SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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CITY OF NEW YORK,

INDEX NO. 100303/13

Plaintiff,

ex rel. JOSEPH LERMAN,

Plaintiff-Relator

-against-

EJ ELECTRICAL INSTALLATION COMPANY,

Defendant.

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JOAN A. MADDEN, J.:

In this *qui tam* action, plaintiff/relator Joseph Lerman ("the Relator") moves for renewal of his opposition to the City of New York's ("the City") motion for an order pursuant to State Finance Law § 190(5)(b) dismissing the first count of the First Amended Complaint against Siemens Electrical, LLC ("Siemens"), which motion the court granted by amended decision and order dated July 3, 2019[1] ("the original decision"). The City opposes the motion. For the reasons below, the motion to renew is granted and, upon renewal, the court adheres to its original decision.

Background

This action arises out of a contract between the City and Siemens for work at the Croton Water Filtration Plant ("Croton Plant") project ("the Project"), which is designed as one large water filtration plant consisting of two smaller filtration plants, known as Plant A and Plant B. Siemens, an electrical engineering and manufacturing company, retained defendant EJ Electrical Installation Company ("EJ") as a subcontractor. EJ hired the Relator in October 2010. In his

[1]The amendment to the decision and order was made to correct a typographical error.

position as a Project Manager/Engineer the Relator was responsible for identifying any electrical violations or other problems resulting from the prior contractor's work.

The Relator commenced this action in 2013 under the *qui tam* provisions of the New York State False Claims Act (NYFCA). The original complaint asserted two counts alleging violations of State Finance Law § 189, relating to the submission of false claims, and § 191, for whistleblower retaliation. With regard to the first count alleging a violation of § 189, the complaint alleged, *inter alia*, that false claims were made with respect to representations that the work performed complied with the New York City Electrical Code ("NYCEC" or "the Code"), and that the electrical work performed at the Croton Plant would provide the redundancy to permit Plant A to shut down while Plant B remained operable in accordance with contract provisions regarding redundancy.

It further alleged that upon his inspection, the Relator "discovered that all service lines-for both Plant A and Plant B-were running through pull boxes[2] where the service feeders were unsegregated and the wiring/conduits for Plant A were intermingled with wiring/conduits for Plant B at juncture points..." (Complaint ¶'s 57-58). It also alleged that these defects, which related only to pull boxes housing 5000 volt (5kV) cables, "create[] a dangerous environment to operate in, especially when contractors neglect to follow the [NYCEC]." (Id ¶ 61).

In March 2016, the State of New York and the City declined to intervene in the action, and the Relator opted to continue the action. Siemens moved to dismiss the complaint against

[2]The complaint alleged that pull boxes are "juncture points through which long electrical wires/conduits run to make the pulling of wire easier" (Id ¶ 56).

it,[3] and EJ cross moved to dismiss the first count of the complaint. Although they declined to intervene in the action, the State and the City each submitted briefs, in which the City argued that Relator failed to allege a violation of the NYCEC. The court held that there was no violation of the NYCEC alleged, [4] but denied the motion and cross motion to the extent of finding that the first count stated a claim based on the theory that defendants breached "the contractual requirements related to the design of the electrical system to ensure redundancy of Plant A and Plant B."

The Relator subsequently filed and served a First Amended Complaint in which the Relator alleged that defendants made false representations that the work performed was in compliance with the Administrative Code of the City of New York and the Rules of the City of New York, including NYCEC, and that defendants falsely represented that the electrical work performed at the facility would provide the Croton Plant with redundancy to allow part of the plant to shut down while the remaining part remained operable. As in the original complaint, the allegations of false claims were based on the Relator's allegations that electrical system at the Croton Plant did not comply with Code requirements or the contractual redundancy requirements

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[3] The court dismissed the second count against Siemens, on the ground that Siemens could not be held liable under the whistleblower provisions of State Finance Law § 191, as it was not the Relator's employer.

