UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA *ex rel*, LISA PECK and ROBIN PECK, also individually as to their individual claims and on behalf of all similarly-situated individuals,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 1:17-cv-07239
CIT BANK, N.A., f/k/a ONEWEST BANK, N.A., f/k/a ONEWEST BANK, F.S.B.; OCWEN LOAN SERVICING, LLC,	)	
Defendants.	)	

OCWEN'S MOTION TO DISMISS UNDER FEDERAL RULES 12(b)(1) AND 12(b)(6) AND INCORPORATED MEMORANDUM OF LAW

PHH Mortgage Corporation, successor to Ocwen Loan Servicing, LLC ("Ocwen") respectfully moves to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Introduction

This case should be dismissed at the pleading stage. Relators' Complaint asserts that OneWest Bank, Defendant CIT Bank's predecessor, certified to the FDIC that it would identify and modify "Qualifying Loans" pursuant to a Purchasing Agreement that OneWest Bank entered into with the FDIC in 2010, and then subsequently failed to identify and modify such loans as it had promised in the Purchasing Agreement. The Complaint further asserts that Ocwen, an alleged subsequent servicer of certain loans subject to OneWest Bank's agreement with the FDIC, made general certifications to government-sponsored enterprises (Freddie Mac and Fannie Mae, the "GSEs") that it was in compliance with GSE servicing guidelines and all applicable laws, rules and regulations. Based on these allegations, Relators purport to assert four claims for

civil damages and penalties under the False Claims Act, 31 U.S.C. 3729, et seq. ("FCA") (Counts I-IV), and two claims for civil penalties and declaratory relief under the Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. 1833a ("FIRREA") (Counts V, VI). Each of these claims should be dismissed at the pleading stage for the following reasons:

- The Complaint fails to state a claim under the FCA because it fails to allege that Ocwen made any statement to the FDIC at all, much less a false claim, and this pleading failure is especially glaring when viewed under the heightened standards required by Federal Rule 9(b) for FCA claims.
- Ocwen's alleged statements to the GSEs are not actionable under the FCA because the GSEs are private corporations and not "officer[s], employee[s], or agent[s] of the United States," as required by the statute.
- All of the allegations underlying Relators' FCA claims were previously disclosed to the public and/or considered and discussed in other litigation. As a result, they are subject to the public disclosure bar for FCA claims and must be dismissed under Federal Rule 12(b)(1) or 12(b)(6).
- Finally, Counts V and VI fail on the pleadings because FIRREA does not ordinarily provide for a private right of action, and Relators have not pled that they complied with the proper procedure—notifying and obtaining approval from the Attorney General—in order to bring a private right of action.

For the reasons discussed more fully herein, Relators' Complaint should be dismissed in its entirety, with prejudice.

Background

This case arises out of Defendant CIT Bank, N.A., f/k/a OneWest Bank, N.A., f/k/a OneWest Bank, F.S.B.'s ("CIT Bank" or formerly "OneWest Bank") alleged misrepresentations made to the Federal Deposit Insurance Corporation ("FDIC") as a "condition of participation" in bidding for IndyMac Bank, F.S.B.'s assets after it failed, and to obtain FDIC insurance. Doc. 1 at ¶ 4; *see also id.* at ¶¶ 115-16 (discussing the Office of Thrift Supervision's determination that IndyMac was unlikely to pay its obligations and appointment of the FDIC as Receiver to IndyMac Bank). Specifically, Relators allege that OneWest Bank failed to modify Relators' loan, in violation of a Purchasing Agreement that OneWest Bank entered into with the FDIC in 2010. *Id.* at ¶ 5; *see also id.* at ¶ 125 ("OneWest agreed and covenanted with the Government to identify and modify Qualifying Loans."); *id.* at ¶¶ 137-41, 145, 149-55 (discussing agreement reached between OneWest Bank and the FDIC).

