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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, *ex rel.* BRIAN HASTINGS,

Plaintiffs,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION (INC.), individually as s/b/m with WELLS FARGO HOME MORTGAGE, INC.; *et al.*,

Defendants.

Case No. 2:12-cv-03624-DDP-SS

REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: June 25, 2014
Time: 2:30 p.m.
Courtroom: 3, 2nd Floor
Judge: Hon. Dean D. Pregerson

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INTRODUCTION

Brian Hastings ("Hastings") alleges that mortgage loans to borrowers who received assistance from seller-funded down payment assistance programs ("DAPs") violated HUD guidelines and were not eligible for FHA insurance. Yet, that allegation was publicly disclosed more than a decade before he filed his first *qui tam* suit based on that theory in 2007 abandoned in 2009. For that reason, and because Hastings is not an original source of any fraud by any of Defendants here, his claims are barred by the Public Disclosure and First-to-File bars of the False Claims Act ("FCA"). Regardless, the public record also demonstrates that loans with seller-funded DAPs were eligible for FHA insurance until Congress amended the Fair Housing Act in 2008, which amendments did not take effect until *after* the origination of the loans at issue in this case. Hastings' Opposition to Defendant's Motion to Dismiss ("Opposition") cannot overcome either of these fatal flaws. As a result, this Court should dismiss the First Amended Complaint ("FAC") with prejudice.

Any relator filing a *qui tam* suit must allege sufficient facts to clear the jurisdictional hurdles of the Public Disclosure and First-to-File provisions of the FCA. Hastings did not, and cannot, clear those hurdles. Defendants cited numerous qualifying public disclosures regarding seller-funded DAPs between 1997 and 2008, and Hastings is simply wrong that these public disclosures failed to mention the "sales price manipulation scheme" at the heart of the FAC. The cited disclosures clearly alleged that sellers were raising home prices to recover donations to DAPs. They certainly contained enough information to enable the government to pursue an investigation, thereby shifting the burden to Hastings to show that he was an original source under 31 U.S.C. § 3730(e)(4)(B). *See U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009).

Hastings fails to carry that burden. As an initial matter, Hastings does not even attempt to rebut Defendants' dismissal arguments and thus effectively concedes that his original source evidence pled in the FAC is insufficient. Instead, Hastings now

relies upon new documents that he contends establish his status as an original source. None of these documents is sufficient, however, because none demonstrates Hastings' firsthand knowledge, or a disclosure to the government, of any allegation that any Defendant had submitted false claims to HUD as a result of mortgages originated through seller-funded DAPs. Hastings thus cannot qualify as a whistleblower of any fraud on the government by any of the Defendants.

The FAC is also barred under the FCA's First-to-File provision. Try as he might to distinguish the FAC from the *qui tam* case he filed in 2007 but abandoned in 2009, Hastings cannot avoid the fact that the two cases allege "the same material elements of fraud," which triggers the bar against successive FCA proceedings. *See U.S. ex rel Lujan v. Hughes Aircraft Co.,* 243 F.3d 1181, 1189 (9th Cir. 2001) (first-to-file bar precludes "later-filed actions alleging the same material elements of fraud . . . regardless of whether the allegations incorporate somewhat different details"). While the FAC includes some new terminology, both suits (i) allege that FHA-approved lenders violated HUD's downpayment requirement by using DAPs; (ii) cite the same statutes, regulations, handbooks, letters and forms; and (iii) purport to seek recovery for the same FHA loans. Because both suits contain the same core allegations, the First-to-File bar applies and precludes this lawsuit.

Even if the FAC were not jurisdictionally deficient, it still fails to state a viable claim and must be dismissed pursuant to Rule 12(b)(6). Hastings' core allegation – that Defendants violated FHA requirements by originating FHA loans for buyers who used seller-funded DAPs – is contrary to HUD's repeated acknowledgement that these DAPs were lawful. Hastings argues that Defendants nevertheless violated the FCA because the sellers' contributions were rolled into the purchase prices and thus financed as part of the mortgages. But, he ignores the fundamental fact that HUD knew that this was occurring and approved the programs anyway. In light of HUD's repeated pronouncements, Hastings did not, and cannot, plead that Defendants submitted a false claim or that they did so with the requisite scienter.

As a final matter, the FAC does not remotely satisfy Rule 9(b)'s heightened pleading standards. Simply providing a list of loans that Defendants originated through a DAP does not identify the who, what, when and how of any alleged fraud**.**

Each of these grounds provides an independent basis for dismissal with prejudice.

ARGUMENT

I. The FAC Must Be Dismissed For Want Of Jurisdiction.

The FCA contains two provisions that preclude opportunistic *qui tam* litigation: the Public Disclosure bar, 31 U.S.C. § 3730(e)(4), and the First-to-File bar, *id.* § 3730(d)(5). The former bars *qui tam* cases that are substantially similar to prior public disclosures unless the relator is an original source of his allegations. *See U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009). The latter bars *qui tam* cases based on the same facts as a prior case. *See U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001). This case violates both provisions, with each providing a separate and independent ground for this Court to dismiss this lawsuit for want of jurisdiction.[1]

A. The Public Disclosure Bar Mandates Dismissal.

1. The Allegations of the FAC Have Been Publicly Disclosed.

Defendants identified numerous qualifying public disclosures from 1997 to 2008 that discussed DAPs, their status under the National Housing Act and HUD/FHA rules, and their potentially inflationary impact on home prices. Defs.' Mem. 4:14-10:27, 17:1-19:13 (discussing Declaration of Brooks Brown ("Brown Decl.") Exs. 2 to 29).[2] These disclosures were more than sufficient to put the

[1] Hastings does not contest that § 3730(e)(4) and § 3730(b)(5) both establish jurisdictional prerequisites to this action. *See* Mem. of Points & Authorities in Supp. of Defs.' Joint Mot. to Dismiss First Am. Compl. ("Defs.' Mem.") 13:24-28 n.4.

[2] Hastings does not contest that the disclosures all fall within the categories enumerated in 31 U.S.C. § 3730(e)(4)(A)(i)-(iii). He also does not object to Defendants' request that the Court take judicial notice of the disclosures for purposes of the Public Disclosure bar. *See* Request for Judicial Notice in Supp. of Defs.' Joint Mot. to Dismiss First Am. Compl.

