UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. PETER D. GRUBEA, *Plaintiffs,* v. ROSICKI, ROSICKI & ASSOCIATES, P.C., PARAMOUNT LAND, INC., THRESHOLD LAND INC., ENTERPRISE PROCESS SERVICE, INC., MCCABE, WEISBERG, & CONWAY, P.C., ATTORNEY OUTSOURCING SUPPORT SERVICES, INC., REO AMERICA ABSTRACT, INC., CENLAR FSB, CITIGROUP, INC., CITIBANK, N.A., CITIMORTGAGE, INC., DITECH FINANCIAL LLC, EVERHOME MORTGAGE COMPANY, EVERBANK FSB, FLAGSTAR BANK, FSB, GREEN TREE CREDIT, JAMES B. NUTTER & CO., METLIFE BANK, N.A., NATIONSTAR MORTGAGE LLC, ONEWEST BANK FSB, PHH MORTGAGE CORPORATION, PNC BANK, FSB, SUNTRUST MORTGAGE, INC., U.S. BANK, N.A., and WELLS FARGO & CO., *Defendants.*	12 Civ. 7199 (JSR)
UNITED STATES OF AMERICA ex rel. PETER D. GRUBEA, Plaintiffs, v. BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., J.P. MORGAN CHASE & CO., and JPMORGAN CHASE BANK, N.A., Defendants.	13 Civ. 1467 (JSR)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' i

MOTIONS TO DISMISS i

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 4

A. Defendants Knowingly Overcharged the GSEs and FHA 4

1. The GSEs and FHA Prohibited Unreasonable or Unnecessary Expenses 5

2. Defendants Violated Those Rules and Overcharged the Government 8

B. The Government Provided Funds Paid to the Servicers 14

III. LEGAL STANDARD 15

IV. ARGUMENT 16

A. Each Defendant Submitted or Caused the Submission of False Claims 16

1. The Overcharges Were False Under the Doctrine of Implied Certification ... 16

2. Fraudulent Overcharges are Factually False 23

3. The Servicers Submitted False Claims and Statements, the Foreclosure Defendants Caused the Submission of False Claims and Statements 26

B. The Overcharges Were Material 27

1. Overcharges are Material Under *Escobar* 28

2. Defendants' Other Arguments Lack Merit 31

C. Defendants Acted "Knowingly" 32

1. The Servicer Defendants Acted Recklessly 33

2. The Law Firms and Affiliates Acted Knowingly 38

D. Relator Alleged the Submission of False Claims with Particularity 39

1. Relator Alleged the Fraudulent Scheme with Particularity 40

2. Relator Alleged Fraudulent Submission of the Claims with Particularity...... 45

E. Fraud on Fannie and Freddie is Covered by the False Claims Act 47

1. Defendants are Liable under § 3729(a)(1)(A) and (a)(1)(B) 48

2. Liability For Reducing Net Sweeps Paid by the GSEs Under § (a)(1)(G) 55

F. The Complaints Plead a Reverse False Claims Theory for Overpayments Received by Defendants 58

1. The FCA Requires the Servicers to Return Overpayments 59

2. The Servicers are Required by Agreement to Return Overpayments 60

3. The Complaints Allege Scienter for the Reverse False Claims 62

G. The Complaints State a Claim for Conspiracy Against the Law Firms and Their Affiliates 63

H. The Action is Not Barred by Any Public Disclosure 65

1. There Was No Public Disclosure 66

2. Relator Is an Original Source 68

I. The Settlements Release Less Conduct than the Servicers Contend 70

1. Bank of America's "Riders" Do Not Immunize its Misconduct 70

2. The Flagstar Release Is Narrow 72

3. The OneWest Release Does Not Come Close to Covering this Fraud 73

V. CONCLUSION 74

TABLE OF AUTHORITIES

Cases

Abbott v. BP Expl. & Prod., Inc.,
851 F.3d 384 (5th Cir. 2017) 29

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 15

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 15

Bellevue v. Universal Health Servs. of Hartgrove,
867 F.3d 712 (7th Cir. 2017) 68

Bishop v. Wells Fargo & Co.,
870 F.3d 104 (2d Cir. 2017) 20

Cedric Kushner Promotions, Ltd. v. King,
533 U.S. 158 (2001) 64

Cooper v. Blue Cross & Blue Shield of Fla., Inc.,
19 F.3d 562 (11th Cir. 1994) 66

Copperweld Corp. v. Indep. Tube Corp.,
467 U.S. 752 (1984) 65

Espinoza ex rel. JP Morgan Chase & Co. v. Dimon,
797 F.3d 229 (2d Cir. 2015) 16

Garg v. Covanta Holding Corp.,
478 F. App'x 736 (3d Cir. 2012) 53

In re Cardiac Devices Qui Tam Litig.,
221 F.R.D. 318 (D. Conn. 2004) 39

Kane ex rel. U.S. v. Healthfirst, Inc.,
120 F. Supp. 3d 370 (S.D.N.Y. 2015) 63

Leshinsky v. Telvent GIT SA,
873 F. Supp. 2d 582 (S.D.N.Y. 2012) 68, 69

Meyer v. Kalanick,
174 F. Supp. 3d 817 (S.D.N.Y. 2016) 63

Mikes v. Straus,
274 F.3d 687 (2d Cir. 2001) 20

Moskal v. United States,
498 U.S. 103 (1990).. 50

O'Brien v. Nat'l Prop. Analysts Partners,
936 F.2d 674 (2d Cir. 1991) 32

Perry Capital LLC v. Mnuchin,
864 F.3d 591 (D.C. Cir. 2017).. 57

Ping Chen ex rel. United States v. EMSL Analytical, Inc.,
966 F. Supp. 2d 282 (S.D.N.Y. 2013) 67

