UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

UNITED STATES OF AMERICA, *ex rel.* LYNN E. SZYMONIAK Plaintiff, v. ACE SECURITIES CORPORATION, et al. Defendants.	)	C.A. No. 0:13-cv-00464-JFA

JOINT MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 9(B) AND 12(B)(6)

Defendants Ocwen Loan Servicing, LLP ("Ocwen"), Litton Loan Servicing, LP (Litton), and Nationwide Title Clearing, Inc. ("NTC") (collectively, "Movants"), respectfully move this Court to dismiss Relator's claims with prejudice for failure to state a claim, pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure,.

This case is about mortgage-backed securities ("MBS"). Although her Complaint is unclear and vague, Relator appears to allege that Ocwen and Litton, who are mortgage servicers, along with NTC and numerous other Defendants, created "false" or "fraudulent" assignments of mortgages to replace missing assignments in collateral files for mortgages held in various MBS trusts (the "Trusts") to be able to foreclose on defaulted properties. Relator also alleges that certain documents pertaining to the Trusts, as well as documents filed with the Securities and Exchange Commission ("SEC"), contained false statements regarding the presence of the mortgage assignments in the files. Relator further alleges that Defendants submitted improper or illegal charges to the Trusts pertaining to the preparation of the allegedly defective assignments, which diminished the value of the Trusts to the detriment of their investors, including the United

States and various state and local governments. Finally, Relator alleges that Defendants submitted false claims to the Department of Housing and Urban Development ("HUD") for mortgage guarantees on defaulted loans.

Based on these allegations, Relator attempts to assert claims against Movants under nearly every section of the federal False Claims Act ("FCA), 31 U.S.C. § 3729, *et seq.*, as well as similar provisions under 20 different state and local false claims laws. Relator seeks damages on behalf of the federal, state, and local governments for the impaired value of the MBS, for charges for fraudulent services and services not provided to the Trusts, for increased costs incurred by the Trusts to prove good title as a result of missing or defective assignments, and for payments by HUD on loan guarantees for mortgages lacking valid notes and assignments.

Under Fourth Circuit law, Rule 9(b) – which requires fraud claims to be pled with particularity – applies to FCA claims. As summarized below, but as set forth more fully in the accompanying Memorandum of Law, Relator has failed to state a claim against Movants under any section of the FCA even under basic Rule 8 standards – let alone with the required Rule 9(b) particularity.

Relator fails to allege that Movants knowingly made a materially false statement or engaged in a materially fraudulent course of conduct that caused the government to pay out money or to forfeit money due. First, Relator fails to adequately allege the presentment of any false claim by Movants based on alleged false statements in the Trust documents or documents filed with the SEC, as they did not draft the documents in question. Second, Relator fails to allege false claims based on the alleged creation of "new" assignments, as there are no allegations that any particular false claim was actually presented to the government. Third, Relator theorizes that improper charges were submitted to the Trusts, including charges for

services related to "missing" notes and assignments, thereby diminishing the value of the Trusts, but she does not allege any specific facts in support of this theory. Fourth, Relator fails to allege that the value of the MBS were impaired as a result of the use of allegedly defective assignments; she merely speculates that the Trusts may incur extra foreclosure-related costs due to difficulties in establishing title. Fifth, Relator fails to state an FCA claim based on claims submitted to HUD for mortgage guarantees, as she fails to allege which loans were guaranteed by the government and which claims were actually submitted to the government for payment.

In addition to those deficiencies, Relator fails to adequately plead each Defendant's culpability, simply lumping all Defendants together. Relator also fails to allege materiality or scienter, both of which are required elements of an FCA claim. Relator's attempt to state a claim for an FCA conspiracy fails because her individual FCA claims fail, and because she fails to adequately plead that any of the Movants entered into any agreement with any other particular Defendant. Moreover, to the extent that Relator is asserting claims based on alleged payments by non-governmental entities, these claims must be dismissed because they do not involve any claims presented to, or paid by, the *government*. Finally, Relator's state and local false claims causes of actions fail – both for the same reasons that her FCA claims fail – and for certain specific deficiencies that will be addressed in the accompanying Memorandum.

In short, even taking all of Relator's vague allegations in her Complaint as true for purposes of this motion to dismiss, Relator fails to state any plausible claims against Movants under the FCA, either individually or as participants in some kind of generalized "conspiracy." All Relator has is an unsupported theory, which is simply not enough for her Complaint to pass muster under Rules 9(b) and 12(b)(6). Accordingly, Relator's claims against Movants should be dismissed in their entirety, with prejudice.

WHEREFORE, Defendants Ocwen Loan Servicing, LLP, Litton Loan Servicing, LP, and Nationwide Title Clearing, Inc. respectfully request that this Court grant their Motion to Dismiss and dismiss this proceeding for failure to state a claim. Movants further request that the Court hold oral argument on this motion.

Respectfully submitted: January 15, 2014

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record, via the Court's CM/ECF system, this 15th day of January, 2014.

/s/ Melissa J. Copeland
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

UNITED STATES OF AMERICA, *ex rel.* LYNN E. SZYMONIAK Plaintiff, v. ACE SECURITIES CORPORATION, et al. Defendants.	)	C.A. No. 0:13-cv-00464-JFA

JOINT MEMORANDUM OF LAW IN IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 9(B) AND 12(B)(6)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

Ocwen Loan Servicing, LLC ("Ocwen"), Litton Loan Servicing, LP ("Litton"), Bayview Loan Servicing, LLC ("Bayview"), Caliber Home Loans, Inc. f/k/a Vericrest Financial, Inc. ("Caliber"), Nationwide Title Clearing, Inc. ("NTC") and Select Portfolio Servicing, Inc., incorrectly named in the complaint as Select Portfolio Services, Inc. ("SPS") (collectively, "Movants"), submit this Memorandum in Support of Motion to Dismiss,[1] pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Under Fourth Circuit law, courts closely scrutinize complaints under the federal False Claims Act ("FCA"), 31 U.S.C. § 3729, *et. seq.*, using the Rule 9(b) screen, so that only those complaints that meet that exacting standard are allowed to proceed. For the reasons that follow, notwithstanding its bulk, this "*qui tam*" complaint[2] should be dismissed with prejudice because Relator fails to state a claim with the required particularity under any section of the FCA or the cited state and local false claims laws.

INTRODUCTION

Apparently, after doing some public records research during her own foreclosure proceedings, Relator concluded that Defendants manipulated the value of residential mortgage-backed securities ("MBS") by forging or otherwise falsely creating assignments of mortgages to cover up alleged gaps in the documentation required to be placed in certain files in connection with the creation of trusts containing pools of mortgage loans. Although her Complaint is vague and unclear, Relator appears to allege that government investors in MBS were harmed by these false or fraudulent assignments, in violation of the FCA as well as various state and local false

[1] Bayview, Caliber and SPS have filed separate motions to dismiss from Ocwen, Litton and NTC.

[2] Relator has already been permitted to amend her complaint twice, and the operative complaint is the Second Amended Complaint filed by Relator on June 28, 2011 (Rec. Doc. No. 30). Throughout this brief, it will be referred to as "the Complaint" and cited as "Cplt ¶ ___." Relator filed her original Complaint on November 12, 2010 (Rec. Doc. No. 1) and a First Amended Complaint on February 3, 2011 (Rec. Doc. No. 17).

claims laws. Further, Relator contends that misrepresentations were made regarding the contents of the loan files in filings with the Securities and Exchange Commission ("SEC"), and that false statements were submitted to the Department of Housing and Urban Development ("HUD") in connection with claims for mortgage guarantees. Even taking all of these allegations as true for purposes of this motion to dismiss, there is no plausible case against Movants under the FCA, either individually or as participants in some kind of vague and generalized concerted action. After more than three years of investigation, none of the named government parties has intervened in this action.[3]

FACTUAL BACKGROUND

MBS are securities created from large pools of residential mortgage loans. When obtaining a loan to buy a home, a borrower executes the mortgage documents with a lender, often referred to as the "Originator" of the loan. *See, e.g.*, Cplt. ¶ 43. That loan and others are often pooled together, sold, and eventually conveyed to a securitization trust by a "Depositor." *See, e.g.*, Free Writing Prospectus for Soundview Home Loan Trust 2006-OPT2 ("Soundview")

[3] All governmental parties have filed notices declining to intervene, except for Montana, New Hampshire, Virginia, Oklahoma, and the City of Chicago, which have filed neither a notice of intervention nor a notice of non-intervention. The United States intervened on May 3, 2012 for the limited purpose of effectuating the dismissal of certain claims against certain defendants. *See* Rec. Doc. No. 41.

