IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY FLORIDA

STATE OF FLORIDA, ex rel,
SAMUEL MCDOWELL,

Plaintiffs,

v.

Case No.: 2006-CA-0003
Civil Division - Judge Bateman

CONVERGYS CUSTOMER
MANAGEMENT GROUP, INC.,

Defendant.
_____/

STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIR'S
RESPONSE TO ORDER TO SHOW CAUSE

The State of Florida, Department of Legal Affairs (the Department), by and through undersigned counsel, responds to the Court's Order to Show Cause dated April 11, 2006. As shown herein, at all times the Attorney General has been acting in good faith to exercise his duties under Section 68.084(1), Florida Statutes, to take "primary responsibility for prosecuting the action."

The Department believes there is a serious question as to whether private *qui tam* actions can be automatically filed under seal. As set forth below, the Department was seeking to lift the seal on this complaint for a number of reasons, while at the same time seeking to complete its investigation into the claims in order to determine whether to take over the case. The Department apologizes that its filings with the Court may not have been as articulate or as helpful in explaining to the Court what the Department was seeking to achieve. As set forth below, however, the Department believes its actions were consistent with the statutory provisions of the Florida False Claims Act. Indeed,

promptly upon receiving the Court's order denying an extension of time, the Department filed its Notice of Appearance signifying it was proceeding with the prosecution of the case pursuant to § 68.083(6)(a). The Department's taking over of this action is fully supported by the Relator, and the Department believes that this is in the best interest of the State. For these reasons, the Department respectfully requests that the Court not impose sanctions and allow this case to proceed pursuant to § 68.083(6)(a) and § 68.084(1)

I. STATUTORY AND PROCEDURAL BACKGROUND

1. The *qui tam* Complaint in this action was filed with the Court by Relator, Samuel McDowell on December 29, 2005.

2. Section 68.083(3), Florida Statutes, requires that immediately upon the filing of a *qui tam* complaint, the complaint and written disclosures of substantially all material evidence and information the relator possesses shall be served on the Attorney General and the Chief Financial Officer. The Attorney General received the subject *qui tam* Complaint and required evidentiary disclosures on January 3, 2006. Section 68.083 (3), F.S. gives the Attorney General 90 days within which to evaluate the case filed by the Relator. In this case, therefore, the 90-day period the Attorney General had to evaluate the *qui tam* lawsuit--absent an extension, tolling or abatement--expired on April 2, 2006.

3. Rule 1.070(j), Fla. R. Civ. P., requires that service be perfected against the defendant within 120 days of the initial filing. This 120 day period of time for service runs on May 3, 2006.

4. The *qui tam* Complaint states on its face that it was filed "**IN CAMERA AND UNDER SEAL**."

5. The Department does not believe that the Chapter 68 *qui tam* provisions provide a

basis for the Clerk of the Court to ministerially seal the complaint and court file. *See* discussion herein of the legislative history of Florida False Claims Act. Nevertheless, in order to avoid a violation of the seal, on March 25, 2006, the Department moved, *ex parte*, and on an emergency basis, to unseal the action, and an order unsealing this *qui tam* case was entered that date. The order was subsequently vacated and replaced by a revised order dated March 27, 2006, which, among other things, noted the Attorney General's reservation of rights to seek an extension of time to continue its investigation in order to make a more informed decision whether to intervene on behalf of the State. *See* further discussion herein.

6. Section 68.083(5), Fla. Stat., expressly provides that the Department is authorized to request an extension of time to make a decision whether or not to intervene on behalf of the State of Florida.

7. Extensions are contemplated in the statute to provide the State with an adequate opportunity, which varies from case to case, to determine whether the allegations made by the relator have substance, are already being investigated, and whether or not it is in the best interest of the State of Florida for the Department to intervene. On March 31, 2006, two days prior to the April 2, 2006, deadline, the Department timely moved for an enlargement of 60 days within which to continue its ongoing investigation and to make an informed determination whether to intervene in this cause. *See* e-mail transmittal, Exhibit "A".[1]

8. In addition to moving for an enlargement of time, the Department sought an order tolling the period of time for service pursuant to Rule 1.070(j), Fla. R. Civ. P., because the 120 days

[1] The initial Motion for Enlargement of Time was sent to the Court via e-mail on March 31, 2006, at 5:20 p.m. The document was sent to the Court via e-mail because counsel understood that this Court encouraged this manner of submission.

permitted under the rule would have expired prior to the 60 day requested enlargement.

