

**SUPERIOR COURT OF NEW JERSEY  
MERCER VICINAGE**

Anthony M. Massi  
Judge of the Superior Court  
(609) 571-4320



Mercer County Courthouse  
P.O. Box 8068  
Trenton, NJ 08650-0068

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January 6, 2014

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Re: State of New Jersey, through Hayling v. CMS, et. al.  
Docket No.: MER-L-2114-08

Dear Counsel:

Enclosed please find the Court's Opinion and Order with respect to the above noted matter.

Very truly yours,

William E. Arnold, IV  
Law Clerk to Anthony M. Massi, J.S.C.

Enclosures

JAN 07 2014

STATE OF NEW JERSEY, through  
LESILE A. HAYLING, JR., DDS,

Plaintiff,

v.

CORRECTIONAL MEDICAL  
SERVICES, INC., ALLCARE DENTAL  
GROUP, LLC, VICKI BYBEE, DAVID  
MEEKER, JANICE BELL, DMD, and  
LIONEL ANICETTE, M.D.,

Defendants.

*Sue Regan*  
SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY  
~~DEPUTY CLERK OF SUPERIOR COURT~~

CIVIL ACTION

DOCKET NO. L-2114-08

ORDER PREPARED BY THE COURT

THIS MATTER having been opened to the Court by Defendants Correctional Medical Services, Inc., Vicki Bybee, and David Meeker, on their Motion to Dismiss Plaintiff's Complaint, and the Court having considered the moving papers and opposing papers and having heard oral argument, if any, and for good cause shown;

IT IS on this 7<sup>TH</sup> day of January, 2014, hereby:

A. **ORDERED** that Defendants' Motion to Dismiss Plaintiff Leslie Hayling, Jr.'s Complaint is **DENIED**;

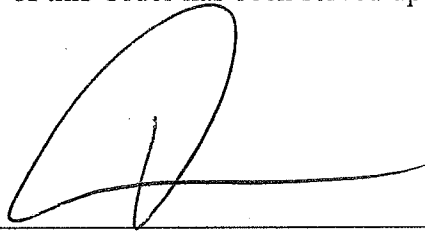
B. **FURTHER ORDERED** that the Court's statement of reasons have been set forth in the attached opinion; and

**A True COPY**

*Sue Regan*

**SUE REGAN**  
Deputy Clerk of Superior Court

**C. FURTHER ORDERED** that a copy of this Order has been served upon all parties by the Court.

A handwritten signature in black ink, consisting of a large, stylized capital 'A' followed by a horizontal line extending to the right.

---

Anthony M. Massi, J.S.C.

STATE OF NEW JERSEY, through  
LESILE A. HAYLING, JR., DDS,

Plaintiff,

v.

CORRECTIONAL MEDICAL  
SERVICES, INC., ALLCARE DENTAL  
GROUP, LLC, VICKI BYBEE, DAVID,  
MEEKER, JANICE BELL, DMD, and  
LIONEL ANICETTE, M.D.,

Defendants.

JAN 07 2014

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

MERCER COUNTY

SUE REGAN

DEPUTY CLERK OF SUPERIOR COURT  
Pcket NO. MER-2114-08

CIVIL ACTION

OPINION OF THE COURT

A True Copy  
*Sue Regan*

SUE REGAN  
Deputy Clerk of Superior Court

FACTS

1. For many years, Defendant Correctional Medical Services, Inc. ("CMS") provided medical and dental services to state inmates in New Jersey. Leslie A. Hayling Jr. ("Relator") was a subcontractor to CMS, providing the dental services through his company Correctional Dental Associates ("CDA").
2. In 2004, the Department of Corrections ("DOC") put out a bid for a combined health and dental service contract for the state prisons.
3. The RFP required the party awarded the contract to "obtain and maintain in full force and effect all required licenses, permits and authorizations necessary to perform the contract," and to "comply with all local, state and federal laws, rules and regulations applicable to the contract and to the goods delivered and/or services performed thereunder." (Confoy Certification, Exhibit I).
4. CMS provided a bid for the Contract, which offered the choice to either continue to provide services through CDS at an additional cost of \$2.8 million per year or to provide

services through its in-house program at a reduced price. The DOC opted for the latter proposal.