(Mar. 13, 2006) (the "Soundview Prospectus");[4] *see also In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 171 (2d Cir. 2011). The Depositor conveys the pooled loans to legal trusts set up for the purpose of holding legal title to the loans (the "Trusts") and in exchange receives certificates that it then sells to an Underwriter, which then sells them to Investors, through a process known as "securitization." *See, e.g.*, Soundview Prospectus*; see also* Cplt. at 1 n.1; *In re Lehman Bros. Secs. & ERISA Litig.*, 800 F. Supp. 2d 477, 479 (S.D.N.Y. 2011).[5]

All mortgage loans are "serviced," whether or not they are sold to a Trust. "Servicers," such as Defendants Ocwen, Litton, Bayview, Caliber, and SPS, do not originate loans, create Trusts, or sell shares in Trusts to investors. Rather, they are responsible for passing payments and information on to the Trustee, as well as for the ongoing interactions with the borrower. *See*

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[4] *See* www.sec.gov/Archives/edgar/data/1356081/000088237706000772/d454063_fwp.htm. The Soundview Trust allegedly holds Relator's mortgage loan. *See, e.g.*, Cplt. ¶ 52. Relator avers that the relevant statements in the prospectuses and PSAs for the Trusts are "substantially the same." *Id.* ¶ 196. Thus, when discussing prospectuses, PSAs and Mortgage Loan Purchase Agreements ("MLPAs") in this motion, Homeward will cite to the Soundview Trust PSA, prospectus and MLPA, and will also refer to those documents as "the PSA," "the Prospectus," and "the MLPA." Because theywere cited in the Complaint and are also publicly available on the SEC's EDGAR database, it is appropriate for the Court to consider them on this motion. *See, e.g.*, *Fare Deals, Ltd. v. World Choice Travel.com, Inc.*, 180 F. Supp. 2d 678, 683 (D. Md. 2001) (stating that court may "consider any documents referred to in the complaint and relied upon to justify a cause of action - even if the documents are not attached as exhibits to the complaint") (citations omitted). Further, for purposes of a motion to dismiss, a court can "take judicial notice of matters of public record." *United States v. Jurik*, No. 5:12-CV-460-F, 2013 WL 1881318, at * 1 (E.D.N.C. May 3, 2013) (*citing Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180) (4th Cir. 2009)); *see also Witthohn v. Fed. Ins. Co.*, 164 F. App'x 395, 396 (4th Cir. 2006) (stating that "a court may consider official public records" in ruling on a motion to dismiss).

[5] "To create such certificates, a 'sponsor' originates or acquires mortgages. Next, the loans are sold to a 'depositor' that securitizes the loans - meaning, in effect, that the depositor secures the rights to cash flows from the loans so that those rights can be sold to investors. The loans are then placed in issuing trusts, which collect the principal and interest payments made by the individual mortgage borrowers and, in turn, pay out distributions to the purchasers of the mortgage pass-through certificates . . . Finally, the depositor sells the certificates to underwriters, who then offer them to investors." *Lehman*, 650 F.3d at 171. The certificates entitle the holder to receive payments of principal and interest from the underlying pool of securities. *See Lehman*, 800 F. Supp. 2d at 479.

Pooling and Servicing Agreement ("PSA") for the Soundview Trust (Apr. 1, 2006) ("Soundview PSA")[6] §§ 3.01, 3.07; *see also CWCapital Asset Mgmt., LLC v. Chi. Props., LLC*, 610 F. 3d 497, 500 (7th Cir. 2010) (describing role of servicer). In turn, the Trustee distributes payments to the Trust. *See* Soundview PSA § 3.11. If the borrower defaults, the Servicer (or the lender) may prosecute foreclosures on behalf of the Trust. *See, e.g., id.* §§ 3.01, 3.16; *see also* Cplt. ¶ 46.

The PSA governs the sale of the loans from the Depositor to the Trust. *See, e.g.*, Soundview PSA. The PSA also governs the terms and conditions of the Trust and the rights and obligations of the Originator, Depositor, Master Servicer, and Trustee, among others. *See generally id.*; *see also* Cplt. ¶ 62; *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 25 (2d Cir. 2010) (describing securitization process and noting that "rights and duties" of the parties are "laid out in contracts known as 'pooling and servicing agreements'"). The PSA is executed by, among others, the Depositor, Servicer, and Trustee. *See, e.g.*, Soundview PSA at 142. In connection with a PSA, a "Mortgage Loan Purchase Agreement" ("MLPA"), which governs the actual transfer of loans from the Originator or the Sponsor to the Depositor, may be executed by, among others, the Originator and the Depositor. *See, e.g.*, Soundview MLPA, Exhibit "C" to Soundview PSA.

Under the PSA, the Depositor files the prospectus and the PSA controls the terms of the securitization. *See id.* §2.07; Preliminary Statement; *see also* Soundview Prospectus. The Depositor is obligated to deliver to the Trustee, or the Custodian on the Trustee's behalf, the "Mortgage File" (or "Collateral File") for each loan in the pool. The Custodian collects and maintains those files. *See* Soundview PSA §§ 2.01, 2.02. A Mortgage File generally includes: (i) the original mortgage note; (ii) the original mortgage; (iii) an original assignment; (iv) any

[6] *See* www.sec.gov/Archives/edgar/data/1356081/000088237706001413/d484978_ex4-1.htm.

intervening assignments; (v) the lender's title insurance policy; and (vi) any assumption, modification, written assurance, or substitution agreements. *See* Soundview PSA § 2.01. The PSA allows original notes to be endorsed in blank or to the Trustee. *See id.* The PSA also allows the "original assignment" to be assigned in blank or to the Trustee. *See id.* Recording of assignments is generally not required when the Trust is created. If a triggering event such as a foreclosure occurs, the assignment is completed and recorded (if needed).[7] *See id.*

Although her allegations are unclear, Relator apparently claims to have uncovered a scheme in which original mortgage assignments either were never delivered to the Trusts or subsequently were lost, and in which Defendants engaged in a process to replace the missing documents with "fraudulent, fabricated assignments" in order to foreclose on defaulted properties. *See, e.g.*, Cplt. ¶¶ 3, 6, 74, 196. Relator alleges that, as part of that process, Defendants had employees or agents of Loan Processing Services, Inc. and other Defendants execute assignments using false corporate officer titles, false dates of assignment, and forged signatures. *See id.* ¶ 88. Relator also alleges that documents pertaining to the Trusts, as well as certifications filed with the SEC, contained false and misleading statements regarding the presence of the assignments in the Collateral Files. *See, e.g., id.* ¶¶ 6, 9, 55, 57, 190-204. According to Relator, Defendants also submitted improper or illegal charges to the Trusts, including charges for services related to "missing" notes and assignments, which diminished the Trusts' values. *See id.* ¶¶ 4, 226-27. In addition, Relator alleges that Defendants falsely represented to the government, through the submission of claims to HUD for mortgage guarantees, that they had good title to properties on which they had foreclosed. *See id.* ¶ 234.

Based on these allegations, Relator purports to assert claims against Movants and the

[7] Although the structure described in this brief is the one that apparently was utilized with respect to the Soundview Trust, there is variation across securitization deals.

other Defendants under several sections of the FCA, as well as similar provisions of state and local false claims laws. Relator seeks damages for: 1) the impaired value of the MBS; 2) charges for fraudulent services and services not provided to the Trusts; 3) increased costs incurred by the Trusts to prove good title as a result of missing or defective assignments; and 4) payments by HUD on loan guarantees for mortgages lacking valid notes and assignments. *See id.* ¶¶ 4-5.

LAW AND ARGUMENT

I. Pleading Requirements Under Rules 9(b) and 12(b)(6)

In an FCA case, the heightened pleading standards of Rule 9(b) apply, mandating that, "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). *See United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F. 3d 451, 455 (4th Cir. 2013), *pet. for cert. filed* May 10, 2013; *see also United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F. 3d 552, 556 (8th Cir. 2006) ("Because the FCA is an anti-fraud statute, [FCA] complaints . . . must comply with Rule 9(b)."); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield*, 472 F. 3d 702, 727-28 (10th Cir. 2006) (requiring FCA claims to be pled with particularity); *United States ex rel. Clausen v. Lab. Corp.*, 290 F. 3d 1301, 1311 (11th Cir. 2002) (same). Failure to comply with Rule 9(b) is a failure to state a claim under Rule 12(b)(6). *Carter v. Halliburton Co.*, No. 1:08cv1162, 2009 WL 2240331, at *7 (E.D. Va. July 23, 2009) (*citing Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

Under Rule 9(b), an FCA plaintiff "must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison*, 176 F. 3d at 784. In other words, a plaintiff must allege "'the who, what, when, where and how' before access to the discovery process can be granted." *United States ex rel. Jones v. Collegiate Funding Servs., Inc.*, No.

3:07cv290, 2010 U.S. Dist. LEXIS 139989, at *23 (E.D. Va. Sept. 21, 2010) (*citing United States ex. rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008)). A complaint that "fails to allege specific claims submitted to the government and the dates on which those claims were submitted" is insufficient. *See United States v. Kernan Hosp.*, 880 F. Supp. 2d 676, 683 (D. Md. 2012) (*citing Clausen*, 290 F.3d at 1311; *United States ex rel. Brooks v. Lockheed Martin Corp.*, 423 F. Supp. 2d 522, 526-27 (D. Md. 2006)). Further, "a plaintiff must show a link between allegedly wrongful conduct and a claim for payment actually submitted to the government." *Kernan*, 880 F. Supp. 2d at 683 (citation omitted).

Rule 9(b) serves several purposes, including elimination of "fraud actions in which all the facts are learned after discovery." *Harrison*, 176 F. 3d at 784 (citation omitted). It also "protects defendants from harm to their goodwill and reputation." *Id.* The Fourth Circuit has noted that Rule 9(b)'s purposes "may apply with particular force in the context of the [FCA], given the potential consequences flowing from allegations of fraud by companies who transact business with the government." *Nathan*, 707 F. 3d at 456; *see also Clausen*, 290 F.3d at 1313 n.24 (noting Rule 9(b)'s special importance in an FCA case, "which provides a windfall for the first person to file and permits recovery on behalf of the real victim, the Government."). Thus, the Fourth Circuit has rejected a "more lenient application" and has "adhered firmly to the strictures of Rule 9(b) in applying its terms to [FCA] cases. . . ." *Nathan*, 707 F.3d at 456 (citations omitted).