Relators do not contend that Ocwen made any misrepresentations to the FDIC or that Ocwen received any of IndyMac Bank, F.S.B.'s assets after it failed. *See id.* at ¶ 29 ("In the case of IndyMac's closure, discussed *infra*, all of the assets were transferred to OneWest."); *see also, e.g.*, *id.* at ¶¶ 233-34 (describing OneWest Bank's certifications made to the FDIC). Rather, they allege that "Ocwen succeeded OneWest as servicer in or about June, 2013, and is the current servicer of Plaintiffs' mortgage loan." *Id.* at ¶ 18. They further allege that Ocwen purchased additional mortgage servicing rights from OneWest Bank in June 2013. *Id.* at ¶ 19. Relators contend that "Defendants"—which presumably includes Ocwen—"continue to breach their duty to self-report their [purported] non-compliance and instead falsely report compliance with mortgage servicing standards in certifications for payment and/or reimbursement made to the [GSEs], Freddie Mac and Fannie Mae[.]" *Id.* at ¶ 6; *see also id.* at ¶ 236 ("OneWest and Ocwen agreed to comply with the GSE guidelines . . ."). Although the Complaint is unclear, Relators

apparently believe Ocwen's continued servicing and eventual foreclosure of Relators' non-modified loan violated legal obligations and/or GSE guidelines. *See, e.g., id.* at ¶¶ 51-55.

Legal Standards

Federal Rule 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject matter jurisdiction. *U.S. ex rel. McGee v. IBM Corp.*, 81 F. Supp. 3d 643, 654 (N.D. Ill. 2015). Where jurisdiction is in question, the party asserting a right to a federal forum has the burden of proof, regardless of who raised the jurisdictional challenge. *Craig v. Ontario Corp.*, 543 F.3d 872, 876 (7th Cir. 2008). As discussed later in this brief, the public disclosure bar requires dismissal of a *qui tam* action under Rule 12(b)(1) "when the relator's action is 'based upon the 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." *U.S. ex rel. McGee*, 81 F. Supp. 3d at 657 (internal citations omitted).

Federal Rule 12(b)(6)

A Rule 12(b)(6) motion challenges the sufficiency of the complaint. *U.S. ex rel. McGee*, 81 F. Supp. 3d at 654 (internal citation omitted). A complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy Rule 8, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." *Mann v. Vogel*, 707 F.3d 872, 877 (7th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678) (internal quotation marks omitted).

False Claims Act cases are further subject to the heightened pleading requirements of Rule 9(b). *Stop Ill. Health Care Fraud, LLC v. Sayeed*, Case No. 12 cv 9306, 2016 WL 4479542, at *3 (N.D. Ill. Aug. 24, 2016) (Coleman, J.) (citing *U.S. ex rel. Gross v. Aids Research Alliance-Chicago*, 415 F.3d 601, 604 (7th Cir. 2005)); *see also U.S. ex rel. Brooks v. Wells Fargo Bank, N.A.*, Case No. 17-cv-1237, 2019 WL 1124834, at *2 (N.D. Ill. Mar. 12, 2019) (Coleman, J.) ("When alleging an FCA violation, the complaint must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)."). This means a relator must identify the specific person or entity who made the alleged false claims, the time, place, and content of the claims, and the method by which the claims were communicated. *U.S. ex rel. Grenadyor v. Ukranian Vill. Pharmacy*, 772 F.3d 1102, 1106 (7th Cir. 2014). Stated differently, under Rule 9(b), a relator must allege "the who, what, when, where, and how" of the alleged fraud. *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009) (internal quotations and citation omitted).

Argument

I. Counts I-IV should be dismissed under Rule 12(b)(6) because Relators fail to allege that Ocwen made any false statements to the FDIC and fail to allege any facts as to Ocwen's conduct with requisite particularity.

To state a claim under §§ 3729(a)(1)(A) or (a)(1)(B) of the FCA, as asserted in Counts I and II of the Complaint, respectively, Relators must allege that Ocwen (1) submitted a claim or record; (2) to the United States government; (3) that was false or fraudulent; (4) knowing its falsity; and (5) seeking payment from the federal treasury. *See* 31 U.S.C. §§ 3729(a)(1)(A) and (a)(1)(B); *U.S. ex rel. Besancon v. Uchicago Argonne*, 12-cv-7309, 2014 WL 4783056, at *2-3 (N.D. Ill. Sep. 24, 2014). Similarly, to state a "reverse false claim" under § 3729(a)(1)(G), as