1 government on notice and activate the "'quick trigger'" of § 3730(e)(4)(A). *Malhotra*
2 *v. Steinberg*, No. 09-1618, 2013 U.S. Dist. LEXIS 15652, at *14 (W.D. Wash. Feb. 5,
3 2013) (quoting *Hagood v. Sonoma Cnty. Water Agency*, 81 F.3d 1465, 1476 n.18 (9th
4 Cir. 1996)). None of Hastings' arguments alter that conclusion. *See* Pl.'s Opp. to
5 Defs.' Mot. to Dismiss ("Opp.") 36:19-39:2.

6 First, Hastings argues that because his own alleged communications with HUD
7 predate the public disclosures, those disclosures came too late to bar the FAC. *See*
8 Opp. 29:21-36:22. This argument misses the mark. The only temporal question under
9 § 3730(e)(4)(A) is whether the disclosures predate the relevant complaint. *See*
10 *Rockwell Int'l Corp. v. U.S.*, 549 U.S. 457, 473 (2007). The disclosures noted here,
11 which occurred between 1997 and 2008, obviously predate the filing of this case.
12 Indeed, most also predate the commencement of the initial FCA complaint that
13 Hastings filed in 2007. *See U.S. ex rel. Hastings v. Countrywide Home Loans, Inc.*
14 *("Hastings I")*, No. 07-3897 (C.D. Cal.).

15 Second, Hastings claims that the Public Disclosure bar does not apply because
16 the disclosures failed to mention the "sales price manipulation scheme" described in
17 the FAC. Opp. 36:22-24. That assertion is false. The press reported that the "costs"
18 of DAPs were "usually shifted to the buyer via an increased price on the house."
19 Brown Decl. Ex. 6 at 2; *see also* Brown Decl. Ex. 3 at 2 (reporting that buyers must
20 agree to purchase the home at "the full asking price"); Brown Decl. Ex. 4 at 2
21 (reporting that contributing to the DAP cost sellers less than accepting an offer on the
22 open market). Beyond this, the HUD Office of the Inspector General ("HUD OIG")
23 reported in 2000 that sellers "raised the sales prices of properties to cover the cost of
24 the [DAPs] <u>causing buyers to finance higher loan amounts</u>." Brown Decl. Ex. 18 at 1
25 (emphasis added). Similar statements were made (i) in other federal reports, *see*
26 Brown Decl. Ex. 23 at 16; Brown Decl. Ex. 24 at 36; Brown Decl. Ex. 25 at 19-20;
27 (ii) at Congressional hearings, *see* Brown Decl. Ex. 22 at 33; Brown Decl. Ex. 27 at
28 12-13, 14, 28-29; Brown Decl. Ex. 29, (iii) in Federal Register notices, *see* 72 Fed.

1 Reg. 27048 (May 11, 2007); 72 Fed. Reg. 56002 (Oct. 1, 2007), and (iv) in judicial
2 opinions, *see Penobscot Indian Nation v. HUD*, 539 F. Supp. 2d 40, 44-45 (D.D.C.
3 2008); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 841 (E.D. Cal. 2008).
4 Third, Hastings argues that the disclosures were required to, but did not,
5 explicitly level accusations of fraud. Opp. 36:24-37:3. The law is to the contrary. As
6 long as a public disclosure describes the same type of violation, it does not matter
7 whether the "fraud" label is used. *See, e.g.*, *U.S. v. Alcan Elec. & Eng'g*, 197 F.3d
8 1014, 1019-20 (9th Cir. 1999) (citing *Hagood*, 81 F.3d at 1473, 1474 n.14);
9 *Amphastar Pharms. Inc. v. Aventis Pharma SA*, No. 09-0023, 2012 U.S. Dist. LEXIS
10 162900, at *19 (C.D. Cal. Nov. 14, 2012). Here, the disclosures clearly alleged that
11 DAPs violated HUD requirements. *See, e.g.*, Brown Decl. Ex. 18 at 7 (DAPs
12 "circumvent" FHA requirements and "do not meet the intent of FHA requirements").
13 In fact, they did so using the precise language that Hastings adopts in his FAC. The
14 most frequent refrain in the FAC is that DAPs involved allegedly <u>false gifts</u>. *See, e.g.*,
15 FAC ¶¶ 78, 86, 89, 95, 106-107, 112-116, 118, 119, 122, 140, 159, 165, 179, 188,
16 190, 196, 200(a), 222, 231(b), 237, 242, 254, 255, 258, 260, 273, 283, 291, 304. That
17 phrase was coined twelve years earlier when HUD OIG alleged that a DAP
18 contribution was "<u>not a true gift</u>." Brown Decl. Ex. 18 at 7 (emphasis added).
19 Fourth, Hastings asserts that the disclosures must have accused these specific
20 Defendants of wrongdoing. Opp. 37:22-38:10. This is incorrect as a matter of law –
21 public disclosures need only identify a "narrow class of suspected wrongdoers," not a
22 specific defendant. Defs.' Mem. 20:11-27; *Amphastar*, 2012 U.S. Dist. LEXIS 62900,
23 at *19; *Alcan Elec.*, 197 F.3d at 1019; *also accord U.S. ex rel. Fine v. Sandia Corp.*,
24 70 F.3d 568, 571-72 (10th Cir. 1995). Although Hastings contends that there are too
25 many FHA-approved lenders for the disclosures to have enabled the government to
26 investigate and identify the Defendants he now targets, Opp. 38:1-2, he also asserts
27 that Defendants are the "industry dominant Direct Endorsement lenders," FAC ¶ 283.
28 He thus sues the "top FHA originators" that hold "an estimated 60.3 percent market

share of FHA lending." FAC ¶ 343. The supposition that the government could not similarly identify "the top FHA experts in the field collectively holding a majority of the FHA market share," FAC ¶ 273, is meritless. *Cf. U.S. ex rel. Adams v. Wells Fargo Bank N.A.*, No. 11-535, 2013 U.S. Dist. LEXIS 175322, at *20 (D. Nev. Dec. 11, 2013) (news articles generally referring to the mortgage servicing industry were sufficient to trigger the Public Disclosure bar).