9. On April 5, 2006, this Court entered an Order Denying Department of Legal Affairs' Motion for Enlargement of Time and Order Requiring Plaintiff to Serve Complaint on Defendant or to Show Cause Why Cause Should not be Dismissed for Lack of Service of Process.

10. In its Order, the Court denied the Department's requested enlargement of time to continue its investigation prior to electing to intervene, based on the Court's apparent reasoning that the Department had caused the matter to be unsealed under § 68.083(5), Fla. Stat., thereby making the request untimely.

11. The April 5th Order also stated that "inasmuch as more than 120 days have passed since the complaint was filed on January 3, 2006," the plaintiff was required to serve the Complaint on the defendant within 10 days of the order, i.e., April 15, 2006.

12. The Department interpreted the April 5th order to hold that by successfully moving to unseal the complaint on March 25th, the Department triggered § 68.083(6)(a), Fla. Stat. The Department thought that by affirmatively filing: (1) a Notice of Appearance, (2) a Response to Order to Show Cause (directed to the date of service), and (3) Request for a Case Management Conference Prior to Service of Complaint that it was complying with the Court's ruling which had apparently concluded that the Department had proceeded with the action pursuant to § 68.083(6)(a), Fla. Stat. Significantly, the Attorney General has never filed a notice that it declined to take over the action pursuant to § 68.083(6)(b).

13. On April 11, 2006, this Court entered its Order to Show Cause to the State of Florida, Department of Legal Affairs, "why the court should not impose sanctions against it and its counsel of record by filing a writing with the clerk of this court setting forth clearly and succinctly the legal

authority for its continued presence in this case when it has not complied with either the requirements of chapter 68, Florida Statutes or the rules of court."

II. RESPONSE AND MEMORANDUM OF LAW

A. Florida's *Qui Tam* Statute Does Not Provide For Automatic Sealing in Private Suits, as the Language Sealing *Qui Tam* Actions Was Stricken By The Legislature Prior To Enactment.

Although the Federal False Claims Act and other state statutes modeled on the federal statute contain explicit language requiring that the complaint be filed under seal[2], Florida's *qui tam* act does not. As discovered below, language contained in some early versions of bills proposing the Florida False Claims Act would have mandated an initial sealing of the complaint and would have created a public records disclosure exemption for that sealed complaint during the time it remained under seal. That language, however, was stricken and not enacted in what became § 68.083(3), Fla. Stat. in 1994; Ch. 94-316, Laws of Florida.

> (3) The complaint shall be identified on its face as a qui tam action and shall be filed in the circuit court of the Second Judicial Circuit, in and for Leon County. ~~The complaint is confidential and exempt from s. 119.07 (1), Florida Statutes. The clerk of the circuit court shall immediately seal the complaint upon filing, and the complaint shall remain under seal for up to 90 days, and shall not be served on the defendant until it is unsealed by order of the court~~. Immediately upon the filing of the complaint, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Attorney General, as head of the department, and on the Comptroller, as head of the Department of Banking and Finance, by registered mail, return receipt requested. The department, or the Department of Banking and Finance under the circumstances specified in subsection (4), may elect to intervene and proceed with the action, on behalf of the state, within 90 days.

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[2] *See, e.g.* the seal provisions of the Federal False Claims Act, 31 U.S.C.A. § 3730(b)(2); The California False Claims Act, Cal. Gov't Code § 12652(c)(2); and The Illinois Whistleblower Reward and Protection Act, 740 I.L.C.S.175/4(b)(2).

> after it receives both the complaint and the material evidence and information. ~~This exemption is not subject to the Open Government Sunset Review Act under s. 119.14.~~

Similarly, proposed language to exempt quit tam complaints from the State's public records law was also amended out of the law as passed:

> ~~Section 14. The legislature finds a public necessity for each exemption to s. 119.079(1), Florida Statutes, contained herein. The information exempted from s. 119.07(1), Florida Statutes, allows the state to effectively and efficiently administer a government program, the Florida False Claims Act, and the administration of the program would be significantly impaired without these exemptions.~~

Given the legislative action described above, the Florida False Claims Act contains an incongruity regarding the provisions referencing the sealing of a complaint filed by a private relator under §§ 68.083(2) and(3), Fla. Stat. While the statute refers in two places to the complaint having been sealed, no such language mandating the complaint be filed under seal exists in the statute, and no public records exemptions exists in the Florida False Claims Act or otherwise for a complaint filed under the Act.