Rainwater v. United States,
356 U.S. 590. (1958).. 18

Rose v. Stephens Inst.,
Case No. 09-cv-05966-PJH, 2016 WL 5076214 (N.D. Cal. Sept. 20, 2016)........................ 3, 30

Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.,
843 F.3d 561 (2d Cir. 2016) 15

U.S. ex rel. Adams v. Aurora Loan Servs., Inc.,
813 F.3d 1259 (9th Cir. 2016) 53

U.S. ex rel. Adams v. Wells Fargo Bank Nat. Ass'n,
2:11-cv-00535-RCJ-PAL, 2013 WL 6506732 (D. Nev. Dec. 11, 2013)................................. 52

U.S. ex rel. Advocates for Basic Legal Equality v. U.S. Bank, N.A.,
No. 13 Civ. 704 (N.D. Ohio May 12, 2015) 68

U.S. ex rel. Bahrani v. Conagra, Inc.,
465 F.3d 1189 (10th Cir. 2006) 62

U.S. ex rel. Baltazar v. Warden,
635 F.3d 866 (7th Cir. 2011) 66, 67

U.S. ex rel. Barko v. Halliburton Co.,
241 F. Supp. 3d 37 (D.D.C. 2017)... 18

U.S. ex rel. Bibby v. Wells Fargo Bank, N.A.,
165 F. Supp. 3d 1340 (N.D. Ga. 2015)... 43

U.S. ex rel. Bilotta v. Novartis Pharms. Corp.,
50 F. Supp. 3d 497 (S.D.N.Y. 2014) 43

U.S. ex rel. Boise v. Cephalon, Inc.,
2015 WL 4461793 (E.D. Pa. July 21, 2015).. 62

U.S. ex rel. Campie v. Gilead Sciences, Inc.,
862 F.3d 890 (9th Cir. 2017) 30

U.S. ex rel. Chorches v. Am. Med. Response,
865 F.3d 71 (2d Cir. 2017) .... passim

U.S. ex rel. Conroy v. Select Med. Corp.,
3:12-cv-00051 (S.D. Ind.)... 66

U.S. ex rel. Cosens v. Yale-New Haven Hosp.,
233 F. Supp. 2d 319 (D. Conn. 2002)... 66

U.S. ex rel. Costa v. Baker & Taylor, Inc.,
No. C-95-1825-VRW, 1998 WL 230979 (N.D. Cal. Mar. 20, 1998)..................................... 27

U.S. ex rel. Doe v. John Doe Corp.,
960 F.2d 318 (2d Cir. 1992) 67, 69

U.S. ex rel. Drakeford v. Tuomey,
792 F.3d 364 (4th Cir. 2015) 63

U.S. ex rel. DRC, Inc. v. Custer Battles,
562 F.3d 295 (4th Cir. 2009) 51

U.S. ex rel. Ervin & Assocs., Inc. v. Hamilton Secs. Grp., Inc.,
370 F. Supp. 2d 18 (D.D.C. 2005).. 33

U.S. ex rel. Escobar v. Universal Health Servs., Inc.,
842 F.3d 103 (1st Cir. 2016)... 29

U.S. ex rel. Farmer v. City of Houston,
523 F.3d 333 (5th Cir. 2008) 37

U.S. ex rel. Feldman v. City of New York,
808 F. Supp. 2d 641 (S.D.N.Y. 2011) 18, 37

U.S. ex rel. Forcier v. Computer Sciences Corp.,
183 F. Supp. 3d 510 (S.D.N.Y. 2016) 42

U.S. ex rel. Garbe v. Kmart Corp.,
824 F.3d 632 (7th Cir. 2016) 3, 26, 27

U.S. ex rel. Harman v. Trinity Indus., Inc.,
872 F.3d 645 (5th Cir. 2017) 29

U.S. ex rel. Harris v. Lockheed Martin Corp.,
905 F. Supp. 2d 1343 (N.D. Ga. 2012) 64

U.S. ex rel. Heath v. AT&T, Inc.,
791 F.3d 112 (D.C. Cir. 2015) 41

U.S. ex rel. Heath v. Wisconsin Bell, Inc.,
272 F. Supp. 3d 1094 (E.D. Wis. 2017) 18

U.S. ex rel. Hendow v. Univ. of Phoenix,
461 F.3d 1166 (9th Cir. 2006) 2, 23

U.S. ex rel. Howard v. KBR, Inc.,
139 F. Supp. 3d 917 (C.D. Ill. 2015) 19, 24, 25, 37

U.S. ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.,
336 F. Supp. 2d 430 (E.D. Pa. 2004) 55, 61

U.S. ex rel. Hussain v. CDM Smith Inc.,
14-cv-9107 (JPO), 2017 WL 4326523 (S.D.N.Y. Sept. 27, 2017) 24

U.S. ex rel. Keltner v. Lakeshore Med. Clinic, Ltd.,
No. 11-CV-00892, 2013 WL 1307013 (E.D. Wis. Mar. 28, 2013) 60, 63

U.S. ex rel. Kester v. Novartis Pharms. Corp.,
23 F. Supp. 3d 242 (S.D.N.Y. 2014) 39, 46, 67

U.S. ex rel. Kirk v. Schindler Elevator Corp.,
130 F. Supp. 3d 866 (S.D.N.Y. 2015) 36

U.S. ex rel. Kirk v. Schindler Elevator Corp.,
563 U.S. 401 (2011) 66

U.S. ex rel. Kirk v. Schindler Elevator Corp.,
601 F.3d 94 (2d Cir. 2010) 66

U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp.,
985 F.2d 1148 (2d Cir. 1993) 65

U.S. ex rel. Landis v. Tailwind Sports Corp.,
160 F. Supp. 3d 253 (D.D.C. 2016) 61, 62