Finally, Hastings argues that the disclosures were insufficient because they were solely concerned with the "default rate" and gave the government "no reason" to investigate the lawfulness of DAPs. Opp. 37:14-21, 38:11-20. This argument fails on both the law and the facts. Legally, the government's motivation for acting (or not acting) is irrelevant. The issue is whether "the prior public disclosures contained enough information to enable the government to pursue an investigation." *Alcan Elec.*, 197 F.3d at 1019 (emphasis added); *see also Amphastar*, 2012 U.S. Dist. LEXIS 162900, at *18. Here, it did. *See* Defs.' Mem. 18:14-19:13. The government actually conducted multiple investigations. HUD OIG interviewed officials from seven different lenders as part of an investigation from May 1999 to January 2000. Brown Decl. Ex. 18 at 6. HUD representatives interviewed another 30 lenders and underwriters as part of a follow-up investigation in 2004. Brown Decl. Ex. 27 at ii, 49. Those investigations were not limited to just the default rate: Both determined that sellers had manipulated the sales prices to recoup the amount of the contributions they were required to make to the DAPs. *See* Brown Ex. 18 at 1; Brown Ex. 27 at vii.

In light of the numerous qualifying public disclosures, it is Hastings' burden to prove that he is an original source under § 3730(e)(4)(B). *See Meyer*, 565 F.3d at 1199.

2. Hastings Is Not An Original Source Of Any Of The Alleged Fraud.

An "original source" is someone who (i) witnesses (and thus has personal knowledge of) a specific fraud that results in a specific false claim, and (ii) discloses

the fraud, the defendant, and the false claim to the government. 31 U.S.C. § 3730(e)(4)(B). Hastings has not demonstrated that he meets these requisite criteria. He does not claim to have witnessed any of the alleged FCA violations of these Defendants, and he does not claim to have disclosed the alleged fraud of these Defendants to the government. Hastings may well have conducted an "investigation" of Nehemiah's "marketing materials," Opp. 32:14-16, and real estate listings promoting that program, Opp. 9:12-13, and he also may have concluded that Nehemiah's programs "increase[d] the total transaction cost of a home purchase," Opp. 30:22-24. Hastings' investigation, however, did not transform him into a whistle-blowing insider who is the original source of the alleged fraud by any of the Defendants here. To hold otherwise "would mean that anyone – an insider or an outsider – who conducts an investigation and learns of alleged fraud from whatever sources [could] maintain a *qui tam* action." *U.S. ex rel. Hansen v. Cargill, Inc.*, 107 F. Supp. 2d 1172, 1185 (N.D. Cal. 2000), *aff'd*, 26 F. App'x 736, 737 (9th Cir. 2002).

Hastings' arguments under § 3730(e)(4)(B) all fail. First, he makes no attempt to defend the original source allegations in the FAC. Second, he fails to show that he had direct knowledge of anything relevant to the case, much less direct knowledge of fraud by any of these Defendants in connection with the loans or insurance claims at issue. Third, he fails to show that he made an adequate or voluntary disclosure to the government. Finally, he fails to show, as required under Ninth Circuit law, that he had a hand in any of the public disclosures at issue in this case. Any one of these failings is sufficient ground to conclude that Hastings is not an original source and that the FAC must be dismissed with prejudice.

a. Hastings Cannot Rely On New, Unverified Evidence To Establish Original Source Status.

Hastings does not defend the meager original source allegations pled in the FAC. He does not suggest that the boilerplate in Paragraph 2 is entitled to any weight or consideration. He has abandoned reliance on the April 1999 patent application

described in Paragraphs 77 and 78, and he does not argue that his vague assertions in Paragraphs 76 or 79 are sufficient (they are not). In other words, Hastings effectively concedes that the allegations of the FAC are insufficient, which alone is cause for dismissal. *See, e.g.*, *U.S. ex rel. Casady v. Am. Int'l Grp.*, No. 10-0431, 2013 U.S. Dist. LEXIS 56622, at *17-18 (S.D. Cal. Apr. 19, 2013); *see also U.S. ex rel. Kinney v. Stoltz*, 327 F.3d 671, 675 (8th Cir. 2003) (relator was "obligated" to show direct knowledge "in his initial complaint").

Rather than defend the original source allegations in the FAC, Hastings submits new documents – his purported communications with the government, Opp. 31:14-20 – in an attempt to avoid dismissal. This is improper. Hastings must support his jurisdictional arguments with admissible evidence. *See Gold River, LLC v. La Jolla Band of Luiseno Mission Indians*, No. 11-1750, 2011 U.S. Dist. LEXIS 142561, at *5-6 (S.D. Cal. Dec. 9, 2011). The new documents were not verified or authenticated as required by Local Rule 7-6 and Federal Rule of Evidence 901. Unauthenticated emails and other hearsay cannot confer jurisdiction. *See U.S. ex rel. Doe v. Staples, Inc.*, 932 F. Supp. 2d 34, 42 (D.D.C. 2013) (refusing to consider hearsay). In any event, even if the documents are accepted at face value, they do not suffice to establish Hastings' status as an original source.

b. Hastings Has Not Shown Direct Knowledge.

An original source must have "'firsthand knowledge of the alleged fraud'" that was obtained "'through his own labor unmediated by anything else.'" *Meyer*, 565 F.3d at 1202 (quoting *Alcan Elec.*, 197 F.3d at 1020); *see also U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 353 (4th Cir. 2009) (original source must have direct, firsthand knowledge of "an actual claim upon the public fisc by . . . the Defendants"). Here, Hastings presents nothing more than speculation to support his allegations that he is the original source of the false claims alleged in this case, *see* Defs.' Mem. 23:13-25:34, and such speculation falls well short of insider knowledge, *see U.S. ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 526 (9th Cir. 1998). Even the

new communications between Hastings and HUD show that he lacks any firsthand knowledge of (i) how DAPs work; (ii) the allegation that DAPs violated HUD requirements; (iii) the allegation that FHA-approved lenders committed fraud by originating loans through DAPs; and/or (iv) the allegation that these Defendants violated the FCA.