[4]Specifically, the court found that contrary to the Relator's position, NYCEC Section § 300.3 (C)(1) or (C)(2), concerning barriers between electrical systems and, in particular a 2003 amendment to Local Law 81, requiring barriers to be provided to isolate conductor when the system voltage exceeds 250 volts, did not apply, since the amendment was codified as subsection (a) of section 300.3(C)(1), which pertains only to conductors rated 600 volts or less. In this connection the court noted that the parties did not provide the underlying principles of electricity or electricity systems applicable to these issues.

underlying the design of the Croton Plant as neither permitted "high voltage cables...from different circuits [to be] installed in the same enclosure" (First Amended Complaint ¶ 116).

City's Dismissal Motion

The City moved to dismiss the first count of the First Amended Complaint,[5] pursuant to State Finance Law § 190(5)(b)(i), which provides for dismissal of a *qui tam* action upon motion by the government "notwithstanding the objection of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard."

The City argued that dismissal was warranted as the Realtor failed to allege sufficient support for a claim under State Finance Law § 189, based on either a violation of the NYCEC or the RCNY or for a breach of contract. Under these circumstances, the City argued that dismissal was appropriate to conserve the resources of three City agencies involved in the litigation, that is City's Department of Environmental Protection ("DEP") which oversaw the work, and the New York City Department of Buildings ("DOB") which enforces the electrical code, and the Law Department which is responsible for litigating the action.

In support of its motion, the City relied on two lines of federal cases interpreting a provision of the Federal False Claim Act ("FCA") (31 USC § 3730(2)(2)(A) which is analogous to section 190(5)(b)(i) of the NYFCA,[6] holding that the government has broad discretion in

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[5]Notwithstanding that the City declined to intervene, by Stipulation so-ordered by the court on September 21, 2018, the City, the State and the Relator agreed to amend the caption to name the City as a plaintiff "to facilitate the efiling of papers by the City and Relator in connection with the [City's] Motion."

[6]The court noted that while it appears there is no New York precedent interpreting NYFCA § 190(5)(b)(i), federal law regarding the parallel federal provision, FCA § 3730(c)(2)(A), is appropriately examined to interpret this section of the NYFCA, citing. See State of New York ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 71 (1st Dept), lv denied 19 NY3d 810

deciding to dismiss *qui tam* actions. One line of cases permits dismissal when the government's decision to dismiss is rationally related to a valid government purpose, and the Relator fails to demonstrate fraud on the court, arbitrariness or illegality (United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F3d 1139 (9th Cir 1998), cert denied 525 US 1067 [1999], while the other line of cases gives the government "unfettered" discretion to dismiss *qui tam* actions absent a showing of fraud on the court or similar exceptional circumstances. Swift v. United States, 318 F Supp3d 250 (DC Cir), cert denied 539 US 994 (2003).

The Relator opposed the motion, arguing, *inter alia*, that the dismissal motion was premature as discovery had not been conducted, and that the court should apply the rational relation test in Sequoia Orange Co., supra, to deny the motion to dismiss. The Relator also raised a new theory not alleged in the First Amended Complaint, that the commingling of certain 5 kV cables violated § 5.11.1, of Con Edison specification EO-2022, which he argued requires the segregation of the subject cables by a minimum of 20 feet.

In reply, the City asserted that the purported violation based on the Con Edison specification does not provide a basis for a viable claim. In support of its position, the City submitted the supplemental affidavit of Mathher Abbassi, ("Abbassi") the Administrative Engineer for Technical Affairs and Code Development at ("DOB"), in which he stated that with regard to EO-2022, § 5.11.1, while this section addresses "Primary Service Feeder separation outside of the Customer's substation .i.e. on the utility side of the substation," the Relator's inquiry to DOB's advisory board regarding the segregation of electrical cable, concerned "the co-mingling of certain cables at points downstream from the medium voltage switchgear units

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(2012)("[N]ew York's False Claims Act] follows the Federal False Claims Act ["FCA"][31 USC § 3729 *et seq.*] and therefore it is appropriate to look toward federal law when interpreting the New York act").

