Docket #0927 Date Filed: 08/13/2019

Hearing Date: August 20, 2019, at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
WINDSTREAM HOLDINGS, INC., *et al.*,	Case No. 19-22312 (RDD)
Debtors.	(Jointly Administered)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA IN CONNECTION WITH (A) DEBTORS' MOTION TO (I) ENFORCE THE AUTOMATIC STAY AND (II) IMPOSE COSTS AND DAMAGES; AND (B) STATE OF FLORIDA'S MOTION FOR ENTRY OF AN ORDER FINDING THAT: (I) THE STATE'S REQUEST TO INTERVENE IN THE STATE COURT LITIGATION DOES NOT VIOLATE THE AUTOMATIC STAY; AND (II) THE AUTOMATIC STAY WILL NOT APPLY TO THE STATE COURT LITIGATION ONCE THE STATE COURT ALLOWS SUCH INTERVENTION

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1. Pursuant to 28 U.S.C. § 517, the United States of America (the "United States" or "Government"), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this statement of interest in connection with (a) the motion of Debtor Windstream Holdings, Inc. and its debtor affiliates (collectively, the "Debtors") to (i) enforce the automatic stay and (ii) impose costs and damages (Dkt. No. 748) ("Debtors' Motion"); and (b) the State of Florida's motion for entry of an order finding that: (i) its request to intervene in the state court litigation does not violate the automatic stay; and (ii) the automatic stay will not apply to the state court litigation once the state court allows such intervention (Dkt. No. 760) ("Florida's Motion"). At bottom, both motions seek a determination from this Court as to whether a governmental unit may pursue a False Claims Act action based on a debtor's fraud during the debtor's bankruptcy proceeding.

2. The action that Florida seeks to pursue in *Florida ex rel. v. Phone Recovery Services, LLC v. Windstream Communications, LLC*, No. 2016-CA002103 (the "State FCA Action") was originally brought by a *qui tam* whistleblower pursuant to Florida's False Claims Act Statute, Fla. Stat. § 68.081 *et seq.* (2016). The lawsuit alleges that Debtors have engaged in "fraudulent" and "ongoing" conduct relating to emergency service 911 ("E911") fees. Specifically, it alleges that that Debtors concealed their practice of under-billing and under-remitting E911 fees, and that they submitted false remittance reports to Florida in violation of Florida law in connection with their underpayment of E911 fees to Florida, "causing the State to lose critical funding for 911 emergency services." Florida's Motion at 2, 7.

3. The Florida False Claims Act and the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"), are the same in all respects relevant to the issues before the Court—unsurprisingly, given that Florida's False Claims Act statute was modeled on the federal FCA.

See United States ex rel. Heater v. Holy Cross Hosp., Inc., 510 F. Supp. 2d 1027, 1033 n.5 (S.D. Fla. 2007) ("The Florida FCA, is modeled after and tracks the language of, the federal False Claims Act.") (quotation marks omitted); *United States ex rel. Dittmann v. Adventist Health System/Sunbelt, Inc.*, No. 10-cv-1062, 2012 WL 3105586, at *2 n.4 (M.D. Fla. July 30, 2012) ("The Florida False Claims Act claims need not be separately discussed; the state statute is nearly identical to the [federal] FCA, and the analysis of the [federal] FCA claims applies equally to the Florida False Claims Act claims."). The Florida False Claims Act statute, like the FCA, was implemented to root out fraud. *See Barati v. State*, 198 So. 3d 69, 77 (Fl. App. 2016) (referencing legislative intent "to assure that false claims are vigorously pursued and that the courts do not unduly interfere with the State's statutory prerogatives to obtain restitution for its losses and to punish those persons and entities which seek to wrongfully defraud the State through double and triple recoveries").