Hastings' own allegations confirm his lack of direct knowledge. Hastings claims that he became aware of Nehemiah because he had conversations with its founder, Opp. 31:7-14, but his purported email to HUD dated March 10, 1997 states that his familiarity with Nehemiah derived from his reading "solicitation material that was faxed throughout the Sacramento Realtor Board Area," Opp. Ex. 7. Either way, Hastings does not have direct knowledge. Discussions with "a third-party insider from the mortgage industry" do not qualify, *Casady*, 2013 U.S. Dist. LEXIS 56622, at *18; *accord Doe*, 932 F. Supp. 2d at 42 ("talking with industry insiders" does not create direct knowledge), and reviewing documents that Nehemiah distributed across Sacramento also did not transform Hastings into an insider, *see U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917 (9th Cir. 2006) (an investigation does not create direct knowledge); *Natural Gas Royalties Qui Tam Litig. v. Pac. Gas & Elec. Co.*, 562 F.3d 1032, 1045 (10th Cir. 2009) ("research" or the "ability to recognize the legal consequences" is not direct knowledge).[3]

Furthermore, the same communications confirm (as Defendants previously argued, *see* Mem. 30:1-8) that Hastings' allegation that DAPs purportedly violated HUD rules merely echoed a whistle previously blown by HUD. His purported email dated March 20, 1997 relied on a letter that HUD had sent to Nehemiah. *See* Opp. Ex. 8 (attaching Opp. Ex. 5). The HUD letter expressed the agency's concerns and explained that "HUD offices responsible for monitoring down payment programs

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[3] Hastings cites *U.S. ex rel. Fine v. Chevron, USA, Inc.*, 39 F.3d 957 (9th Cir. 1994), but that opinion was withdrawn and vacated after the *en banc* Ninth Circuit held that Mr. Fine was not an original source. *See U.S. ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740, 741 (9th Cir. 1995).

similar to yours have rejected them" for failing to comply with HUD Handbook 4155.1 and/or Mortgagee Letter 96-18. Opp. Ex. 5. Hastings' email from June 1997 also relied on HUD's prior conclusions. Hastings wrote that he "couldn't agree more" with the "ruling" from HUD that Nehemiah unlawfully transferred "funds directly from the seller to the buyer." Opp. Ex. 9. Thus it is HUD – not Hastings – that is the original source of the allegation that DAPs violate HUD's downpayment requirements.[4]

Additionally, none of Hastings' communications with the government from 1997 to 1999 accused any lender of wrongdoing. And, while neither the FAC nor the Opposition discloses how Hastings came to suspect misconduct by Defendants (or any lender), sworn evidence from *Hastings I* shows that he has no direct knowledge of that theory either. *See Hastings I*, Doc. No. 44, Decl. of Dean Francis Pace, Esq., ("Pace Decl."). Hastings' own counsel declared to this Court, under penalty of perjury, that, on May 21, 2007, he "personally informed Brian Hastings" of a potential FCA violation "by the FHA Approved Lenders" and that Hastings thereupon "consented" to be the "nominal" relator. *Id.* at 2-3. That sworn testimony is dispositive: "The law does not permit [a relator] to rely on information from . . . [his] attorney to qualify as an original source." *Casady*, 2013 U.S. Dist. LEXIS 56622, at *18.

Hastings also lacks any direct knowledge of any false claims that any Defendant made to the government that could trigger potential FCA liability. Hastings says he has experience as a mortgage broker and thus had knowledge of the underwriting standards that lenders require brokers to follow for various loan products. *See* Opp. 39:11-19. But, origination of an FHA-insured loan is never an FCA violation – as a matter of law, the FCA is not implicated until someone submits a

[4] Hastings also cribbed his theories from others. In his purported email from April 1999, Hastings alleged to HUD that the Nehemiah program violated Regulation Z because the seller's contribution was "payable indirectly by the borrower." Opp. Ex. 11. However, the email reveals that Hastings learned this, too, from someone else – unidentified "private counsel" representing "a Nehemiah borrower who was foreclosed upon." *Id.*

claim. *See U.S. v. McNinch*, 356 U.S. 595, 599 (1958); *U.S. v. Veneziale*, 268 F.2d 504, 505 (3d Cir. 1959). Thus, to be an original source, Hastings must show direct knowledge of Defendants' submission of a false or fraudulent claim. *See Meyer*, 565 F.3d at 1202. This he cannot do. Hastings, like any broker, remains a stranger to Defendants' submission of claims to HUD. Predictably, he appears to have identified the loans in his Appendices through public records about properties conveyed to HUD. *See* Opp. 43:25-26. Collecting that information may have enabled Hastings to "arbitrarily select a large group of defendants" that he believes might have violated the FCA, but that kind of guesswork is nothing more than an attempt to win the "relator lotter[y]," which the law "do[es] not countenance." *U.S. ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 332 (5th Cir. 2011).[5]

c. Hastings Did Not Make An Adequate Or Voluntary Disclosure Of His Allegations To The Government.

Even if Hastings had direct knowledge (and he does not), he still would not qualify as an original source because he did not adequately or voluntarily disclose that knowledge to the government. Hastings was required to disclose the specific fraud that is "the subject of his Complaint." *U.S. ex rel. Oliver v. Philip Morris USA, Inc.*, 949 F. Supp. 2d 238, 250-51 (D.D.C. 2013). None of Hastings' supposed communications from 1997 and 1999 accuse any lender of wrongdoing. Nor could they have. The Nehemiah program was in its infancy in 1997, and Hastings could not possibly have had direct knowledge of any actual fraud at that time, and certainly not a fraud associated with loans that were not originated until years later. *See* FAC App'x A. Further, his communications with the government in 1997 and 1999 were not voluntary attempts to disclose fraud. Rather, Hastings was trying to determine

[5] The Broad Street Mortgage investigation cited by Hastings highlights the difference between his "speculation" and the sort of information that could qualify someone as an original source. The evidence in Broad Street was tied to the loans at issue and included "price lists for new homes that showed the [lower] prices offered to the general public," "sales prices . . . increased on revised sales contracts," and loan file documents showing the gift amount being added to the purchase price as "financed closing costs." Opp. Ex. 1 at 6-7. Hastings' disclosures contained none of the above.

why Nehemiah had been able to obtain HUD approval while his proposed competing program had not. *See, e.g.*, Opp. Ex. 7 ("[C]ould you clarify the differences in these programs that might explain the delay?"). Pursuing approval for a competing product is not blowing the whistle. *Cf. U.S. ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539 (9th Cir. 1998) (disclosure made in course of job duties not voluntary).

Hastings also claims to have observed sales price manipulation in certain MLS real estate listings posted by real estate agents in 1999. *See* Opp. 41:10-22 (discussing FAC Ex. U). This observation gets Hastings nowhere, however, because he does not demonstrate (or, for that matter, even claim) that he disclosed it to the government. *See Natural Gas*, 562 F.3d at 1044 ("[I]f a relator does not deem information important enough to voluntarily disclose it to the government before filing suit, he should not be allowed to later rely upon it to establish his status as original source."). Beyond this flaw, Hastings also does not connect the listings to any of the properties, mortgages, or Defendants at issue in this case, let alone show that they actually resulted in sales price manipulation. The same is true for the 2004-2006 underwriting guidelines that he relies on in support of his Opposition arguments. Opp. 39:5-40:13. This is because the guidelines are in no way connected to the loans at issue – which were originated years later – and the substance of the guidelines does not even suggest the alleged sales price manipulation.

