UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC., Plaintiffs, – against – WESTCHESTER COUNTY, NEW YORK, Defendant.	**ECF CASE** 06 CV 2860 (DLC)

DEFENDANT WESTCHESTER COUNTY, NEW YORK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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Pursuant to Fed. R. Civ. P. 9(b) and 12(b)(1) and 12(b)(6),[1] the defendant, the County of Westchester, New York (the "County"), respectfully submits this brief in support of its Motion to Dismiss.

This *qui tam* action – in which the government understandably declined to intervene – should be dismissed because the relator, the Anti-Discrimination Center of Metro New York, Inc. ("ADC" or "relator"), neither sets forth a cognizable claim under the federal False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§ 3729-3733, nor satisfies the jurisdictional prerequisite of being an "original source" with independent, first-hand knowledge of the facts at issue. A side effect of relator's fundamental failings is its transgression of the heightened pleading requirements of Fed. R. Civ. P. 9(b). For all of these reasons, relator may not proceed in the absence of the government and its complaint must therefore be dismissed.

Relying upon information long in the public domain, relator attempts to fashion a political argument that the County should have acted in a way that relator might prefer, but which the law does not require. This argument, suited for a legislature or a policy forum, misuses the FCA. Relator argues a policy preference, not a violation of the Federal fraud law. Indeed, the argument that it makes – that the defendant was ignorant of the policy-driven conclusions that relator relies upon – inherently contradicts the *scienter* requirement of the FCA.

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[1] On a 12(b)(1) motion, the Court may consider certain outside evidence. *See Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir. 2000) (district courts may in resolving a 12(b)(1) motion "resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary hearing") (citation omitted). Indeed, under the FCA, courts necessarily and typically consider background facts of a jurisdictional nature in order to rule on motions to dismiss. *See United States ex rel. Smith v. Yale-New Haven Hosp., Inc.*, 411 F. Supp. 2d 64, 70 (D. Conn. 2005). Moreover, on a 12(b)(6) motion, "a district court may consider 'any statements or documents incorporated in [the complaint] by reference,' matters of public record, and 'documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit.'" *Id.* (*quoting Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000)).

While the civil FCA only requires general intent, one cannot have any intent at all if one does not know what one is doing. And that is precisely what relator contradictorily alleges.

More importantly, whatever relator alleges, it is not entitled to proceed where, as here, the government has declined to intervene because the complaint is wholly based on information within the public domain, namely New York Freedom of Information Law ("FOIL") responses, census data, and media reports – categories of information clearly within the jurisdictional bar of the FCA. Because relator lacks independent, first-hand knowledge of what is alleged, it cannot be an original source, within the meaning of the Act. Finally, as noted, relator, which never details how the County's certifications were fraudulent, founders on the barriers of the pleading strictures of Rule 9(b).

Relator describes itself as a not-for-profit New York corporation that works "to prevent and remedy discrimination and expand civil rights protections in housing. . . ." *See* Ex. A[2] (FCA Complaint and Demand for Jury Trial, dated April 12, 2006 ("Compl.")), at ¶ 8. While the County finds ADC's goals to be laudable, the law does not require the County to pursue these and other important housing-related goals according to relator's preferences. The fact that ADC disagrees with (or, more accurately, misunderstands and mischaracterizes) the County's efforts does not turn the dispute into one that concerns a false claim. Notably, in attacking the County on policy grounds, relator not only ignores the County's recognized achievements in the arena of administering federal housing and development funds effectively,[3] but also ignores the practical

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[2] All exhibits ("Ex.") referred to herein are attached to the Affirmation of Michael A. Kalish in Support of Defendant's Motion to Dismiss the Complaint, dated April 16, 2007.

[3] In 2005, the County was included as one of eleven counties studied in a United States Department of Housing and Urban Development ("HUD") report of the "best practices in sub-recipient performance management." *See* Ex. B (HUD, Office of Policy &

realities and actual constraints on the County's abilities to impose its will upon the various municipalities located within its borders. New York's Constitution and state law grant these municipalities considerable autonomy, especially with regard to the use of land within their borders.[4]

Even relator recognizes the national "Not-in-my-Backyard" phenomenon of local governments resisting any intrusion by other levels of government into their land use decisions.[5] Thus, with only limited weapons available to enlist municipalities in solving the affordable housing problem, the County has determined that pragmatism demands a cooperative approach.

Research, *Managing Sub-Recipients of CDBG Grantees* (Dec. 2005) (*found at* http://www.huduser.org/Publications/pdf/CDBGgrantees.pdf)) ("Managing Sub-Recipients of CDBG Grantees"), at Foreward. The authors chose Westchester because of its "demonstrated effective sub-recipient management practices." *Id.*; *see also id.* at Acknowledgement.