asserted in Count IV of the Complaint, Relators must allege that (1) a false record was created; (2) Ocwen knew the record was false; (3) the false record or statement is made, used, or caused to be made or used; (4) to conceal, decrease, or avoid an obligation to pay the Government; and (5) the misrepresentation is material. *See* 31 U.S.C. §§ 3729(a)(1)(G); *U.S. ex rel. Ramsey-Ledesma v. Censeo Health, L.L.C.*, 14-cv-0018-M, 2016 WL 5661644, at *11 (N.D. Tex. Sep. 30, 2016). Finally, § 3729(a)(1)(D), asserted in Count III of the Complaint, imposes liability on a person or entity who "has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property." 31 U.S.C. § 3729(a)(1)(D). In other words, all four of the FCA claims rely on false statements, claims, records, concealment, and/or delivery. As noted above, FCA claims are subject to the heightened pleading requirements of Federal Rule 9(b).

Here, the Complaint fails to satisfy the ordinary pleading standards under Rule 8 as they relate to Ocwen, and comes nowhere close to satisfying the heightened standards under Rule 9(b). The crux of Relators' case is that OneWest Bank, CIT Bank's predecessor, certified to the FDIC that it would identify and modify unlawful "Qualifying Loans" pursuant to a Purchasing Agreement that OneWest Bank entered into with the FDIC in 2010, and then subsequently failed to identify and modify such loans as it had promised in the Purchasing Agreement. Doc. 1 at ¶¶ 4-5.[1] Ocwen is not alleged to have made any statement to the FDIC or played any role with

[1] *See also, e.g.*, Doc. 1 at ¶ 29 (after its closure, all of IndyMac's assets were transferred to OneWest Bank); ¶ 125 (discussing that as part of OneWest Bank's purchase of IndyMac's deposits and assets, OneWest Bank "agreed and covenanted with the Government to identify and modify Qualifying Loans"); ¶ 137 ("[T]he FDIC and OneWest negotiated...and reached an agreement which thereby acknowledged the toxicity of negative amortizing, adjustable-rate loans such as the Relators' . . ."); ¶ 138 (similar); ¶ 139 ("OneWest's signing was a certification and an agreement to identify and modify such loans . . ."); ¶ 140 ("OneWest, upon signing the Purchase Agreement, agreed to follow and be guided by the FDIC Loan Modification Program . . ."); ¶ 141-44 (similar); ¶ 145 ("OneWest was required to identify Qualifying Loans and modify them . . ."); ¶ 148 ("OneWest had enormous financial incentives to not modify loans.") (emphasis in original); ¶¶ 149-50, 152-55 (discussing OneWest's alleged failures); ¶¶ 233-34, 252

respect to the Purchase Agreement. Moreover, while Ocwen is alleged to have received benefits as a result of OneWest Bank's allegedly false certifications,[2] these allegations are contingent on OneWest Bank's—not Ocwen's—alleged misrepresentations. And, to the extent Relators seek to lump Ocwen together with OneWest Bank for purposes of stating a claim under the FCA, that is impermissible and cannot withstand scrutiny under Federal Rule 12(b)(6). *Stop Ill. Health Care Fraud*, 2016 WL 4479542, at *4 (an FCA complaint must inform *each defendant* of the nature of his alleged participation in the fraud). Ultimately, Relators fail to plead any of the essential elements of any of their four FCA counts with respect to Ocwen. Dismissal under Rule 12(b)(6) is therefore appropriate.

Moreover, Relators cannot avoid dismissal by relying on their generalized allegations that Ocwen made certifications to the GSEs (as opposed to the FDIC) that Ocwen was complying with GSE servicing guidelines and all applicable laws, rules and regulations. These allegations similarly fail to identify the "who, what, where, when, and how" of Ocwen's alleged conduct in a manner that satisfies Rule 9(b). *See, e.g., U.S. ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003) (Rule 9(b) requires "specific false statements made in order to obtain payment") (emphasis in original). Relators assert that Ocwen failed to identify and modify "Qualifying Loans," Doc. 1 at ¶¶ 247-48, but the only agreement giving rise to any obligation to modify Qualifying Loans is the Purchase Agreement by and between the FDIC and OneWest Bank. That agreement is not binding on Ocwen, so Ocwen had no independent obligation to

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(discussing alleged certifications made by OneWest Bank); ¶ 242 ("OnWest, now CIT, agreed to and was required to identify Qualifying Loans . . . and modify them.").