Hastings' letter to HUD OIG dated February 16, 2012, *see* Opp. Ex. 10, also did not allege any violation of the FCA. There, Hastings wrote that the lenders "reviewed and approved Nehemiah and Nehemiah-type" programs that were "inconsistent with" applicable requirements. *Id.* The letter identifies many such requirements, but it conspicuously fails to jump to the conclusion that lenders violated the FCA. It certainly does not describe any FCA violation with particularity. *See, e.g.*, *U.S. ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1019-20 (E.D. Va. 1995) (original source disclosures must comply with Rule 9(b)).

d. Relator Did Not Have A Hand In The Disclosures.

Hastings' new documents also cannot paper over his failure to have had a hand in the public disclosures cited by Defendants. *See* Defs.' Mem. 26:8-17 (citing *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992)). Hastings asserts a *post hoc, ergo propter hoc* theory of involvement. He argues that because he communicated with HUD in March of 1997, he must have had a hand in any disclosures that occurred after that date. *See* Opp. 37:14-39:2. Temporal sequence, however, does not show causation. A relator does not "have a hand in" subsequent disclosures or investigations where it appears, as here, that they were prompted by other causes. *See, e.g.*, *Malhotra*, 2013 U.S. Dist. LEXIS 15652, at *22-24. Hastings' own documents reflect and repeat earlier HUD communications regarding the agency's review of the Nehemiah program. Moreover, the public disclosures reflect that HUD had been contacted by other sources prior to Hastings' alleged communications. *See* Brown Decl. Ex. 11 (noting that "lenders, title companies, and builders" had contacted HUD about Nehemiah prior to February 1997).

Hastings also certainly cannot claim responsibility for the earliest press reports that were critical of the Nehemiah program. *See* Brown Decl. Ex. 2-8. The articles do not cite or quote Hastings or suggest that he prompted them. They refer only to HUD and Nehemiah spokespeople. *See, e.g.*, Brown Decl. Ex. 2 (June 20, 1997 article quoting only HUD and a Nehemiah spokesman); Ex. 4 (September 28, 1997 article stating that Nehemiah borrowers pay higher prices and not mentioning Hastings). For this reason, too, he is not an original source.[6]

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[6] Hastings does not contest that the pre-2010 version of the original source definition applies. *See* Defs.' Mem. at 22:15-23:1 & 23 n.10. However, Hastings also fails to demonstrate that he is an original source under the amended statute. First, as discussed above, he has not shown that he voluntarily disclosed to the government that Defendants violated the FCA with respect to the loans at issue. Second, he contends that he independently and materially added to the public disclosures in seven "revelatory" ways, *see* Opp. 43:12-44:18, but his supposed "revelations" are nothing more than a self-congratulatory summary of the conclusory allegations in his FAC. For reasons previously explained, *see* Defs.' Mem. 31:18-33:5 (collecting authorities), the seven "revelations" in Hastings' Opposition, are not material additions under the amended statute.

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B. Even If Hastings Is An Original Source, The First-To-File Bar Still Mandates Dismissal.

Once a *qui tam* action has been commenced under 31 U.S.C. § 3730(b)(1), no one except the government may "bring a related action based on the facts underlying" the first case. *Id.* § 3730(b)(5). This provision stands as an "exception free" jurisdictional hurdle that was intended to preclude relators from filing "opportunistic" or "repetitive" claims. *Lujan*, 243 F.3d at 1187. The concerns expressed in *Lujan* are directly implicated here. Hastings brought his first case in 2007 and then abandoned it in 2009, over the strenuous and public objections of his counsel. *See* Pace Decl. at 2. Hastings did not try to revive this case until after the multi-billion dollar National Mortgage Settlement was announced on February 9, 2012. *See* Opp. Ex. 10. The First-to-File bar exists to stop precisely this sort of strategic behavior. *See U.S. ex. rel. Shea v. Cellco P'ship*, No. 12-7133, 2014 U.S. App. LEXIS 6663 (D.C. Cir. Apr. 11, 2014) (holding that a relator is barred from bringing a second, related case after the first is dismissed).

Hastings' assertion that his two cases are not sufficiently similar to implicate the First-to-File bar, *see* Opp. 27:22-28:13, is meritless. The question is not whether his two cases are identical, but whether the second case "alleges the defendant[s] engaged in the same type of wrongdoing . . . even if the allegations cover a different time period or location." *Lujan*, 243 F. 3d at 1188. Put another way, the First-to-File bar applies "regardless of whether the allegations incorporate somewhat different details." *Id.* at 1189.

There is no question that this case is based on the same "facts underlying" *Hastings I*. 31 U.S.C. § 3730(b)(5). They were filed by the same plaintiff in the same court against mostly the same defendants. *See Hastings I,* Second Am. Compl. ("2009 SAC") ¶ 2. Both asserted claims against "FHA-approved lenders" who originated FHA-insured mortgages. *Id.* ¶ 3. Both alleged that lenders violated HUD's downpayment requirements by originating mortgages through "seller funded

downpayment assistance programs." *Id.* ¶ 32. Both sued over all FHA loans originated through a DAP between 2000 and 2008. *Id.* ¶ 38. And both relied on the same statutes, regulations, guidance, and forms.[7]

Even Hastings cannot point to a substantive difference. He notes that his prior case alleged that DAPs violated HUD rules because they involved a "'written contractual condition precedent scheme,'" while his new one alleges that DAPs violated HUD rules through a "'sales price manipulation scheme.'" Opp. 25:27-26:25 (emphasis in the original). This change in vocabulary shows only that Hastings has invented a new catchphrase. The gravamen of both cases is that claims for FHA insurance on loans originated through DAPs violated the FCA because the assistance provided by DAPs were false gifts. *See* 2009 SAC ¶ 31. Hastings' new catchphrase indicates only a shift in emphasis: whereas he previously focused on the seller's obligation to contribute to the DAP after closing, he now emphasizes the way the cost of that contribution is reflected in the sale price. That shift in emphasis cannot obscure the fact that Hastings sues today over precisely the same programs and precisely the same set of loans that he did in 2007. *See, e.g.*, *Lujan*, 243 F. 3d at 1188-89 ("different details" do not affect the First-to-File bar); *U.S. ex rel. Wilson v. Bristol-Myers Squibb*, No. 13-1948, 2014 U.S. App. LEXIS 8159, at *18-19 (1st Cir. Apr. 30, 2014) (prior case alleging off-label promotion barred subsequent case alleging off-label promotion for different uses); *Shea*, 2014 U.S. App. LEXIS 6663, at *6-7 (second case related to the first even though it included additional "agencies, contracts, and charges"); *U.S. v. Apollo Grp., Inc.*, No. 08-1399, 2009 U.S. Dist. LEXIS 131566, at *9-10 (S.D. Cal. Nov. 6, 2009) (invocation of different statute was a "distinction . . . of no consequence").