[4] "Effective local self government and intergovernmental cooperation are the purposes of the people of the state." N.Y. Const. art. IX, § 1. Town Law and Village Law provide zoning authority to municipalities. *See Sherman v. Frazier*, 84 A.D.2d 401 (2d Dep't 1982); *see also* N.Y. Mun. Home Rule Law § 10; N.Y.Mun. Home Rule Law § 10(1)(ii)(a)(11) and (12). Although state law would usually supersede inconsistent local laws, a limited exception exists for local laws that fall under Municipal Home Rule Law. *See* N.Y.Mun. Home Rule Law §10 (1)(ii)(d)(3); *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423 (1989).

[5] The "fair housing bibliography" on relator's website contains a law review article that discusses this phenomenon as it pertains to affordable housing efforts: "Resistance to diversity is greatest when communities think that government is forcing on them members of a social class who cannot afford the neighborhood's housing." *See* Ex. C (excerpts of Schuck, Peter H., "Judging Remedies: Judicial Approaches to Housing Segregation," 37 Harvard C.R.-C.L. L. Rev. 289, 290 (Summer 2002) (*found at* www.antibiaslaw.com/biblio/Schuck.pdf)). In order to increase support for affordable housing among constituents, the County has engaged in a broad-based educational campaign including providing interactive housing tours and a website video.

In addition to appropriating its own funds to affordable housing projects,[6] the County spearheads efforts to, among other things, "encourage municipalities to adopt zoning variances for the construction of affordable housing," "encourage municipalities to maintain affordable housing by rehabilitation," "provide[] financial and technical assistance to affordable housing sponsors," and "provide[] funds to make necessary improvements to public housing projects to preserve the existing housing stock." *See* Ex. D (Westchester Urban County Consortium, Fiscal Year 2004 Consolidated Annual Performance and Evaluation Report ("2004 CAPER")), at 7-8. Although relator advocates that the County use a more adversarial approach, the County's approach is eminently reasonable. Certainly, the County's alleged failure to do things the way that relator demands cannot create false fair housing certifications.

Notably, relator's complaint is devoid of details concerning how federal money is distributed by the County. In fact, the County engages in vigorous community outreach to attract and assist grant applicants. *See* Ex. E (excerpts of Westchester Urban County Consortium, Community Development Block Grant Program Manual ("Manual") (2005) (*found at* http://www.westchestergov.com/planning/housing/CDBGprogramManualFY06-08.pdf)), at 2, 23; Ex. B ("Managing Sub-recipients of CDBG Grantees"), at 28, 29; Ex. D (2004 CAPER), at 17. For each grant application received, the County subjects the application to painstaking review by the County's Department of Planning (the "Department"), committees, and the public. Ex. E (Manual), at 25-27. The County ensures that all of the grants individually and on a macro level achieve the applicable program requirements. *Id.* The County funds programs run by both

[6] In fiscal year 2004, the County appropriated tens of millions of dollars to assist in the acquisition of real property for affordable housing purposes and for the construction of infrastructure improvements for affordable housing projects. *See* Ex. D (2004 CAPER), at 16.

social service organizations as well as municipalities. *Id.* at 2. In fiscal year 2004, for example, Community Development Block Grant ("CDBG") funds rehabilitated owner housing and rental units and provided housing counseling and referral services to low and/or moderate income households. Ex. D (2004 CAPER), at 14-17. Additionally, the County used HOME Investment Partnership Program ("HOME") funds to promote and develop new affordable housing units. *Id.* at 18. Again, against this background, relator cannot seriously allege that the County's certifications were false.

In short, this current action has no factual or legal basis. ADC's complaint has already been rejected by United States Department of Justice ("DOJ"), and should likewise be dismissed by this Court.

Factual Background

Falling far short of the specificity required in a *qui tam* lawsuit – to which the heightened pleading requirements of Rule 9(b) apply – relator broadly alleges that the County made false certifications on multiple occasions in order to obtain federal housing funds. Ex. A (Compl.), at ¶ 2.

A. The County's Administration of Federal Housing Grants

CDBG is a HUD program that provides funds to communities for neighborhood revitalization and improvement, including for housing, public improvements, social services, and economic development. *See* Ex. E (Manual) at 1.[7] Based on a formula, HUD allocates CDBG funds to the Westchester Urban County Consortium (the "Consortium"). *Id.* at 2. The County,

[7] CDBG program funds comprise the majority of the funds the County receives from HUD. *See* Ex. D (excerpts of Westchester Urban County Consortium, Consolidated Plan Covering Fiscal Years 2004 - 2008 (May 2004) ("2004 Consolidated Plan") (*found at* http://www.westchestergov.com/planningdocs/ConsolidatedPlan/ConsolidatedPlan04/WEB%20SITE/IntroPageHTML/conplan04.html), at 6. A second program identified in the Complaint, HOME, provides "incentives to develop and support affordable rental housing and

which administers the funds on behalf of the Consortium, in turn distributes the monies through a multi-stepped grant application process, which runs on three-year cycles. *Id.* at 1, 19, 23. Casting a wide net, the County solicits applications for its CDBG program from a variety of recipients including "public or private non-profit agencies, [or] authorities." *Id.* at 19. The County undertakes extensive review of the grant applications and multiple bodies review the County's recommendations, including review at two public hearings, "which provide citizens with opportunities to comment on proposed awards." *Id.* at 25. The County has given "[m]aximum priority . . . to activities benefiting low and moderate income persons or aiding in the prevention or elimination of slums and blight." *Id.* at 3.