5. Relator and CDS provided services to inmates through the DOC up until March 31, 2005, at which time the new contract between the DOC and Defendants commenced.
6. Relator alleges that CMS's reliance on independent contractors in the latter bid violated New Jersey regulations relating to a general corporation's employment of physicians and dentists and the requirements of the RFP because CMS is not a professional corporation and, therefore, was not legally qualified to provide professional medical or dental services under the DOC contract.
7. According to Defendants, in retaliation for this, Relator asserted a noncompete clause in his agreements with the individuals who had worked for CDA to prevent any of those individuals from participating in CMS's new contract with the state. As a result, Defendant CMS argues that Relator created a significant obstacle in CMS's efforts to recruit and hire dental personnel so as to meet their contractual obligations to the State.
8. Defendant CMS states in its brief that in order to provide the required amount of staff under the contract, CMS retained Defendant All Care Dental Group as a subcontractor.
9. On August 25, 2008, Hayling filed his original complaint asserting claims of fraud under seal in accordance with N.J.S.A. 2A:32C-5c and remained under seal for the next 13 months while under review with the Attorney General.
10. In a related matter, on November 10, 2008, CMS filed a complaint challenging the State's decision to withhold payments on the DOC contract for liquidated damages. The Court in that matter held that as a claim for contract damages, the exclusive method for recovery by CMS was through N.J.S.A. 59:13-1 (NJCLA) and dismissed the matter.

Thereafter, CMS filed a second Complaint against the State on April 8, 2009 pursuant to the NJCLA. This matter was dismissed with prejudice in the Law Division under the docket number MER-L-904-09 on July 13, 2013.

11. On September 21, 2009, the Office of the Attorney General notified the Court and the Relator that it declined to intervene in this action, but did not dismiss the action.
12. However, pursuant to the September 30, 2009 Unsealing Order of Hayling's Complaint, the State remains the real party in interest.
13. After the service of the Complaint, all Defendants moved to dismiss.
14. On March 11, 2010, the Attorney General issued a Statement of Interest concerning its interpretation of the NJFCA.
15. Dr. Hayling opposed the motions to dismiss and filed a cross-motion to consolidate his Complaint with the pending CMS Complaint.
16. Following the motions by all defendants to dismiss the matter, the Court dismissed the matter with prejudice on the grounds that the NJFCA was to be applied prospectively from its March 13, 2008 effective date.
17. The trial court also denied Hayling's motion to consolidate the matter with the CMS Complaint.
18. On appeal, the Appellate Division affirmed the trial court's decision that the NJFCA was to be applied prospectively only, but reversed the dismissal as to claims that arose after the effective date and permitted Dr. Hayling leave to assert such claims in an amended complaint. See State ex rel. Hayling v. Correctional Medical Serv., Inc., 422 N.J. Super. 363 (App. Div. 2011).
19. On March 23, 2012, Relator filed an Amended Complaint under seal.

20. On April 11, 2012, the Attorney General notified the Court and the parties that it declined to intervene.

21. According to Defendants, the Amended Complaint asserts new legal theories, but relies on only pre-enactment events to support those allegations.

22. The Defendants now move to dismiss this matter.

### **Defendants' Arguments**

**1. The Amended Complaint should be dismissed because Relator attempts to circumvent the Court's prior ruling that the NJ FCA does not apply retroactively.**

Defendants argue that the Amended Complaint should be barred because the claims made therein are based on actions that took place prior to the enactment of the statute on which they are based. Defendants contend that the Amended Complaint focuses events that occurred long before the enactment of NJ FCA. The non-retroactive application of the NJ FCA was established in the ruling of the Appellate Division in the original complaint. In State ex rel. Hayling v. Correctional Medical Services, the Appellate Division stated that "notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them." 422 N.J. Super. 363, 370.

Like the original Complaint, Defendant notes that the Amended Complaint focuses its allegations of fraud on events that occurred prior to the March 13, 2008 enactment of the NJ FCA. Specifically, Defendants point to ¶24-46 of the Amended Complaint, which contains a section labeled, "False Statements Regarding AllCare's Qualifications." This section covers actions allegedly taken by Defendants in 2004 and 2005, far in advance of the NJ FCA.

According to Defendants, other than the requests for and receipt of payment for services between

March 13, 2008 and September 30, 2008, the Amended Complaint fails to provide post-enactment activity to support his claims.