Hastings also argues that the bar against successive complaints does not apply

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[7] Specifically, both complaints cited 12 U.S.C. § 1709(b)(9), 24 C.F.R. §§ 203.5(a), 203.5(b)(1), 203.5(c), 203.19, HUD Handbooks 4000.2, 4000.4, 4155.1, 4165.1, 4330.1, HUD Mortgagee Letter 00-08, HUD Forms 11701, 54113, 92001, 92900-A, and the HUD-1 Settlement Statement.

because *Hastings I* was jurisdictionally defective. *See* Opp. 28:14-29:15. Specifically, he argues that "the record" from *Hastings I* contains no "competent evidence" demonstrating that he was an original source. Opp. 28:18-19 (emphasis in the original). This is a curious argument. The Pace Declaration (cited above) was the only record evidence submitted in *Hastings I*. That declaration is clear and convincing evidence that Hastings was not an original source, which supports the conclusion that *Hastings I* was defective under § 3730(e)(4). *See* Opp. 28:25-29:4 (citing *U.S. ex rel. Ackley v. IBM*, 76 F. Supp. 2d 654, 669 (D. Md. 1999)). But, if the Public Disclosure bar applied in *Hastings I* (as Hastings himself contends), then it also necessarily applies here, which means the Court must dismiss under § 3730(e)(4). It cannot be that Hastings was not an original source when *Hastings I* was filed in 2007, or dismissed in 2009, yet somehow became one during the intervening years.

Finally, Hastings' reliance on *Campbell v. Redding Medical Center*, 421 F.3d 817 (9th Cir. 2005), is misplaced. *See, e.g., U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 35 (1st Cir. 2013) (finding no textual support for the proposition that a complaint must comply with Rule 9(b) prior to triggering the first-to-file bar); *U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210-11 (D.C. Cir. 2011) (same). Regardless, the narrow exception recognized in *Campbell* has no application here. In *Campbell*, the court was concerned about the possibility that a complaint filed by a relator who was not an original source could divest the court of jurisdiction over a subsequent complaint filed by a relator who was an original source. *See* 421 F.3d at 824-25. Thus, *Campbell* held that the First-to-File bar does not block a subsequent lawsuit where (i) the second case was filed by a different relator, and (ii) the first case was dismissed "solely" on the ground that the relator was not an original source. *Id.* Neither circumstance is present here because Hastings filed both cases and chose to voluntarily dismiss the first. For either reason, Hastings cannot reply on *Campbell*, *see, e.g., U.S. ex rel. Sandager v. Dell Marketing, L.P.*, 872 F. Supp. 2d 801, 811 (D. Minn. 2012) (explaining that *Campbell* does not apply where the first case was

voluntarily dismissed), and this case is barred by § 3730(b)(5).

II. Hastings Has Not Alleged – And Cannot Allege – A Violation Of The False Claims Act.

To state a claim under the FCA, Hastings must plead, among other elements, that (i) there was a false or fraudulent claim, and (ii) Defendants had knowledge of the falsity. Defs.' Mem. 23:5-9; *see also Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1047 (9th Cir. 2012). Hastings has not pled either of these elements. Highlighting the deficiency, his Opposition merely presents a single, conclusory sentence – "Relator alleged Defendants violated the FCA." – to support the argument that "Hastings' FAC Alleges A Violation Of The False Claims Act," Opp. 25:4-5. Hastings may have asserted a claim under the FCA, but he has not adequately pled the elements of that claim.[8]

A. Hastings Has Not Alleged A False Or Fraudulent Claim.

Hastings has not pled, and cannot plead, that Defendants submitted a false or fraudulent claim to the government. Defs.' Mem. 34:17-36:24. Hastings' entire theory that Defendants submitted false claims rests on his allegation that seller-funded DAPs violated applicable HUD regulations. FAC *passim*; Opp. *passim*. But, HUD examined the structure of seller-funded DAPs and repeatedly concluded that the programs were an acceptable means for buyers to obtain down payments for FHA-insured mortgages. Defs.' Mem. 5:9-10:27; 34:17-36:24. Nothing in Hastings' Opposition establishes otherwise.

In an apparent reaction to the clear pronouncements that seller-funded DAPs were permissible sources of down payment assistance for FHA-insured loans until Congress amended the National Housing Act in 2008, *see* Defs.' Mem. 5:9-10:27,

[8] Relator also erroneously states that he is required to plead the elements of his FCA claim under Rule 8. Opp. 21:24-22:2. In fact, Hastings must plead his case under the FCA with particularly under Rule 9(b). Defs.' Mem. 41:16-27; *see also Ebeid ex rel. U.S. v. Lungwitz,* 616 F.3d 993, 998-99 (9th Cir. 2010). Regardless, Plaintiff has not adequately pled the elements of an FCA claim under either pleading standard.

1 Hastings attempts to draw a false distinction between permissible "seller-funded
2 charities" and impermissible "buyer-financed false gift schemes," Opp. 5:13-6:28.
3 This attempted distinction does not fit with Hastings' theory of liability – that seller-
4 funded DAPs are impermissible because the cost is ultimately passed on to the buyer,
5 FAC *passim*; Opp. 10:8-12:10 – because HUD repeatedly examined these very
6 programs and concluded they were permissible sources of down payment assistance,
7 Defs.' Mem. 34:17-36:24. Hastings' categorizations do not defeat HUD's own
8 declarations that the very programs at the heart of his allegations were permissible
9 sources of down payment assistance for FHA-insured loans until the National Housing
10 Act was amended in 2008.