Admittedly, references to <u>unsealing</u> the complaint and the time the complaint remains under seal are contained in the Act.[3] The Department submits that it was simply an editing error that these references to sealing or unsealing were not deleted when the redlined language was stricken by the legislature. A trial court is authorized to disregard a mistaken provision or read it as corrected, in order to give effect to the intent of the legislature. *See*, <u>Curry v. Department of Corrections</u>, 423

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[3] The second sentence of § 68.083(2), Fla. State reads: *"prior to unsealing the complaint under subsection (3), the action may be voluntarily dismissed by the person bringing the action only if the department gives written consent to the dismissal and its reasons for such consent."* However, subsection (3) contains no language referencing a "seal" or "sealing." Similarly, the sentence of § 68.035(5), Fla. Stat. reads: *"The department may, for good cause shown, request the court to extend the time during which the complaint remains under seal under subsection (2)."* However, subsection (2) contains no language mandating the sealing of the complaint.

So.2d 584 (Fla. 1st DCA 1982) (where the Legislature has made a mistake in a reference in a statute to another statute and the real intent of the Legislature is manifest and would be defeated by adherence to terms of the mistaken reference, a court may disregard the mistaken reference or read it as corrected in order to give effect to the intent of the Legislature).

Despite the absence of specific language in the Florida False Claims Act mandating that a complaint filed by a *qui tam* relator be filed *in camera* and under seal, many such complaints have been sealed by the Clerk of the Court[4], or have been ordered sealed by the Court in response to motions filed by relator's counsel. These practices have arisen as the Court, the Clerk, and counsel for relators, the State of Florida, and defendants understandably struggle to resolve issues raised by the inconsistencies in the statute. Notwithstanding the above, in this action it appears that no order sealing the case was entered (the Clerk's docket lists no such order). Rather, the Clerk of the Court accepted the complaint and filed it under seal.

B. Evaluation of Qui Tam Complaints by the Department Pursuant to §68.083.

Whether or not the sealing of the complaint in the instant case was authorized or at least impliedly authorized under the Florida False Claims Act, once filed the relator must immediately serve a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses upon the Attorney General. § 68.083(3), Fla. Stat. The statute then provides that the Department may elect to intervene and proceed with the action within 90 days after it receives both the complaint and the material evidence and information. § 68.083(3), Fla. Stat. The Department may request the court to extend the time during which the complaint remains under seal

[4] The practice is only an issue for the Clerk of the Court for the Second Judicial Circuit in and for Leon County, Florida, as the Florida False Claims Act contains a special venue provision requiring relators to file *qui tam* actions in Leon County Circuit Court. § 68.083(3), Fla. Stat.

for good cause shown. § 68.083(5), Fla. Stat. Before the expiration of the 90-day period or any extensions thereof, the statute provides that the Department shall: (a) proceed with the action, in which case the action is conducted by the Department on behalf of the state; or (b) notify the court that it declines to take over the action, in which case the person bringing the action has the right to conduct the action. § 68.083(6)(a)-(b), Fla. Stat.

The qui tam Complaint was received by the Department on January 3, 2006. Upon motion by the Department, the Complaint was unsealed by order of the court on March 25, 2006, 81-days after its receipt by the Department and within the 90-day time period prescribed by the statute. That unsealing order was replaced by a *nunc pro tunc* order on March 27, 2006, which, among other things, specifically recognized that the Department was preserving its full 90-day review period for making a decision on intervention. That initial 90-day period was set to expire on Monday, April 2, 2006. On March 31st, the Department e-mailed its motion seeking an enlargement of that 90-day period. In its Order Denying Department of Legal Affairs Motion For Enlargement of Time, the Court notes that the motion was filed at 1:17 p.m. on "this date," referenced as April 4, 2006**.** Paragraph 3 of that order states, in reference to the relevant statutory provision: "Paragraph (5), by its plain and unambiguous terms, states that the department may request the court to extend the time during which the complaint remains under seal under subsection (2). Inasmuch as the Department caused the complaint to be 'unsealed' on March 25, 2006, its motion to extend the time filed after the complaint as been unsealed is untimely." The Department interpreted the Court's reasoning to be that once the file was unsealed on March 25th, the Department's March 31st motion for enlargement of time to make its election was too late.