Similar to the Federal FCA, in its prospective application, the NJ FCA applies only to the false claims submitted after the effective date of the statute and the pre-enactment activities must be dismissed. Therefore, Defendants assert that the prospective application of the NJ FCA prohibits its applications to claims submitted for payment to the State prior to March 31, 2008 and the Court should dismiss the action in its entirety. The submission of invoices and receipt of payments without a false statement, according to Defendants, does not create FCA liability because an independent basis for a claim is not established with these activities.

**2. Relator's action is barred by the statute's facial ban on qui tam suits that are based upon the same allegations or transactions that are the subject of a pending administrative proceeding.**

While no case law is available in interpreting N.J.S.A. 2A:32C-9(b), the language of the statute is nearly identical to its federal counterpart. 31 U.S.C. 3730(e)(3) states, "In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." Similarly, 9(b) states that "[a] person may not bring an action under this act based upon allegations or transactions that are the subject of a pending action or administrative proceeding to which the State is already a party."

Defendants argue that Relator is barred from bringing these actions, as the state had previously initiated an action against CMS at the time Relator took action. Relator did not bring his cause of action against Defendants until August 25, 2008. Prior to the filing of this action,



the Department of the Treasury's Contract and Administration Unit had audited CMS and an OIG investigation had taken place and promulgated two reports. Additionally, a July 31, 2008 letter of notice of the intent to withhold liquidated damages against CMS was processed, the final assessment of which was made December 22, 2008.

In support of the notion that the actions taken by the state are akin to the administrative efforts stated in the statute, Defendants cite Foundation for Fair Contracting, Ltd. v. G&M E. Contracting & Double E LLC. 259 F. Supp. 2d 329 (D.N.J. 2003). In that matter, the District Court of New Jersey stated that the DOL investigation constituted an administrative proceeding so as to bar a relator's action under the federal statute in that the investigation "provided the government with the facts and the amount of compensatory and liquidated damages that were needed to redress its inquiry into defendant's possible mispayment of wages," so finding that relator's claim after the government had already obtained redress would be pointless. Id. at 337-38.

Defendants claims that the allegations raised by Relator in bringing his action on August 25, 2008 were based upon allegations or transactions that are the subject to an administrative proceeding to which the state is already a party. Defendants point to the OIG report filed a year prior to Relator's claim, in which the OIG stated that it was auditing the performance of the 2005 CMS contract with the DOC. Relator's Amended Complaint is of the same substance, including the same allegations and transactions. Defendants assert that it is obvious that the facts alleged in the Amended Complaint are identical to the subject of two OIG reports, revealing that the OIG investigation was based upon the same "transaction" as is Dr. Hayling's claims.

Defendants argue that Relator now attempts to seek a second recovery against CMS upon the same transactions and allegations the State had fully investigated and for which the State has

already recovered. Therefore, § 9(b) precludes Relator from bringing this action on behalf of the State while an administrative proceeding is pending.

**3. The Amended Complaint should be dismissed because Relator is not an original source of the publicly disclosed allegations.**

According to Defendants, this is essentially a whistleblower claim, yet Relator is not the original source of the allegations, as this was all publicly disclosed by OIG in 2007. Although Relator claims that his allegations led to the OIG conducting its own investigation, merely triggering an investigation is not enough to show that Relator had “direct and independent knowledge” of the allegations in the amended complaint.

Defendants reject the notion that Relator could have had direct and independent knowledge of the alleged fraud. Relator was not in a position to have firsthand knowledge, as he was not a party to the contract nor hired as a subcontractor. Plaintiff cites Rockwell, the U.S. Supreme Court case in which the Court ruled that a relator who no longer works for the defendant cannot be considered to have direct and independent knowledge. 549 U.S. 457 (2007).

Either way, according to Defendant, Relator’s pleadings are lacking in this matter, as he makes nothing more than conclusory statements to support his original source status. In United States ex rel. Hafter v. Spectrum Emergency Care, Inc., the Court held that a qui tam plaintiff must make “specific factual allegations, rather than brought conclusory statements” in order to bring such an action. 190 F.3d. 1160, 1162 (10th Cir. 1999). Relator has failed in this regard, as he does not explain what information was uncovered, how he gained access to such information, nor what he reported to the state. Therefore, the Amended Complaint must be dismissed for lack of jurisdiction.