B. The County's Certifications

The regulations under the CDBG program require that jurisdictions make various certifications in conjunction with their HUD grant applications. 24 C.F.R. § 91.225. Although ADC's complaint never clearly sets forth precisely what certifications are at issue in this case, a typical certification submitted on March 9, 2004 provides in relevant part:

- "The jurisdiction will affirmatively further fair housing, which means it will conduct an analysis of impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting that analysis and actions in this regard."
- "The grant will be conducted and administered in conformity with . . . the Fair Housing Act."

See Ex. F (2004 Consolidated Plan), at Certifications.

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homeownership affordability" through various mechanisms. 24 C.F.R. § 92.205(a).

Although one would not know this from reading relator's complaint, the County does *not* certify to HUD that it will "make certain that participating municipalities themselves were complying with all provisions of the Fair Housing Act." *But see* Ex. A (Compl.), at ¶ 24. The County nevertheless ensures that the sub-grantees of federal funds comply with these and other obligations through tracking reports, frequent meetings, and audits. Ex. D (2004 CAPER), at 12. With regard to the certifications that the County actually made, reasonable minds can disagree over the precise contours of what it means to "conduct an analysis of impediments to fair housing choice," and "to take appropriate actions to overcome the effects of any impediments identified." And that is just the point, especially where relator does not argue that the County abdicated its responsibilities.[8] Rather, relator argues that the County did not go far enough and that it did not fulfill its responsibilities in the way it would have liked. Neither the certifications themselves, nor even relator's complaint, provide any objective standard by which truth or falsity may be gauged. However, the fact that the County undisputedly addressed the matter of barriers to fair housing commands the conclusion that it did not, as a matter of law, knowingly submit any false certification.

C. The Complaint

Relator's complaint sets forth two overarching factual theories for why it believes the County did not affirmatively further fair housing. First, ADC contends that the County insufficiently accounted for race and national origin discrimination and segregation in its analyses. Second, relator posits that the County should have exercised control over the municipalities that it alleges were not affirmatively furthering fair housing.

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[8] Nor could relator make this argument. In the 2004 Consolidated Plan, the County identified no less than 13 impediments to affordable housing. Ex. F (2004 Consolidated Plan), at 17. The County has furthermore taken appropriate actions to overcome the effects of these identified impediments. *See generally* Ex. D (2004 CAPER), at 4-29.

Reflecting the semantic nature of ADC's arguments, ADC points to the absence of the phrases "housing discrimination" and "housing segregation" in the County's 2004-2008 Consolidated Plan as "confirm[ation]" of the County's purported failure "to conduct anything resembling an actual fair housing impediments analysis." Ex. A (Compl.), at ¶¶ 3, 32-34. Similarly, ADC charges that the County should have specifically delineated "the housing needs of different racial or ethnic groups" in its list of groups whose housing needs were assessed, which ADC acknowledges include "handicapped persons[,] larger/smaller families, [and] extended families," Ex. A (Compl.), at ¶¶ 35-36, even though racial and ethnic groups obviously comprise a portion of these groups whose needs were evaluated.

Relator's own complaint highlights the illogic of its argument that the County necessarily committed fraud because the analysis of impediments that it conducted allegedly did not account for racial discrimination. ADC alleges that the County's "admission [that the County's impediment analysis did not refer to housing discrimination because Yonkers was not a member of the Consortium] represents clear evidence that Westchester *neither understands housing discrimination to be a problem* throughout the County, nor understands how the demographic of different parts of the County and region are interactive." Ex. A (Compl.), at ¶ 43 (emphasis added). If the County allegedly did not understand housing discrimination to be a problem, then the County could not *knowingly* make a false statement. In any event, a difference of opinion over how far the County must go, in the world of real politics, is far from what Congress intended in passing the 1986 amendments to the FCA that empower relators to bring claims. The government itself recognized this in declining to intervene; so should the Court, which should dismiss the action.

