

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
ROCK HILL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,  
*Ex rel.*

C.A. No.: 10-cv-01465-JFA

LYNN E. SZYMONIAK,

Plaintiff - Relator,

vs.

AMERICAN HOME MORTGAGE  
SERVICING, INC., *et al.*,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff,  
*Ex rel.*

C.A. No.: 13-cv-00464-JFA

LYNN E. SZYMONIAK,

Plaintiff - Relator,

vs.

ACE SECURITIES CORPORATION, *et al.*,

Defendants.

**RELATOR’S MEMORANDUM OF  
LAW IN SUPPORT OF MOTION TO  
BIFURCATE MOTIONS TO DISMISS, TO  
STAY NON-JURISDICTIONAL  
PORTIONS OF THE MOTIONS, AND  
FOR LEAVE TO FILE AN AMENDED  
AND CONSOLIDATED COMPLAINT**

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Relator Lynn E. Szymoniak respectfully submits this memorandum of law in support of her motion (1) to bifurcate the pending motions to dismiss so that the threshold issue of jurisdiction is briefed and decided first, (2) for leave to file an amended and consolidated complaint, and (3) to stay further briefing or consideration of non-jurisdictional aspects of the motions until the issue of jurisdiction is decided and the amended and consolidated complaint is filed.

### **Background**

On January 15 and 16, 2014, the Defendants filed 31 motions to dismiss, with a total of 479 pages of briefing. The Court's January 15 docket entry (Dkt. Item 212) states that Relator's opposition to all of these motions is due February 3, 2014 – a mere 12 business days after the motions were filed.<sup>1</sup>

In addition to filing motions under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, the motions included two motions under Rule 12(b)(1) challenging this Court's subject-matter jurisdiction.<sup>2</sup> Specifically, in their jurisdictional motions Defendants contend that all of the Relator's claims were "publicly disclosed" for purposes of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and corresponding state and local laws (collectively, the "FCA Laws").<sup>3</sup> Public disclosure would be a jurisdictional bar to certain of the Relator's whistleblower claims under the FCA Laws unless the Relator were an "original source" of those claims. *See* 31 U.S.C.

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<sup>1</sup> In the event that the Court were to deny all of the relief requested in this motion, Relator respectfully requests that she be granted at least 45 days to respond to all of these 31 motions.

<sup>2</sup> *See* No. 13-cv-00464 Dkt. Item 193; No. 10-cv-01465 Dkt. Item 234. Some of the Defendants' other motions also refer to jurisdiction, but only to incorporate by reference the two joint motions on jurisdiction.

<sup>3</sup> *See, e.g.*, Joint Memorandum of Law in Support of Defendants' Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction, No. 13-cv-00464 Dkt. Item 193-1 ["Joint Memo. 193-1"], at 20.

§ 3730(e)(4) (2009).<sup>4</sup> Defendants claim that Relator is not an “original source.”<sup>5</sup> Defendants also contend that Civil Action No. 13-cv-01465 is barred by the FCA Laws’ “first-to-file” jurisdictional bar.<sup>6</sup> *See* 31 U.S.C. § 3730(a)(5). If Defendants are correct in their contentions, the Court would lack subject-matter jurisdiction over these consolidated cases and it would be unable to consider any other aspect of Relator’s claims.

In their 29 non-jurisdictional motions, Defendants make a wide assortment of arguments under both federal law as well as the laws of numerous states, including:

- Relator has failed to make particularized allegations of fraud with respect to each Defendant’s participation in the scheme as required by Fed. R. Civ. P. 9(b)’s heightened pleading requirements;
- The claims against certain Defendants have already been resolved and dismissed in connection with the Government’s settlement of April 4, 2012;
- Claims against certain allegedly “misjoined” defendants should be severed or dismissed pursuant to Fed. R. Civ. P. 20 and 21.
- Claims against certain Defendants must be dismissed pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub. L. 101-73, 103 Stat.183;
- Relator fails to allege that any false claim was “presented” to the Government for payment as required by the version of the False Claims Act, 31 U.S.C. § 3729(a)(1)

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<sup>4</sup> Section 3730(e)(4) of the federal False Claims Act was amended by the Patient Protection and Affordable Care Act of 2010, Pub. L. 111–148, § 10104(j)(2), 124 Stat. 119, 901–02 (March 23, 2010), and is no longer a jurisdictional bar. *See United States ex. rel May v. Purdue Pharma L.P.*, 737 F.3d 908, 916-17 (4th Cir. 2013). The amended False Claims Act applies to Defendants’ conduct occurring after March 23, 2010. *Id.* at 917-18.

<sup>5</sup> Joint Memo. 193-1 at 29.

<sup>6</sup> *See id.* at 16-18.

(West 2005) in effect before the Fraud Enforcement and Recovery Act of 2009 (“FERA”), Pub. L. 111–21, 123 Stat. 1617;

- Relator fails to allege that any false or fraudulent statement or record was submitted “for the purpose” of having the Government pay a false claim as required by the pre-FERA version of the False Claims Act, 31 U.S.C. § 3729(a)(2) (2005).
- Application of the post-FERA version of the False Claims Act to Pre-FERA conduct would violate the *ex post facto* clause of the United States Constitution, Article 1, Section 9, Clause 3;
- Relator fails to allege the requisite scienter with respect to each of her claims;
- Relator fails to allege that any false statement was material to the government’s decision to purchase mortgage-backed securities;
- Relator fails to allege that the government paid any specific mortgage insurance claim;
- Relator fails to allege that any false statement was material to the government’s decision to pay a mortgage insurance claim;
- Relator fails to allege any specific instance in which a Defendant submitted improper or illegal charges to the mortgage-backed-security trusts pertaining to the preparation of allegedly defective assignments;
- Relator fails to allege the existence of any “money” or “property” possessed by Defendants that should have been “delivered” to the United States for purposes of her claim under 31 U.S.C. § 3729(a)(1)(D);
- Relator fails to allege any obligation to pay the United States for purposes of her claim under 31 U.S.C. § 3729(a)(1)(G).

