

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:15-cv-24585-UNGARO/O'SULLIVAN

UNITED STATES OF AMERICA,)
<i>ex rel.</i> , BRUCE JACOBS,)
)
Plaintiffs,)
)
v.)
)
BANK OF AMERICA CORPORATION;)
BANK OF AMERICA, N.A.;)
BAC HOME LOANS SERVICING L.P.;)
COUNTRYWIDE HOME LOANS, INC.;)
COUNTRYWIDE FINANCIAL CORPORATION;)
COUNTRYWIDE MORTGAGE VENTURES, L.L.C.;)
COUNTRYWIDE BANK, F.S.B.; and)
RECONTRUST COMPANY, N.A.,)
)
Defendants.)
)

**THE UNITED STATES OF AMERICA'S UNOPPOSED
MOTION TO INTERVENE FOR PURPOSES OF SETTLEMENT
WITH SUPPORTING MEMORANDUM OF LAW**

The United States of America, by its undersigned counsel, hereby moves for entry of an Order permitting it to intervene in this action, pursuant to 31 U.S.C. § 3730(b)(4), for purposes of settlement. As grounds in support of this motion, the United States submits the following Memorandum of Law.

Memorandum of Law

I. Background

1. On December 14, 2015, Relator Bruce Jacobs (“Relator” or “Jacobs”) filed a complaint (D.E. 1) in this action pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) against Bank of America Corporation; Bank of America, N.A.; BAC Home Loans Servicing L.P.; Countrywide Home Loans, Inc.; Countrywide Financial Corporation;

Countrywide Mortgage Ventures, L.L.C.; Countrywide Bank, F.S.B.; and ReconTrust Company, N.A. (n/k/a ReconTrust, N.A.), (collectively the “Bank of America Parties”). Thereafter, on January 18, 2016, Jacobs filed a First Amended Complaint. D.E. 9.

2. On July 27, 2016, the United States filed its Notice of Election to Decline Intervention. D.E. 15. On August 10, 2016, the Court issued an Order on United States of America’s Notice of Election to Decline Intervention, which re-opened this action, unsealed the Complaint and First Amended Complaint and required Relator to serve the First Amended Complaint by September 9, 2016. D.E. 16.

3. Following the United States’ decision to decline intervention (D.E. 15) and the Court’s August 10, 2016 Order (D.E. 16), Relator elected to pursue this matter on his own pursuant to 31 U.S.C. § 3730(c)(3). On September 6, 2016, Relator filed his Motion to Extend Deadline to Serve Defendants with Amended Complaint. D.E. 19. On September 7, 2016, the Court entered an Order on [Relator’s Motion for] Extension of Time and ordering Relator to serve the Amended Complaint on Defendants by September 26, 2016. D.E. 21. The Court also ordered Relator to file a status report no later than September 19, 2016. D.E. 21. On September 20, 2016, the Court entered an Order to Show Cause ordering Relator to serve the First Amended Complaint on the Bank of America Parties and to file a status report by September 23, 2016. D.E. 30. Thereafter on September 27, 2016, this Court entered a subsequent Order to Show Cause, ordering Relator to file verified returns of service on Defendants by September 29, 2016. D.E. 32.

4. Pursuant to the Court’s September 27, 2016 Order to Show Cause (D.E. 32), Relator filed Verified Returns of Service on certain of the Bank of America Parties on September 28, 2016 (D.E. 33) and on October 5, 2016 (D.E. 36).

5. The Bank of America Parties filed their Motion to Dismiss First Amended Complaint on October 21, 2016 (D.E. 43). After briefing on that motion, the Court entered its Order on Motion to Dismiss on December 20, 2016 (D.E.73).