D. ADC's FOIL Requests and the County's Responses

Preceding the filing of its complaint, ADC made several FOIL requests to the Department, beginning in May 2005. *See* Ex. G (5/26/05 letter from ADC to Department); Ex. H (7/15/05 letter from Department to ADC referencing additional materials requested by ADC); Ex. I (8/4/05 letter from ADC to Department); Ex. J (9/6/05 letter from ADC to Department). The County responded to all such requests. *See* Ex. K (7/1/05 letter from Department to ADC); Ex. H (7/15/05 letter); Ex. L (7/20/05 letter from Department to ADC); Ex. M (8/31/05 letter from Department to ADC); Ex. N (9/13/05 letter from Department to ADC). Without exception, the County's responses consisted of administrative reports that were publicly available for inspection at the Department even without a FOIL request and many of the reports were available online at http://www.westchestergov.com/planning. Additionally, ADC representatives met with the County in person to discuss the FOIL requests. Ex. H (7/15/05 letter from Department to C. Gurian). Nothing disclosed by the County in this or in any other conversation with ADC was remotely confidential. These FOIL responses, consisting of administrative/investigative documents, and information from other public sources including media reports, form the entire basis of the complaint. And, none of the information is based on relator's independent, first-hand knowledge.

ARGUMENT

POINT I

RELATOR FAILS TO STATE A FALSE CLAIM

Within the compass of the FCA, a false claim is a largely economic matter relating to the fact of whether goods or services have been provided to the government according to bargained-for and agreed-upon specifications. *See Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001). No evidence exists that Congress intended to transform the Act into a vehicle for policy

disputes like this one, where the issue is not whether a particular course of conduct has been followed but whether another course of action might have proved more effective. That sort of argument should be made to a legislature or administrative or supervisory body, not a court. In any event, such a dispute cannot give rise to a false claim, as required by the Act. *See United States v. Gatewood*, 173 F.3d 983, 987 (6th Cir. 1999) ("Accordingly, we conclude that the indictment in the instant case is 'premised on a statement which on its face is not false.'") (citation omitted).

Relator alleges that, in making its applications under the CDBG and HOME programs, the County falsely "represented that it would conduct an analysis of impediments to fair housing choice[.]" Ex. A (Compl.), at ¶¶ 22, 30.[9] However, relator's complaint *acknowledges* that the County conducted an "analysis of impediments." Ex. A (Compl.), at ¶¶ 32-33, 35-36, 39.[10] Although relator faults the analysis on various grounds, relator never alleges – nor could it – that the County certified that it would conduct its analysis in the manner that ADC would have liked. The requirements that relator folds into the certification simply do not exist. This case is thus similar to *Castenson v. City of Harcourt*, 86 F. Supp. 2d 866, 880-881 (D. Iowa 2000), where the district court held that defendant city did not make a false certification of compliance with the National Environmental Policy Act ("NEPA"). Plaintiffs had argued that an archeological survey was required before the city embarked on a project, but could not point to an explicit survey requirement in the regulations. *Id.* Here, relator likewise cannot point to

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[9] Although ADC vaguely alleges that the County made other certifications, it fails to delineate them and to offer any explanation as to why these other certifications were false. Compl. ¶¶ 21, 24. Thus, the County will focus on the only allegation concerning which relator has provided enough detail for the County to address (though still not sufficient detail to comply with the requirements of Rule 9(b), *see infra*).

any requirement mandating that the County conduct the analysis of impediments in the manner ADC sees fit.

HUD's certification requirements do not dictate how grantees like the County should achieve the broad mandates of conducting an analysis of impediments and taking appropriate steps to overcome the impediments identified. Similarly, the relevant regulations do not mandate that the County identify specific impediments. Case law has recognized that "imprecise statements or differences in interpretation growing out of a disputed legal question are . . . not false under the FCA." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (citation omitted); *United States ex rel. Swafford v. Borgess Med. Ctr.*, No. 00-1288, 2001 WL 1609913, at *1 (6th Cir. Dec. 12, 2001) ("Disputes as to the interpretation of regulations do not implicate [FCA] liability."); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) ("For a certified statement to be 'false' under the Act, it must be an intentional, palpable lie. . . . Innocent mistakes, mere negligent misrepresentations and differences in interpretations are not false certifications under the Act.") (citation omitted); *United States ex rel. Kersulis v. RehabCare Group, Inc.*, No. 4:00-CV-00636 GTE, 2007 WL 294122, at*13 (E.D. Ark. Jan. 29, 2007) (even if plaintiff's interpretation of the rule were correct, defendant could not have submitted a "knowingly" false certification of compliance where "'defendant's interpretation of the applicable regulations is reasonable even though incorrect.'") (citations omitted).

Moreover, although the County disagrees strongly with the aspersions that relator casts on its extremely comprehensive impediments analysis, the County nonetheless notes that

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[10] The fact that the County did not use the terminology that ADC wishes does not amount to fraud. Compl. ¶ 45 (acknowledging that the County identified "barriers to affordable housing," which amounted to "barriers to fair housing").

neither its certification nor the relevant regulations contained any qualitative criteria by which to evaluate its analysis. Thus, relator's allegations that the County should have conducted the analysis differently, or better, misses the point of the certification. *See Mikes*, 274 F.3d at 698 ("The term 'medical necessity' does not impart a qualitative element mandating a particular standard of medical care, and Mikes does not point to any legal authority requiring us to read such a mandate into the form."); *Luckey v. Baxter*, 183 F.3d 730, 733 (7th Cir. 1999) ("All this record reveals is a dispute about whether Baxter's testing protocols could be improved. An affirmative answer to that question would not suggest that Baxter's representations to the United States in years past were false or fraudulent.") (citation omitted).