[2] *See, e.g.*, Doc. 1 at ¶ 6 (OneWest Bank's alleged misrepresentations to the FDIC "continue to inure to Defendants' benefit[.]"); ¶ 153 ("OneWest, and now Ocwen, reaped the financial benefits of servicing non-performing loans, resulting in significant losses to the FDIC and the GSEs."); ¶ 155 ("Because of the misrepresentations OneWest made to FDIC, Defendants continue to reap the unjust financial enrichments from the remaining toxic loans in the IndyMac MSR Portfolio to this day.").

modify Relators' loans. *See* Agreement at Section 10.12 (requiring *OneWest Bank* to complete in-process modifications). Relators do not allege any agreement between Ocwen and the FDIC, let alone any specific contractual provisions or representations or warranties that were contained in any particular agreements that would be attributable to Ocwen. *See U.S. ex rel. Gross*, 415 F.3d at 605 (finding that relator's failure to identify the content of specific documents giving rise to the alleged certifications of compliance did not comply with Rule 9(b)). As a result, the Complaint lacks any allegations that could rise to an inference that Ocwen made intentionally false statements actionable under the FCA.

Finally, Count IV fails to state a claim for the independent reason that Relators do not allege Ocwen concealed any obligation to return payments. Relators' claim for a "reverse false claim" under FCA section 3279(a)(1)(G) requires particularized allegations of a false statement used not to obtain payments from the Government, but to "conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." *U.S. ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818, 835 (7th Cir. 2011) (internal citations omitted). Relators make no such allegations anywhere in their Complaint. Instead, Count IV relies on the same allegation that "Defendants" (group pled) purposely avoided modifying Qualifying Loans, resulting in losses to the GSEs. *See, e.g.*, Doc. 1 at ¶¶ 287-89. The Complaint therefore fails to plausibly allege that Ocwen concealed any obligation to return any payments to the Government. Count IV should be dismissed for this additional reason.

In sum, Relators fail to plead the elements of any their purported FCA claims with the requisite particularity. Counts I through IV should therefore be dismissed.

II. Counts I-IV should be dismissed because the FCA does not apply to statements made to government-sponsored enterprises.

As demonstrated above, the Complaint fails to plead the elements of a claim under the FCA. To the extent Relators' FCA claims are based on statements by Ocwen to the GSEs (as opposed to the FDIC), those claims are subject to dismissal for the additional reason that statements to GSEs are not actionable under the FCA because GSEs are private corporations.

A claim under the FCA requires that a demand or request for payment be "presented to an officer, employee, or agent of the United States." 31 U.S.C. § 3729(b)(2)(A)(i). In their Complaint, Relators appear to assume that because Fannie Mae and Freddie Mac are "government-sponsored enterprises chartered by Congress," they are part of the federal government. Doc. 1 at ¶¶ 41, 49. Relators are incorrect. Fannie Mae's and Freddie Mac's charters explicitly provide that they are private corporations, with all the characteristics of a private company: stock that is publicly-traded and boards of directors elected by common stockholders. *See, e.g.*, 12 U.S.C. §§ 1716(b), 1718(d), 1723(b). Moreover, Fannie Mae and Freddie Mac purchase residential mortgages with "private capital" and pool them into securities, and both are prohibited by federal law from representing that their securities are backed by the United States. *Id.* §§ 1716, 1719(b), 1455(h)(2). In fact, this Court recently held that the GSEs are private corporations. *See U.S. ex rel. Brooks*, 2019 WL 1125834, at *4 (Coleman, J.) (citing *Fed. Nat'l Mortg. Ass'n v. City of Chi.*, 874 F.3d 959, 960 (7th Cir. 2017)).

Given their private nature, courts in this District and across the country have held that GSEs are not government actors, nor are they "officer[s], employee[s], or agent[s] of the United States" under the FCA. *See Caldwell v. Citimortgage, Inc.*, No. 15-CV-1784, 2015 WL 6445467, at *4 (N.D. Ill. Oct. 23, 2015) ("Freddie Mac is not a government actor"); *U.S. ex rel. Adams v. Aurora Loan Servs., Inc.*, 813 F.3d 1259, 1260 (9th Cir. 2016) (a claim presented to the