That the evidence may be solely in the defendant's possession will not excuse a relator's failure to plead FCA claims with the requisite specificity. Indeed, "Rule 9(b) is aimed at preventing such fishing expeditions": "The clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed." *United States ex rel. Elms v. Accenture LLP*, 341 F. App'x 869, 873 (5th Cir. 2009) (*citing Harrison*, 176 F.3d at

789); *see also Nathan*, 707 F.3d at 456-58 (refusing to apply a more relaxed pleading standard even where relator "may not have independent access" to the records she needs to state a claim because "a claim brought under the Act that 'rest[s] primarily on facts learned through the costly process of discovery . . . is precisely what Rule 9(b) seeks to prevent'") (*citing Wilson*, 525 F.3d at 380);[8] *see also Clausen*, 290 F.3d at 1314 (recognizing that "corporate outsider" may have trouble obtaining information and meeting FCA's pleading requirements; however, "neither the Federal Rules nor the [FCA] offer any special leniency under these particular circumstances.").

II. Relator Fails to State Any Actionable Claims Under FCA Subsections (A) and (B)

Subsection 3729(a)(1)(A) of the FCA imposes liability on one who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." Under subsection 3729(a)(1)(B), a person is liable if he "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[9] In the Fourth Circuit, the same test applies to both subsections: a relator must allege with Rule 9(b) particularity that (1) the defendant made a false statement or engaged in a fraudulent course of conduct; (2) such statement was made or carried out with the requisite scienter; (3) the statement or conduct was material; and (4) the statement or conduct caused the government to pay out money or to forfeit money due. *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003); *see also United States ex rel. McLain v. KBR, Inc.*,

[8] In *Nathan*, the court rejected relator's argument that Rule 9(b) allows claims to be "alleged with somewhat less specificity" where the alleged claims are numerous, where they involve the government being defrauded, and where privacy laws "prevent the relator from having 'access to all facts'" concerning the allegedly false claims. *See* Redacted Brief for Plaintiff-Appellant Nathan, *United States ex rel. Nathan v. Takeda Pharm. N.A., Inc.*, Case No. 11-2077, Rec. Doc. No. 32, at 48-50 (filed Mar. 5, 2012) (citations omitted).

[9] Although the definition of "claim" was recently amended, at its core a "claim" is "any request or demand . . . for money or property . . . presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i).

No. 1:08-cv-499, 2013 WL 710900, at *5 (E.D. Va. Feb. 27, 2013) (citations omitted). Although a claim under subsection (B) refers to "false records," the existence of a "false claim" is still required. *United States ex rel. Badr v. Triple Canopy, Inc.*, No. 1:11-cv-288, 2013 WL 3120204, at *13 (E.D. Va. June 19, 2013) (*citing United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728-29 & n.* (4th Cir. 2010)).

"The Supreme Court has cautioned that the [FCA] was not designed to punish every type of fraud committed upon the government." *Harrison*, 176 F.3d at 785 (*citing United States v. McNinch*, 356 U.S. 595, 599 (1958)). Indeed, it "imposes liability not for defrauding the government generally; it instead only prohibits a narrow species of fraudulent activity: 'present[ing], [or] caus[ing] to be presented . . . a false or fraudulent claim for payment or approval.'" *Kernan*, 880 F. Supp. 2d at 686 (brackets and ellipses in original) (*citing United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007)). Thus, to be actionable, a false statement "must constitute a 'false or fraudulent *claim*.'" *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc., 707 F.3d 451, 454 (4th Cir. 2013), pet. for cert. filed* May 10, 2013 (emphasis in original) (citation omitted); *see also Clausen v. Lab. Corp.*, 290 F.3d 1301, 1311 (11th Cir. 2002) ("The submission of a [false] claim is . . . the *sine qua non* of a False Claims Act violation.") (brackets and ellipses in original). "Without the presentment of such a claim, while the practices of an entity . . . may be unwise or improper, there is simply no actionable damage to the public fisc as required under the [FCA]." *Clausen*, 290 F. 3d at 1311.

A. The Pre-FERA Version of the FCA Applies to Relator's Claims, But Under Either Version of the FCA, Relator's Claims Fail

In *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668-69 (2008), the Supreme Court held that false statement liability under the FCA extended only to false statements that a contractor intended to be material to the government's decision to pay or

approve the claim. Congress responded to *Allison Engine* by enacting the Fraud Enforcement Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21 § 386, 123 Stat. 1617 in May 2009, which amended certain sections of the FCA, including some at issue in this case. Among other things, FERA altered the false statement provision to include liability for false statements "material to" a false or fraudulent claim - thus eliminating the requirement of intentional conduct.[10]

Relator's claims – which appear to span a time period from 2004 to 2009 – are governed by pre-FERA standards.[11] First, section 4(f)(1) of FERA (the amended liability provision) states that it applies to "all claims under the [FCA] that are pending on or after" June 7, 2008. As one court has recently noted, "[t]he weight of authority appears to tip in favor of applying the post-FERA version [of the FCA] . . . *only if* the actual false claims at issue were pending after June 7, 2008." *United States v. Kernan Hosp.*, 880 F. Supp. 2d 676, 683 (emphasis added) (citation omitted). Here, most, if not all, of the purported false claims pre-date June 7, 2008 and thus are not governed by FERA. More fundamentally, "retroactivity is not favored in the law," *United States ex. Rel. Baker v. Cmty. Health Sys.*, 709 F. Supp. 2d 1084, 1105 (D.N.M. 2010), and retroactive application of FERA would violate the *ex post facto* clause of the U.S. Constitution, *see* U.S. Const. Art. I, § 9, cl. 3, as it would punish Defendants for conduct that was not unlawful

[10] The prior version of the FCA's false statement section imposed liability on a person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Allison Engine*, 553 U.S. at 668 (*citing* former section 3729(a)(2), now section 3729(a)(1)(B)).

[11] Courts are divided as to whether FERA's use of the word "claims" in section 4(f)(1) was intended to mean "claims for payment" or "cases" pending as of June 7, 2008. The Fourth Circuit has not yet decided this. *See United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F. 3d 724, 735 n.* (4th Cir. 2010) (assuming that the amended version of the FCA applied to the false statements portion of the case, "since [relator's] claim fails in any event"); *see also United States v. Fadul*, No. DKC 11-0385, 2013 WL 781614, at *15 n.10 (D. Md. Feb. 28, 2013) (noting the dispute among courts as to the retroactive effect of the FERA amendments, but concluding it was not necessary to resolve because it would not be outcome-determinative).

when allegedly undertaken.[12]

Regardless of whether FERA applies, Relator's claims fail because they do not meet the core requirements of the FCA (both prior to and after FERA): Relator fails to identify a *false claim – i.e.*, a request or demand for money or property – *presented* to the government or anyone else. *See Nathan*, 707 F.3d at 456. Nor does she allege that any Defendant made a *false record or statement material* to a false claim. *See* 31 U.S.C. § 3729(a)(1)(B).

B. Relator Fails to Adequately Plead Each Defendant's Culpability

In FCA cases with multiple defendants, it is not enough to lump them together. A relator must "set forth with particularity each defendant's culpable conduct." *United States ex rel. Ahumada v. Nat'l Ctr. for the Employment of the Disabled*, 2013 WL 2322836, at *3 (E.D. Va. May 22, 2013). Multiple defendants "cannot simply 'be grouped together without specification of which defendant committed which wrong.'" *Id.* (citation omitted). Rather, "the complaint must apprise each defendant of the specific nature of his or her participation in the fraud." *Id.* (citation omitted); *see also Apple v. Prudential-Bache Sec.*, 820 F. Supp. 984, 987 (W.D.N.C. 1992) ("[W]hen a relator raises allegations of fraud against multiple defendants, the complaint must apprise each defendant of the specific nature of his or her participation in the fraud.").

Relator alleges that unspecified "Defendants" created or sold MBS, that unspecified "Defendants and their agents and employees" made false representations regarding title to the MBS properties, that unspecified "Defendants" received money from the U.S. government to

[12] Damages for FCA violations are "essentially punitive in nature." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 592 U.S. 765, 784 (2000). Thus, several courts have held that the FCA cannot be applied retroactively. *See United States ex. rel. Cafasso v. Gen. Dynamics C4 Sys.*, 637 F. 3d 1047, 1051 n.1 (9th Cir. 2011); *Hopper v. Solvay Pharms.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009); *United States ex rel. Baker v. Cmty. Health Sys.*, 709 F. Supp. 2d 1084, 1108-12 (D.N.M. 2010); *United States v. Hawley*, 812 F. Supp. 2d 949, 958-62 (N.D. Iowa 2011); *but see United States. ex rel. Sanders v. Allison Engine Co.*, 703 F. 3d 930 (6th Cir. 2012).

provide services to the Trusts, and that unspecified "Defendants" made false representations in connection with claims on mortgage guarantees. Thus, Relator alleges, unspecified "Defendants and their agents and employees knowingly presented or caused to be presented a false or fraudulent claim . . . ." Cplt. ¶ 257. Elsewhere, Relator refers only to "Defendants," "Trustee Bank Defendants," and "Mortgage Foreclosure Servicing Defendants" without specifying which allegations pertain to which Defendant(s). *See, e.g., id.* ¶¶ 88, 92.