**ARGUMENT**

**I. THE JURISDICTIONAL MOTIONS SHOULD BE BRIEFED AND DECIDED FIRST**

It is settled law that “[t]he existence of subject matter jurisdiction is a threshold issue, which th[e] court must address before addressing the merits of” a plaintiff’s claim. *Signal v. Gonzales*, C.A. No. 9:05-cv-1972-PMD-RSC, 2006 U.S. Dist. LEXIS 32317, at \*6 (D.S.C. Jan. 9, 2006).<sup>7</sup> Therefore, when confronted with motions that raise both jurisdictional and non-jurisdictional bases to dispose of a case, it is appropriate to bifurcate the motion and initially address only the jurisdictional issues. *See Francorp, Inc. v. Siebert*, 210 F. Supp. 2d 961, 968 (N.D. Ill. 2001) (“We agreed to bifurcate the motion and address the jurisdictional question first.”); *see also Watson v. South Carolina*, C.A. No. 2:04-cv-22257-23AJ, 2004 U.S. Dist. LEXIS 30331, at \*3, \*6 (D.S.C. Dec. 21, 2004) (where motion to dismiss presented the “threshold question of jurisdiction” along with other grounds for dismissal, court granted dismissal on jurisdictional grounds and the remaining grounds were “deemed moot”).

For purposes of judicial efficiency and to conserve the parties’ resources, Relator respectfully submits that the jurisdictional motions should be briefed and decided in advance of further briefing and consideration of the 29 non-jurisdictional motions.

**II. IN THE EVENT THAT JURISDICTION IS UPHeld, LEAVE TO FILE AN AMENDED AND CONSOLIDATED COMPLAINT SHOULD BE GRANTED**

The Fourth Circuit has “repeatedly held that leave to amend under Fed. R. Civ. P. 15(a) “shall be freely given when justice so requires’ and that ‘[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits,’ and that ‘[i]n the absence of any apparent or

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<sup>7</sup> Unpublished case law is attached as **Exhibit A**.

declared reason—such as undue delay, bad faith or dilatory motive ... the leave ... should' be 'freely given.'" *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (citing *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1059 (4th Cir. 1982), and *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)); see *Foman v. Davis*, 371 U.S. 178, 182 (1962). In exercising its discretion to grant or deny leave to amend, the Court should focus "on prejudice or futility or bad faith as the only legitimate concerns in denying leave to amend, since only these truly relate to protection of the judicial system or other litigants." *Davis v. Piper Aircraft Co.*, 615 F.2d 606, 613 (4th Cir. 1980). "Mere delay unaccompanied by prejudice, bad faith, or futility in moving to amend is not a sufficient reason to deny leave to amend." *Berkeley-Dorchester Counties Economic Dev. Corp. v. United States Dep't of Health & Human Servs.*, 395 F. Supp. 2d 317, 325 (D.S.C. 2005); accord *Island Creek Coal*, 832 F.2d at 279.

In particular, courts routinely grant leave to amend where, as here, the purpose of the amendment is to provide "a more particular pleading of the damages plaintiff incurred as a result of defendants' actions." *General Security, Inc. v. APX Alarm Security Solutions, Inc.*, 647 F. Supp. 2d 207, 212 (N.D.N.Y. 2009); see *Medoil Corp. v. Clark*, 753 F. Supp. 592, 596 (W.D.N.C. 1990) ("The clearest cases for leave to amend are correction of an insufficient claim or defense and *clarification of previously alleged claims*") (emphasis added).

Many of Defendants' non-jurisdictional motions assert alleged defects that can be remedied by amendment, such as that the complaints fail to provide sufficient detail so as to pass muster under Fed. R. Civ. P. 9(b). Defendants can hardly be heard to complain if the complaints are amended to provide such details, since a central contention of their motions is that they need greater particularization of Relator's claims in order to respond to the complaints.

Furthermore, as the Court is aware, Relator has filed two complaints – one in this District and one in the Western District of North Carolina. As the latter complaint has now been transferred to this Court, it would further the goal of judicial efficiency to allow Relator to file a consolidated complaint.

**Conclusion**

Relator respectfully requests that the Court enter an Order:

- a. Setting a schedule for briefing and consideration of Defendants’ jurisdiction-based motions [No. 10-cv-01465 Dkt. Item 234; No. 13-cv-00464 Dkt. Item 193];
- b. Granting Relator leave to file an amended and consolidated complaint in the event that jurisdiction is upheld; and
- c. Staying briefing and consideration of Defendants’ non-jurisdiction-based motions to dismiss [No. 10-cv-01465 Dkt. Items 212, 223, 227, 235, 237, 238, 240, 241,242,243,248; No. 13-cv-00464 Dkt. Items 171, 180, 181, 184, 186, 187, 195, 198, 199, 200, 203, 206, 208, 209, 212, 213, 214, 215] until the Court resolves Defendants’ jurisdiction-based motions and an amended and consolidated complaint is filed.

Dated: January 21, 2014

Respectfully submitted,

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