UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-60185-CIV-DIMITROULEAS/SNOW

UNITED STATES OF AMERICA and
THE STATE OF FLORIDA ex rel.
MANUEL CHRISTIANSON and
BRIAN ASHTON,

Plaintiff/Relator,

vs.

EVERGLADES COLLEGE, INC. d/b/a
KEISER UNIVERSITY.

Defendant.
_____/

ORDER GRANTING MOTION FOR INDICATIVE RULING

THIS CAUSE is before the Court on the United States' Motion for an Indicative Ruling [DE 430] (the "Motion") filed herein on March 4, 2015. The Court has carefully reviewed the Motion, Defendant's Notice of Joinder [DE 431], Relators' Memorandum in Opposition [DE 432], Defendant's Reply to Relator's Memorandum in Opposition [DE 433], the United States' Reply to Relators' Opposition [DE 434], and the record. The Court is otherwise fully advised in the premises.

I. Background

This is a False Claims Act ("FCA") action, brought by Relators against Defendant. Relators alleged that Defendant submitted upwards of 200,000 false claims. Ultimately, the Court entered judgment in favor of Relators following a bench trial. However, judgment was entered in the relatively small amount of $11,000, based on the Court's finding that Keiser did knowingly submit only two false claims. *See* [DE 318, 319]. On September 4, 2014, Relators filed their

Notice of Appeal. *See* [DE 323]. On September 17, 2014, Defendant cross appealed. *See* [DE 328]. Relators subsequently filed their appellate brief. Since that time, the United States and Defendant reached a settlement in principle that would resolve the action, save for Relators' claim to attorneys' fees, costs, and to a share of the proceeds of the settlement pursuant to 31 U.S.C. § 3730(d). On that basis, the Defendant moved for an extension of time to file its appellate brief, which Relators opposed. The United States has not previously sought to intervene in this action. The United States now seeks an indicative ruling from this Court stating that it would grant the United States' proposed motion to intervene for good cause shown and approve the proposed settlement between the United States and Defendant if the case were remanded. Defendant supports the United States' Motion. *See* [DE 431].

II. Discussion

Federal Rule of Civil Procedure 62.1(a) provides that "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . state . . . that it would grant the motion if the court of appeals remands for that purpose." Subsequently, "[t]he district court may decide the motion if the court of appeals remands for that purpose." Fed. R. Civ. P. 62.1(c). Accordingly, the Court has considered the merits of the United States' proposed motions to intervene and to approve the proposed settlement agreement.

a. The Court would find good cause to allow the United States to intervene.

Even where the Government initially "elects not to proceed with the action . . . the court . . . may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3). The United States cites two cases in which district courts found that good cause existed to allow the United States to intervene, despite initially declining to do so,

in order to reach a settlement despite a party's objections. *See U.S. ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 689, 695 (W.D. Tex. 2007) (permitting intervention over relator's objection and noting that "the status and rights of the Relators [would] not be limited by [the] intervention because the Relators [retained] the possibility of obtaining recovery in the form of a percentage of the settlement agreement"); *U.S. ex rel. Reynolds v. Gen. Elec. Co.*, No. CIVA 6:03CV03372 GRA, 2007 WL 3020464, at *3 (D.S.C. Oct. 11, 2007) (finding "good cause for the United States to be permitted to intervene for purposes of facilitating the settlement," where defendants objected to the settlement).

Relators argue that the good cause requirement is designed to protect the relator's interests. Regardless of the fact that the United States has not wielded control over the litigation thus far, it remains the real party in interest in this action. *See U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930 (2009); *United States v. R&F Properties of Lake Cnty., Inc.*, 433 F.3d 1349, 1359 (11th Cir. 2005). Relators also argue that the Motion is untimely under Fed. R. Civ. P. 24, taking into account four factors enumerated in *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977), including the extent of prejudice the existing parties would suffer. While the United States rejects the applicability of these timeliness factors, regardless, the Court finds that even if they do apply, the factors weigh in favor of timeliness in light of the prejudice to the real party in interest, the United States, should the Motion to Intervene be denied. Despite expending considerable time and resources, Relators have arguably failed to obtain significant results in this case. As the United States argues, if it is denied intervention, certainly its interest in obtaining a settlement sum that far exceeds the amount of the judgment, and likely its interest in preventing Eleventh Circuit affirmation of unfavorable legal conclusions bearing on future FCA claims, would be prejudiced. The Court rejects Relators' contention that the *Urquilla-Diaz et al.*