These allegations, which amount to "generalized allegations against multiple parties," are "insufficient to meet the particularity requirements of Rule 9(b)" and must be dismissed. *Ahumada*, 2013 WL 2322836, at *3 (dismissing FCA complaint for failure to state a claim where count made "general assertions against all of the Manufacturing Defendants without specifics of each Defendant's alleged conduct"); *United States ex. rel. Brooks v. Lockheed Martin Corp.*, No. Civ. L-00-1088, 2005 WL 841997, at *2 (D. Md. Mar. 22, 2005) (dismissing FCA complaint which "lumps all of the Defendants together without identifying the person, or the corporation, making the alleged misrepresentations"); *Arnlund v. Smith*, 210 F. Supp. 2d 755, 760 (E.D. Va. 2002) (holding that complaint must be dismissed where defendants are "grouped together without specification of which defendant committed which wrong").

C. Relator Fails to Allege Adequately the Presentment of Any False Claim

The essence of Relator's allegations appears to be that Defendants violated the FCA in four ways: (1) during the securitization process, the Trusts falsely represented that they had the original notes and/or assignments and made false representations to investors that the Trusts had good title to the mortgaged properties; (2) that Defendants created "new" or "fraudulent" assignments to replace the ones that were missing; (3) that Defendants charged the Trusts for these improper or illegal services, which diminished the value of the Trusts to the detriment of their investors; and (4) that Defendants falsely represented that they held good title to properties

when submitting claims to HUD for mortgage guarantees on defaulted properties.

None of these claims is sufficiently pled. The first three assertions go to claims involving the securitization process, described earlier in the context of MBS Trusts. Relator alleges that, as a result of her securitization allegations, the MBS were impaired. The fourth assertion is wholly separate from the other three assertions of liability, although it too depends on improprieties in the documents of title, particularly the assignments.

(1) Securitization Claims

(a) Relator Fails to Establish False Claims Based on Statements in Trust Documents or SEC Filings

Throughout the Complaint, Relator refers to allegedly false statements contained in the prospectuses and PSAs pertaining to the Trusts. *See, e.g.*, Cplt. ¶¶ 191-204. Relator claims that such documents falsely represented that the Trusts held the notes and mortgages. *See, e.g., id.* Even if such false statements were made, however, there is no allegation that Movants were responsible for them. The Servicers did not write the PSAs or the prospectuses, nor did they file them with the SEC. Moreover, the Servicers did not sell the MBS to investors. Similarly, Defendant NTC did not write the PSAs or the prospectuses, nor did it file them with the SEC. Thus, any false statements in the PSAs or prospectuses cannot form the basis for an FCA claim against any of the Movants. *See, e.g., United States ex rel. Badr v. Triple Canopy, Inc.*, No. 1:11-cv-288, 2013 WL 3120204, at * 7 (E.D. Va. June 19, 2013) (holding that allegedly false statements on claim forms not completed by defendant were not "claims" by defendant for purposes of an FCA violation) (*citing United States ex rel. Butler v. Hughes Helicopters, Inc.*, 91 F. 3d 321, 331 (9th Cir. 1995)). Further, as noted below, Relator has not alleged that such statements were material to a decision to expend government funds.

Relator also attempts to allege that Defendants made false statements in their own

securities filings under SEC Regulation AB because they "failed to state that the notes and mortgage assignments had not been transferred to the trusts." *See, e.g.*, Cplt. ¶¶ 74-75, 200-01. However, Regulation AB certifications are not statements that Collateral Files contain particular documents; rather, they are statements that a servicer's systems comport with certain uniform servicing criteria and the "applicable servicing agreement," as attested by annual audits. *See* 17 C.F.R. §§ 229.1122(a), 1123; *see also The Securities Exchange Act of 1934, SFINA* § 11.04[B][1][c] (Aspen Pub. 2012) ("Item 1122 provides that each party that participates in the servicing function must file . . . a report on that party's compliance with the uniform servicing standards, and each of these reports must be accompanied by an independent accounting firm," and that "Item 1123 requires a compliance statement . . . that "the servicer has fulfilled all of its obligations under the [applicable servicing] agreement."); SEC Release No. 8518, at *118 (2004) (accompanying final rule). Relator has not alleged at all, let alone with the requisite specificity, that the PSAs for each of the unnamed Trusts made the Servicers or NTC responsible for ensuring that notes and mortgage assignments were delivered to the Trusts. Thus, there can be no FCA liability for any of the Movants on the basis of the Regulation AB certifications.

(b) Relator Fails to Establish False Claims Based on the Alleged Creation of New Assignments

Relator theorizes that, because original assignments were missing from the Collateral Files, "new" or "fraudulent" assignments were created by Defendants, and that the Trusts (and then the investors) were charged for these "illegal" or "improper" services. *See, e.g.*, Cplt. ¶¶ 88-91, 256-57, 263-64. Although the Complaint alleges defective assignments, there are no allegations that any false *claim* was actually presented to the government. That a defective assignment may have been created for a loan in a Trust, or even that it may have been filed in a foreclosure proceeding, does not establish that a false claim was presented to the government.

In *Clausen*, the court addressed a similarly deficient FCA complaint. There, the relator alleged that a medical testing company performed unnecessary tests on Medicare patients for which it billed the government. *United States ex rel. Clausen v. Lab. Corp.*, 290 F.3d 1301, 1303 (11th Cir. 2002). The district court dismissed the case because the complaint was based entirely on "conclusory allegations of fraudulent billing" and failed to "identify any specific claims that were submitted to the United States or . . . the dates on which those claims were presented . . . ." *Id.* at 1311. The court held that identifying the type of claim form used and alleging approximately when a claim was filed was insufficient to comply with Rule 9(b). *Id.* (citation omitted). The Eleventh Circuit affirmed, agreeing that "nowhere in the blur of facts and documents . . . can one find any allegations, stated with particularity, of a false claim actually being submitted to the government." *Id.* at 1312. The Fourth Circuit recently followed *Clausen* and held that "when a defendant's actions, as alleged and as reasonably inferred from the allegations, *could have led*, but *need not necessarily have led*, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment." *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013), *pet. for cert. filed* May 10, 2013 (emphasis added).

Here, "[w]hile on their face plaintiff's allegations may seem specific, the specificity is illusory." *United States ex. rel. Goldstein v. Leonard's Draperies, Inc.*, 238 F. Supp. 2d 711, 712 (D. Md. 2002). Relator attempts to allege a "complicated scheme," but does not "identify a single" false claim, thereby failing to "link this scheme with any claims actually submitted." *United States v. Kernan Hosp.*, 880 F. Supp. 2d 676, 686 (D. Md. 2012). Relator's failure to allege any false claims actually submitted to the government, "the crucial link between the alleged scheme and ultimate False Claims Act liability," is fatal to her case and requires its

dismissal. *See id.; see also Nathan*, *supra*; *United States ex rel. Ahumada v. Nat'l Ctr. for the Employment of the Disabled*, 2013 WL 2322836, at *4 (dismissing FCA complaint "devoid of any particularized facts" because "[n]ot a single employee, specific communication, the specific products shipped, or a specific invoice that was submitted to the Government is mentioned."); *United States ex rel. Weiner v. Ancillary Care Mgmt., Inc.*, No. CCB-12-1038, 2013 WL 1310675, at *2 (D. Md. Mar. 28, 2013) ("[A]lthough [relator] may have plausibly alleged a troubling set of relationships . . . even if his allegations rose to the level of actionable fraud, there is no indication a 'false claim' was 'actually presented to the government for payment.").[13]

Further, contrary to Relator's allegation that it was fraudulent for any Defendant to create "new" assignments in lieu of using the original assignments in foreclosure proceedings, the validity of subsequent assignments (whether "new," duplicative, or confirmatory) has been affirmed by a number of courts. *See, e.g.*, *Horvath v. Bank of NY*, 641 F. 3d 617 (4th Cir. 2011); *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C.*, 717 F. Supp. 3d 724 (E.D. Mich. 2010), *aff'd*, 399 F. App'x 97 (6th Cir. 2010), *cert. denied*, 131 S.Ct. 1696 (2011); *In re Ismael Almeida*, 417 B.R. 140 (Bankr. D. Mass. 2009); *In re Samuels*, 415 B.R. 8

[13] Other courts have held similarly. *See, e.g.*, *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1358 (11th Cir. 2006) (complaint failed to meet Rule 9(b); although plaintiff "described in detail what he believes is an elaborate scheme for defrauding the government by submitting false claims," he failed to show that defendants "actually submitted reimbursement claims for the services he describes"); *Chesbrough v. VPA, P.C.*, 655 F. 3d 461, 467 (6th Cir. 2011) (dismissing FCA claims based on alleged Medicare scheme because plaintiffs "failed to allege with particularity any billings for those [allegedly unnecessary] tests that were actually submitted to the government, and their lack of personal knowledge of defendant's actual billing practices was fatal to any inference which might arise" from certain representative test samples attached to the complaint); *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, No. 06-11848, 2009 U.S. Dist. LEXIS 30393, at * 23 (E.D. Mich. Apr. 7, 2009), *aff'd*, 618 F.3d 505 (6th Cir. 2010) (holding that "the 'listing' of sixty five contracts between Ford and the Government . . . does not now provide [the] Court with any evidence as to even a single claim for payment made by Ford. . . ").