U.S. ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 51

U.S. ex rel. Millin v. Krause,
2018 WL 1885672 (D.S.D. Apr. 19, 2018) 64

U.S. ex rel. Poehling v. UnitedHealth Grp., Inc.,
No. CV 16-08697-MWF, 2018 WL 1363487 (C.D. Cal. Feb. 12, 2018) 30

U.S. ex rel. Roy v. Anthony,
914 F. Supp. 1504 (S.D. Ohio 1994) 23

U.S. ex rel. Spay v. CVS Caremark Corp.,
913 F. Supp. 2d 125 (E.D. Pa. 2012) 43, 60

U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.,
944 F.2d 1149 (3d Cir. 1991) 69

U.S. ex rel. Todd v. Fid. Nat'l Fin., Inc.,
1:12-cv-666-REB-CBS, 2014 WL 4636394 (D. Colo. Sept. 16, 2014) 52

U.S. ex rel. Watkins v. KBR, Inc.,
106 F. Supp. 3d 946 (C.D. Ill. 2015) 18, 19

U.S. ex rel. Wood v. Allergan, Inc.,
246 F. Supp. 3d 772 (S.D.N.Y. 2017) .... passim

U.S. ex rel. Worthy v. E. Maine Healthcare Sys.,
2:14-cv-00184-JAW, 2017 WL 211609 (D. Me. Jan. 18, 2017) 31

U.S. ex rel. Yesudian v. Howard University,
153 F.3d 731 (D.C. Cir. 1998) .... passim

United States ex rel. Barko v. Halliburton Co.,
241 F. Supp. 3d 37 (D.D.C. 2017) 18

United States ex rel. Koch v. Koch Indus., Inc.,
57 F. Supp. 2d 1122 (N.D. Okla. 1999) 55, 57

United States ex rel. Ladas v. Exelis,
824 F.3d 16 (2d Cir. 2016) 64, 69

United States ex rel. Petras v. Simparel, Inc.,
857 F.3d 497 (3d Cir. 2017) 57, 58

United States ex rel. Springfield Terminal Ry. Co. v. Quinn,
14 F.3d 645 (D.C. Cir. 1994) 66

United States ex rel. Tessler v. City of New York,,
14-CV-6455 (JMF), 2016 WL 7335654 (S.D.N.Y. Dec. 16, 2016) 44

United States v. Caremark, Inc.,
634 F.3d 808 (5th Cir. 2011) 55

United States v. DynCorp Int'l LLC,
253 F. Supp. 3d 89 (D.D.C. 2017) .... passim

United States v. Huron Consulting Grp., Inc.,
843 F. Supp. 2d 464 (S.D.N.Y. 2012) 70

United States v. Huron Consulting Grp.,
No. 09 Civ. 1800 (JSR), 2011 WL 253259 (S.D.N.Y. Jan. 24, 2011) 16, 43

United States v. King-Vassel,
728 F.3d 707 (7th Cir. 2013) 33, 39

United States v. Krizek,
111 F.3d 934 (D.C. Cir. 1997) 33

United States v. McNinch,
356 U.S. 595 (1958) 24

United States v. Prabhu,
442 F. Supp. 2d 1008 (D. Nev. 2006) 18

United States v. President & Fellows of Harvard Coll.,
323 F. Supp. 2d 151 (D. Mass. 2004) 64

United States v. Public Warehousing Co.,
1:05-cv-2968-TWT, 2017 WL 1021745 (N.D. Ga. Mar. 16, 2017) 32

United States v. Rachel,
289 F. Supp. 2d 688 (D. Md. 2003) 24

United States v. Rivera,
55 F.3d 703 (1st Cir. 1995) 24

United States v. Rogan,
517 F.3d 449 (7th Cir. 2008) 30

United States v. Sanford-Brown, Ltd.,
840 F.3d 445 (7th Cir. 2016) 29

United States v. Supervalu, Inc.,
218 F. Supp. 3d 767 (C.D. Ill. 2016) 27, 43

United States v. TEVA Pharms. USA, Inc,
13 Civ. 3702 (CM), 2016 WL 750720 (S.D.N.Y. Feb. 22, 2016) 16, 39

United States v. United Healthcare Ins. Co.,
848 F.3d 1161 (9th Cir. 2016) 42

United States v. Visiting Nurse Serv. of N.Y.,
14-cv-5739 (AJN), 2017 WL 5515860 (S.D.N.Y. Sept. 26, 2017) 16, 17, 42

United States v. Wells Fargo Bank, N.A.,
972 F.Supp.2d 593 (S.D.N.Y. 2013) 42

Universal Health Servs., Inc. v. U.S. ex rel. Escobar,
136 S. Ct. 1989 (2016).. passim