(MVSs)...[which] are on the customer side of the substation and, therefore, do not fall within the ambit of Section 5.11.1 of Con Edison's Template for High Tension Technical Specification.[7]"

The City also submitted an affidavit of Maxim Klavansky ("Klavansky"), who has been the Chief of Power and Mechanical Support Division of ("DEP") since 2007, who stated that he is familiar with the electrical work performed at the Croton Plant. With regard to compliance Con Edison's specifications, Klavansky stated that:

> Con Edison brought four service feeders to manholes at the property line outside the Croton plant. Under the CRO-312-E2 contract, Siemens was responsible for running feeders from these property line manholes into the service switchgear inside the substation at the plant. This work was performed based on applicable specifications, including Con Edison requirements, and drawings approved by DEP's design engineer. Con Edison received detailed drawings and other information concerning the work under the CRO-312-E2 contract, to the extent the work implicated Con Edison specifications including EO-2022, pertaining to high tension service. Con Edison conducted multiple inspections of the work to ensure compliance with its specifications. After completion of the relevant work under the CRO-312-E2 contract, and following its inspections, Con Edison turned on the power to the Croton plant. Con Edison would not have taken this step unless the work met Con Edison's specifications.

With respect to the commingling of cables, he stated that "[t]here is no commingling of cables above the level of the MVSs, [i.e. four medium voltage switch gear units]." "The MVSs feed electricity to individual raw and treated water pumps and secondary to substations (SUSs). The MVSs include overcurrent devices that can shut off power to the pumps, and SUSs [and] there are several overcurrent devices above each MVS." He further stated that "to the extent certain cables fed from the MVSs (i.e., downstream of the MVSs [on the customer side]) are commingled within junction boxes, such commingling is permissible under the CRO-312-E2

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[7] He also stated that "[i]n the course of approving applications for electrical installations, it is common for the ... Board to advise applicants to contact Con Edison regarding Blue Book requirements where such requirements may be applicable [and that] ... [his] understanding is that Con Edison will not turn on power to a facility unless it is satisfied, through its own inspections, that the installation complies with applicable Con Edison requirements and specifications."

contract." He also stated that "the Relator's complaints about commingling have come to the attention of in-house engineers at DEP, DEP's outside design engineer, and regulators at the [DOB], all of which (among others) have found that the commingling complies with applicable requirements and specifications."

The Original Decision

In the original decision, the court granted the City's motion to dismiss, finding that the City satisfied the requirements of rational relationship standard by showing, *inter alia*, that its decision to seek dismissal of the Relator's State Finance Law § 189 claim was based on the tenuous merit of such claim and the City's legitimate interest in conserving the resources of three City agencies.[8]

In connection with the merit of the claim, the court noted that the City had investigated the allegations asserted in the Relator's original complaint and First Amended Complaint that the electrical system at the Croton Plant violated the NYCEC, and provided affidavits attesting to the compliance with applicable requirements. The court further noted that in his opposition, the Relator, by not addressing the opinions in the City's affidavits that the NYCEC and other provisions cited in the First Amended Complaint are inapplicable, implicitly conceded this issue. As for the contractual requirements, the court noted that the City submitted an uncontroverted affidavit from Klavansky, stating that the commingling of cables from the four medium voltage switch gear units was permissible under the contract.

With respect to the Relator's new assertions regarding noncompliance with Con Edison, specification E0-2022, § 5.11, the court pointed out that in his supplemental affidavit, Abbassi

[8]As the court found that the City met the rational relationship standard, it did not reach whether that standard or the more liberal unfettered discretion standard applied.

explained that these requirements refer to equipment located on the utility side of the substation, whereas the cables at issue were located on the customer's side of substation.[9]

Accordingly, the court found that the City had shown a rational basis for dismissal of the § 189 claim, thus shifting the burden to the Relator to show that City's decision to dismiss was "fraudulent, illegal or arbitrary and capricious." Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F3d at 1145 (internal citation and quotation omitted). As the Relator failed to meet this burden, the court granted the City's motion to dismiss the claim.

