

A sight for sore eyes: Tennessee court rejects government's belated attempt to intervene in suit against eye care specialists

By Mindy A. Gorin, Esq., Debra E. Schreck, Esq., and Sara L. Shudofsky, Esq., *Arnold & Porter**

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A Tennessee federal judge has taken the highly unusual step of denying the government's request to intervene in a *qui tam*¹ suit in which it had previously declined intervention.

In a complaint filed in April 2017, the relators² in *United States ex rel. Odom v. SouthEast Eye Specialists, PLLC*, alleged that the defendants violated the False Claims Act (FCA) by paying kickbacks to induce optometrists to refer their patients for surgery.

The government argued that "good cause" existed for its late request to join the case, pointing to purported "new evidence" discovered in its investigation.

After receiving six extensions that dragged out the seal period for over two years, the government (DOJ and the State of Tennessee) declined intervention in August 2019.

Six months later, in February 2020, the government changed its mind and set its sights on joining the suit. In its motion to intervene, the government argued that "good cause" existed for its late request to join the case, pointing to purported "new evidence" discovered in its investigation.

The government further argued that the relators had no objection to the intervention and that joining the suit only six months after the declination would not prejudice the defendants because formal discovery had not yet begun.

The defendants opposed the government's request, arguing that the government had failed to specify any new facts learned from its investigation, the relators' consent was not enough to establish good cause, and intervention would not only prejudice the Defendants — who had already endured years of one-sided discovery and expended resources on a dismissal motion — it would also undermine congressional intent to establish an intervention deadline.

Siding with the government, the magistrate judge issued a Report & Recommendation ("R&R") noting that courts generally

interpret the "good cause" provision "broadly" and finding the government had demonstrated it here. *United States v. SouthEast Eye Specialists, PLLC*, 2020 WL 4431464 (M.D. Tenn. July 31, 2020).

The magistrate judge credited the government's assertions regarding "new evidence," and found that the relators' consent "weigh[ed] heavily in [] favor of allowing" intervention and that any prejudice to Defendants was not "weighty enough to prevent intervention." *Id.* at *5.

Among other things, the magistrate judge cited the absence of any precedent denying a request to intervene where discovery had not yet begun. The defendants objected to the R&R.

In a one-page order issued on February 24, 2021 and citing to the record of a hearing held two days earlier, the district court vacated the R&R.

At that hearing, notwithstanding the government's assertion in its briefing that denial of the motion would be a "wholly unprecedented step," the court found that the government had "not come close to establishing the good cause necessary to intervene and take control of the litigation nearly three years after the original complaint was filed, and more than six months after the court set a final deadline for intervention that was extended six times." (Hearing transcript reported by Law 360, <https://bit.ly/3eCyh4Z>).

The denial comes as a welcome surprise to *qui tam* defendants, who have grown accustomed to a lenient approach by courts to belated intervention requests by the government.

The court pointedly noted that the government seemed to "simply expect the court to trust them because they say there is, quote, new and sufficient evidence. This, the court will not do." *Id.*

The denial comes as a welcome surprise to *qui tam* defendants, who have grown accustomed to a lenient approach by courts to



belated intervention requests by the government, often on the heels of resource-draining, one-sided discovery over an extended period of time.

However, the story isn't over yet; DOJ appealed the decision to the Sixth Circuit on March 26, 2021. We at *Qui Notes* will be watching closely as the appeal progresses.

But for now, at least, *SouthEast Eye Specialists* shows that, where appropriate, defendants shouldn't blink before strongly opposing belated intervention motions by the government. Stay tuned for more on this case.

Notes

¹ <https://bit.ly/3xzp8CX>

² <https://bit.ly/3aGl6yl>

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ABOUT THE AUTHORS



Mindy A. Gorin (L), an associate at **Arnold & Porter**, is part of the firm's General Litigation Practice Group and represents clients in a range of litigation matters. She can be reached at mindy.gorin@arnoldporter.com. **Debra E. Schreck** (C), a partner with the firm, represents clients in complex investigations and litigation matters across a range of industries. A go-to adviser for life sciences clients, she represents pharmaceutical and medical device companies in connection with criminal and civil investigations by government agencies. She can be reached at debra.schreck@arnoldporter.com. **Sara L. Shudofsky** (R), also a partner with the firm, represents clients in a range of government investigations and commercial suits. Her practice focuses on health care and contracting fraud investigations and litigation under the False Claims Act. She can be reached at sara.shudofsky@arnoldporter.com. All of the authors are based in New York. A version of this article was published March 16, 2021, on the firm's website. Republished with permission.

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