GSEs is not presented to an 'officer, employee, or agent' of the United States"); *U.S. ex rel. Ashmore v. 1st Financial, Inc.*, Case No. 8:16-cv-1387-T-23JSS, 2018 WL 310032, at *2 (M.D. Fla. Jan. 5, 2018) (GSEs are "not officer[s], employee[s], or agent[s] of the United States"); *U.S. ex rel. Todd v. Fidelity Nat'l Fin., Inc.*, No. 1:12-cv-666-REB-CBS, 2014 WL 4636394, at *2, 7-10 (D. Colo. Sep. 16, 2014) (GSEs not a government actor for purposes of the FCA); *Fed. Home Loan Mortg. Corp. v. Shamoon*, 922 F. Supp. 2d 641, 643-45 (E.D. Mich. 2013) (Freddie Mac is not a government actor); *U.S. ex rel. Adams v. Wells Fargo Bank, N.A.*, No. 2:11-cv-00535-RCJ-PAL, 2013 WL 6506732, at *8 (D. Nev. Dec. 11, 2013) (a false claim against the GSEs does not implicate the FCA); *Liberty Mortg. Banking, Ltd. v. Fed. Home Loan Mortg. Corp.*, 822 F. Supp. 956, 958 (E.D.N.Y. 1993) (Freddie Mac is an essentially private entity).

Relators also allege that the Federal Housing Finance Agency ("FHFA") was created to oversee the GSEs, which were placed into conservatorships with FHFA appointed as conservator. Doc. 1 at ¶¶ 44-46. To the extent Relators contend Ocwen made false certifications to the FHFA and that those certifications constitute false claims made to the Government, such contentions would fail for the same reasons. When the FHFA was appointed as conservator, it lost any status as "government actor" and stepped into the shoes of the GSEs. *See Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 96 (D.D.C. 2012) ("FHFA as conservator of Fannie Mae is not a government actor."); *Bernard v. Fed. Nat'l Mortg. Ass'n*, No. 12-14680, 2013 WL 1282016, at *6 (E.D. Mich. Mar. 27, 2013) ("FHFA's conservatorship of Fannie Mae does not and cannot transform a private corporation into a government actor . . . because FHFA, as conservator, merely 'steps into the shoes' of Fannie Mae, a private corporation"). Therefore, Relators' FCA claims, to the extent they are based on statements by Ocwen to the GSEs, fail to state a claim and should be dismissed under Federal Rule 12(b)(6).

III. Counts I-VI are based on publicly-available information and thus subject to the public disclosure bar.

Courts must dismiss *qui tam* actions when the claims are "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, 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); *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 912-13 (7th Cir. 2009).[3] A public disclosure occurs when "the critical elements exposing the transaction as fraudulent are placed in the public domain." *U.S. v. Nicor Gas, Inc.*, No. 09-cv-298, 2013 WL 1787817, at *2 (N.D. Ill. Apr. 25, 2013) (Coleman, J.) (internal citation omitted) (dismissing case based on public disclosure bar). A claim is "based upon" disclosed allegations "when the relator's allegations and the publicly disclosed allegations are substantially similar." *See Glaser*, 770 F.3d at 915; *see also U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, 760 F.3d 688, 691 (7th Cir. 2014). Claims based on publicly disclosed allegations are barred because authorities are already in the position to vindicate the public's interests and thus, the *qui tam* action would serve no purpose. *See id.* (citing *Feingold*, 324 F.3d at 495).

[3] It is unclear whether Relators' claims should be dismissed under the public disclosure bar pursuant to Rule 12(b)(1) or 12(b)(6). The 1986 version of the FCA states: "*No court shall have jurisdiction* over an action under this section based upon the public disclosure of allegations[,]" which courts have construed as jurisdictional in nature. *See U.S. ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, 764 F.3d 699, 706 (7th Cir. 2014). In 2010, the FCA was amended and the phrase "no court shall have jurisdiction" was replaced with the phrase "[*t*]*he court shall dismiss* an action or claim under this section[.]" *U.S. ex rel. Cause of Action v. Chi. Transit Authority*, 71 F. Supp. 3d 776, 779 (N.D. Ill. 2014) (emphasis in original). Following the amendment, the Seventh Circuit questioned whether the public disclosure bar should be treated as jurisdictional. *See Absher*, 764 F.3d at 706. Because the 2010 amendment was not retroactive, the earlier version applies to conduct before March 23, 2010, and the amended version applies to conduct post-dating the amendment. *See U.S. ex rel. Bogina v. Medline Indus., Inc.*, No. 11 C 05373, 2015 WL 1396190, at *2 (N.D. Ill. Mar. 24, 2015). Regardless, Relators' FCA claims are barred under either analysis.