(Bankr. D. Mass. 2009).[14] In fact, the Federal National Mortgage Association, Inc. ("Fannie Mae") explicitly approves of the use of "new" assignments in foreclosure proceedings.[15]

(c) Relator Fails to Identify Any False Charges Submitted to the Trusts

Relator alleges that Defendants submitted improper charges to the Trusts in connection with creating defective assignments, and that these charges impaired the Trusts' values. *See, e.g.*, Cplt. ¶¶ 226-27. However, it is mere speculation that any improper charges pertaining to allegedly invalid assignments were submitted to the Trusts; Relator simply assumes this to be the case, and does not identify a single false charge that was allegedly submitted to the Trusts. Thus, these allegations are not enough to satisfy *Twombly*,[16] let alone Rule 9(b)'s heightened pleading standard. *See United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 456-57

[14] *See also* Restatement (Third) of Property: Mortgages § 5.4 (1997) ("Institutional purchasers of loans in the secondary mortgage market often designate a third party, not the originating mortgagee, to collect payments on and otherwise 'service' the loan . . . . In such cases the promissory note is typically transferred to the purchaser, but an assignment of the mortgage from the originating mortgagee to the servicer may be executed and recorded. This assignment is convenient because it facilitates actions that the servicer might take, such as releasing the mortgage, at the instruction of the purchaser. The servicer may or may not execute a further unrecorded assignment of the mortgage to the purchaser. It is clear in this situation that the owner of both the note and mortgage is the investor and not the servicer. This follows from the express agreement to this effect that exists among the parties involved. The same result would be reached if the note and mortgage were originally transferred to the institutional purchaser, who thereafter designated another party as servicer and executed and recorded a mortgage assignment to that party for convenience while retaining the promissory note. Again, the parties' agreement that ownership of the note should remain in the purchaser would be enforced.").

[15] *See FannieMae Servicing Guide Part VIII, 107: Conduct of Foreclosure Proceedings*, at 801-34 (Mar. 14, 2012), *available at* https://www.fanniemae.com/content/guide/svc031412.pdf.

[16] In order to survive a motion to dismiss, the complaint must set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 n.3 (2007). The complaint must be "plausible on its face," meaning that the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555, 570. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (*quoting Twombly*, 550 U.S. at 556-57).

(4th Cir. 2013), *pet. for cert. filed* May 10, 2013 (Rule 9(b) "does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government") (*quoting United States ex rel. Clausen v. Lab. Corp.*, 290 F.3d 1301, 1311 (11th Cir. 2002)); *see also Sanderson v. HCA – The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (same).

A relator must allege more than a theoretical scenario about what may have happened. In *Nathan*, which involved an alleged marketing scheme to promote a prescription drug for off-label use, the relator tried to assert FCA claims without any allegations of specific false claims that were actually presented to the government. Indeed, the relator in *Nathan* failed to "include any details about the particular prescriptions these physicians wrote . . . nor . . . allegations that [ ] patients ever 'filled' these prescriptions or that corresponding claims for reimbursement ever were submitted to the government." *Id.* at 460-61. Thus, the court could not infer that just because "a patient is insured under a government program . . . any prescription the patient received for an off-label use was filled and that a claim was presented to the government" and, therefore, the court dismissed the claims. *Id.* at 460, 461; *see also Clausen*, 290 F.3d at 1313 n.23 ("Contrary to the dissent's suggestion, we cannot presume what LabCorp's billing practices were and assume LabCorp actually billed the Government in whole or in part for all tests it 'took the trouble to order'"); *United States ex rel. Palmieri et al. v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 856-67 (D. Md. 2013) (following *Nathan* as "binding circuit precedent" and dismissing FCA complaint: "To be sure, the [ ] Complaint is replete with details of the marketing scheme allegedly perpetrated by defendants. But, the relator has not alleged the details of the submission of any [ ] prescription to a government entity for payment. Rather . . . the relator relies on the

inference that, given defendants' alleged unlawful scheme to market [the drug] and the contemporaneous governmental expenditures . . . some prescriptions caused by the fraudulent scheme must be among [those] that were reimbursed from government coffers.").

Similarly, here, Relator makes only general allegations that certain charges were improperly submitted to the Trusts, and does not identify a *single false charge* that was allegedly submitted to the Trusts by any of the Defendants. She essentially asks this court to infer, based on her conclusory and unsupported allegations that assignments were missing from various Trusts, and that charges to create new and/or defective assignments *must* have been incurred and *must* have been submitted to the Trusts. Relator's assumptions, however, are insufficient to satisfy her pleading requirements. Accordingly, Relator's FCA claims must be dismissed.

(d) Relator Fails to Establish That Any Securities Were Impaired

Relator does not allege any facts to support her allegation that, by virtue of Defendants' use of allegedly defective assignments, "impaired securities" were transferred to the government. *See*, *e.g.*, Cplt. ¶ 257. This is because her legal conclusion is fundamentally flawed. Under the Uniform Commercial Code ("UCC"), which governs promissory notes secured by mortgages in nearly every state,[17] "the mortgage follows the promissory note"; that is, possession of a promissory note, properly endorsed, is sufficient to establish standing to foreclose and a separate assignment of mortgage is not necessary to transfer legal title. *See* UCC § 3-301 (providing that a person may enforce a note either through possession of the note as the holder or nonholder with the rights of a holder); § 9-203(g) cmt.9 ("a transfer of an obligation secured by a security

[17] UCC Article III applies to negotiable instruments; UCC Article IX applies to non-negotiable and other security instruments.

interest or other lien on personal or real property also transfers the security interest or lien);[18] *see also United States v. Washington*, No. 10-cv-39, 2013 WL 1314420, at *7 (D.N.H. Mar. 28, 2013); *In re Sandford*, No. 11-10-14424, 2012 WL 6012785, at *3 (Bankr. D.N.M. Dec. 3, 2012); *In re Robinson*, No. 07-02146-8, 2011 WL 5854905, at *3 (Bankr. E.D.N.C. Nov. 22, 2011); *In re Escobar*, 457 B.R. 229, 239 (Bankr. E.D.N.Y. Aug. 22, 2011); *In re Kemp*, 440 B.R. 624, 630 (Bankr. D.N.J. Nov. 16, 2010); *Edelstein v. Bank of N.Y. Mellon*, 286 P. 3d 249, 261 (Nev. Sept. 27, 2012). Because assignments of mortgage are generally not required to transfer title to mortgage loans, the absence of assignments, or even the presence of "false" or "fraudulent" assignments, does not impair the title to the loan or the ability to foreclose.

Relator speculates that, "[w]ithout the assignments, the value of the assets is severely diminished because the trustee is unable to establish clear chain-of-title to pursue a foreclosure action." Cplt. ¶ 76. However, she alleges no specific facts to support that conclusion; it is just her unsupported theory.[19] Relator's failure to provide any specific allegations about the increased costs that the Trusts actually have incurred with respect to these foreclosures is fatal to her claims. And as for foreclosures that have not yet occurred, Relator's claim that Trusts *may*

[18] *See also Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes*, Permanent Editorial Board for the UCC (Nov. 14, 2011), at 12 *available at* http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf ("What if a note secured by a mortgage is sold . . . , but the parties do not take any additional actions to assign the mortgage that secures payment of the note, such as execution of a recordable assignment of the mortgage? UCC Section 9-203(g) explicitly provides that . . . the assignment of the interest of the seller . . . of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee . . . ") (*cited in* Kraettli Q. Epperson, *Case Note: Bac Home Loans-the Mortgage Follows the Note*, 65 Consumer Fin. L.Q. Rep. 415, 416 (2011)).

[19] Tellingly, at several points in the Complaint Relator uses the future tense and/or speculative language. For example, she avers: "DBNTC *may* prove unable to establish title or *will* expend significant funds in an effort to prove its allegations that it is the lawful owner of Relator's Mortgage . . . ." Cplt. ¶ 63 (emphasis added); *see also, e.g., id.* ¶¶ 224, 240 ("In any foreclosures on assets in the trust, the Trustee Bank Defendants *will* be unable, or will have to expend significant funds, to prove their allegations that the trust is the lawful owner of the subject mortgage . . . ") (emphasis added).

incur increased costs in the future is simply too speculative to pass muster under Rule 9(b).

(2) Mortgage Guarantee Claims

Relator alleges that Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), as well as HUD, "provide guarantees to lenders for borrower defaults, and that each time a Defendant lacking valid notes and mortgage assignments submitted a claim for payment on such guarantee, said Defendant submitted a false claim for payment or approval." Cplt. ¶ 234. The only other HUD-related allegations in the Complaint are these: "The U.S. Government is further harmed by payments made on mortgage guarantees to Defendants lacking valid notes and assignments of mortgages who were not entitled to demand or receive said payments"; and "Defendants falsely represented, in connection with submitting claims on mortgage guarantees, that they held good title to the notes and mortgages." *Id.* ¶¶ 4, 257, 264. Thus, nowhere does Relator allege *which* loans were guaranteed by the government, much less which, if any, insurance *claims* were actually submitted by any of the Defendants for payment. Indeed, there is not a single allegation of a specific presentment by any particular Defendant, including Movants. Accordingly, the mortgage guarantee claims should be dismissed.