4. Although the United States is not a party to the state court litigation, it has an interest in the outcome of these motions because the federal FCA is its principal tool for combatting fraud involving federal funds. *See United States v. Niefert-White Co.*, 390 U.S. 228, 232 (1968) ("The original False Claims Act was passed in 1863 . . . [and] was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government."); S. Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.") Thus, the United States has a substantial interest in the correct interpretation of the law applicable to FCA claims, and submits this statement to address certain arguments raised in the motion papers.

5. Specifically, the Government highlights herein ample case law supporting the established proposition that it and other governmental units may pursue False Claims Act litigation up to judgment against a debtor in bankruptcy, pursuant to the police or regulatory exception to the automatic stay in 11 U.S.C. § 362(b)(4). The Court should thus permit Florida to intervene and prosecute the State FCA Action against Debtors notwithstanding the automatic stay.

ARGUMENT

6. Section 362(b)(4) of the Bankruptcy Code provides an exception to the automatic stay for actions by a governmental unit to enforce its police or regulatory power against a debtor. It expressly provides that the filing of a bankruptcy petition does not operate as a stay against the:

> commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4). The purpose of this exception is prevent a debtor from "frustrating necessary governmental functions by seeking refuge in bankruptcy court." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991) (internal quotation marks and citations omitted). Thus, as Congress explained, "where a governmental unit is suing a debtor to prevent or stop a violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." H.R. Rep. No. 95-595, at 343 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6299; *accord* S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838.

I. A Governmental Unit's Pursuit of a False Claims Act Action Falls Within the Automatic Stay's Police or Regulatory Power Exception

7. Debtors' principal argument in support of their motion to enforce the automatic stay is that the primary purpose of the State FCA Action is to advance Florida's fiscal interests, rather than to stop and deter a fraud against the state. Debtors' Mot. ¶ 17. Specifically, Debtors contend that the State FCA Action relates to the collection of certain E911 charges, and that the "Florida Attorney General would only be participating in that litigation out of a pecuniary interest or the alleged fees," thereby placing the action outside of the automatic stay's police or regulatory power exception. Hr'g Tr. 20:19-23, June 17, 2019; *see also* Debtors' Mot. ¶ 17.

8. This argument is misplaced and mischaracterizes the nature of an FCA action. Although "the FCA has, as one of its purposes, the objective of providing restitution to the government for frauds committed upon [it], it is well-settled that the statutory scheme, which includes a treble damages provision, also has the distinct public policy purpose of punishing and deterring fraud committed upon the [government]." *United States ex rel. Fullington v. Parkway Hospital*, 351 B.R. 280, 288 (E.D.N.Y. 2006) (citations omitted); *see also Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-86 (2000) ("[T]he current version of the FCA imposes damages that are essentially punitive in nature . . . . The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." (quotation marks omitted)); *cf. Barati*, 198 So. 3d at 77 (referencing Florida's legislative intent to both obtain restitution for fraud and "to punish those persons and entities which seek to wrongfully defraud the State through double and triple recoveries").

9. For this reason, numerous courts have found that the government may pursue an FCA action during a defendant's bankruptcy proceeding, pursuant to the police or regulatory

powers exception. In *Fullington*, Judge Bianco concluded that "actions brought pursuant to the FCA enforce [the government's] police or regulatory power because it serves the important public policy interest of deterring fraud upon the government." 351 B.R. at 288. *Fullington* is consistent with (and cites) many other decisions holding that a governmental unit may pursue FCA claims against a debtor notwithstanding the automatic stay. For example, in *United States v. Commonwealth Cos.* (*In re Commonwealth Cos.*), 913 F.2d 518, 522 (8th Cir. 1990), the seminal case addressing this issue, the Eighth Circuit found that FCA actions fall within the automatic stay police or regulatory power exception because:

> civil actions by the government to enforce the FCA serve to inflict the 'sting of punishment' on wrongdoers and, more importantly, deter fraud against the government, which Congress has recognized as a severe, pervasive, and expanding national problem. The police and regulatory interests furthered by enforcement of the FCA are undeniably legitimate and substantial. . . . We find nothing in the language or legislative history of the exception that warrants such an artificial restriction on its scope.