Here, Relators' FCA claims are barred because they are based upon publicly disclosed allegations and not brought by the Attorney General or the original source of the allegations. In the *FHFA v. Goldman Sachs & Co.* case referenced by Relators, Plaintiffs—the FHFA, Fannie Mae, and Freddie Mac—sued Goldman Sachs and other individual defendants for their offer and sale of residential mortgage-backed securities with registration statements allegedly containing materially false or misleading statements or omissions. 11-cv-06198-DLC (S.D.N.Y. 2011), its Doc. 1 at ¶ 1. According to that complaint, Goldman Sachs falsely stated that the mortgage loans and properties in the trusts—to include Relators', according to Relators—complied with certain underwriting guidelines and standards and that such false statements and misleading omissions purportedly significantly overstated the ability of borrowers like Relators to repay their mortgage loans and the value of the collateralized property. Doc. 1 at ¶¶ 105, 109-10. The FHFA, in its complaint, also alleged that IndyMac "often ignored its stated underwriting and appraisal standards . . ." *Id.* at ¶ 112. Relators assert that their "experiences with their IndyMac mortgage origination and subsequent servicing by the Defendants in this case provide independent corroboration, and matches the contours, of the FHFA's allegations in *Goldman*." *Id.* at ¶ 113. Because the allegations as to the purported toxicity of the loan assets were previously alleged and articulated in *FHFA*, they already exist in the public domain.

Additionally, in *U.S. ex rel. Beekman v. OneWest Bank FSB, et al.*[4], the relator in that *qui tam* action similarly alleged that IndyMac engaged in fraud, misrepresentation and other illegal

[4] The Court may take judicial notice of this case and other publicly available litigation that was not included in the Complaint under Federal Rule of Evidence 201. Fed. R. Evid. 201; *see also U.S. ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 208 (1st Cir. 2016) (taking judicial notice of proffered press releases, news articles, a report, and Congressional testimony and finding that "[t]his praxis is fully consistent with the approach of our sister circuits, which routinely have considered undisputed documents provided by the parties in connection with Rule 12(b)(6) motions based on the public disclosure bar."); *see also U.S. ex rel. Conroy v. Select Medical Corp.*, 211 F.3d 1132, 1143 n.5 (S.D. Ind. 2016) (taking judicial notice, in the context of public disclosure argument raised at the motion to dismiss stage, of

acts to get relator to be foreclosed upon. Case No. 9:12-cv-81183-JIC, its Doc. 1 at ¶ 22. Specifically, relator there contended—in equally convoluted fashion—that OneWest Bank and the FDIC entered into a "loss sharing agreement" by which "losses" would be "shifted" to the U.S. government. *See id.* at ¶ 23 ("Plaintiff is a victim of this scheme and plan which allows One West Bank to force losses disproportionately to the Government and the people as taxpayers . . . . it looks like One West [] [is] only paying 20% of any loss and can then buy the property at a foreclosure sale and reap 100% of the profits."); *id.* at ¶ 27 ("[T]his implausible response is not uncharacteristic of lenders who exploit FDIC loss-share agreements by seeking to foreclose on nonperforming loans, even when prudent business judgment calls for short sale or loan modification solutions."); *compare* Doc. 1 at ¶ 153 ("Rather than modifying Qualifying Loans, as it was required to do, OneWest . . . reaped the financial benefits of servicing non-performing loans, resulting in significant losses to the FDIC and the GSEs."). In later permutations of the complaint, the relator makes allegations about the same "toxic loans" Relators do here. *See* Case No. 9:12-cv-81183-JIC, its Doc. 95 at ¶ 20.

Relators also offer other publicly available information, including an article published by the National Consumer Law Center, purportedly demonstrating why servicers do not have an incentive to modify loans. *Id.* at ¶¶ 77-85, fn 1.

Finally, Relators do not allege that they are the original sources of the public information included in their allegations. Accordingly, only the Attorney General, and not Relators, may pursue any course of action against Defendants. *See U.S. ex rel. McGee*, 81 F. Supp. 3d at 657.