In *United States ex rel. Jones v. Collegiate Funding Services, Inc.*, No. 3:07CV290, 2011 WL 129842 (E.D. Va. Jan. 2, 2011), *aff'd*, 469 F. App'x 244 (4th Cir. 2012), the relators alleged that defendant, a private lender, made false statements in claim forms to the Department of Education ("DOE") for reimbursement on federally-guaranteed loans. Relators alleged that the claim forms required lenders to certify that all information was true and that the loans complied with all applicable federal rules and regulations. *Id.* at *1. Relators averred, as the basis for their FCA claim, that the DOE claims forms were false because the loans in question violated the Higher Education Act ("HEA"). *Id.* at *1-2. However, like here, relators did not "allege any instances of payments made by the government, instances of default, or any other facts from

which the Court could infer that Defendants actually submitted any false statements." *Id.* at *18. The court rejected relators' argument that they had satisfied Rule 9(b) by attaching a blank claim form, by generally describing the defendants' alleged HEA violations, and by asserting that they had "personal knowledge [that] false certifications were indeed used to get legally false claims paid," since there were no supporting facts to "lead to a strong inference that claims were actually submitted." *Id.* at *17 (citations omitted). In other words, "the simple fact that Defendants *could* submit such claims to the DOE does not permit the inference that Defendants *did* submit any such claims."[20] *Id.* at *19 (emphasis in original). Thus, the court found that relators' claims were too speculative and dismissed the case. *See id.*

Numerous other cases have similarly dismissed FCA claims where relators have described allegedly fraudulent claims or schemes, yet have failed to provide any details about the *actual claims* allegedly presented to the government. *See, e.g., United States v. Kernan Hosp.*, 880 F. Supp. 2d 676, 686 (D. Md. 2012) (dismissing FCA case involving allegedly false cost reports where complaint did not identify either a single report actually submitted to, or payment by, the government agency for services not rendered); *United States ex rel. Rostholder v. Omnicare, Inc.*, No. CCB-07-1283, 2012 U.S. Dist. LEXIS 114278, at *49 (D. Md. Aug. 14, 2012) (dismissing FCA claims based on improper Medicare billing where relator "has not sufficiently explained the nature of this [billing] process or directed the court to the specific regulations, guidance manuals, or specific forms that are used in the payment process – much less copies of the specific forms that requested reimbursement for the drugs at issue."); *Carter v. Halliburton Co.*, No. 1:08cv1162, 2009 WL 2240331, at * 11 (E.D. Va. July 23, 2009) (dismissing FCA claim based on alleged false statements made in reimbursement form where

[20] It is worth noting that *Jones* was decided before the Fourth Circuit's decision in *Nathan*, which took an even more stringent approach to Rule 9(b)'s pleading standards in the FCA context.

relator did not provide "information regarding what [the] form is, when it was signed or who signed it); *United States ex rel. Martinez v. Virginia Urology Ctr.*, No. 3:09-CV-442, 2010 WL 3023521, at *5 (E.D. Va. July 29, 2010) ("While [the] pleadings do contain specific allegations regarding particular procedures which were not followed and specific forms which were left blank, they are deficient in details linking these omissions to claims actually submitted for payment and to amounts inappropriately paid.").[21] Here, too, Relator lacks allegations that specific mortgage guarantee claims were "false" and were actually presented to the government. These deficiencies are fatal to her FCA claims.

D. Relator Fails to Adequately Plead Materiality

Relator must also plead that the false statement or claim was "material." *See Harrison v. Westinghouse Savannah River Co.*, 176 F. 3d 776, 785 (4th Cir. 1999) ("Liability under each of the provisions of the [FCA] is subject to the further, judicially-imposed, requirement that the false statement or claim be material."). A "material" statement is one that "has a natural tendency to influence agency action or is capable of influencing agency action." *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F. 3d 1453, 1460 (4th Cir. 1997). However,

[21] Courts outside the Fourth Circuit have held similarly. *See, e.g., United States ex rel. McMullen v. Ascension Health*, No. 12-1894, 2013 WL 5989312, at * 2 (N.D. Tex. Nov. 12, 2013) ("Relator may have identified conduct which allegedly violated a Medicare guideline, but he has not identified . . . a specific false claim of which he has personal knowledge which was in fact presented to the government"); *Thompson v. LifePoint Hosps., Inc.*, No. 11-01771, 2013 WL 5970640, at * 4 (W.D. La. Nov. 8, 2013) ("Relator has set out the procedure and process by which defendants could have produced false claims, but provides no facts that this. . . did, in fact, result in the submission of false claims."); *United States ex. rel. Moore v. GlaxoSmithKline, LLC*, No. 06 Civ. 6047, 2013 WL 6085125, at * 5 (E.D.N.Y. Oct. 18, 2013) ("It is insufficient to allege that the submission of a false claim is merely conceivable or even likely. Here, plaintiff has failed to allege details of either a specific claim for payment that was submitted. . . *or* the specific details of an actual [ ] certification form signed by a particular physician") (emphasis in original); *Winkler v. BAE Sys., Inc.*, No. 10-cv-13558, 2013 WL 3724784, at * 13 (E.D. Mich. July 15, 2013) (dismissing FCA claims that failed to "identify single actual claim," where relator had no personal knowledge of the contract or the billing practices at issue).

Relator does not sufficiently allege materiality – *i.e.*, that in connection with any of the MBS purchases or the payments by HUD on insured loans, the government relied on anything that any of the Defendants represented. Indeed, there is only one oblique reference to materiality in the Complaint (repeated twice): that the government was "unaware of the falsity or fraudulent nature of the claims made by Defendants," and therefore, "approved, paid and participated in payments . . . for claims that otherwise would not have been paid." Cplt. ¶¶ 258, 265. However, this conclusory allegation is clearly insufficient under Rule 9(b). Accordingly, because Relator fails to allege the required element of materiality, her FCA claims should be dismissed. *See United States ex. rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F. 3d 288, 299 (4th Cir. 2008) (upholding district court's finding of lack of materiality where false statements alleged by relator were immaterial to government's payment decision); *Jones*, 469 F. App'x at 259 (rejecting FCA claim where relators "alleged only the broad inferential claim that but-for the certifications, the loans would not have been disbursed," but did not allege "any particular transactions . . . in which the certifications were material"); *United States ex rel. McLain v. KBR, Inc.*, No. 1:08-cv-499, 2013 WL 710900, at * 8 (E.D. Va. Feb. 27, 2013) (dismissing complaint that "fail[ed] to allege any causal connection or link between the compliance logs and either the submission or payment of a claim," because it "fail[ed] to provide a plausible basis upon which to find that the . . . logs . . . are in any way material to a payment by the government."); *United States ex rel. Badr v. Triple Canopy, Inc.*, No. 1:11-cv-288, 2013 WL 3120204, at * 14 (E.D. Va. June 19, 2013) (finding lack of materiality where complaint was "devoid of any allegations that the weapons certification forms were actually reviewed prior to the submission of any claims for payment").

E. Relator Fails to Adequately Plead Scienter

In an FCA case, a plaintiff must show that those responsible for allegedly making false statements did so "knowingly." *See* 31 U.S.C. § 3729(b); *see also United States ex rel. Becker v.*

Westinghouse Savannah River Co., 305 F. 3d 284, 288 (4th Cir. 2002). "Knowingly" means "actual knowledge" of the information, or either "deliberate ignorance" or "reckless disregard" of its truth or falsity. *See* 31 U.S.C. § 3729(b)(1)(A). Further, to establish the requisite scienter, the plaintiff "cannot rely on the collective knowledge of the entity's agents." *United States v. Fadul*, No. DKC 11-0385, 2013 WL 781614, at * 9 (D. Md. Feb. 28, 2013) (*citing United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918 n.9 (4th Cir. 2003)) (rejecting plaintiff's attempt to "prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials"). Thus, an entity's scienter must be proven by showing that "a particular employee or officer acted knowingly." *Id.* (citations omitted).

"Although intent may be alleged generally, the relator must still plead specific facts supporting an inference of fraud." *United States ex rel. Ahumada v. Nat'l Ctr. for the Employment of the Disabled*, 2013 WL 2322836, at *4 (E.D. Va. May 22, 2013) (*citing Wilson*, 525 F.3d at 379); *see also United States ex. rel Decesare v. Am. in Home Nursing*, No. 1:05cv696, 2011 WL 607390, at *6 (E.D. Va. Feb. 10, 2011). Here, Relator has not sufficiently pled scienter, as she merely alleges conclusorily, with respect to each count in the Complaint, that Defendants acted "knowingly." *See, e.g.*, Cplt. ¶¶ 66, 204, 257, 264, 272, 279, 285. Because Relator fails to allege any "specific facts supporting an inference of fraud" or that any Defendant knew that any particular statements were "false," she fails to satisfy the pleading standards. *See Ahumada*, 2013 WL 2322836, at *4; *see also United States ex rel. Decesare v. Americare In Home Nursing*, 757 F. Supp. 2d 573, 583 (E.D. Va. 2010) (dismissing complaint that stated that "defendants knowingly" made false statements, but did not allege "facts showing [defendant's] knowledge that its certifications falsely reported the absence of kickbacks").

III. Relator Fails to State a Claim Under FCA Subsections (C) (D) and (G)

A. Relator Fails to State a Claim Under Subsection (D) Because She Fails to Adequately Plead Specific Services That Were Not Provided

Section 3729(a)(1)(D) of the FCA imposes liability on one who has possession of government property or money and knowingly delivers less than all of it to the government. Relator posits a theory that subsection (D) was violated by Defendants' creation of false mortgage assignments and receipt of payment for services that were not provided, "including, but not limited to, custodial services relating to the notes and mortgage assignments." *See* Cplt. ¶ 272. However, Relator does not identify *a single service* charged to the Trusts that was not provided. Nor does she allege that any government "property" or "money" was possessed by any Defendant and not delivered to the government. Thus, this claim should be dismissed.