In short, what ADC alleges the County did simply does not conflict with what the County certified it would do. "The [complaint] therefore simply does not present a false statement." *See Gatewood*, 173 F.3d at 987 ("The indictment . . . purports to raise a direct conflict between the certification that Gatewood made and the actual facts . . . [but actually] presents a false dichotomy, because certifying that one has made payments to subcontractors is not inconsistent with having yet to pay the subcontractors in full.") *Id.* Had HUD wanted to mandate that grantees identify racial discrimination and segregation as impediments in their analyses, then it could have drafted the certifications to require that. *Id.* (noting that had the Navy wanted to incorporate a particular requirement, "it should have drafted the certification to reflect that desire."). *Id.*

HUD itself has actually recognized that the regulatory requirements to analyze and take appropriate steps to counter impediments do not provide clear guidelines to grantees. Although "the regulations define the certification [to affirmatively further fair housing] to mean that a grantee will conduct an 'analysis of impediments to fair housing choice . . . [and] take

appropriate actions to overcome the effects of any impediments identified through that analysis,'" more precise guidelines were required. *See* "Proposed Rules on Determining Accuracy of Certification that Fair Housing is Furthered," 63 Fed. Reg. 57882-01, 1998 WL 745863, at 57882 (HUD Oct. 28, 1998) ("Proposed Rules"). Despite HUD's efforts in providing "both guidance and training to grantees on meeting the Consolidated Plan fair housing certification requirements," "*confusion remains over both the[ir] meaning and application . . . .*" *Id.* at 57883 (emphasis added). Thus, In 1998, HUD issued Proposed Rules intended "to establish a standard for determining if the jurisdiction's certification . . . is inaccurate." *Id.* at 57882. The Proposed Rules were never adopted. *See* Ex. O (withdrawal of Proposed Rules).

In its Proposed (but never adopted) Rules, HUD attempted to flesh out the certification requirements so as to provide more guidance to grantees. In particular, the bolstered certification would have clarified that at the time of the certification, the grantee should already have conducted the impediments analysis and should already be taking actions to eliminate and overcome "identified impediments." *Id.* at 57883. Moreover, the Proposed Rules would have added qualitative requirements in the form of performance standards. Under these standards, HUD would assess a grantee's performance by determining whether "[1] the analysis of impediments to fair housing choice is accurate and substantially complete based on generally available facts and data, and (2) that the actions taken to eliminate the impediments . . . result in meaningful and measurable progress." *Id.* at 57884.

Thus, these Proposed Rules would have amended the regulations "to provide performance review *standards*," would have "*ma[d]e clear*" what compliance meant, and "would serve to provide communities with a *clear idea* of the standards that HUD would use in . . . reviewing certifications . . . ." *Id.* at 57882; *see also id.* at 57883 (*stating* HUD "wishes to

ensure *more objective* application of requirements" and that "the proposed rule is intended to provide *specific standards*") (emphasis added).[11] Obviously, HUD deemed that these attributes – namely precision and performance standards – were lacking in the regulations as they now read. If HUD concluded its own regulations lacked concreteness and qualitative criteria, then relator undoubtedly is in no position to be construing them narrowly and accusing the County of fraud just because it did not share relator's precise view of them.

Relator's allegations that rest on the portion of the County's certifications that it would "take appropriate actions to overcome the effects of any impediments identified through that analysis" likewise fails to state a claim. In these allegations, ADC faults the County for not taking steps to cure impediments it *allegedly would have identified* had it conducted its analysis of impediments correctly. In essence, this claim flow entirely from the County's allegedly imperfect analysis. As shown above, this allegedly imperfect analysis cannot support a *qui tam* action. Nor can relator's arguments concerning the non-existent municipal certifications state a claim as the County made no such certifications. *Cf. Castenson*, 86 F. Supp. 2d at 879 (plaintiffs failed to show that "the Mayor falsely certified that the City 'is in compliance with NEPA' in the CDBG Application . . . because the CDBG Application contains no such certification") (citation omitted).

In sum, policy disagreements and differences of interpretation do not render false the statements of the party whose actions are disputed.