6. On January 4, 2017, Relator filed a Second Amended Complaint pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (D.E. 79) against the Bank of America Parties. Relator's Second Amended Complaint alleges False Claims Act ("FCA") violations and unjust enrichment involving the Bank of America Parties' application for and receipt of FHA mortgage insurance payments from the U.S. Department of Housing and Urban Development ("HUD") and the Federal Housing Administration ("FHA"). Relator alleges that the Bank of America Parties submitted false claims, in violation of the FCA, in two principal ways. First, that the Bank of America Parties allegedly violated the FCA by "prosecut[ing] foreclosures using surrogate signed endorsements placed on original notes," by "submit[ting] false statements and testimony about the dates when endorsements were stamped," and by "us[ing] purported assignments to the . . . MERS [Mortgage Electronic Registration System, Inc.] . . . to mislead courts into believing that [Defendants] had received an assignment of a mortgage that would confer standing to foreclose." [hereinafter, the "Implied Certification and False Statement Claims"] Omnibus Order at 4-5 (internal quotation marks omitted in Order); Jacobs' Second Amended Complaint, ¶ 52). Relator attached as Exhibit FF to Jacobs' Second Amended Complaint a spreadsheet of 39 "FHA Claims Identified By FHA Case Number With Dates & Amounts Paid To Bank Of America, N.A. and Their Affiliates." Second, Relator additionally asserted a Reverse False Claims Act claim alleging the Bank of America Parties made false statements when entering into the April 4, 2012 National Mortgage Settlement ("NMS") Consent Judgment with the United

States, which required compliance with various HUD servicing standards and regulations because they allegedly knew when agreeing to the Consent Judgment, that they did not intend to “perform as promised [their] obligation to make sure that foreclosure-related filings were to be ‘accurate and complete and . . . supported by competent and reliable evidence.’ [hereinafter, the “Reverse False Claim claim”]” Jacobs’ Second Amended Complaint, ¶ 51.

7. On January 27, 2017, Defendants filed their Motion to Dismiss Plaintiff’s Second Amended Complaint (D.E. 95) and a Motion for Judicial Notice (D.E. 96). This Court’s March 21, 2017 Omnibus Order denied Defendants’ Motion to Dismiss and granted Defendants’ Motion for Judicial Notice with respect to Exhibit 7 to Defendants’ Motion for Judicial Notice which was described as Liberty Road Media, No Endorsement, No Negotiation – No Negotiation, No Securitization, LIBERTYROADMEDIA.WORDPRESS.COM (June 20, 2014), available at <https://libertyroadmedia.com/2014/06/20/no-endorsement-no-negotiation-no-negotiation-no-securitization>. D.E. 116.

8. On April 7, 2017, Defendants filed their Motion for Reconsideration, Or, In The Alternative, Certification Pursuant To 28 U.S.C. § 1292(B), Of The Court’s Order Denying Defendants’ Motion To Dismiss. D.E. 126. After extensive briefing, on April 27, 2017, this Court entered its Order on Motion for Reconsideration and dismissed with prejudice, Relator’s Reverse False Claim claim and the related “conspiracy claim.” D.E. 151. Defendants filed their Second Amended Answer (D.E. 157) on May 3, 2017.

9. On June 1, 2017, Defendants filed their Motion for Judgment on the Pleadings, arguing in part that, if Relator’s claim on behalf of the United States was “premised on allegedly improper conduct that occurred before February 9, 2012, then the claim is released [by the National

Mortgage Settlement (“NMS”), and] [i]f the claim is based on conduct thereafter, an enforcement action may be brought only if the enforcement procedures under the NMS Consent Judgment are first complied with.” D.E. 169. On June 15, 2017, the United States filed its Statement of Interest about Certain Issues Regarding the National Mortgage Settlement in which we took no position on the overall merits of Defendants’ Motion for Judgment and for the reasons set forth in our Statement of Interest, we respectfully submitted that Defendants misconstrued what was meant by an “enforcement action” under the NMS Consent Judgment. We maintained that Relator’s FCA claim was not an “enforcement action” under the NMS Consent Judgment and thus Relator need not submit to the pre-enforcement procedures set forth in the Consent Judgment. (D.E. 176). Thereafter, on the same day, Relator filed his opposition to Defendants’ motion for judgment on the pleadings (D.E. 177). Defendants filed their Reply in support of their Motion for Judgment on the Pleadings (D.E. 182) on June 22, 2017.¹