B. Relator Fails to State a "Reverse False Claim" Because it is Redundant of the Other FCA Claims

31 U.S.C. §3729(a)(1)(G), the FCA's so-called "reverse false claims" provision, imposes liability on one who knowingly makes, uses, or causes to be made a false record or statement material to an obligation to the government, or knowingly decreases an obligation to the government. Congress enacted this provision "not to provide a redundant basis to state a false statement claim," but rather "to ensure that one who makes a false statement in order to avoid paying money owed to the government 'would be equally liable under the Act as if he had submitted a false claim to receive money.'" *United States ex rel. Thomas v. Siemens AG*, 708 F. Supp. 2d 505, 514 (E.D. Pa. 2010) (*citing* S. Rep. No. 99-345, at 15, 18 (1986)). Here, however, Relator bases her reverse false claims on the same allegations as her other claims: the creation of false assignments, false representations made in Trust documents, and the charging of the Trusts for improper or unlawful services. *See* Cplt. ¶¶ 277-79. "This type of redundant false claim is not actionable . . . ." *United States v. HCA Health Servs., Inc.*, No. 3:09-CV-0992, 2011 WL

4590791, at *8 (N.D. Tex. Sept. 30, 2011) (citation omitted)); *see also United States ex rel. Conrad v. GRIFOLS Biologicals, Inc.*, 2010 WL 2733321, at *6 (D. Md. July 9, 2010) (dismissing reverse false claim involving "precisely the same allegations" as presentment and false records claims).

C. Relator Fails to State a Conspiracy Claim by Failing to Adequately Plead an Unlawful Agreement, and Because the Individual FCA Claims Fail

31 U.S.C. § 3729(a)(1)(C) imposes liability on one who "conspires to commit a[n FCA] violation." To state a claim, Relator must "allege with particularity facts (1) to support the formation of an unlawful agreement between the conspirators to get a false claim paid, and (2) at least one overt act in furtherance of the conspiracy." *United States ex rel. Ahumada v. Nat'l Ctr. for the Employment of the Disabled*, 2013 WL 2322836, at *4 (E.D. Va. May 22, 2013) (*citing United States ex rel. Godrey v. KBR, Inc.*, 360 F. App'x 407, 413 (5th Cir. 2010)); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 790 (4th Cir. 1999). Conclusory allegations of an agreement are insufficient, as Rule 9(b) applies equally to the conspiracy provision as it does to the other FCA sections. *See United States ex rel. Walker v. Corp. Mgmt., Inc.*, Civ. Action No. 2:07-CV-342, 2012 WL 5287065, at *4 (S.D. Miss. Oct. 24, 2012) (*citing United States ex rel. Grubbs v. Ravijumar Kanneganti*, 565 F.3d 180 (5th Cir. 2009)); *Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055, 1063 (S.D. Ohio 1995)).

"Where the conduct that the conspirators are alleged to have agreed upon involved the making of a false record or statement, it must be shown that the conspirators had the purpose of 'getting' the false record or statement to bring about the Government's payment of a false or fraudulent claim." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672-73 (2008), *abrogated by statute on other grounds*, Pub. L. No. 111-21 § 386, 123 Stat. 1617 (2009). Moreover, a plaintiff "must show that the conspirators agreed to make use of the false record or

statement to achieve this end." *Decesare*, 757 F. Supp. 2d at 584 (*citing Allison Engine*, 553 U.S. at 665). Indeed, the alleged conspirators "must have 'shared a specific intent to defraud the Government.'" *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir.1999) (*citing United States ex rel. Farmer v. Houston*, 523 F.3d 333, 343 (5th Cir. 2008)).

First, Relator fails to sufficiently plead any underlying FCA claims, so she cannot proceed with a conspiracy claim. *See United States ex rel. Godfrey v. KBR, Inc.*, 360 F. App'x 407, 412-13 (4th Cir. 2010) (where conspiracy claim is "premised on those claims of underlying FCA violations, the conspiracy claim rises and falls with the individual claims."); *see also United States ex rel. Phillips v. L-3 Commc'ns. Integrated, Sys., L.P.*, No. 3:10-CV-1784, 2012 WL 3649699, at *8 (N.D. Tex. Aug. 24, 2012) (holding that because there was no actionable FCA claim, the FCA conspiracy claim failed as well); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006) ("Because Conner's FCA claims fail to state a claim, there can be no conspiracy. Conner's conspiracy count, therefore, fails as a matter of law."). Thus, Relator's conspiracy claim should be dismissed.

Further, Relator simply asserts that unspecified "Defendants embarked on a plan to forge assignments" and concludes that Defendants conspired to violate the FCA. *See* Cplt. ¶¶ 91, 283-86. However, Relator fails to allege that any of the Movants entered into any *agreement* with any other particular Defendant. Therefore, this claim should be dismissed. *See Godfrey*, 360 F. App'x at 413 (affirming dismissal of conspiracy claim which "failed to provide sufficient facts giving rise to an inference of a meeting of the minds and agreement sufficient to support a claim for conspiracy" and failed to "plead sufficient facts to show that the conspirators intended to defraud the government.") (*citing Allison Engine*, 553 U.S. at 672-73); *Ahumada*, 2013 WL 2322836, at *4; *Decesare*, 757 F. Supp. 2d 573, 584 (dismissing conspiracy claim where

defendant's "membership" in FCA conspiracy was not pled; relator "fails to show that [defendant] was aware of any agreement, let alone that it knowingly joined one," and that defendant "had any intent to defraud the government, let alone shared specific intent to do so"); *Walker*, 2012 WL 5287065, at *4 (dismissing FCA conspiracy claim where plaintiff failed to plead "any specific facts evincing an agreement among the Defendants.").

Relator also alleges that "[t]he Trustee Bank Defendants *directed* the Mortgage Foreclosure Servicing Defendants to prepare and file forged mortgage assignments to replace the existing assignments." Cplt. ¶ 92 (emphasis added). This conclusory allegation does not sufficiently allege that any particular Defendant actually received such directions and actually followed them. Moreover, even if it were sufficient, it would not establish an agreement, since allegations (particularly unsupported ones that are inconsistent with the parties' roles as defined in the PSA) of one defendant following another's instructions does not establish a "meeting of the minds" or establish a "conspiratorial objective." *Durcholz*, 189 F. 3d at 545-546.

IV. Relator Fails to State FCA Claims Based on Alleged Payments by Non-Governmental Entities

Under the FCA, "claim" is defined as a request or demand which is "presented to an officer, employee, or agent of the United States" or "is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest . . . ." 31 U.S.C. § 3729(b)(2). Relator alleges that investments were made in MBS through two limited liability companies called "Maiden Lane" which, according to Relator, were formed to facilitate the merger of the Bear Stearns Companies and JPMorgan Chase. *See* Cplt. ¶¶ 205, 208-09. Relator alleges that government funds were used to purchase MBS from or through unspecified "public-private partnership investment funds." *See id.* ¶ 205. Relator also alleges that Fannie Mae and Freddie Mac "paid the mortgage

service defendants named herein millions of dollars in U.S. government funds to provide services involving mortgage assignments." *Id.* ¶¶ 228, 230-33. Relator's own allegations – that the U.S. purchased MBS from institutional investors on the secondary market, rather than directly from any of the Defendants – are insufficient to establish false claims liability as they do not involve a request or demand for payment from the *government*.[22]

Further, neither Fannie Mae nor Freddie Mac are U.S. "agencies, establishments, or instrumentalities"; rather, they "are private corporations created by the government." *Wells Fargo*, 2013 U.S. Dist. LEXIS 175322, at *22 (*citing* 12 U.S.C. § 1716(b)).[23] Indeed, Relator concedes that Fannie Mae and Freddie Mac are "government sponsored entities," or "GSEs." *See* Cplt. ¶ 228 *see also United States ex rel. Adams v. Wells Fargo Nat'l Ass'n*, No. 2:11-cv-00535-RCJ-PAL, 2013 U.S. Dist. LEXIS 175322, at *6 (D. Nev. Dec. 11, 2013). Moreover, as noted by the court in *Wells Fargo*, the 2008 law that created the Federal Housing Finance Agency ("FHFA") and granted it authority to place the GSEs under conservatorship (which it did on September 6, 2008), states that any receivership would be a "limited-life regulated entity,"

[22] Although Relator fails to specify the dates on which the claims for payment were made, it is clear from the Complaint that many of them were made before May 20, 2009, when the FCA clearly did not cover claims made to non-governmental entities, even if funded by the government. *See United States v. Countrywide Fin. Corp.*, No. 12 Civ. 1422, 2013 WL 4437232, at * 9 (S.D.N.Y. Aug. 16, 2013) ("Prior to May 20, 2009, the [FCA] did not encompass such claims when made to entities like Fannie Mae and Freddie Mac."); *United States ex rel. Totten v. Bombardier Corp.*, 380 F. 3d 488, 494-97 (D.C. Cir. 2004) (holding that false claims submitted to Amtrak were not actionable under the pre-FERA FCA, even though Amtrak is funded by the government, because it is not a government agency or instrumentality); *see also Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008), *abrogated by statute on other grounds*, Pub. L. No. 111-21 § 386, 123 Stat. 1617 (2009) ("Recognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute.").

[23] "The purposes of this title include the partition of the Federal National Mortgage Association as heretofore existing into two separate and distinct corporations, each of which shall have continuity and corporate succession as a separated portion of the previously existing corporation. One of such corporations, to be known as [Fannie Mae], will be a Government-sponsored private corporation . . . ." 12 U.S.C. § 1716(b).

defined as "an entity established by the [FHFA] under section 4617(i) of this title with respect to a Federal Home Loan Bank in default or in danger of default or with respect to an enterprise in default or in danger of default." 2013 U.S. Dist. LEXIS 175322, at *23 (*citing* 12 U.S.C. §§ 4617(i)(2)(A)(i)--(ii)), 4502(2), (13)). A "limited-life regulated entity is not an agency, establishment, or instrumentality of the United States." *Id.* (*citing* 12 U.S.C. § 4617(i)(10)(A)-(B)). Relator's allegations regarding the investment by the government of "substantial sums in MBS through financial support of its GSEs" (*see* Cplt. ¶ 229) do not alter this result. *See Wells Fargo*, 2013 U.S. Dist. LEXIS 175322, at *23 (holding that fact that U.S. is majority shareholder in the GSEs does not make them governmental entities because it "is well-established . . . that shareholders and corporations are separate entities . . . .")