Relator's Motion for Renewal

The Relator now moves for renewal of its opposition based on documents received by the Relator on August 21, 2019, in response to his October 5, 2018 Freedom of Information Law ("FOIL") request to City's DOB, Electrical Division, Electrical Advisory Board related to its approval of the high voltage system for the Croton Plant. The documents received in connection with the FOIL request are: 1) a Short Circuit Study prepared by CSA Engineering Services ("CSA") a firm retained by Siemens in 2008; 2) correspondence between CSA and DOB's Electrical Advisory Board from 2009 related to approval of the Croton Plant; and 3) drawings of the High Voltage System. The Relator argues that these documents provide a basis for granting renewal as they were not received until after the issuance of the original decision, and "establish the fact that the High Voltage Installation must conform to Con Edison requirements and general specifications for high tension service provided within EO-2022, §§ 5.11.1 and 5.11.2,[10] in

[9]In the original decision, the court erroneously stated that the MVS cables were in the substation instead of downstream from the substation, which is on the customer side.

[10]Con Edison's specification EO-2022, Section 5.11.1, entitled "Primary Service Feeder separation outside the Customer's substation," provides:

5.11.1.1 For all contingency areas, primary service feeders shall be segregated

addition to other criteria requiring isolated circuits." Accordingly, the Relator argues that the documents establish that the commingling of the cables that are downstream from the four MVSs is in violation of §§ 5.11.1 and 5.11.2.

In support of his position, the Relator cites to the Short Circuit Study the stated purpose of which "was to determine the maximum available fault current at the various electric buses in the facility." Specifically, the Relator cites an excerpt providing that with respect to the High Voltage System approved by DOB, "the following assumptions are made about the cable and the conduit system:" 1. The four cables installed in each conduit [must] complete a three-phase circuit and are sufficiently spaced from other conduits so their heating affects do not require any derating of the cable. 2. All cables are assumed to be copper conductors, with an insulation rated for their application. 3. All conduits are Rigid Steel (Metallic), PVC coated."

The Relator also asserts that the drawings, and in particular E-6.01and E-1.02,[11] show that "DOB approved designs for [the system], which consisted of four independent, isolated circuits [and that] [e]ach of these circuits must be isolated from each other, beginning at the

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> such that no more than one feeder band (two primary service feeders) shall be installed on a common pole, or within the same duct bank or manhole.
>
> 5.11.1.2
>
> A minimum of twenty feet shall separate feeder bands regardless of the contingency.

[11]Specifically, in his memorandum of law the Relator maintains that E-6.01 shows that starting with the Con Edison power source, four separate sources of power connected to the Croton Plant through two manholes; that each of the four separate sources of power are directly connected to their four respective 13.2 KV Service Switchgear, and that each 13.2 KV Services switchgear is then connected to its respective Transformer which is connected to a 4.15 KV Main switchgear which is then connected to its individual 4.15 Distribution Switchgear. As for E-1.02, the Relator asserts that the drawing is a one line diagram which shows MVS cables exiting at the bottom of each of the four circuits of the drawing.

manhole service all the way downstream from the medium voltage switch gear units (MVSs) to the pumps and unit substations." The Relator maintains that as the cables at issue "are downstream from their respective MVSs, their cables are included within the DOB approved project because the entire cable is depicted between switchgear and its respective motor (pump) or unit substation (SUS)." In other words, the Relator apparently argues that as the MVSs and their cables are shown on the drawings they are part of the High Voltage System approved by DOB's Electrical Advisory Board, the cables at issue are subject to Con Edison specification, EO-2022 generally, and specifically § 5.11.1 and 5.11.2, which require segregation of primary feeders.

In further support of its position, the Relator also refers to notes section of Drawing E-1.02 that states:

> 1.THIS PROJECT INSTALLS NEW ELECTRICAL DISTRIBUTION SYSTEM TO SUPPLY THE ELECTRICAL LOADS AT CROTON 'WATER TREATMENT PLANT.
> 2. FOUR SEPARATE CON EDISON FEEDERS SHALL SUPPLY INDIVIDUAL SWITCHGEAR WITH ASSOCIATED CONTROL AND PROTECTION, DESIGN SHALL MEET OR EXCEED REQUIREMENT OF CON EDISON SPECIFICATION EO-2022.

(capitalization in the original).