**4. The Amended Complaint should be dismissed because Relator fails to plead fraud with requisite specificity.**

Defendants next assert that because the Relator asserts only a violation of state regulations, the Amended Complaint must be dismissed because there is no pleading of fraud with the requisite specificity. Under R. 4:5-8, all allegations of fraud, mistake, breach of trust must be pled with particularity. This means that claims must include “the particulars of the wrong, with dates and items if necessary.” R. 4:5-8. Defendants contend that the Amended Complaint does not provide the necessary details regarding Defendant CMS’s alleged fraudulent conduct. Moreover, the Complaint fails to provide the specifics as to Relator’s role as an original source. As such, Relator’s claims must be dismissed pursuant to R. 4:5-8.

**5. Portions of the Amended Complaint should be dismissed or stricken pursuant to R. 4:6-4(b) and the Opinion of the Appellate Division in this Case.**

## **Hayling's Opposition**

### **1. Defendants' Motion to Dismiss should be denied because Dr. Hayling's Amended Complaint clearly states claims for relief against Defendants under the NJFCA.**

According to Relator's papers, Relator has valid claims for relief against Defendants because Defendants presented to the DOC payment requests after March 31, 2008. Relator dismisses Defendants' assertion that the Complaint must be dismissed because the post-effective date presentation of false claims is linked to their pre-effective date false statements. Instead, Relator contends that NJ FCA does not require a "new" false statement to be made in conjunction with the submission of each false claim. Relator requests that the Court look at the submission of the claim and "not concern itself with whether or to what extent there exists a menacing underlying scheme." United States v. Alfatooni, 314 F.3d 995, 1002 (9th Cir. 2002). According to his brief, Plaintiff's Amended Complaint contains allegations that Defendants presented false claims to the State for payment following NJ FCA's effective date, creating an action upon which Plaintiff can bring a claim under NJ FCA. Each invoice submitted for payment to CMS constituted a false statement because Defendants implied their compliance with the terms of the DOC contract and other New Jersey laws and regulations. In support of this, Plaintiff provides a list of federal cases: Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519, 531-33 (10th Cir. 2000); Ab-Tech Construction, Inc. v. United States, 31 Fed.Cl. 429, 434 (1994); United States v. Science Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010).

Moreover, Plaintiff highlights that the Amended Complaint does in fact allege that the Defendants' false certification compliance with the terms of the contract was a condition of payment, thereby complying with the requirements to state a sufficient False Claims Act claim.

**2. Defendants' Motion to Dismiss should be denied because Dr. Hayling's Amended Complaint alleges sufficient facts to support his standing as the Relator in this action.**

Plaintiff supports this statement by stating that the "Amended Complaint identifies Dr. Hayling Jr. as the relator of the claims in issue, who had direct and independent knowledge of the information alleged, and whose investigation clearly preceded Inspector General's investigation and the issuance of the OIG Reports." Plaintiff disputes the claim that the allegations in the Amended Complaint are based upon the same allegations that are the subject of any administrative proceeding. Plaintiff asserts that Defendants are attempting to avoid liability under NJ FCA by characterizing the DOC Purchase Division's audit of the CMS's performance and imposition of liquidated damages as a pending "administrative proceeding." This audit does not satisfy the NJ FCA requirement for an administrative proceeding. Therefore, it cannot be a jurisdictional bar to these claims.

Moreover, the OIG investigation also does not bar this action. Section 7(b) of the NJ FCA, Plaintiff argues, supports that conclusion that the OIG investigations are not considered administrative proceedings. Section 7(b) states:

If the Attorney General proceeds with an action which the court finds to be based primarily on disclosures of specific information, other than that provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing; a legislative, administrative, or inspector general report, hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate. . . .

Here, the two actions are independent of each other, seek different forms of relief, and involve different parties. Therefore, there is jurisdictional bar here to this action. As such, Plaintiff requests that the motion to dismiss be denied.

### Statement of Interest/Amicus Curiae

The Attorney General filed a Statement of Interest, or in the alternative, to participate as *amicus curiae*. The Attorney General has the power to “[a]ttend generally to all legal matters in which the State or any officer, department, board, body, commission or instrumentality of the State Government is a party or in which its rights or interests are involved. . . .” N.J.S.A. 52:17A-4(g).