Assuming *arguendo* no extension of time is timely requested and granted, as described

above, the Florida False Claims Act requires the Department, before the expiration of the initial 90-day period either: "proceed with the action..." or "notify the court that it declines to take over the action..." § 68.083(6)(a)-(b), Fla. Stat. Pursuant to this provision "proceed[ing] with the action" and service most commonly means the filing of a notice coupled with service upon the defendant.

Notwithstanding the fact that the Department sought to preserve and extend its period for making a decision whether to affirmatively intervene, the Department construes the cumulative effect of the Court's orders of March 25, 2006, March 27, 2006, and April 5, 2006, as tantamount to the Court holding the Department elected to "proceed" under § 68.083(6)(a) by seeking and obtaining an order unsealing the complaint on March 25, 2006, within the initial 90-day review period.

The Court's Order To Show Cause Directed To State Of Florida Department Of Legal Affairs cites Florida Rule of Civil Procedure 1.230 and East County Water Control District v. Lee County, 884 So. 2d 93 (Fla. 2d DCA 2004), regarding the general requirements for intervention for anyone claiming an interest in pending litigation. The Department respectfully suggests that this lawsuit is distinguishable as the statutory procedural provisions of the Florida False Claims Act control the intervention of the Department of Legal Affairs or the Department of Financial Services, not Rule 1.230 and case law thereunder.

The Florida False Claims Act contains two other provisions on intervention by the Department. In a situation in which the Department initially elects not to proceed with an action, the court may permit the Department to intervene and take over the action on behalf of the state at a later date upon a showing of good cause. § 68.084(3), Fla. Stat. This provision is similar to the Federal False Claim Act and other state false claims statutes. Additionally, § 68.084(6) provides that the Department "may intervene on its own behalf as a matter of right." This provision is unique to

Florida's False Claim Act. While the provision has never been construed, the Department considers it a strong statement by the Legislature that the Department be given maximum discretion in whether to intervene and conduct Florida False Claims Act actions.[5]

C. No Objection By Relator Sam McDowell

Lastly, but importantly, the Relator does not object to the Department taking "primary responsibility for prosecuting" the action. Florida False Claims Act actions are brought "in the name of the State of Florida." § 68.083(2), Fla. Stat. In a situation in which the Court has not yet exercised jurisdiction over the defendant, and there is an issue raised as to whether the relator or the department is the proper entity to proceed with the litigation, in the absence of an objection to the department's role by the Relator, the Court should defer to the executive's exercise of its statutory options.

D. The Attorney General's Actions In This Cause Have at All Times Been Well-Intentioned and Based Upon a Good Faith Interpretation of the Florida False Claims Statute.

The Attorney General has elected to take "primary responsibility for prosecuting" this case. To the extent the Department has procedurally erred in the eyes of the Court, the Attorney General stands ready to fully comply with this Court's procedural orders and to take whatever procedural steps are necessary or available under the AG's substantive authority.

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[5] This is consistent with constitutional, statutory and case law relating to the role of the Attorney General in prosecuting cases on behalf of the State and/or where the alleged injury is to the public. *See, e.g.*, Fla. Const., Art. IV, § 4(c) (Attorney General is "the chief state legal officer"); Fla. Stat. § 16.01(4)(Attorney General, as chief law officer of the State, may appear in and attend to all suits or actions in which the State may be "in anywise interested"); State ex rel Shevin v. Yarborough, 257 So.2d 891, 895 (Fla. 1972) (Ervin, J., specially concurring)("Among the cases above cited are statements to the effect that the Attorney General's discretion to litigate, or intervene in, legal matters deemed by him to involve the public interest is the exercise of a judicial act, and his standing therein cannot be challenged or adjudicated.")

Upon service of the Complaint and required evidentiary support, the Attorney General commenced an investigation of the claims pursuant to its statutory authority under Section 68.081, *et seq.* This investigation was limited, however, to only those aspects of the claim that could be investigated given the "in camera and under seal" posture on the case. For example, while the Department of Management Services had already conducted its own investigation, that work was initiated based on an unsigned affidavit provided to that agency by Relator's counsel prior to the filing of this action. The evidentiary materials provided to the Attorney General's office contained new information and affidavit testimony that could not be fully investigated in light of the seal. Moreover, the Attorney General had learned additional information from a related *qui tam* matter, The State of Florida, ex rel., Tara J. Pagano and Kristina M Gilmore v. Global Docugraphix, Inc., and Document Imaging, Inc. d.b.a. GDXdata, as a follow up to which the Department desired to inquire of GDX personnel regarding possible links to claims in the instant action. In this particular case, the Department was constrained from approaching certain non-parties, for to do so could have disclosed the existence of the matters under seal.