11 Hastings also points to actions against Beazer Mortgage and its employee
12 Janette Parker, as well as a HUD OIG audit of Broad Street Mortgage, to assert that
13 loans with seller-funded DAPs were not eligible for FHA insurance. Opp. 6:24-28. In
14 those cases, however, the upward sales price revisions were done ***after*** the homes
15 were already under contract at a lower price. Moreover, the Department of Justice's
16 information against Ms. Parker alleged that she "employ[ed] various methods to
17 deceive underwriters," including by causing real estate agents to alter purchase
18 contracts "to add false 'upgrades' to Beazer homes in order to justify an increase in
19 price."[9] Here, Hastings has made no allegations that Defendants altered
20 documentation to disguise an improper gift, only that the structure of the seller-funded
21 DAPs was improper. In contrast to Hastings' position, HUD's Office of General
22 Counsel – in an opinion referenced by the HUD OIG in its audit report of Broad Street
23 Mortgage – stated that the same seller-funded programs challenged by Hastings were
24 permissible sources of down payment assistance because the seller did not make a
25 contribution to the program until after the closing of the loan. As a result, there was
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[9] *See U.S. v. Parker,* Criminal Information at 4, No. 11-cr-282 (W.D.N.C., filed Sept. 19, 2011), Dkt. No. 1; HUD OIG Audit Report 2005-FW-1010 at 6, *available at* http://archives.hud.gov/offices/oig/reports/files/ig561010.pdf.

1 no direct path of gift funds from the seller to the buyer.[10]

2 Hastings also points to HUD Mortgagee Letter 00-08 in an attempt to negate
3 HUD's various pronouncements that seller-funded DAPs were appropriate sources of
4 down payment assistance for FHA-insured loans. Opp. 14:3-15:1. But Mortgagee
5 Letter 00-08 simply states that mortgagees are responsible for ensuring that loans
6 submitted for FHA approval, including loans with down payment assistance, satisfy
7 HUD requirements – something that Defendants do not dispute. Mortgagee Letter 00-
8 08, however, does not negate HUD's various pronouncements that loans with seller-
9 funded down payment assistance satisfied HUD's requirements for FHA insurance.
10 Defs.' Mem. 5:9-10:27.

11 Furthermore, the legal authority that Hastings cites does not support his claim.
12 Opp. 22:11-23:28. To the contrary, this authority demonstrates that he has not pled a
13 false or fraudulent claim. Hastings, for example, extensively relies on the Ninth
14 Circuit's decision in *United States v. Peterson*, 538 F.3d 1064 (9th Cir. 2008), to
15 argue about the "the materiality of the information." Opp. 23:1-28. Defendants have
16 not challenged the materiality of the information allegedly submitted to the
17 government, but instead contend that there is no false claim to begin with. Defs.'
18 Mem. 34:3-36:24. Indeed, the Ninth Circuit in *Peterson* specifically stated that the
19 seller-funded DAPs that form the basis of Hastings' claim were permissible:

20 Under HUD's regulations and policies, the buyer is not required to have the down payment come out of his or her own pocket—he or she may
21 receive the down payment as a gift from friends, relatives, or non-profit housing assistance organizations. However, the sellers of the property
22 are not permitted to make direct gifts to the buyers. Despite this restriction on sellers, the seller was permitted indirectly to subsidize the
23 downpayment by providing money to a non-profit organization. Under the permissible indirect subsidy scheme, after the non-profit approved a
24 buyer, the non-profit agreed to gift the down payment at closing. The gift was paid out of the non-profit's own funds, and only after closing did the
25 seller pay the non-profit a "service fee" equal to the gift from the proceeds of the sale. If the closing did not go through, the seller was not
26 required to pay the service fee. The fee was used by the non-profit to

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28 [10] HUD OIG Audit Report 2005-FW-1010 at 112, *available at* http://archives.hud.gov/offices/oig/reports/files/ig561010.pdf.

provide gifts to future home purchasers.

538 F.3d at 1068. The additional legal authority to which Hastings cites is similarly unavailing. *See U.S. v. Eghbal*, 548 F.3d 1281 (9th Cir. 2008) (sellers made direct contributions to buyers and fraudulently signed documents stating that they provided no funds toward the down payment); *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166 (9th Cir. 2006) (addressing the incentive compensation ban for educational institutions that receive subsidies under Title IV and the Higher Education Act).

Notably, Hastings brushes aside the decisions in *Penobscot Indian Nation v. HUD*, 539 F. Supp. 2d 40 (D.D.C. 2008), and *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008), in which courts struck down HUD's 2007 rule that attempted to prohibit seller-funded DAPs. Defs.' Mem. 35:24-28. Hastings argues that those cases are irrelevant because they addressed whether HUD had violated the Administrative Procedures Act ("APA") in its promulgation of the rule. Opp. 6:2-12. But those decisions struck down HUD's 2007 rule specifically because the rule reflected a change in HUD's previous position that such programs were permissible without following appropriate procedures under the APA. *Penobscot Indian Nation*, 539 F. Supp. 2d at 47; *Nehemiah Corp. of Am.*, 546 F. Supp. 2d at 848-49. Perhaps most telling, Hastings never addresses the fact that, after courts struck HUD's 2007 rule, Congress amended the National Housing Act in 2008 to prohibit seller-funded DAPs. Defs.' Mem. 10:21-27. Put simply, the seller-funded programs that form the basis of Hastings' entire complaint were permissible sources of down payment assistance until Congress amended the National Housing Act in 2008, and nothing in Hastings' Opposition establishes otherwise. Defs.' Mem. 34:3-36:24. Hastings has not pled – and cannot plead – a false or fraudulent claim.

B. Hastings Has Not Alleged That Defendants Had Knowledge Of Any False Or Fraudulent Claim.

Hastings also has not pled that Defendants had knowledge of any false or fraudulent claim. Defs.' Mem. 36:27-41:13. As an initial matter, Hastings cannot

plead such knowledge because there were no false or fraudulent claims to begin with. Defs.' Mem. 34:3-36:24. But even if the seller-funded programs that Hastings challenges in this case were not permissible sources of down payment assistance for FHA-insured loans – and the record shows that they were – Hastings still has not alleged that Defendants had knowledge of any false or fraudulent claim. Defs.' Mem. 36:27-41:13.