Statutes

12 U.S.C. § 4513(a)(1)(A), (B)(i), (B)(v) 49

18 U.S.C. § 371 64

31 U.S.C. § 3729 26

31 U.S.C. § 3729(a)(1).. 48

31 U.S.C. § 3729(a)(1)(A) 19, 48

31 U.S.C. § 3729(a)(1)(B) 48

31 U.S.C. § 3729(a)(1)(G) 48, 55

31 U.S.C. § 3729(b)(1)(A)(ii)-(iii).. 32

31 U.S.C. § 3729(b)(1)(B) 3, 32

31 U.S.C. § 3729(b)(2)(A).. 48

31 U.S.C. § 3729(b)(2)(A)(ii) 48, 49, 50, 52

31 U.S.C. § 3729(b)(3) 56, 58, 59, 61

31 U.S.C. § 3729(b)(4) 27

31 U.S.C. § 3730(e)(4)(A) (2009) 66

31 U.S.C. § 3730(e)(4)(B) 68

Other Authorities

155 Cong. Rec. H5686-01, 2009 WL 1373400 48

155 Cong. Rec. S1679-01, 2009 WL 275706.. 48

48 C.F.R. § 1.101 19

48 C.F.R. § 2.101 19

Fannie Mae Servicing Guide 6, 22, 23, 28

Fed R. Civ. P. 9(b) .... passim

Freddie Mac Single-Family Seller/Servicer Guide .... passim

H. Rep. No. 111-97 68

HUD Handbook .... passim

S. Rep. No. 110-507 & n.80 .... 68, 69

S. Rep. No. 111-10 .... 48, 59, 62

S. Rep. No. 96-615 33

S. Rep. No. 99-345 33

I. INTRODUCTION

Relator Peter Grubea brings this lawsuit on behalf of the United States to recover hundreds of millions of dollars in overcharges billed to and paid by the Federal Housing Administration ("FHA") and two government-sponsored enterprises ("GSEs"), Fannie Mae and Freddie Mac. The fraudulent scheme alleged in this case involves wrongdoing in two stages: First, mortgage-foreclosure law firms across the country, often using thinly-disguised affiliates, submitted egregiously marked-up and inflated charges for expenses such as title searches and service of process. Second, the servicers of those defaulted mortgages—ignoring binding legal obligations to scrutinize and oversee those charges—passed them on with no oversight to the GSEs and FHA. The scope of the fraud is simply staggering.

Beginning in 2012, in lawsuits filed under seal, Relator disclosed this scheme to the Government. Since then, the Government has twice intervened: first against a servicer, and the second time against a mortgage-foreclosure law firm. The servicer was HSBC, which in 2014 paid a $10 million settlement and admitted the central allegations in Relator's Complaint, including that the bank failed to "ensure that the fees and expenses submitted by outside counsel and other third-party providers to HSBC . . . were reasonable, customary, or necessary." *See* Declaration of Cory Buland, Ex. A. The law firm was Rosicki, Rosicki & Associates, which now faces the Government's complaint-in-intervention alleging egregious markups of foreclosure expenses—inflated by up to 750%—that were passed on to Fannie Mae's servicers. In each case, the Government recognized Peter Grubea as an appropriate Relator under the False Claims Act. Far from being mere speculation or guesswork by an uninformed outsider, Relator's core theories of the fraud already have been vindicated by the Government's investigation.

But the misconduct that Relator revealed at HSBC implicates far more than just the Rosicki law firm; and the misconduct Relator uncovered at the Rosicki firm implicates far more

than just HSBC as servicer. In fact, Rosicki submitted fraudulent overcharges to over a dozen servicers, and HSBC submitted false claims that it received from multiple law firms. Relator has alleged similar misconduct throughout the stable of firms and servicers that were supposed to be protecting the GSEs and FHA—and, by extension, the taxpayers—against fraudulent overcharges in the foreclosures of GSE owned or federally insured mortgages. Relator's lawsuit is necessary in order to reverse years of false claims, and that is why the Government, far from dismissing Relator's case, is taking the unprecedented step (at least in this District) of opposing dismissal of Relator's Complaints on public disclosure grounds.

While the circumstances of the scheme are unique, Relator's Complaints present a classic overbilling FCA case that is pleaded in detail and backed by decades of caselaw. Defendants' "kitchen sink" arguments for dismissal should be rejected. First, Defendants argue that the Complaints fail to allege falsity. But overcharges in violation of a program's rules and regulations have been recognized for decades as false. *See, e.g.*, *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006) ("[W]here a private company overcharges under a government contract" it is an "archetypal *qui tam* False Claims action."). Defendants argue that under the Supreme Court's recent decision in *Escobar*, the representations relied on must be in the claims themselves, but that is not the law. *See U.S. ex rel. Wood v. Allergan, Inc.*, 246 F. Supp. 3d 772, 811 (S.D.N.Y. 2017) (after *Escobar*, "falsity may arise from the defendant's submission of a claim for payment that does not include a specific representation about the goods or services provided, coupled with noncompliance with a material payment requirement").

Second, contrary to defendants' arguments, the alleged markups and overcharges were material by definition. Under the FCA, "material" means "having a natural tendency to influence . . . payment"—a definition that squarely applies to the false sums that triggered the

overpayments here. Not surprisingly then, the caselaw demonstrates that violations of pricing terms are material to government payment decisions. *See, e.g.*, *U.S. ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 639 (7th Cir. 2016) (explaining that conduct need only be capable of leading to a recipient getting "more money than it should have gotten" to be material). Defendants claim that the continued payment of claims by the GSEs and FHA should defeat materiality, but courts have observed that the Government's failure to take action is "not terribly relevant to materiality" unless the Government explains that it is still paying in spite of the false statements, which is not the case here. *Rose v. Stephens Inst.*, Case No. 09-cv-05966-PJH, 2016 WL 5076214, at *6 (N.D. Cal. Sept. 20, 2016).

Third, Defendants claim that the Complaints fail to sufficiently allege scienter, but the FCA "does not require proof of 'a specific intent to defraud' and 'scienter may be alleged generally.'" *Wood*, 246 F. Supp. 3d at 828 (S.D.N.Y. 2017) (quoting § 3729(b)(1)(B) and citing Fed. R. Civ. P. 9(b)). Relator's Complaints plead facts giving a rise to a strong inference of at least recklessness by pleading (a) a duty on the part of the Servicer Defendants to monitor law firm expenses, paying particularly close attention to those using affiliates; (b) red flags warning the Servicer Defendants of the fraudulent billings, including a government investigation into their conduct and the HSBC settlement for the same misconduct; and (c) a nationwide pattern of fraudulent transactions, exemplified by 66 false claims detailed in the Complaints, that Servicer Defendants rubber-stamped and passed along to the GSEs and HUD.

Fourth, Defendants argue that the Complaints fail to satisfy Rule 9(b)'s particularity requirement, even while arguing simultaneously that the particulars of the overcharge scheme were so well known that Relator's pre-2010 claims should be dismissed on public disclosure grounds. Relator's Complaints, which include over 100 pages of specific allegations and

examples of transactions alleged to be false, contain sufficient detail to satisfy Rule 9(b).