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[11] Notably, although HUD wanted "to provide clear guidance to local communities," its Proposed Rules did not adhere to ADC's vision of a correct analysis of impediments; nowhere do the Proposed Rules mandate that a grantee identify racial discrimination or segregation as an impediment. Rather, HUD clearly wished to set less ambiguous parameters to aid grantees "to responsibly identify and solve fair housing problems" while, at the same time, permitting some flexibility in recognition of the fact that its "grantees [were] striving to achieve their own visions of 'viable urban communities.'" *Id.* at 57883.

POINT II

THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE RELATOR WAS NOT AN ORIGINAL SOURCE OF PUBLICLY DISCLOSED INFORMATION

Under the FCA, "[n]o Court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A); *Rockwell Int'l Corp. v. United States*, 127 S.Ct. 1397, 1405 (2007); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) ("[I]f the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred.") (citation omitted).

The party invoking federal jurisdiction must "allege in [its] pleading the facts essential to show jurisdiction," and "must support [those facts] by competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936); *Mt. Sinai Union Free Sch. Dist. v. New York State Teachers Retirement Sys.*, 60 F.3d 106, 109 (2d Cir. 1995). As dramatically demonstrated by the Supreme Court's recent *Rockwell* decision, in which the Court held, even after the completion of a jury trial, that the trial court had no jurisdiction over relator's action, a court must satisfy itself at all times during a litigation that it has jurisdiction of the matter. *Rockwell*, 127 S.Ct. at 1406-07 ("[W]e may, and indeed must, decide whether Stone met the jurisdictional requirement of being an original source.").

Relator vainly attempts to intone the talismanic jurisdictional phrases such as "not publicly disclosed" and "directly." *See, e.g.*, Ex. A (Compl.), at ¶¶ 28-29, 37-39, 41-43, 47-52,

54-55. However, these incantations evaporate when the jurisdictional facts are reviewed, which manifest previous public disclosure.

A. There Was a Public Disclosure of all Relevant Factual Matters.

All of the information relied upon in relator's complaint falls within the public disclosure bar to subject matter jurisdiction. For the most part, relator has relied upon the County's responses to its requests under New York's Freedom of Information Law which consisted entirely of administrative reports that were produced to ADC following an administrative investigation. As discussed below, these FOIL responses constitute public disclosures. Relator's reliance upon census data[12] and official resolutions[13] merit the same characterization.

Although the Second Circuit has not opined on this particular subject, the weight of the federal court case authority has held that "the disclosure of information in response to a [Freedom of Information Act ("FOIA")] request" constitutes a public disclosure. *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999) (Alito, J.); *United States v. A.D. Roe Co.*, 186 F.3d 717, 724 (6th Cir. 1999); *Lamers*, 168 F.3d at 1017-18; *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684-86 (D.C. Cir. 1997); *cf. Consumer Prod. Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-09 (1980) (holding that "as a matter of common usage the term 'public' is properly

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[12] Census data is an administrative report and is available online at http://www.census.gov/. *See* Compl. ¶¶ 14-15.

[13] Harrison's "official resolution," Compl. ¶ 66, received ample media attention, including in an editorial in the *Daily News*. *See* Ex. P (excerpts of Julie M. Solinsky, Comment, "Affordable Housing Law in New York, New Jersey and Connecticut," Fall/1996-Spring/1997 Pace L. Rev. (Spring 1998) (*found at* http://www.pace.edu/lawschool/landuse/afford.html#fnB161)), at 12, 32.

understood as including persons who are FOIA requesters. A disclosure pursuant to the FOIA [is] accurately characterized as a 'public disclosure' within the plain meaning of § 6(b)(1)" of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1)). No reason exists to treat disclosures under FOIL differently than disclosures under FOIA.

The Second Circuit has held that information need only be accessible to "strangers to the fraud" to constitute a "public disclosure" and that it was unnecessary that each member of the public have a legal right to access the information at issue. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992) (*following United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991) (holding that the public disclosure bar was "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator")); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993). Here, *the general public* had access to the information upon which relator relies.

Moreover, a FOIL response constitutes a public disclosure in an "administrative . . . report" and one that occurs in an "administrative . . . investigation." 31 U.S.C. § 3730(e)(4)(A). *See Mistick*, 186 F.3d at 383 (holding "FOIA request was an 'administrative ... report' and that the documents that HUD provided were publicly disclosed 'in' that 'report'" and that "this response occurred 'in a[n] ... administrative ... investigation'") (citation omitted). (Notably, the documents produced in the FOIL responses consisted of administrative reports that had already been widely available to the public in any event.)