The City opposes the motion, arguing that renewal should be denied as the Relator provides no reason for failing to present the documents earlier, noting that the Relator's FOIL request was made almost six years after this *qui tam* action was filed, more than two and a half years after the City declined to intervene in the action, and after the City filed its motion to dismiss in September 2018.

The City further argues that the "new facts," on which the motion is based "simply corroborate the evidence submitted by the City on the City's prior motion," and are not a basis for altering the original decision. In particular, the City asserts that drawing E-6.01 on which the Relator relies does not depict the cables at issue, which cables are downstream from the

substation shown on the drawing. As for the note on drawing E-1.02 relied on by Relator to argue that Con Ed specification EO-2022 applies to the MVS cables, the City maintains that the note expressly applies only to "Con Edison feeders" and that, in contrast, another note on the drawing states the NYC Electrical Code applies to "all electrical construction." The City also asserts that the drawings relied on by the Relator are consistent with the affidavits of Abbassi and Klavansky that the commingling of the cables from the MVSs does not violate the applicable Con Edison specifications, including EO-2022 §§ 5.11.1 and 5.11.2.

In reply, the Relator raises new arguments, including that the commingling of the MVS cables violates (i) a different sections of EO-2022, i.e., §§ 5.12.1 and 5.12.2, governing primary service feeders inside the substation,[12]and (ii) certain standards of the Institute of Electronics Engineers ("IEEE Standards").[13] The Relator also cites statements from both the Short Circuit

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[12] Section 5.11.2, entitled Primary Service Feeders inside the Customer's substation, provides:

> 5.11.2.1 For customers with services designed to first contingency requirements - All primary service feeders shall be concrete encased up to the Customer's Primary Service Feeder pothead cubicle.
>
> 5.11.2.2 For customers with services designed to second contingency requirements - A minimum of ten foot separation must be maintained between feeders. Primary service feeders installed in conduits in switchgear equipment rooms separated by less than ten (10) feet between feeder bands, shall be concrete encased up to the primary service feeder pothead cubicle.

[13]In reply, the Relator also cites to, and attaches, an opinion of the New York City Electrical Code Revision Interpretation Committee (ERIC) dated February 8, 2019 regarding whether NYCEC section 300.3(C)(1)(a) permits "load conductors" from 4.16KV Main Switchgear Substations feeding corresponding 4.16K Distribution Switchgears to share a common Pull Box without barriers between them. The Relator urges that response that "Secondary of transformers are not allowed to share raceways or pull boxes," demonstrates that Abbasi, who was the chair of ERIC at the time, was "mistaken" in finding the commingling of the MVSs cables at the Croton Plant did not violate the NYCEC. Notably, as indicated above, the court previously found that version of section 300.3(C)(1)(a) in effect at the relevant time did not apply to the cables at issue, and while the First Amended Complaint referred to NYCEC § 300.3, it does not specifically allege a violation of the section.

Study and the application for approval submitted by CSA to the DOB's Electrical Advisory Board, to argue that Con Edison Specification EO-2022 applies to the Croton's Plant's entire electrical system, including the cables from the MVSs.

"A motion to renew under CPLR 2221… is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 (1st Dept), lv dismissed 80 NY2d 1005 (1992); see CPLR 2221 (e)(2). Renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Nor is it available to argue new legal theories which could have previously been relied on." Matter of Beiny, 132 AD3d 190, 210 (1st Dept 1987), lv dismissed 71 NY2d 994 (1988), citing Foley v. Roche, 68 AD2d 558, 568 (1st Dept 1979). At the same time, "the rule is not inflexible and the court, in its discretion, may grant renewal, in the interest of justice, upon facts known to the movant at the time of the original motion." Rancho Satna Fe Ass'n v. Dolan-King, 36 AD3d 460, 461 (1st Dept 2007); see also, May v. May, 78 AD3d 667, 667 (2d Dept 2010) ("the court has the discretion to grant renewal upon facts known to the movant at the time of the original motion").