Fifth, despite being notified that the Government is opposing dismissal of the Relator's Complaints on public disclosure grounds, Defendants nevertheless claim that the public disclosure bar still applies as to allegations pre-dating the FCA's 2010 amendments. These arguments should be summarily rejected. As reflected by the Government's decision to oppose dismissal, Relator Peter Grubea is not the type of "parasitic" relator the public disclosure bar was designed to eliminate, who learns about a scheme through the press or piggybacks on a pending Government investigation. On the contrary, Relator learned about the Defendants' scheme through his own work on foreclosure cases, admissions made to him by foreclosure firm attorneys, and discussions with those who had witnessed the Defendants' misconduct firsthand, and he furnished that information to the Government, triggering the Government's investigation, not the other way around.

While the Servicer and Foreclosure Defendants attempt to point fingers at each other, each was an essential component of the other's wrongdoing: the law firms could not have submitted false claims absent the servicers' reckless lack of oversight, and the servicers would not have submitted a single false claim absent the law firms' underlying dishonesty. Relator has sufficiently pleaded a case against both groups of defendants, and their motions to dismiss should be denied.

II. FACTUAL BACKGROUND

A. Defendants Knowingly Overcharged the GSEs and FHA

Fannie Mae and Freddie Mac helped lenders originate mortgage loans by purchasing and guaranteeing them. Similarly, FHA, an arm of the United States Department of Housing and Urban Development ("HUD"), insured approved lenders against losses on mortgage loans. Third

Amended Compl., 12 Civ. 7199 ("TAC"), ¶¶ 4-5.[1] The GSEs and FHA relied on private mortgage servicers to collect payments from borrowers, pursue collections from delinquent borrowers, and execute foreclosures where necessary. *Id.* ¶¶ 4-5. In exchange, the GSEs and FHA would reimburse servicers for the costs associated with foreclosures so long as those expenses were actual, reasonable, and necessary. *Id.* ¶ 6.

1. <u>The GSEs and FHA Prohibited Unreasonable or Unnecessary Expenses</u>

Each of the Servicer Defendants was bound by the rules issued by the GSEs and FHA governing foreclosure expenses. Defendants do not dispute that the Servicer Defendants were bound by these rules—they contractually agreed to the GSEs' rules (and certified their compliance annually, as a condition to participate in the programs) and, for FHA, certified at the beginning of the program (and annually as well) that they would be bound by HUD's rules. *See* TAC ¶¶ 59-60, 86-87, 98. Further, the Foreclosure Defendants[2] do not dispute their knowledge of the rules' requirements; in fact, the Rosicki Defendants submitted with their motion a copy of an agreement directly between the Rosicki firm and Fannie Mae apprising it of these obligations and imposing additional obligations to limit foreclosure expenses. *See* 12 Civ. 7199, Dkt. 133-2.

a. Fannie Mae

Fannie Mae's rules provide that every "servicer must attempt to minimize the costs

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[1] The allegations in both live complaints in 12 Civ. 7199 and 13 Civ. 1467 are substantially identical. Relator's brief will cite to the TAC filed in 12 Civ. 7199 unless additional information only contained in the Second Amended Complaint ("SAC") in 13 Civ. 1467 is being cited.

[2] The "Foreclosure Defendants" are the Rosicki firm and its affiliates, Paramount Land, Inc., Threshold Land, Inc., Enterprise Process Service, Inc. (collectively, the "Rosicki Defendants") and McCabe Weisberg & Conway and its affiliates, Attorney Outsourcing Support Services, Inc. ("AOSS") and REO America Abstract, Inc. ("REO", and together with McCabe and AOSS, the "McCabe Defendants"). The remaining defendants in both 12 Civ. 7199 and 13 Civ. 1467 are collectively referred to as the "Servicer Defendants" or the "Servicers."

incurred from vendors utilized by law firms—such as auctioneers, process servers, title companies, posting companies, and newspapers or other publications—by ensuring that all costs are actual, reasonable, and necessary." TAC ¶ 62 (citing Fannie Mae Servicing Guide E-5-07 (Dec. 13, 2017). Fannie Mae requires that the "servicer and law firm ***must regularly examine*** the pricing offered by alternative vendors and negotiate for the best value from the vendor and other qualified service providers." *Id*. (emphasis added). The servicing guide further specifies

- The servicer must inquire whether its attorney . . . has any interest in any Affiliated Business Entity that provides services in connection with any foreclosure, bankruptcy, or eviction proceeding;
- The servicer must require its attorney . . . to promptly disclose any such relationship or interest, and agree that any fees or expenses for such services do not exceed the customary and reasonable fees for comparable services in their jurisdiction; and
- The servicer is responsible for monitoring the fees or expenses charged by any Affiliated Business Entity and Fannie Mae will require the servicer to reimburse Fannie Mae for any unreasonable or excessive fees or costs.