10. Relator and the Bank of America Parties engaged in vigorous discovery through interrogatories, extensive production requests and depositions. Among other things, Relator also propounded upon various departments and agencies of the United States, *Touhy* and FOIA requests, to which the United States responded. Among the issues Relator and the Bank of America Parties attempted to negotiate and ultimately litigated was the extent of discovery upon the underlying allegedly false claims made upon the FHA. On August 4, 2017, the Court overruled Jacobs’ objections to the Magistrate Judge’s July 7, 2017 Discovery Order [D.E. 198] which, among other things, limited discovery in the Civil Action “to that which is relevant and

¹ The Court did not enter an Order on Defendants’ Motion for Judgment on the Pleadings.

proportional to proving or disproving the allegations concerning the 39 FHA claims pleaded in [Jacobs]' . . . Second Amended Complaint [D.E. 79] including but not limited to Exhibit FF [D.E. 79-32] thereto." D.E. 223.

II. Agreement Reached in Principle to Resolve Action

11. The United States, Relator and the Bank of America Parties have reached an agreement in principle to resolve this action. In light of this agreement, and for the purpose of effectuating and formalizing that resolution, pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4), the United States respectfully advises the Court of its decision to intervene in this matter for the purposes of settlement as to those certain civil claims against the Bank of America Parties arising from the Implied Certification and False Statement Claims described above and only as to the 39 loans identified in Exhibit FF to Relator's Second Amended Complaint [D.E. 79-32].

12. Under the terms and conditions of the proposed Settlement Agreement that the parties will soon be executing, the parties anticipate that they will file, after full execution of the Settlement Agreement, a Stipulation of Dismissal in this action requesting the Court to retain jurisdiction over this matter to enforce the terms of the Settlement Agreement.

13. In light of the proposed resolution of this case, the United States does not presently intend to file a complaint in intervention but reserves the right to seek leave to file such a complaint in the event the terms of the settlement in principle is breached.

14. The False Claims Act provides that after a relator "proceeds with [a *qui tam*] action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. §

3730(b)(4).

15. The United States submits that the agreement that the parties have reached in principle, allowing completion and execution of the settlement agreement, and accommodating dismissal of the claims against the Bank of America Parties, all provide good cause to allow the United States to intervene. The United States also submits that allowing this intervention and settlement to go forward will not prejudice any other parties to this litigation.

Local Rule 7.1 Certificate

Relator and the Bank of America Parties have given the United States authority to represent to the Court that they do not oppose the requested relief. In providing consent, the Bank of America Parties and Relator requested that the United States specifically advise the Court that while an agreement has been reached in principle, there are remaining issues, the Settlement Agreement has not been executed or consummated and payments have not been tendered. Accordingly, the United States, the Relator and the Bank of America Parties request the Court to retain jurisdiction in order to enforce the terms of the settlement. The United States notes that only after execution of the Settlement Agreement by all parties will the parties seek dismissal of the instant case.

Conclusion

For all the foregoing reasons, the United States requests that this motion be granted.

Dated: December 21, 2017

Respectfully submitted,

BENJAMIN G. GREENBERG
Acting United States Attorney

By: /s/James A. Weinkle

JAMES A. WEINKLE
Assistant United States Attorney
Fla. Bar No.: 0710891
99 N.E. 4th Street, Suite 300
Miami, Florida 33132

Tel: 305.961.9290

Email: James.Weinkle@usdoj.gov

Counsel for United States

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on December 21, 2017, I electronically caused the foregoing document to be filed with the Clerk of Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record in the manner specified via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ James A. Weinkle

James A. Weinkle
Assistant United States Attorney