From a policy perspective, if FOIL responses did not constitute public disclosures, then "'public agency records would be flooded with citizens requesting information

in order to bring *qui tam* suits." *See Mistick*, 186 F.3d at 385 (*quoting United States ex rel. Herbert v. National Acad. of Scis.*, No. 90-2568, 1992 WL 247587, at *6 (D.D.C. Sept. 15, 1992)). Surely, such a result would undermine Congress' purpose in enacting the public disclosure bar – to prevent parasitic and opportunistic lawsuits. In short, "Congress did not intend the *qui tam* provision to transform FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow.'" *See Id.*

The public disclosure bar applies when an action is based "in any part upon publicly disclosed allegations or transactions. . . ." *See Kreindler & Kreindler*, 985 F.2d at 1158 (internal quotation and citation omitted). Although the County strongly disagrees with the conclusion of fraud that relator has drawn, all of the information from which relator drew that conclusion was publicly available in administrative and investigative files and in media accounts. *See United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Prods., Inc.*, No. 00 Civ. 6593(SHS), 2004 WL 74310, at*3 (S.D.N.Y. Jan. 15, 2004), *aff'd*, No. 04-0825-CV, 2007 WL 32020 (2d Cir. Jan. 4, 2007) ("[A] *qui tam* action is barred where there is enough information in the public domain to expose the fraud."). Relator's claim thus derives *wholly* from publicly disclosed information and therefore is clearly 'based upon' a public disclosure for purposes of § 3730(e)(4)(A).

B. Relator Cannot Prove That It Is an Original Source.

Given the clear public disclosure of the information upon which it relies, relator cannot proceed with this lawsuit unless it can establish that it was the original source of the public disclosure. This it plainly cannot do. Relator is not the original source of the information regarding the County because it does not have any "direct and independent knowledge of the information on which [its] allegations are based," as required by the FCA, 31 U.S.C. § 3730(e)(4)(B). Indeed, relator evidently learned all of the information upon which it bases its

claim against the County through FOIL requests and media reports. Thus, relator cannot prove that it was the "'source of the core information' upon which the . . . complaint is based." *United States v. New York Med. Coll.*, 252 F.3d 118, 121 (2d Cir. 2001) (citation omitted).

Direct knowledge means knowledge that is first hand and unmediated by anything but the plaintiff's own labor. *See Kreindler & Kreindler,* 985 F.2d at 1159. ADC does not satisfy this requirement. Because relator cannot state that it "[saw] [anything related to the County's policy and decisions concerning its application for and administration of federal government funds] *with [its] own eyes*" it cannot have direct knowledge. *See United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003) ("The False Claims Act is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing.") (emphasis added and citation omitted).

In addition to proving direct knowledge, relator must also demonstrate that it has independent knowledge of the information upon which it bases its claims, a hurdle it likewise cannot surmount. Independent knowledge means knowledge that is not dependent on public disclosures. *See Kreindler & Kreindler*, 985 F.2d at 1158; *United States ex rel. McAllan v. City of New York,* No. 98 Civ. 3349, 1999 WL 280416, at *6 (S.D.N.Y. May 5, 1999). Nothing suggests that relator could have learned the information relied upon in its complaint independently. Nothing suggests that ADC or anyone employed by ADC was employed by or affiliated with the County. ADC was not a party to any internal County discussions or decisions. And, ADC was not involved in any communications between the County and the municipalities in the Consortium. Thus, relator could not have independently acquired the information asserted

in its complaint. Given relator's total lack of independent knowledge it cannot, as a matter of law, be considered an original source of what it alleges.

In sum, given the clear public disclosure of the relevant information at issue, relator cannot demonstrate original source status because it has no direct or independent knowledge. It is an echo, not a voice. Relator therefore cannot satisfy the threshold jurisdictional prerequisites for an FCA suit in the absence of the government, which declined to intervene in this case.

POINT III

RELATOR FAILS TO SATISFY THE HEIGHTENED PLEADING REQUIREMENTS OF THE FEDERAL RULES

Relator's complaint fails to allege with requisite particularity its allegations of fraud in contravention of Rule 9(b). Despite its length, the complaint never provides the names of County employees who participated in the alleged fraud or who signed the certifications. It never directly quotes the language in the certifications at issue. Relator provides no dates on which these certifications were submitted. And, relator never explains how the certifications were fraudulent. Thus, ADC's complaint should be dismissed.

A. Rule 9(b) Applies to FCA Actions.

As the "FCA is an anti-fraud statute . . . courts routinely require FCA claims to comply with Rule 9(b)." *See Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) (citations omitted). Rule 9(b) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). *See Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 51 (2d Cir. 1995). Although the County provided reams of documents to ADC, relator's complaint provides few details of the alleged

fraud. In essence, the complaint effectively requires the County to try to fill in the blanks in order to defend itself from these spurious allegations, thus contravening the purpose of the fraud pleading requirements. *See Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1003 (2d Cir. 1988); *see also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 226 (1st Cir. 2004), *cert. denied*, 543 U.S. 820 (2004). The strict pleading requirement in Rule 9(b) also helps to advance the government's interests in protecting the public fisc. As the First Circuit has observed, "allowing a relator to plead generally at the outset and amend the complaint . . . after discovery would be at odds with the FCA's procedures for filing a *qui tam* action and its protections for the government (which is, of course, the real party in interest in a *qui tam* action)." *Id.* at 231.

