**United States Department of Justice**

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September 28, 2023

Hon. Mae A. D'Agostino
United States District Court
445 Broadway, Courtroom 5
Albany, New York 12207

**RE:** ***U.S. ex rel. Eimers v. Lindsay Corp., No.*** **1:19cv286 (MAD/CFH)**
**(Filed *ex parte* and Under Seal)**

Dear Judge D'Agostino:

We represent the United States in this sealed matter and write to request a pre-motion conference to address the United States' proposed Motion to Dismiss Relator Stephen Eimers' First Amended Complaint pursuant to 31 U.S.C. § 3730(c)(2)(A) of the federal False Claims Act (FCA). The seal is presently scheduled to expire on October 4, 2023.

The FCA, 31 U.S.C. §§ 3729-3733, imposes civil penalties and treble damages for knowingly submitting false claims for payment to the United States. Civil suits to enforce the FCA may be brought either by the Attorney General, *id.* § 3730(a), or by a private person who files suit "for the person and for the United States Government" in the name of the United States, *id.* § 3730(b)(1). The private person is known as a "relator," and the suit is called a *qui tam* action. *Id.* After a relator has filed a *qui tam* action, "[t]he Attorney General diligently shall investigate" to determine whether there has, in fact, been an FCA violation. *Id.* § 3730(a).
Many states also have their own *qui tam* statutes that permit relators to sue to recover losses that state governments sustained as a result of fraud.

Relator Stephen Eimers filed this *qui tam* action in 2019 and amended his complaint in 2021. He asserts claims under the FCA and invokes the Court's supplemental jurisdiction to assert claims under twelve different states' *qui tam* statutes. The claims revolve around a product called the X-LITE End Terminal ("X-LITE"), which is a roadside safety device installed at the end of a section of highway guardrail to absorb energy from a vehicle crash. Relator contends that Defendants deceived the Federal Highway Administration into issuing a letter determining X-LITEs to be eligible for federal reimbursement when purchased and installed by states.

The United States has investigated the allegations and now seeks to move to dismiss the *qui tam* action. The FCA authorizes the United States to dismiss such an action, even if the relator objects: "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C.

§ 3730(c)(2)(A). The Supreme Court's decision in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 143 S. Ct. 1720, 1727 (2023), held that district courts should apply the standard of Federal Rule of Civil Procedure 41(a) when evaluating a motion to dismiss under § 3730(c)(2)(A) ("We also hold that in handling such a motion, district courts should apply the rule generally governing voluntary dismissal of suits: Federal Rule of Civil Procedure 41(a)."). If the United States moves to dismiss before the defendant has answered or moved for summary judgment, as the United States is doing here, then under Rule 41(a)(1) the district court "has no adjudicatory role" other than to dismiss the action. *Id.* at 1734 n.4.

In *Polansky*, the Supreme Court addressed how to reconcile the relator's right to a hearing with the fact that the district court has no adjudicatory role under Rule 41(a)(1) other than to grant the government's motion to dismiss when dismissal is sought before the defendant files an answer or a motion for summary judgment. The Supreme Court suggested that a hearing might inquire into any allegations that a dismissal "violate[s] the relator's rights to due process or equal protection." *Id. Polansky* did not elaborate on what would constitute such a constitutional violation or what procedures would satisfy the requirement of a hearing. *Cf. Brutus Trading, LLC v. Standard Chartered Bank*, 2023 WL 5344973, at *3 (2d Cir. Aug. 21, 2023) (explaining that "the district court met the hearing requirement by carefully considering the parties' written submissions.").

Here, the United States has determined that dismissal is commensurate with the public interest because the claims lack merit and the matter does not warrant the continued expenditure of resources to pursue or monitor the action. Defendants have not served an answer or a motion for summary judgment so under *Polansky* and Rule 41(a)(1) the United States is entitled to dismiss the FCA claims pursuant to § 3730(c)(2)(A). The United States has been advised by counsel for the twelve states that the states have no objection to the Court declining to exercise supplemental jurisdiction over the remaining state claims and to dismissing those claims without prejudice to the states.

Respectfully submitted,

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