Id. ¶ 63 (quoting Fannie Mae Servicing Guide, Part VIII, § 106.03 (Mar. 14, 2012)); *see also* Fannie Mae Servicing Guide, Part VIII, § 104.03 (Apr. 28, 2010)). Fannie Mae's contracts with the Servicer Defendants permit reimbursement only of those costs that are "***actual, reasonable, and necessary***." *Id.* ¶ 64 (emphasis added).

b. Freddie Mac

Freddie Mac has similar rules requiring oversight of foreclosure expenses. For example, Freddie Mac requires servicers to monitor, evaluate, and approve all parties to whom foreclosure activities are outsourced or assigned. TAC ¶ 91 (citing Freddie Mac Single-Family Seller/Servicer Guide, Vol. II, 57.2(b) (Jan. 1, 2015)). Freddie Mac requires that servicers ensure that any law firms they retain are free of any "***conflict of interest or potential conflict of interest***." *Id.* ¶ 92 (emphasis added) (quoting Freddie Mac Single-Family Seller/Servicer Guide,

Vol. II, 69.3(y) (June 1, 2013)). Freddie Mac requires servicers to "develop and have in place policies and procedures regarding oversight and compliance of firms" handling foreclosure matters. *Id.* ¶ 93. Servicers "***must have policies and procedures*** reasonably designed to ensure that firms handling Freddie Mac Default Matters are in compliance with . . . the applicable provisions of the Guide, and applicable law," specifically referring to "***compliance monitoring***" including of each law firm's "compliance with the limited retention agreement, including the fee and cost guidelines." *Id.* (emphasis added) (citing Freddie Mac Single-Family Seller/Servicer Guide, Vol. II, 69.11(a) (June 1, 2013).[3] Freddie Mac's contracts permit reimbursement of only those costs that are actual, reasonable, and necessary. *Id.* ¶ 94 (citing, *e.g.*, Freddie Mac Single-Family Seller/Servicer Guide Vol. II, 66.15.2 (October 1, 2011) ("Foreclosure counsel or trustee fees must be reasonable and comparable to those customarily charged in the area where the property is located.")).

c. FHA

FHA's rules require servicers to create and implement a quality control plan that ensures compliance with HUD rules, TAC ¶ 101, including that mortgagees review all claims to ensure that unallowable foreclosure expenses are not included in claims, *id*. ¶ 104-05, and that they "ensure that their contractors, agents, and loan correspondents are acceptable to FHA and operate in compliance with FHA requirements," *id*. ¶ 106. HUD rules expressly provide that the following costs are unallowable, and that HUD will not reimburse a servicer for:

- Fees and costs that exceed reasonable and customary fees for the area;
- Costs that are not necessarily incurred . . . ; and
- Costs that are overhead items such as postage, telephone, duplicating or collection services, all of which should be included in the attorney's or trustee's fees.

[3] *Available at*: http://www.freddiemac.com/singlefamily/guide/.

TAC ¶ 110 (quoting HUD Handbook 4330.4, 2-15(B)). HUD rules expressly prohibit servicers from listing any unallowable costs on their applications for FHA benefits as either attorneys' fees or foreclosure-related costs, *id*. ¶ 111, and they obligate servicers to "promptly reimburse HUD for any amount overpaid because of incorrect, unsupported or inappropriate information they provide," *id*. ¶ 112 (quoting HUD Handbook 4330.4, 1-28).

2. Defendants Violated Those Rules and Overcharged the Government

a. Law Firms

Law firms, including the Foreclosure Defendants, generated illegal and excessive charges for foreclosure costs such as title searches, service of process, the arrangement of publication of legal notices, and related services. TAC ¶ 114. The law firms were motivated to submit these excessive charges because Fannie Mae, Freddie Mac, and FHA monitored, capped, and limited reimbursement for attorneys' fees—***but generally not costs***. *Id.* ¶ 116. By inflating charges for costs, as opposed to fees, law firms were able to profit handsomely from their foreclosure work, despite the strict limitations on attorneys' fees. *Id*.

A key element of the law firms' scheme was to create subsidiary corporations to handle and bill for foreclosure expenses. Affiliated subsidiaries (such as the Rosicki Firm's affiliates, Paramount and Enterprise) generated illegal and excessive charges for foreclosure services, which the law firms then passed along to loan servicers. *Id.* ¶ 114.[4] The scheme frequently involved the affiliated entities hiring third parties to do the work at market rates and then charging the law firms for the identical service at marked-up prices. In other instances, the

[4] The Servicer Defendants point out that FHA reimburses servicers for the majority, but not all, of the submitted foreclosure costs. Svc. Br. at 5. The fact is irrelevant to Defendants' liability for claims submitted to FHA—it goes only to the amount of damages and not to liability – and says nothing about Defendants' liability for claims submitted to the GSEs.

affiliate might actually do the work but charge a price well above market rates. The law firms, including the Foreclosure Defendants, were aware of the Fannie Mae, Freddie Mac, and FHA rules limiting fees to necessary and reasonable costs, but overbilled nevertheless. *Id*.

i. Rosicki

The Rosicki Firm provides a stark example of the law firms' overcharges. Indeed, Rosicki does not challenge that the Government and Relator have pleaded the facts of the scheme as against it in accordance with Rule 9(b).

It is undisputed that during the time period in question, Rosicki had an interest in and controlled two companies, Paramount and Enterprise, that Rosicki used for title and service work throughout the State of New York. *See* TAC ¶ 122. Paramount and Enterprise systematically overbilled for foreclosure services that were not reimbursable by the GSEs or FHA, and as they knew, the overcharges were ultimately submitted to those agencies. *Id.* ¶¶ 123-133. For example, Relator's Complaint notes that Paramount and Enterprise regularly billed at excessive rates or services including: title searches (*e.g.*, at $495, despite market rates between $100-$250); personal service well above market rates (*e.g.*, at $125, despite market rates of approximately $20-$40, and full charges for additional defendants residing at the same address). *Id.* ¶ 131. Moreover, Enterprise often contracted with other companies to conduct these foreclosure services, and then simply marked up the bills before seeking reimbursement. *Id.* ¶ 134. The Government's complaint-in-intervention alleges a number of examples of egregious overcharges involving the Rosicki firm, and notes that senior attorneys at Rosicki were aware of the revenue margins on expenses marked up by Enterprise, "***which ranged from 300% to 750%***." Gov't Compl. ¶ 75 (emphasis added). Relator's Complaints include thirteen different examples of significant overbilling, involving false claims submitted by many of the servicer defendants, involving the Rosicki firm.

ii. McCabe

As with Rosicki, it is undisputed that the McCabe firm has an interest in and control over two affiliates used for title and service work, AOSS and REO. *Id.* ¶¶ 138-139. Relator's Complaints allege that McCabe used these affiliates to grossly overbill the servicers, and ultimately the GSEs and FHA, for expenses including title search and service of process. Relator's Complaints include several different examples of significant overbilling by the McCabe firm, involving false claims submitted by many of the servicer defendants.