Accordingly, this action should be dismissed under the public-disclosure bar.

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public documents purportedly establishing the existence of relators' allegations in the public domain and stating that "Courts may take judicial notice of public records, newspaper articles, and governmental documents not subject to reasonable dispute as to accuracy . . .").

IV. Counts V and VI should be dismissed because Relators do not have a private right of action under FIRREA.

Plaintiffs' FIRREA claims fail as a matter of law because FIRREA does not normally provide a private right of action. *See Breiding v. Wilson Appraisal Servs.*, 14-cv-124, 2016 WL 1175257, at *4 (N.D.W.V. Mar. 23, 2016); *Dempsey v. U.S. Bank Nat'l*, 10-cv-679, 2012 WL 2036434, at *6 (E.D. Tex. June 6, 2012) (finding no private right of action under FIRREA for defaulting borrowers seeking to stop foreclosure). Generally, FIRREA claims are properly brought by the Attorney General. *U.S. v. Bank of N.Y. Mellon*, 941 F. Supp. 2d 438, 443 (S.D.N.Y. 2013) (observing that FIRREA permits the Attorney General to bring an action for civil penalties against anyone who violates a number of criminal statutes, including those "affecting a federally insured financial institution.").

However, the Crime Control Act enables qualified private citizens to bring *qui tam* actions for violations that would give rise to civil penalties under FIRREA. 12 U.S.C. §§ 4201-13. To qualify for this authority, a person must file information with the Attorney General sufficient to set out a prima facie case of a FIRREA violation. *Id.* § 4201. If the Attorney General does not pursue the action and so notifies the private party, the private party may obtain a contract with the Attorney General to pursue the case through private counsel. *Id.* § 4206-07.

Relators do not allege that they filed any information with the Attorney General seeking authority to file a private FIRREA claim against Ocwen, let alone that the Attorney General declined to pursue any such action and notified Relators, or that Relators obtained a contract with the Attorney General to pursue a FIRREA claim against Ocwen. Accordingly, the aforementioned general rule that FIRREA does not provide a private right of action governs, and Relators' FIRREA claims should be dismissed on that basis.

Relators' claim for declaratory relief under FIRREA (Count VI) also fails because Relators cannot now request such relief as to prior conduct. The declaratory judgment statute's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations[.]" *MNW, LLC v. Mega Auto Grp., Inc.*, 884 F. Supp. 2d 740, 764 (N.D. Ind. 2012). Declaratory judgment claims are not appropriate to adjudicate past conduct. *See Bryant v. Jackson Nat'l Life Distributors, LLC*, No. 12 C 9391, 2013 WL 1819927, at *4 (N.D. Ill. Apr. 30, 2013) (dismissing declaratory judgment action as improper because alleged breach of contract had already occurred); *Troya v. Wilson*, Case No. 2:17-cv-0162-WTL-DKL, 2017 WL 1346993, at *3 (S.D. Ind. Apr. 12, 2017) (dismissing declaratory judgment claim because declaratory judgment cannot be used "solely to adjudicate [a defendant's] past conduct" and not to affect future behavior) (internal citation omitted).

Here, Relators concede that "Defendants" successfully utilized FIRREA's administrative exhaustion requirement to defeat Relators' counterclaims in their foreclosure proceedings. Doc 1 at ¶ 302. Relators now, by their declaratory judgment claim, seek to adjudicate past conduct. For example, Relators contend that notice(s) should have been sent to creditors and that neither they, nor any creditors, received such notice(s). *See id.* at ¶¶ 304-07. Relators therefore ask that the Court make certain declarations, including, but not limited to, that the administrative exhaustion requirement should not be applied to anyone who was allegedly not sent requisite notice by the FDIC and should not have defeated Relators' counterclaims. *See id.* at ¶¶ 308-14.

Conclusion

For the reasons presented above, Ocwen respectfully requests that the Court dismiss Relators' Complaint, with prejudice, and grant such further relief as the Court finds just and appropriate.

Dated: September 25, 2019

Respectfully submitted,

OCWEN LOAN SERVICING, LLC

/s/ Simon Fleischmann
One of Its attorneys

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed and served on all counsel of record via ECF on September 25, 2019.

/s/ Simon Fleischmann