Kaplan Univ. et al., No. 13-13672, 2015 WL 1037084 (11th Cir. Mar. 11, 2015) decision greatly increases the likelihood of success on appeal such that the United States' argument is vitiated. Furthermore, the Court would grant intervention for the purpose of facilitating settlement, and the proposed settlement will not inhibit the Relators claims to attorney's fees, costs, or share of the settlement. The Court finds that there is good cause to allow the United States, the real party in interest in this case, to intervene to execute the proposed settlement, the merits of which will be addressed, *infra*.

b. The Court would likely find that the settlement agreement is fair, adequate, and reasonable.

Pursuant to 31 U.S.C. § 3730(c)(2), "[t]he Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."

The United States suggests that the deferential standard set forth in *Sequoia* should be used in evaluating the settlement. In *Sequoia*, the Ninth Circuit held that the Government need only show a valid purpose or policy for the dismissal, and a rational relationship between the dismissal and the Government purpose or policy. *See U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1444-46 (9th Cir. 1998). If the Government can do that, the Ninth Circuit held that the burden switches to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* at 1145. Relators argue that the appropriate standard is rather based on the plain language of the FCA that it be "fair, reasonable, and adequate." Specifically, Relators identify the factors for evaluating a class action settlement agreement, which are: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or

below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Day v. Persels & Associates, LLC*, 729 F.3d 1309, 1326 (11th Cir. 2013).

Under the terms of the proposed settlement agreement, Defendant shall pay the United States $335,000 to resolve the FCA liability claims. [DE 430-1 at 4]. Even under the class action standard promoted by Relators, the proposed settlement passes muster.[1] Success at trial was, to say the least, limited, and while it is true that appeal of the judgment is pending, the proposed settlement agreement amount far exceeds the relatively small $11,000 civil penalty imposed following trial. As the United States argues, presumably Relators' share of this settlement amount will be greater than their share of the $11,000 judgment should that judgment be affirmed. The United States contends that the proposed settlement would "eliminate the uncertainty of the appeal, promote judicial efficiency, and minimize further demands on judicial time and resources." [DE 430 at 5]. While this proposed settlement follows lengthy and costly proceedings, and faces vigorous opposition from relators, the fact that so much effort has been expended for so little benefit achieved to date weighs in favor of resolving this action now for a sum much larger than that awarded at trial. Again, the settlement does not inhibit in any way Relators' claims as to attorneys' fees, costs, and a share of the settlement. *See* [DE 430-1 at 5] ("[t]he stipulation of dismissal shall specify that the [relevant court] retains jurisdiction to resolve any ongoing issues

[1] Relators argue that they are entitled to an evidentiary hearing and broad discovery on all communications surrounding the negotiation of the settlement agreement. The Court does not believe that such extensive discovery as requested by Relators would be merited here. *See U.S. v. U.S. ex rel. Thornton*, 207 F.3d 769, 772-73 (5th Cir. 2000) (arguing that while relator should be "allowed access to as much documentation as possible" the inquiry must not be permitted to "balloon into extensive collateral litigation"); *see also U.S. ex rel. Schweizer v. Oce N. Am.*, 956 F. Supp. 2d 1, 11 (D.D.C. 2013) (explaining that while some discovery may be warranted under certain circumstances, "plaintiff-relator is not entitled to full-blown discovery at this stage as of right"); *U.S. ex rel. Resnick v. Weill Med. Coll. of Cornell Univ.*, No. 04 Civ. 3088 (WHP), 2009 WL 637137, at *3 (S.D.N.Y. Mar. 5, 2009) (denying relator's request for discovery on the settlement agreement as "not necessary" because the settlement was "clearly fair, adequate, and reasonable").

regarding the Relators' entitlement to a share of the Settlement Amount and to the payment of attorney's fees and costs pursuant to 31 U.S.C. § 3730(d).").

III. Conclusion

For the reasons set forth above, the Motion for Indicative Ruling [DE 430] is **GRANTED** as follows: the Court would grant the United States' proposed motion to intervene for good cause shown for the purpose of approving the proposed settlement between the United States and Defendant, pending a hearing as required by 31 U.S.C. § 3730(c)(2), if the case were remanded.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 1st day of April 2015.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record