Id. at 526.

10. Following the Eighth Circuit's reasoning, courts have held that the government may pursue *qui tam* lawsuits up to the point of obtaining a judgment against a debtor in bankruptcy, based on the police or regulatory exception to the automatic stay. *See, e.g.*, *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008) (affirming district court's jurisdiction to enter FCA judgment against debtor, citing police or regulatory exception to the automatic stay); *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294, 1298 (9th Cir. 1997) ("[A] civil suit brought pursuant to the Federal False Claims Act is sufficient to satisfy the section 362(b)(4) exception."); *United States v. Vanguard*, LLC, 565 B.R. 627, 632-34 (M.D. Tenn. 2017) ("[i]t is well settled that actions brought [by the government] under the False Claims Act fall squarely within the § 362(b)(4) exception to the

stay") (alteration in original); *United States ex rel. Green v. Inst. of Cardiovascular Excellence, PLLC*, No. 11-cv-406, 2016 WL 2866567, at *2 (M.D. Fla. May 17, 2016) (affirming that FCA action was excepted from the automatic stay, noting that "Defendants fail to cite any binding contradicting authority contradicting the persuasive rationale that FCA actions are exempt from the automatic stay through the entry of judgment"); *Fullington*, 351 B.R. at 291 ("The government may proceed with its action, up until the point that damages are fixed through the entry of judgment."); *see also In re McOuat*, No. 15-05150-5-SWH, 2016 WL 5947229, at *2 (Bankr. E.D.N.C. Oct. 13, 2016); *United States v. Worldwide Fin. Servs., Inc.*, No. 01-70414, 2007 WL 4180718, at *1 (E.D. Mich. 2007); *United States ex rel. Rahman v. Oncology Assocs., P.C.*, No. H-95-2241, 2000 WL 1074304, at *5 (D. Md. 2000); *United States ex rel. Doe v. X, Inc.*, 246 B.R. 817, 818 (E.D. Va. 2000); *United States v. Mickman (In re Mickman)*, 144 B.R. 259 (E.D. Pa. 1992). Debtors have not cited any cases to the contrary, and the Government is not aware of any since the Eighth Circuit's decision in *Commonwealth*. *See Vanguard*, 565 B.R. at 635 (discussing that pre-*Commonwealth* decisions were based on a "flawed analysis").

11. The Court should thus decline to adopt Debtors' incorrect interpretation of the police or regulatory exception to the automatic stay as it applies to False Claims Act actions (both state and federal), and hold that Florida's pursuit of the State FCA Action is excepted under section 362(b)(4) because it is an exercise of its police or regulatory power.

II. A Governmental Unit's Motion To Intervene in a Declined FCA Action Does Not Violate the Automatic Stay

12. Debtors' argument that Florida's motion to intervene in the State FCA Action is not a "commencement" of an action or a "continuation" of "something [Florida] was doing prepetition" sufficient to place Florida's intervention within the ambit of the police or regulatory exception, *see* Debtors' Mot. ¶ 17, is similarly misplaced, and also misconstrues the nature of an

FCA action.[1] Contrary to Debtors' suggestion, Florida is not attempting to intervene in a plain vanilla civil action to which it is not party, pursuant to Federal Rule of Civil Procedure 24 (or the state court equivalent). A governmental unit's intervention in *an FCA action* is wholly different in nature. *Cf. United States v. Aseracare, Inc.*, No. 12-cv-245, 2012 WL 4479123, at *2 (N.D. Ala. Sept. 24, 2012) ("[T]he very nature of government intervention in FCA cases creates circumstances and considerations not present in ordinary cases involving a non-party's efforts to intervene under [Federal Rule of Civil Procedure] 24." (citation omitted)).