A party who wishes to initiate suit pursuant to the NJ FCA, must file the complaint under seal and serve it on the Attorney General. The Attorney General is required to review and investigate the claim. N.J.S.A. 2A:32C-5. If the Attorney General decides not to proceed in the matter, the parties involved must nevertheless continue to serve papers on the Attorney General. N.J.S.A. 2A:32C-6(f). The Attorney General maintains the right to move to dismiss the case for good cause at any point of the litigation. N.J.S.A. 2A:32C-6(b). Furthermore, the State will be the primary beneficiary of any recovery under the NJ FCA.

In its Statement of Interest, the State contends that the Motion to Dismiss raises significant questions of first impression about the Act. The State’s position is that: (1) while the NJ FCA applies prospectively, “false claims presented to the State after the Act’s March 13, 2008 effective date are actionable even if the relationship with the State commenced prior to the effective date; (2) an investigation by the State’s Office of Inspector General is not an administrative proceeding that limits NJFCA suits; (3) disclosures in an OIG report are not “public disclosures that limit NJ FCA suits; (4) although Rule 4:5-9’s pleading standard applies to NJFCA allegations, both false and fraudulent claims are actionable under the NJFCA.

### **Defendants' Reply**

In their reply, Defendants argue that this matter is a straight forward one: the Amended Complaint fails to plead a cause of action for events after the effective date of the NJ FCA and the Court lacks subject matter jurisdiction over this action.

As a result of the Appellate Division's ruling that the Amended Complaint can only state claims that were made after the effective date of NJ FCA, Defendants argue the Relator raises the implied certification theory for the first time in this action in order to preserve any possibility of an action in this case. In courts that recognize the implied certification theory, it is required that compliance with the regulation be a condition of payment to satisfy this theory, which Defendants contend that Plaintiff has failed to do. Defendants claim that this argument fails and the Plaintiff's Complaint falls apart because a review of Plaintiff's cited regulations in support of its claims do not expressly condition payment to CMS on their compliance with them. Therefore, these regulations cannot form the basis for a NJ FCA claim under the implied certification theory.

Moreover, Defendants assert that Plaintiff's claims should be dismissed because there is a lack of subject matter jurisdiction. Under Section 9(b) of NJ FCA, an action is required to be dismissed if the act is based upon allegations or transactions that are the subject of a pending action or administrative proceeding to which the State is already a party. Further, Section 9(c) of NJ FCA state:

No action brought under this act shall be based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing or audit conducted by or at the request of the Legislature or by the news media, unless the action is brought by the Attorney General, or unless the person bringing the action is an original source of the information. For purposes of this subsection, the term "original source" means an individual who has direct and independent

knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under this act based on the information.

These two independent bases for dismissal apply to the actions here and, as such, Plaintiff's Complaint should be dismissed. Here, there was an OIG Investigation and a related assessment of liquid damages, which fall under the definition of administrative proceeding for the application of NJ FCA jurisdictional bar. Defendants maintain that the Appellate Division has recognized that the NJ FCA was modeled after the federal FCA, and therefore, applying the federal FCA term for administrative proceeding, it is clear that it encompasses a much broader spectrum than just civil suits. Found. For Fair Contracting, 259 F. Supp. 2d at 336. Because the actions here are based upon the allegations and transactions in the OIG Investigation and Reports and the OIG Investigation and related assessment of liquidated damages were pending at the time Relator commenced this action, Relator's actions are barred.



## ANALYSIS

With an allegation of failure to state a claim under Rule 4:6-2(e), the investigation is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. Rieder v. Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The Court is to “search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” DiCristoforo v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957). The Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint at this preliminary stage of the litigation; therefore, plaintiffs are entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956).

The New Jersey False Claims Act establishes a qui tam action as a means of policing fraud on state government. State ex rel. Hayling v. Correctional Medical Services, 422 N.J. Super. 363, 373 (App. Div. 2011). In order to establish a prima facie case under the FCA, a plaintiff must prove: (1) defendant presented a claim for payment to the government; (2) the claim was false or fraudulent; and (3) defendant knew the claim was false or fraudulent. United States ex rel. Wilkins v. Untied Health Group, Inc., 659 F.3d 295, 304-05 (3d Cir. 2011). Similar to the federal FCA, the NJ FCA states that each claim submitted to the government will be evaluated individually and those claims submitted prior to the enactment of the state are closed off from review. United States ex rel. Cantekin v. Univ. of Pitt., 192 F.3d 402, 409 (3d Cir. 1999). Again, like the federal version of the act, NJ FCA applies to all false claims for payment individually, not by each contract. 390 U.S. 228, 233 (1968). Therefore, as established by the Appellate Division in this case, each of Plaintiff’s claims will be evaluated individually

and the claims to be evaluated must be limited to the monthly payments after the enactment of NJ FCA – after March 13, 2008.