B. Relator's Allegations do not Satisfy Rule 9(b)'s Requirements.

Relator fails to identify any County employees or agents who made the false statements or were otherwise responsible for submitting the alleged false certifications. *See United States ex rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039, 1050-51 (S.D.N.Y. 1996) (FCA complaint failed to satisfy Rule 9(b) because it failed to, *inter alia*, "refer to specific employees who may have been involved in submitting false claims" or "identif[y] the individuals involved in the alleged fraud"); *see United States ex rel. Vallejo v. Investronica, Inc.*, 2 F. Supp. 2d 330, 336-37 (W.D.N.Y. 1998). Nor does the complaint allege any specific dates that could give notice to the County concerning which certifications ADC alleges were fraudulent. Vaguely alleging broad time periods does not substitute for citing actual dates and therefore fails to satisfy Rule 9(b). Ex. A (Compl.), at ¶¶ 2 ("[o]n multiple occasions within the preceding six years . . ."), 20 ("Westchester applied each year. . . .")

In *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1020 (7th Cir. 1992), the Seventh Circuit explained that a FCA complaint was properly dismissed when the relator could

not identify the dates of allegedly false invoices, but only provided an approximate date range. *See also Karvelas,* 360 F.3d at 234 (noting that allegation that hospital was improperly certifying therapists from 1994-1997 was insufficient because it provided "no details concerning the particular dates . . . of the alleged certification").

Most importantly, Rule 9(b) requires that a relator both specify "the statements that [it] contends were fraudulent, . . . and . . . explain why the statements were fraudulent." *Acito*, 47 F.3d at 51. Relator does neither.

First, it never directly quotes or enumerates the certifications it claims were false but rather broadly alleges that the County certified in its CDBG and HOME applications that "it and the participating municipalities would affirmatively further[] fair housing and comply with each and all of the provisions of the Fair Housing Act . . . [and] [m]ore specifically, . . . that it would conduct an analysis of impediments to fair housing choice within the jurisdiction [and] take appropriate actions to overcome the effects of any impediments identified through that analysis . . . ." Ex. A (Compl.), at ¶¶ 21-22. ADC also broadly – and misleadingly – alleges that the County "obligated itself to make certain that participating municipalities themselves were complying with all provisions of the Fair Housing Act, including the obligation to affirmatively further fair housing." Ex. A (Compl.), at ¶ 24. The fact that relator never actually quotes any certifications the County made obscures the certifications on which it founds its claims. This falls short of its obligations under Rule 9(b).

Second, ADC does not specify why these certifications were fraudulent. Notably, relator never alleges that the County made inappropriate grants or that those grants did not further fair housing. Rather, ADC quibbles with the County's policy choices and how it went about accomplishing what it certified it would do. This does not suffice to allege that the

County's certifications were fraudulent. *Cf. Lamers*, 168 F.3d at 1018 ("differences in interpretation growing out of a disputed legal question are . . . not false under the FCA.").

For example, with regard to conducting an analysis of impediments, relator simply cannot dispute that the County did conduct analyses of impediments. The County's certification *did not* specify that it had to identify any particular impediments and relator's complaint does not explain why the County's alleged failure to include racial discrimination as an impediment rendered the County's certification fraudulent.

With regard to the County's certification "to take appropriate actions to overcome the effects of any impediments identified through that analysis," this certification did not specify that the County had to take appropriate steps to overcome impediments that the County did not identify, but that ADC believes *should have been* identified. ADC's complaint simply does not set forth why the County's alleged failure to overcome impediments it never identified rendered its certification fraudulent.

Finally – even taking relator's complaint at face value with regard to the County's (non-existent) certifications concerning oversight of municipalities – ADC *never* alleges that the County certified that it would ensure municipal compliance with fair housing obligations in a particular way. Although ADC prefers the County to use a "sticks" approach, even ADC admits the County never obligated itself to do so.

Specificity is critical where a *qui tam* action arises out of a defendant's certifications that it will comply with broad and ill-defined standards. Under Rule 9(b) generalized, conclusory allegations of fraud, such as the ones that make up the basis of relator's claim, are insufficient. *United States ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F. Supp. 2d 1201, 1215 (M.D. Fla. 1999). Thus, ADC's complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court dismiss relator's complaint and award the County its costs and expenses in defending this action, including its reasonable attorneys' fees, along with such other and further relief that the Court deems just and appropriate.

Dated: New York, New York
April 16, 2007

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

OF COUNSEL TO CHARLENE M. INDELICATO
WESTCHESTER COUNTY ATTORNEY

By: s/Stuart M. Gerson
Stuart M. Gerson (SG-3017)
Michael A. Kalish (MK-8118)
Carrie Corcoran (CC-4553)
250 Park Avenue
New York, New York 10177-1211
(212) 351-4500

Attorneys for Defendants