13. Although a whistleblower or "relator" often commences a False Claims Act action on behalf of the government, 31 U.S.C. § 3730(b)(1); Fla. Stat. § 68.083(2), the government is the real party in interest in every case brought pursuant to the False Claims Act. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934 (2009). Accordingly, both the federal and Florida FCA statutes provide that the government may intervene in such an action and continue it in its own name, even if the government had previously declined to intervene. *See* 31 U.S.C. § 3730(c)(3); Fla. Stat. § 68.084(3). When a governmental unit decides to intervene in a *qui tam* FCA action, "it shall have the primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1); Fla. Stat. § 68.084(1). Thus, a governmental unit's intervention in an FCA action is either (1) the commencement of the government's fraud claim against the defendant; or (2) the continuation of the same action that was commenced by the relator, with the government bearing primary responsibility for prosecuting the action. *See* 31 U.S.C. § 3731(c) ("If the Government elects to intervene and proceed with an action brought under 3730(b), the

[1] The single case cited by Debtors for this proposition is inapposite because it did not involve an intervention motion on behalf of the government in an FCA case, but rather the Cayman Island Monetary Authority's "support of an insolvency petition commenced by parties acting in their private interests." *In re Soundview Elite, Ltd.*, 503 B.R. 571, 586 (S.D.N.Y. 2014) (Debtors' Motion at 8 n.5).

Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief."); *accord* Fla. Stat. § 68.089(2).

14. With respect to the federal FCA, in enacting Section 3730(c)(3), which permits the United States to intervene even if it had initially declined, Congress expanded the "limited opportunity for Government involvement" during the investigation period, and provided the government with the option of intervening in "situations where new and significant evidence is found" which "escalate[s] the magnitude or complexity of the fraud" S. Rep. No. 99-345, at 26-27, *reprinted in* 1986 U.S.C.C.A.N. at 5291-92.

15. If the Court were to adopt Debtors' incorrect characterization of Florida's intervention in the State FCA Action, it would severely restrain the government's ability to pursue potential fraudulent conduct, and would allow a debtor to "improperly seek[] refuge under the stay in an effort to frustrate necessary governmental functions." *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988). That the government learned of the extent of a defendant's fraud after its initial declination to intervene in a case should not infringe upon its ability to prevent or stop a violation of fraud through intervention. *See United States ex rel. Hall v. Schwartzman*, 887 F. Supp. 60, 62 (E.D.N.Y. 1995) (granting United States' motion to intervene because "discovery of new and significant evidence . . . altered [government's] view of the magnitude of the alleged fraud"). The Court should thus reject Debtors' argument that Florida is not entitled to intervene as unsupported by the text of the Bankruptcy Code, contrary to the policy supporting the automatic stay's police or regulatory exception, inconsistent with the False Claims Act's intervention provisions, and directly contrary to Congress's express intent to

empower the government to pursue fraud allegations notwithstanding a defendant's bankruptcy proceeding.[2]

CONCLUSION

For the reasons set forth above, the Court should, in deciding Debtors' and Florida's Motions, conclude that a governmental unit may pursue an FCA action up to the point of obtaining a judgment notwithstanding a defendant's bankruptcy proceedings, in accordance with the police or regulatory exception to the automatic stay. 11 U.S.C. § 362(b)(4).

Dated: August 13, 2019
New York, New York

Respectfully submitted,

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[2] Although Florida has sought this Court's determination as to whether its pursuit of the State FCA Action falls within the police or regulatory exception to the automatic stay, and the issue is not contested, we note that both this Court and the court in which the proceeding is pending have concurrent "jurisdiction to decide whether the proceeding is subject to the stay." *Dominic's Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012); *see also In re Siskin*, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001) (holding state courts have concurrent jurisdiction to determine the applicability of the automatic stay). Specifically, "'[t]he court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay.'" *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 939 (6th Cir. 1986) (quoting *In re Baldwin United Corp. Litig.*, 765 F.2d 343, 347 (2d Cir. 1985)).