The McCabe firm seeks to convert the motion to dismiss into a motion for summary judgment, presenting highly redacted documents from fly-by-night vendors in support of its argument that it did not use its affiliate AOSS for service of process in some of the examples. McCabe's submission is notably silent about the allegations that it used its affiliate REO to inflate title work in the examples (TAC ¶¶ 306-307; SAC ¶¶ 189-190, 254-255), and says nothing about the two examples provided in the 13 Civ. 1467 Complaint, which Relator has confirmed involved AOSS (SAC ¶¶ 191-192; 255-256). Remarkably, it also points to the highly redacted invoices as evidence of what reasonable market rates for service of process were—including one performed for the Baum Firm, a notorious foreclosure firm shut down in 2011 for foreclosure abuses.[5]

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[5] Relator is prepared to supplement his Complaint, if necessary, to provide additional examples of McCabe using its affiliates REO and AOSS to service GSE mortgages at indisputably unreasonable rates. Two illustrations include GSE foreclosures where McCabe's REO title affiliate billed between $445-$510 for New York title work (which should have cost $100-$250, *see* TAC ¶ 141(a)), and where its AOSS service affiliate billed $836 for personal service on two defendants, three attempts at service, and mailings (all of which should have cost less than $150, *see* TAC ¶ 141(b), plus the minimal costs of mailing). *See* Declaration of Kaleigh Erin Wood, dated May 7, 2018, ¶¶ 8-23 & Exs. 2-3, 5-6. As alleged in the Complaint, in both cases, McCabe chose not to contract directly with the process server—who charged the going rate of $30 for personal service, *see id.* ¶ 6—but to route service through its affiliate, AOSS, who then

iii. Other Firms

The Complaints point to dozens of examples concerning other firms' overbilling, including but not limited to the Aronowitz Firm, *see, e.g.,* TAC ¶ 193 ($275 for title work that cost $100-125), Shapiro, Dicaro & Barak, LLC, *id.* ¶ 231 ($1,215 for service of process work, including $75 for personal service on each defendant, where market rates were between $20-40); Fein Such, *id.* ¶ 291 ($450 for title work; market rates were between $100-250 per person); and Medved Dale Decker & Deere, *id.* ¶ 382 (charging $275 for title work that on information and belief was completed by an unaffiliated title company for $100-$125).

As the Servicer Defendants point out, in 2014, after Relator's Complaints were filed, the Colorado Attorney General filed civil enforcement actions against eight different Colorado law firms (including the Aronowitz and Medved firms identified above) specifically charging them with "misrepresenting and inflating the costs they incur for foreclosure-related services to fraudulently obtain tens of millions of dollars in unlawful proceeds." Declaration of Andrew Schilling ("Schilling Decl.") Ex. N ¶ 1, 12 Civ. 7199, Dkt. 126-14.[6] Colorado specifically alleged after "an extensive two-year civil law enforcement investigation" that foreclosure firms

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aggressively marked up the bill many times over before seeking reimbursement. Relator also could describe conversations with individual process servers who signed certificates of service on behalf of AOSS for McCabe foreclosures, including GSE foreclosure examples. These process servers confirmed that they signed as if they worked for AOSS, but that they were actually independent process servers who charged market rates to AOSS, and that AOSS marked up their prices substantially before passing them on to McCabe.

[6] The Servicer Defendants' brief incorrectly states that Relator did not raise any allegations about Colorado-based law firms until after the Colorado Attorney General's complaint, which was filed on July 14, 2014. Servicers' Br. 46; *see* Schilling Dec. Ex. N. In fact, Relator had previously raised allegations about the Colorado-based Aronowitz firm in his disclosure statements filed with the U.S. Attorney's Office, as well as his Second Amended Complaint in 12 Civ. 7199, dkt. 28, and his First Amended Complaint in 13 Civ. 1467, dkt. 23.

in Colorado handling the majority of foreclosures from 2006 onward "unlawfully exploit[ed] the foreclosure process by misrepresenting and inflating the costs they incur." *Id.* ¶¶ 1-4. As to the Aronowitz firm, the Attorney General alleged that the firm and its principals "do this primarily through affiliated vendors, which create invoices for foreclosure services at costs grossly inflated above the actual costs and above what unaffiliated vendors charge for the same services." *Id.* ¶ 2. The Attorney General secured consent judgments against several of the firms as well as about $12 million in settlements.[7]

Relator's Complaints note that firms nationwide use affiliates for title search and service of process work, including the law firm of Steven J. Baum (practiced in New York), Aronowitz & Mecklenberg (in Colorado), Routh, Crabtree & Olsen (on the west coast), Schneiderman & Sherman (in Michigan), and Brock & Scott (in Florida, Georgia, Tennessee, North and South Carolina, Virginia, and Maryland). TAC ¶ 163. Indeed, approximately three quarters of the law firms handling Fannie Mae foreclosures appear to be utilizing affiliate vendors. *Id.* ¶¶ 163-64.

b. Servicer Defendants

The GSEs and FHA relied on the Servicer Defendants as their watchdogs to monitor and control the foreclosure expenses submitted by law firms. Instead, the Servicer Defendants did nothing, simply filing false claims to the agencies that included the law firms' overcharges, in violation of their obligations. There was a plain motivation for the servicers' lack of oversight: they wished to avoid the substantial time and expense that proper oversight of foreclosure expenses would have required. The servicers preferred to turn a blind eye and pass the false charges along to the GSEs and FHA, all the while continuing to generate massive fees for themselves by servicing federally guaranteed and insured loans. *See, e.g.*, Wells Fargo & Co.,

[7] https://www.reuters.com/article/us-usa-coloradoo-foreclosure/colorado-attorney-general-settles-with-three-more-foreclosure-firms-idUSKBN0IQ2CR20141106.

