

STONE MAGNANINI

COMPLEX LITIGATION

January 9, 2017

Patricia S. Connor, Clerk
United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: Federal Rule of Appellate Procedure 28(j) letter for *U.S. ex rel. Carter v. Halliburton Co.*, No. 16-1262 (tentatively calendared for argument during the March 21-24, 2017, session)

Dear Ms. Connor,

Defendants' Supplemental Letter misrepresents two cases and mischaracterize Plaintiff's arguments. In *State Farm Fire & Casualty Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016), the Supreme Court references § 3730(b)(5) in passing dicta in comparison to § 3730(b)(2). *Rigsby*, 137 S. Ct. at 442-43. This statutory reference is irrelevant to this matter—the question before the Court is *whether* § 3730(b)(5) applies when the prior case is dismissed before reaching its merits, not *if* § 3730(b)(5) mandates dismissal if a prior case is pending. As the Supreme Court stated in *Carter*: “Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?” *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1974 (2015) (“*Carter*”).

In response to this Court's remand for “consideration...of whether the FCA's first-to-file bar or public-disclosure bar deprived the district court of subject-matter jurisdiction,” the district court unnecessarily reversed itself. *United States ex rel. Palmieri v. Alpharma, Inc.*, 647 F. App'x 166, 167 (4th Cir. 2016); *see U.S. ex rel. Palmieri v. Alpharma, Inc.*, No. 10-cv-1601, 2016 WL 7324629 (D. Md. Dec. 16, 2016) (“*Palmieri 2016*”). Moreover, *Palmieri 2016* failed to consider the persuasive reasoning of the Supreme Court decision in *Carter* or the First Circuit's

decision in *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 3 (1st Cir. 2015).

In contrast, *Carter*, which addressed this case, and *Gadbois*, which addressed both *Carter* and similar claims to the instant matter, reached decisions consistent with Plaintiff's arguments. Moreover, the Supreme Court rejected a challenge to *Gadbois. PharMerica Corp. v. United States ex rel. Gadbois*, 136 S. Ct. 2517 (2016). This sound judgment has been adopted by other Courts, which have likewise concluded that, per *Carter*, "Congress would not want an abandoned first suit to bar a potentially successful recovery for the government in a second suit." *United States ex rel. Boise v. Cephalon, Inc.*, 159 F. Supp. 3d 550, 554 (E.D. Pa 2016).

Respectfully submitted,

/s/ David S. Stone

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cc: See attached Certificate of Service

CERTIFICATE OF SERVICE

The undersigned certifies that on January 9, 2017, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All counsel of record in this case are registered CM/ECF users and will be served with the letter by the appellate CM/ECF system. A paper copy of the letter will be served on this date via First-Class Mail on the following:

Richard W. Sponseller
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314

Dated: January 9, 2017

/s/ David S. Stone
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