejudice to the parties or proceeding."). The State learned that on September 19, 2018, Adalex paid LWD \$104,000, plus a \$10,000 administrative fee, to resolve the allegations that it had violated the Prevailing Wage laws for those two employees for 2015 and 2016. Thereafter, LWD voluntarily provided the State with its file, and the LWD attorney who handled the matter spoke with the State. Following its analysis of this new information, the State re-evaluated its existing file and concluded it has substantial basis to pursue FCA and Unjust Enrichment claims against Adalex for its violations of the Prevailing Wage laws. This new information provides the State with more than sufficient good cause to intervene. See, e.g., U.S. ex rel. Drennen v. Fresenius Med. Care Holdings, Inc., No. 09-10179-GAO, 2016 U.S. Dist. LEXIS 185587 (D. Mass., Jan. 14, 2016) (magistrate judges report and recommendation) (permitting intervention for good cause when government was made aware of new evidence regarding the timing of false statements obtained by relator's counsel during discovery that strengthened its view of the merits of the FCA case), adopted

in relevant part by NO. 09-10179-GAO, 2017 U.S. Dist. LEXIS 50556, 2017 WL 1217118 (D. Mass., Mar. 31, 2017); Griffith v. Conn, No. 11-157, 2016 WL 3156497, at \*3 (E.D. Ky. Apr. 22, 2016) (permitting intervention for good cause when government cited three new pieces of evidence including another government agency's identification of claims that allegedly contain falsely certified and fraudulently submitted evidence that strengthened its view of the merits of the FCA case).<sup>5</sup>

Third, intervention will not cause undue prejudice to the Relator. Relator has no valid basis to rely on any settlement deal with Adalex when it never consulted with the State prior to striking the deal, and the deal required the State to waive its interests in the FCA claims and its statutory right to object to the dismissal of the FCA claims. N.J.S.A. 2A:32C-5(c). Nor does Relator have any other basis to claim any undue prejudice from the

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<sup>5</sup> In court and in communications with the State, Adalex has argued that the State's post-declination investigation was improper, citing In re Enf't of New Jersey False Claims Act Subpoenas, 229 N.J. 285 (2017). But that case held only "that the language of the New Jersey False Claims Act (NJFCA), N.J.S.A. 2A:32C-1 to -15, -17 to -18, does not authorize the Attorney General to invoke his or her administrative subpoena power in a given matter after the right to intervene in the qui tam action has expired." Id. at 286-87. Further, the Court noted explicitly that "[i]f, as a result of monitoring a qui tam action conducted by the relator, the Attorney General learns of information that warrants his or her involvement, he or she can seek leave to intervene; the NJFCA authorizes the court, on a showing of good cause, to 'permit the Attorney General to intervene and take over the action on behalf of the State at a later date.'" Id. at 289 (citing N.J.S.A. 2A:32C-6(f)).

State's intervention here.

One purpose of the FCA's "good cause" requirement is to "protect the interests of the relator." U.S. ex rel. Stone v. Rockwell Int'l Corp., 950 F. Supp. 1046, 1049 (D. Colo. 1996); see also U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., No. 6:09-CV-1002-ORL-31, 2011 WL 4480846, at \*1 (M.D. Fla. Sept. 27, 2011) (same). The reason is that under the federal False Claims Act, 31 U.S.C. §3730(d), upon which the New Jersey False Claims Act, N.J.S.A. 2A:32C-7 is modeled, a relator may be awarded 25-30% of any recovery if the Attorney General declines intervention, and 15-25% of the recovery if the Attorney General intervenes in the action. Thus, the court observed in Stone, that "[g]overnment intervention . . . may be unfair to a relator who has expended considerable resources to advance the case and then lose up to half of the reward for bringing the action." Stone, 950 F. Supp. at 1049; see also Baklid-Kunz, 2011 WL 4480846, at \*1 (relying on Stone in granting the government's motion to intervene where relator consented to the government's motion).

Here, the State's intervention at this stage in the litigation is not "unfair" to Relator. Indeed, Relator consents to this motion. The Relator sought to dismiss the FCA claims with prejudice and release his FCA claims entirely. Relator will suffer no undue prejudice from the State's intervention to pursue the FCA claims that Relator himself did not wish to pursue.



Fourth, Adalex will also not suffer undue prejudice from the State's intervention. Adalex cannot claim prejudice from the State's refusal to consent to a dismissal with prejudice of the FCA claims in a settlement because the parties were required to obtain the State's consent. N.J.S.A. 2A:32C-5(c). Nor can Adalex claim that the State's intervention would unduly delay the litigation. The litigation is in its initial stages. Adalex has not even answered or otherwise responded to Relator's complaint, and the parties have yet to commence discovery.

**CONCLUSION**

For these reasons, this Court should grant the State's Motion for Partial Intervention, and permit the State to file the attached Complaint in Partial Intervention.

Dated: September 10, 2020  
Newark, New Jersey

Respectfully submitted,

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