On March 25, 2006, the Department filed its emergency *ex parte* motion to unseal the case and brought it to the attention of the presiding judge at first appearances. This action was deemed essential for several reasons.

First, as shown above, the existence of the seal was substantially hampering the Attorney General's investigation. Given the rapidly approaching 90-day deadline to make the required determination whether to take the case on behalf of the people of the State of Florida, the Attorney General determined there was an urgent need for immediate relief from the case seal.

Second, the Relator greatly exacerbated the problem posed by the seal by publicly revealing

the bases of claims that are the subject of the Complaint, effectively unsealing the Complaint and tipping off the prospective defendants. Further, the Relator filed an ethics complaint against the Attorney General averring the Department wasn't investigating the matter. However, given the existence of the seal, the Attorney General could neither appropriately respond to the public nor go forward with the unfinished aspects of its investigation.

Third, this matter is of great public concern. The Secretary of the Department of Management Services had recently issued 110,000 letters to enrollees in the People First! System alerting them to the possibility of identity theft because personal information had been shipped overseas by one of Convergys' subcontractors, and concerning the availability of a credit protection program for identify theft. This disclosure, understandably, caused tremendous public angst. The Relator's premature disclosures to the press that there had been additional improper viewing of state employee personal data elevated the angst to new levels. The Attorney General needed to immediately respond publicly and reassure the affected citizens. The Department takes very seriously its *duty* to respond to inquiries from the public and the press regarding legal matters of great public concern. Given the non-routine nature of this matter and the "in camera" filing and the unique problems caused by the Relator's public statements, in accordance with its authority – constitutional, statutory and at common law – the Attorney General determined that the Department should, in the best interests of the citizens of this State, move on an emergency basis to unseal the matter as soon as practicable in order to allow the Attorney General to publicly respond and go forward with the matter without violating a court seal.

As set forth in greater detail above, the Department obtained an order and an amended order unsealing the complaint recognizing the Department's reservation of right to request an extension

of time to make its election and complete its previously hampered investigation.

On March 31, 2006, the Department timely moved for an enlargement of 60 days within which to continue its ongoing investigation and to determine whether to intervene in this cause. The Court denied that motion and entered a series of orders that have us here today.

The Department interpreted the April 5th Order as the Court's determination that § 68.083(6)(a) had been triggered, *i.e.*, no extension would be granted because, by unsealing the case, the Department was proceeding with and taking over the action.[6] The Department therefore promptly filed a Notice of Appearance (signifying its election to take over the action), filed a paper responsive to the Court's direction regarding time to make service on the Defendant, and filed a motion seeking a status conference before the Court.

In summary, the Department has at all times acted in good faith and with the intention to take primary responsibility for prosecution of this matter, and respectfully suggests that good cause has been shown that sanctions should not be imposed. Further, the Department stands ready to take the steps necessary to comply with any perceived procedural steps necessary to effect its statutory authority to take control of this *qui tam* matter.

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[6] The Court may have interpreted the Department's motion to unseal as an implicit notice by the Department of an intention not to proceed with this matter. This was not the intent - whether express or implicit - of the Department's filing. The Department believes that a complaint can be unsealed (or not sealed) while the Department's investigation into the allegations is still pending, but it is absolutely correct that motions filed by the Department to unseal a private *qui tam* action are usually signs that the Department is proceeding with the case. The Department believes the statute's requirement of an express statement by the Department whether it is in the case or not is, among other things, designed to avoid putting the Court in the position of having to guess what the Department is doing with a case, and the Department regrets the confusion that its motion to unseal may have created. To be clear, the Department has never filed anything that could be considered a notice, pursuant to § 68.083(6)(b), that it was declining to take over the action. An exemplar of a notice filed by the Department in that situation is attached as Exhibit B.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Facsimile and U.S. mail on: Steven R. Andrews, Esq. and David W. Moye, Esq., **Andrews & Moye, LLC**, 822 North Monroe Street, Tallahassee, FL 32303, on April 14th 2006.

Gerald B. Curington