In short, "the GSEs are not government agencies by virtue of their creation, their conservatorship, or the United States' majority ownership of their stock." *Id.* at *24-25. Accordingly, because the GSEs cannot be defrauded within the meaning of the FCA, Relator's claims based on alleged payments by Fannie Mae and Freddie Mac to provide services involving mortgage assignments must be dismissed.[24] *See id.* at *27 (dismissing FCA claims based on alleged attempt to defraud the GSEs). So, too, Relator's claims based on alleged payments by public-private partnerships or any other non-governmental entities must be dismissed.

V. Relator's State and Local Causes of Action Should Also Be Dismissed

A. The Claims Should be Dismissed for the Same Reasons as the Federal Claims

With a few exceptions noted below, the provisions of the state and local false claims laws

[24] It is not clear from the Complaint how many of the Trusts at issue involve Fannie Mae and Freddie Mac. However, according to Relator, Fannie Mae and Freddie Mac use mortgage servicing companies such as Homeward to service the loans they acquire, and Fannie Mae and Freddie Mac "provide funding for more than $6.3 trillion of the $11 trillion U.S. mortgage market." Cplt. ¶¶ 228, 230.

at issue in this case are modeled on, and are therefore substantially similar to, the FCA. For that reason, and because of the dearth of case law interpreting state and local false claims laws, courts consistently rely on federal cases to interpret them.[25] Further, "Rule 9(b)'s heightened pleading standard applies to state law fraud claims asserted in federal court." *United States ex rel. Palmieri et al. v. Alpharma, Inc.*, 928 F. Supp. 2d 840, 852 (D. Md. 2013) (*citing N. Am. Catholic Educ. Programming Found. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009)). Thus, for the reasons set forth *supra*, Relator's state and local claims fail as well. *See id.*

The only notable difference between the FCA and the state and local false claims laws at issue herein is that some of the laws contain an additional basis for liability: for a beneficiary of an inadvertently submitted false claim who discovers its falsity but fails to disclose it within a reasonable time. *See* Cal. Gov't Code § 12651(a)(8); D.C. Code Ann. § 2-308.l4(a)(9), *recodified at* 2-381.02(a)(9); Haw. Rev. Stat. § 661-21(a)(8); Mass. Gen. Laws Ann. ch. 12, § 5B(9);[26] Mont. Code Ann. 17-8-403(1)(h); Nev. Rev. Stat. § 357.040(h); *see* Cplt. ¶¶ 295-302, 311-18, 327-33, 350-57, 366-81. But Relator fails to provide any facts to support any claims

[25] *See, e.g., Fassberg Constr. Co. v. Hous. Auth.*, 151 Cal. App. 4th 267 (Cal. Dist. Ct. App. 2d 2007); *State ex rel. Higgins v. SourceGas LLC*, C.A. No. N11C-07-193, 2012 WL 1721783 (Del. Super. May 15, 2012); *United States v. Cypress Health Sys. Inc.*, No. 1:09cv137, 2012 WL 467894 (N.D. Fla. Feb. 14, 2012); *Cnty. of Haw. v. Unidev, LLC*, Civ. No. 09-000368, 2010 WL 520696 (D. Haw. Feb. 11, 2010); *State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Ctrs., Inc.*, 377 Ill. App. 3d 990 (2007); *United States. v. Reid Hosp. & Health Care Servs., Inc.*, No. 1:10-cv-0526, 2012 WL 3949532 (S.D. Ind. Sept. 10, 2012); *United States v. Compass Med.*, P.C., No. 09-12124, 2011 WL 5508916 (D. Mass. Nov. 10, 2011); *Seimonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 186 (2006); *Foglia v. Renal Ventures Mgmt.*, LLC, 830 F. Supp. 2d 8 (D.N.J. 2011); *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 297 P. 3d 357, 364, *cert. granted*, 300 P. 3d 1181 (N.M. 2013); *United States. v. Dialysis Clinic, Inc.*, No. 5:09-C-00710, 2011 WL 167246 (N.D.N.Y. Jan. 19, 2011); *Va. ex rel. FX Analytics v. Bank of N.Y. Mellon*, 84 Va. Cir. 473 (2012).

[26] Relator has not expressly asserted a claim under the beneficiary provision of Massachusetts' false claims statute, as it is not cited under Count XIV, the Massachusetts False Claims Act count. *See* Cplt. at 109. However, in Count XIV, Relator refers to the language of the beneficiary provision. *See id.* ¶ 355.

based on this additional basis for liability, simply concluding that "Defendants benefited from the submission of false claims and, after discovering the falsity of the claim, failed to disclose . . . [them] within a reasonable time." *See, e.g.*, Cplt. ¶ 355. This does not satisfy Rule 9(b) and should be dismissed.

B. The Claims Should be Dismissed Where Statutes Do Not Apply Retroactively

According to the Complaint, the relevant time period is from 2004 to 2009. *See, e.g.*, Cplt. ¶ 77. However, several of the false claims statutes at issue in this case were enacted *after* some or all of the alleged false claims were made. *See* Ind. Code Ann. § 5-11-5.5 *et seq.* (2005); Minn. Stat. §§ 15C.01 *et seq.* (2009); Mont. Code Ann. § 17-8-401 *et seq.* (2005); N.J. Stat. §§ 2A:32 C-3 *et seq.* (2008); R.I. Gen. Laws § 9-1.1-1 *et seq.* (2008). These statutes do not apply retroactively. *See United States ex rel. Conrad v. GRIFOLS Biologicals, Inc.*, 2010 WL 2733321, at * 7 (D. Md. July 9, 2010) (holding that Indiana's false claims statute applies only prospectively); *United States ex rel. King v. Solvay S.A.*, 823 F. Supp. 2d 472, 525-26, 531-33 (S.D. Tex. 2011), *vacated in part on other grounds*, 2012 WL 1067228 (S.D. Tex. Mar. 28, 2012) (holding that Rhode Island and Minnesota's false claims statutes do not apply retroactively, and accepting Relator's concession that Montana's statute was not retroactive); *State ex rel. Hayling v. Corr. Med. Servs., Inc.*, 28 A. 3d 1246, 1261 (N.J. Super. Ct. App. Div. 2011) (holding that New Jersey False Claims Act could not retroactively apply to claims submitted before its effective date on March 13, 2008). Accordingly, any causes of action under these statutes based on alleged false claims made before these statutes' effective dates should be dismissed. *See King*, 823 F. Supp. 2d at 523-34 (dismissing various state FCA claims under statutes that did not apply retroactively where claims arose before statutes' effective dates).

C. The Claims Should be Dismissed Where Statutes Apply to Medicaid Fraud

The New Mexico and New Hampshire statutes cited by Relator apply only to Medicaid

fraud.[27] As Relator's claims do not involve Medicaid fraud, these claims should be dismissed.

D. The Claims Should be Dismissed for Lack of Compliance With Procedures

Several of the false claims laws impose procedural requirements with which Relator has not alleged compliance. Specifically, Montana's false claims statute and the New York City False Claims Act both impose pre-filing requirements.[28] Because Relator has not alleged compliance with those procedures, her claims under those laws should be dismissed. *See Ping Chen ex rel. United States v. EMSL Analytical, Inc.*, No. 10 Civ. 7504, 2013 WL 4441509, at *20 (S.D.N.Y. Aug. 16, 2013) (dismissing New York City FCA claims where plaintiff failed to allege he was authorized by the Corporation Counsel). In addition, both Delaware and New Mexico require a "written determination" by the state that "there is substantial evidence that a violation" has occurred. *See* Del. Code Ann. tit. 6, § 1203(b)(4)(b); N.M. Stat. § 27-14-7(E)(2).

Finally, several of the statutes require that the government decline intervention before a relator may proceed with a case. *See* Mont. Code Ann. § 17-8-406(3); N.H. Rev. Stat. Ann. § 167:61-c(II)(e)(2); Va. Code Ann. § 8.01-216.5(D); Chicago Mun. Code § 1-22-030(c)(3). However, those jurisdictions have not done so. Thus, those claims should be dismissed. *See, e.g., United States ex rel. Simpson v. Bayer Corp.*, No. 05-3895, 2013 WL 4710587, at *15 (D.N.J. Aug. 30, 2013) (dismissing claims brought prematurely because the state FCAs require states to decline intervention before relator proceeds).

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[27] *See* N.H. Rev. Stat. Ann. § 167:58 *et seq.*; N.M. Stat. § 27-4-1 *et seq.*; Cplt. ¶¶ 382-89, 398-405.

[28] Under New York's law, only "corporation counsel" or its "special designates" may pursue claims, and private parties who want to pursue an action must first submit a proposed complaint to corporation counsel, who can, *inter alia*: 1) commence an action against the defendant or 2) designate the private person as a special assistant corporation counsel for purposes of filing the complaint. *See* N.Y.C. Admin. Code § 7-804. Montana's statute requires that a relator serve "[a] copy of the complaint and written disclosure of substantially all material evidence and information . . . on the government attorney[.]" Mont. Code Ann. § 17-8-406(2).

CONCLUSION

For the reasons set forth above, Movants request that the Court grant this Motion to Dismiss and order that this case be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record, via the Court's CM/ECF system, this 15th day of January, 2014.

/s/ Melissa J. Copeland
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