Annual Report (Form 10-K) (Feb. 28, 2012), Ex. 13 (Annual Report to Stockholders) at 37 (showing $3-$5 billion in servicing revenue each year between 2009, 2010, and 2011). The Servicer Defendants' wholesale failure to monitor, audit, and control foreclosure expenses created the opportunity for law firms and their affiliates, as well as other vendors, to overcharge for those fees. TAC ¶ 117. If the Servicer Defendants had lived up to their obligations to monitor and refuse to pay unreasonable and unnecessary fees, then law firms, including the Foreclosure Defendants, would not have been able to submit false claims to the GSEs and FHA for unnecessary and unreasonable foreclosure expenses. *Id.* ¶ 118.

The Servicer Defendants should have discovered the law firms' misconduct with regard to foreclosure expenses. The Complaints note several red flags, including Relator's own complaints to several of the Servicer Defendants and the Government's 2013 subpoenas relating precisely to this conduct. TAC ¶¶ 154-58. Moreover, the Servicer Defendants now claim that the possibility that law firms might retain affiliates and overcharge was "*exhaustively* reported in the national press for nearly two decades." Servicers' Br. at 41 (emphasis in original).

Moreover, HSBC and its affiliates, formerly co-defendants with the Servicer Defendants in this case, reached a widely-publicized settlement with the Government prior to the unsealing of these actions. In that settlement, HSBC ***admitted*** that it "failed to create or maintain an adequate FHA quality control program to review the fees and charges submitted by outside counsel," that it "failed to sufficiently oversee the fees and charges, despite certifying to FHA that it had done so," and that it "failed to create or maintain Fannie Mae audit and control systems sufficient to ensure that the fees and expenses submitted by outside counsel and other third providers to HSBC, which HSBC then submitted to Fannie Mae for reimbursement, were reasonable, customary, or necessary." Buland Decl., Ex. A ¶ 2(h), (i), (l). In sum, HSBC

admitted the fundamental accuracy of Relator's allegations.[8]

In the July 2014 Aronowitz complaint, the Colorado Attorney General expressly alleged after its investigation that "there is generally no . . . monitoring" by servicers of foreclosure costs. 12 Civ. 7199, Dkt. 126-14 ¶ 46. The complaint makes clear what causes this lack of oversight: "Servicers that hire the law firm for the investor do not absorb the law firm's costs themselves. Rather, servicers obtain reimbursement from homeowners, investors, and insurers. . . . Here, the servicer has little incentive to scrutinize costs because it ultimately passes those costs to someone else." *Id.* ¶ 47. Consequently, "servicers rely on the law firm's representations as to what its vendors charge for foreclosure services without verifying whether these charges are actual, necessary, reasonable, or consistent with market rates." *Id.* ¶ 48.

B. The Government Provided Funds Paid to the Servicers

Following a nationwide crash in the housing market, by September 2008, Fannie Mae and Freddie Mac were at the brink of insolvency. *See* TAC ¶ 45. In response, Congress created the Federal Housing Finance Agency ("FHFA") to provide oversight of Fannie Mae and Freddie Mac. *Id.* ¶ 46. On September 6, 2008, FHFA exercised its statutory authority to place both Fannie Mae and Freddie Mac into conservatorship. Both GSEs remain under FHFA conservatorship today. *Id.* ¶ 47.

As part of this arrangement, the Government provided Fannie Mae and Freddie Mac with over $100 billion between 2009 and 2012 in order to cover the amount by which the GSEs'

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[8] Since Relator filed his Complaints, the United States has frequently entered into other settlements with many of the Servicer Defendants to resolve other misconduct. Each time, including settlements with Suntrust, Bank of America, MetLife, US Bank, and Wells Fargo, the United States has specifically carved out of its release liability arising out of the misconduct asserted in Relator's Complaint and specifically cited Relator's Complaint. *See* Buland Decl. & Exs. C at Ex. J ¶ 3(k); D at ¶ 15(m); E at ¶ 3(d), F at ¶3(d), and G at ¶ 10(e).

liabilities exceeded their assets. *Id.* ¶¶ 49, 75. In this period, each dollar of fraud against the GSEs resulted in their absorption of an additional dollar of taxpayer money. *Id.* ¶¶ 76-77. In exchange, Fannie and Freddie agreed to make quarterly dividend payments to the Treasury under Senior Preferred Stock Purchase Agreements ("SPA"). *Id.* ¶¶ 50-52, 76. In 2012, Third Amendments to the SPAs replaced the current dividend scheme with an obligation for each GSE to make quarterly payments to the United States Treasury equal to their net worth less a small capital reserve. *Id.* ¶¶ 50, 76.

The Government's funds remain invested in the GSEs, and the GSEs' obligations to repay the Government have not been satisfied. *Id.* ¶¶ 53, 80. Because the SPAs obligate the GSEs to make quarterly dividend payments directly related to their net worth, and because any money used to pay servicing expenses necessarily diminishes their net worth, the reimbursements at issue in this case decreased the amount of dividend payments owed and paid to the United States on a dollar-for-dollar basis. *Id.* ¶ 513.

III. LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss must be denied where the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if it supported by "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In analyzing a complaint, the court must "accept[] all factual allegations as true and draw[] all reasonable inferences in favor of the plaintiff." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016).

Rule 9(b) requires that the plaintiff "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). But "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* "'[T]he adequacy of particularized

V. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied.

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New York, New York

Respectfully submitted,

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