Lastly, as to the claims based upon implied certification, the District of Columbia Circuit set forth a “rule, adopted by all courts of appeals to have addressed the matter, that a false certification of compliance with a statute or regulation cannot serve as the basis for a *qui tam* action under the FCA unless payment is conditioned on that certification.” United States ex rel. Siewick v. Jamieson Science and Engineering, Inc., 214 F.3d 1372, 1376 (D.C. Cir 2000).

The Motion to Dismiss here contains the primary arguments made by all of the moving Defendants to dismiss the complaint for failure to state a claim upon which relief can be granted. The Defendants argue that the complaint should be dismissed because the NJ FCA should be applied prospectively and not retroactively, this court lacks jurisdiction, and fraud is not plead with specificity.

In reviewing the Complaint, the Answer, the briefs, and the oral arguments given by all parties, the Motion to Dismiss cannot be granted in this matter because there are outstanding questions of fact here. When deciding on a motion to dismiss, every inference must be granted to the Plaintiff in this matter. In doing so, it is evident that there may be causes of action here. The Court cannot and will not decide upon the Plaintiff’s ability to prove these claims. However, it is clear that the jurisdictional bar does not apply here. The claims of fraud have been stated with sufficient specificity. The Appellate Division has previously stated that the NJ FCA claims may be made if the events, the basis for these claims, occurred after the enactment of the NJ FCA. Lastly, it appears that there is sufficient legal dispute with factual components that should be permitted to proceed into the discovery phase. Therefore, the Motion to Dismiss is

denied.

It has been established that the NJ FCA limits Plaintiff's claims to events that occurred after March 2008. If legislative intent is clear with regards to the application of a statute, the "court's sole function is to enforce the statute in accordance with the language." Bunk v. Port. Auth. 144 N.J. 176, 193 (1996). The general rule of construction is that a statute is to be applied prospectively. Gibbons v. Gibbons, 86 N.J. 515, 522-23 (1981). Where a statute does not explicitly express so to the contrary, "there are well-settled rules concerning the circumstances in which statutes should be applied retroactively." Id. at 522. In reviewing these well-settled rules, accordingly, the trial court and the Appellate Division determined that the NJ FCA applies prospectively and required that the Relator only assert claims that concern conduct occurring after the effective date of the NJ FCA. Thereby, Relator is limited to bringing claims against Defendants in this action for events that occurred after March 13, 2008 only, which is consistent with the Appellate Division's decision. Relator alleges in his Complaint that there were misrepresentations to the DOC that CMS was eligible for payment from March 2008 to October 2008. These claims can serve as a basis for a FCA claim and are sufficient to state a cause of action.

With regard to the issue of the jurisdictional bar, the Defendants' argument that the Relator's action is barred by 9(b)'s facial ban on *qui tam* suits that are based upon the same allegations or transactions that are the subject of a pending administrative proceeding holds some merit. An administrative proceeding is defined as a governmental non-judicial determination of wrong doing, which if found, may result in the assessment of damages or fines. Despite Defendants' argument to the contrary, it does not appear that the OIG investigation and the liquidated damages action fit into this definition.

As the State outlined in its oral argument before the Court, § 9(b) and 9(c) do not bar this action because liquidated damages action and the OIG investigation do not qualify as a pending administrative action. The OIG conducted a three year investigation into CMS's performance under the contract, which resulted in the assessment of liquidated damages on two occasions, July and December 2008. The OIG investigation, however, was not adversarial; there was no adjudication and no final resolution.

The liquidated damages action also does not fit the category of a pending administrative proceeding because the allegations in this matter – CMS's eligibility to be contracted for the dental work for the DOC -- were not litigated in the liquidated damages case. In fact, this matter was carved out of the liquidated damages action giving the inference that the issue was out there. Therefore, Relator's claims against Defendants are not barred by § 9(b) and 9(c).

By granting every inference to Relator in this matter, the Motion to Dismiss Relator's Complaint must be denied and the matter should proceed to discovery.

### **CONCLUSION**

For the foregoing reasons, Defendants' Motion to Dismiss is denied at this time.