Hastings argues that Defendants' mortgage underwriting guidelines for non-FHA loans show that Defendants knew that the use of seller-funded DAPs for FHA-insured loans was impermissible. Opp. 12:15-13:27; 15:4-26. But Hastings continues to ignore the fact that that FHA and non-FHA loan programs by their very purpose and design result in different underwriting guidelines. Defs.' Mem. 39:14-41:13. While Hastings points to affordable mortgage program guidelines for certain Defendants in an attempt to argue that those guidelines should not be different from FHA programs, Opp. 15:4-16:21, the analogy continues to disregard the different risk profiles for FHA and non-FHA insured loans, Defs.' Mot. 39:14-41:13. And while Hastings continues to assert that Defendants did not exercise the "same level of care" in originating FHA and non-FHA loans by maintaining different underwriting guidelines, Opp. 15:4-17:18, he fails to acknowledge that the requirement he identifies relates to the verification of documentation. It does not require identical, or even similar, underwriting guidelines for FHA and non-FHA insured loans. Defs.' Mot. 39:14-41:13. Put simply, Defendants' underwriting guidelines for non-FHA loans are irrelevant to the question of what HUD permitted for FHA-insured loans.

Finally, Hastings fails to address the Ninth Circuit's holding that there can be no knowledge of falsity (that is, no scienter to submit a false claim) where a claim is based on regulatory infractions or is open to interpretation. Defs.' Mot. 37:8-39:7; *see also U.S. ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 996 (9th Cir. 2011) (differences in interpretations will not suffice to create liability under the FCA's scienter requirement); *U.S. ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825, 832 (8th

Cir. 2013) ("An FCA defendant does not act 'with the requisite knowledge that the FCA requires before liability can attach' when 'the defendant's interpretation of the applicable law is a reasonable interpretation[.]'"); *U.S. ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000) ("it is hard to see how [the relators] could . . . have satisfied even the loosest standard of knowledge [under the FCA], *i.e.*, acting in reckless disregard of the truth or falsity of the information, when the relevant legal question was unresolved"). While the record demonstrates that seller-funded programs were permissible sources of down payment assistance until Congress amended the National Housing Act in 2008, even if this were not true, the most Hastings could show is that the legality of these programs was disputable. As a matter of law, this negates any allegation by Hastings that Defendants had knowledge of any false or fraudulent claim.

III. <u>Hastings Fails To Meet The Pleading Requirements Of Rule 9(b).</u>

Hastings' allegations fail to satisfy the Ninth Circuit's directive that a relator must plead fraud with particularity, including "the who, what, when, where, and how" of the alleged misconduct. Defs.' Mem. 41:16-27. Hastings' opposition fails to rebut Defendants' Rule 9(b) challenge because neither the FAC nor his Opposition connects the elements of the alleged price-manipulation scheme to any claim by Defendants for the payment of FHA insurance. Under Rule 9(b), Hastings may only proceed with allegations of a corporate-wide fraud by (i) providing "representative examples" of the alleged fraud, or (ii) alleging "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Ebeid v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010) (quoting *U.S. ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)). Hastings has done neither in his FAC.

First, Hastings has not provided representative examples of the alleged fraud. He claims that the FAC, the documentary evidence attached to it, and Appendix B (and the revised Appendix B-2 attached to his Opposition) provide the necessary

particularity. Opp. 17:21-25. Neither the FAC nor the documentary evidence, however, identify a single representative example of the alleged fraud. The Appendix also fails to provide this information. Instead, the Appendix merely lists 146 loans that Hastings contends are representative of the claims submitted by Defendants. The list is devoid of any details connecting the loans to the so-called "sales price-manipulation practice." Hastings, for example, has provided no details explaining how a single one of these loans was connected to a scheme to manipulate the price of the home in such a way as to violate HUD regulations. Hastings has made it clear that the alleged sales price-manipulation at the heart of the FAC occurs only when use of a DAP causes an increase in the purchase price of a home. *See, e.g.*, Opp. 6:13-24. Yet, Hastings has not alleged with the requisite particularity under Rule 9(b) that this sales price manipulation occurred on any of the identified loans, much less that it occurred each and every time a homebuyer financed a down payment using a DAP. Appendix B/B-2 merely lists (i) homeowner and address, (ii) lender (whether originator or purchaser) and DAP operator, and (iii) the FHA case/claim number and claim amount. There is no information that reflects (or even implies) an increase in the purchase price as a result of using a DAP. As a result, Appendix B/B-2 alone does not allege representative examples of a price-manipulation scheme.[11]

Hastings also has not alleged "reliable indicia that lead to a strong inference" that Defendants actually submitted false claims. While Hastings cites this legal standard, *see* Opp. 17:21-18:2, he does not explain how the FAC satisfies it. Most importantly, Hastings has not connected the elements of the price-manipulation

[11] Hastings' reliance on *United States v. Wells Fargo Bank, N.A.*, No. 12-7527, 2013 U.S. Dist. LEXIS 136539 (S.D.N.Y. Sept. 24, 2013), is misplaced. There, the court found that the representative loans alleged in that case included specific details for each example that were connected to the alleged scheme. For example, in one example, the United States specifically alleged that the defendant had "failed to obtain the borrower's most recent pay stubs that could corroborate the information on the verification of employment," which was connected to the alleged reckless origination scheme. *U.S. v. Wells Fargo Bank, N.A.*, No. 1:12-cv-07527 (S.D.N.Y.), Dkt. No. 22, ¶ 93. Hastings has alleged no comparable details that connect the loans listed in Appendix B/B-2 to the alleged price-manipulation scheme.

scheme alleged in the FAC to any actions taken by Defendants. In the FAC, Hastings cites the MLS listings set forth in Exhibit U to support his allegations. But, Hastings does not allege that any of the homes listed therein were actually sold, that the homebuyers received an FHA-insured mortgage with assistance from a DAP, that use of a DAP actually caused an increase in the purchase price, that any of the Defendants originated mortgages for these homes, that any of the homes went into foreclosure, or that any of the Defendants submitted claims for FHA insurance on the homes. At most, Hastings has asserted a theoretical scheme without alleging with particularity any connection between that scheme and Defendants' actual conduct. That assertion does not satisfy Rule 9(b)'s pleading standards.

CONCLUSION

For the foregoing reasons and those stated in Defendants' Memorandum of Points and Authorities in Support of Joint Motion to Dismiss First Amended Complaint, Defendants respectfully request that this Court dismiss the FAC in its entirety without leave to amend.

All signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Respectfully submitted,

Dated: May 23, 2014

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CERTIFICATE OF SERVICE

I, Katherine E. Hertel, certify and declare as follows:

I am over the age of 18 and not a party to this action. My business address is 333 South Hope Street, Sixteenth Floor, Los Angeles California 90071.

On May 23, 2014, I caused a copy of the **REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT** to be served upon the following counsel via the Court's CM/ECF system:

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I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

Executed on the 23rd day of May, 2014, at Los Angeles, California.

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