Here, although the Relator offers no excuse for first seeking the documents obtained in connection with his FOIL request after the City filed its dismissal motion, the court finds that under the circumstances here, renewal is warranted. However, for the reasons below, since the Relator fails to show that the newly submitted documents provide grounds for altering the court's finding that the City had shown that the dismissal of the State Finance Law § 189 claim is rationally related to a valid government purpose, the court adheres to its original decision.

At the outset, the court finds that the newly submitted documents are insufficient to support the Relator's contention that the commingling of the cables at issue violate Con Edison specification EO-2022, §§ 5.11.1 and 5.11.2.[14] Significantly, these documents, which are technical in nature and not self-explanatory, are not accompanied by affidavits or other substantiation, and the court will not adopt the meaning attributed to them by Relator's counsel in the absence of such support.

In contrast, as indicated above, in support of its dismissal motion, the City submitted affidavits of Abbassi and Klavansky who, variously stated that §§ 5.11.1 and 5.11.2, were not violated as these sections expressly apply to primary service feeders on the utility side of the substation, while cables from the MVSs, are downstream from the substation on customer side, and that the work of bringing the four Con Edison service feeders from the property line manholes to the service switchgear inside the substation was performed in accordance with the applicable specifications, including Con Edison requirements, and that Con Edison, which received drawings and other information as to the subject contract, performed multiple inspections of the property to confirm compliance with its specifications.

Next, as the Relator first raises arguments with respect to alleged violations of §§ 5.12.1 and 5.12.2 and certain IEEC standards in reply, such arguments are not properly considered. See JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 AD3d 575, 576 (1st Dept 2012) (declining to consider argument raised for the first time in party's reply brief). Moreover, even if the court were to consider these arguments, they would not provide a basis for altering the

[14]While the Relator resubmits, a preliminary report dated March 11, 2012 from Thomas Boehly, Ph. D, a forensic engineer, and an affidavit from William Mari, a master electrician, dated August 30, 2017, neither expert addresses the Con Edison specification at issue on this motion.

original decision. Regarding §§ 5.12.1 and 5.12.2, while these sections require certain barriers and separations between "primary service feeders" "inside a customer's substation," the Relator does not provide any substantiation for his position that these provisions apply to the cables at issue, which are located downstream from the substation.[15] As for the IEEC standards, the application of these standards is neither explained nor substantiated.

As for the Relator's argument that compliance with Con Edison specification EO-2022 was required of the entire electrical system at the Croton Plant, including the medium voltage cable like those at issue here, to the extent the documents relied on by the Relator support this argument, such argument is nonetheless unavailing as the Relator fails to cite any specific section of EO-2022 that was violated by the commingling of the MVS cable. As for the Short Circuit Study, Relator does not explain the implications of the assumptions in the study with respect to his allegations that the commingling of the MVS cable violated Con Edison specification EO-2022.

Accordingly, the court adheres to its original decision finding that the City has met its burden of showing that the dismissal of this action serves a rational government of conserving the City's resources, while the Relator has failed to demonstrate that the City's decision to dismiss was based on "improper factors." Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F3d at 1145-1146. See also United States ex rel. Stevens v. State of Vt. Agency of Natural Res., 162 F3d 195 (2d Cir.1998) rev'd on other grounds, 529 U.S. 765 (2000)(stating in dicta, that "the district court need only find that the government's decision to dismiss a qui tam suit,

[15]The Relator also does not address if these sections which apply to "customers with services designed for first contingency requirements" (§ 5.11.2) and "customers with services designed for second contingency requirements" (§ 5.12.2), are pertinent to the Croton Plant.

even a meritorious one, is supported by a valid governmental purpose that is not arbitrary or irrational and has some rational relation to the dismissal")(internal citation and quotation omitted); United States ex rel Piacentile v. Amgen Inc., 2013 WL 5460640, *3 (ED NY 2013)(the government was entitled to dismissal of qui tam complaint based on "its preference to avoid expending further resources on this action," and when, in the course of its investigation "the government determined that Relators' claims were unsupportable").

Conclusion

In view of the above, it is

ORDERED that the motion to renew is granted and, upon renewal, the court adheres to its original decision.

DATED: December 2020

J.S.C.

HON. JOAN A. MADDEN
J.S.C.