UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, ex rel. S. PRAWER & COMPANY, GILBERT PRAWER and HARVEY PRAWER, PLAINTIFFS v. FLEET BANK OF MAINE and RECOLL MANAGEMENT CORP., DEFENDANTS	**)))))))))))**	**Civil No. 93-165-P-H**
UNITED STATES OF AMERICA, ex rel. S. PRAWER & COMPANY, GILBERT PRAWER and HARVEY PRAWER, PLAINTIFFS v. VERRILL & DANA, P. BENJAMIN ZUCKERMAN, ANNE M. DUFOUR and AMY BIERBAUM, DEFENDANTS	**))))))))))))**	**Civil No. 95-321-P-H**

ORDER ON ALL PENDING MOTIONS[1]

BACKGROUND

This a False Claims Act lawsuit brought initially by private relators. Eventually the government elected to intervene as to some, but not all, of the defendants. Because there have been

[1] The motion to consolidate is pending in both cases. The remaining motions pertain only to Civil No. 95-321-P-H.

a number of previous orders in this case, including a decision by the First Circuit Court of Appeals, many of the facts and much of the procedural background have been set forth previously. As a result, I summarize only the relevant background here.

The private relators had a $2 million line of credit relationship with Maine National Bank when it was declared insolvent in early 1991. On July 12, 1991, Fleet Bank of Maine ("Fleet") agreed with the Federal Deposit Insurance Corporation ("FDIC") to take over the failed bank's operations and assume various assets and loans. A lengthy document entitled "Assistance Agreement" governed the relationship among the various corporate entities that were party to this complex transaction. See Donson Decl., Ex. 8 ("Assistance Agreement"). Under the Assistance Agreement, Fleet could require the FDIC to repurchase a non-performing "loan"—defined in Article I of the Assistance Agreement as including lines of credit—provided that it met certain conditions. See Assistance Agreement § 10.2. Such a transaction is called a "put" by the parties. Fleet "put" the private relators' line of credit to the FDIC on May 6, 1992. At the time, the outstanding amount drawn on the line of credit pursuant to various notes was $1.6 million.[2] The private relators maintain that Fleet made material fraudulent statements to the FDIC so that it could make the put. The FDIC accepted the put by sending Fleet a written concurrence.

The FDIC hired the defendant Verrill & Dana in late October of 1992 to be its legal counsel in a lawsuit against the private relators seeking to collect on the loan. The defendants Benjamin

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[2] The private relators seem to argue that all that was "put" on May 6, 1992, were seven notes totaling $1.6 million. As I read the Assistance Agreement, however, notes are only "credit documents." All that can be put from Fleet to the FDIC is a "loan," § 10.2(b), defined in Article I to include lines of credit. In other words, the only thing that could be put on May 6, 1992, was the lending relationship with the private relators, which would include all of their outstanding debts on the line of credit. Fleet did not have the option of picking and choosing among the notes. To be sure, there may well have been defects in the put resulting from the previous renewal of certain notes, the financial condition of the debtor, the lack of appropriate documentation in the file or other matters that the private relators assert, but there was only one put, whether successful or defective.

Zuckerman and Anne Dufour were two of the lawyers from Verrill & Dana who worked on the case. In December of 1992, the FDIC assigned a staff lawyer, the defendant Amy Bierbaum, to supervise and monitor the Verrill & Dana law firm. According to the private relators, the Verrill & Dana defendants and Bierbaum learned at some point that the original Fleet put had been improper, but nevertheless proceeded to conceal and cover up that impropriety and failed to disclose it to the FDIC. They also allegedly transferred and endorsed other private relator notes to the FDIC when they realized that some of the notes in the May 1992 put had been paid earlier or had expired. Moreover, the private relators assert, Verrill & Dana had previously represented C&S Wholesalers ("C&S"), the company that had purchased the private relators' business. The C&S purchase allegedly caused the loan to become unsatisfactory to Fleet and brought about the May 1992 put. According to the private relators, Verrill & Dana's representation of C&S was a conflict of interest that Verrill & Dana failed to disclose to the FDIC, even though the FDIC hired Verrill & Dana to sue not only the private relators but also C&S.

Initially the private relators filed their *qui tam* action against Fleet, Recoll Management Corp. ("Recoll"),[3] Verrill & Dana, Zuckerman, Dufour and Bierbaum. Ultimately the United States elected to pursue the lawsuit against Fleet and Recoll but not the other defendants (whom I will call the "lawyer defendants"). That lawsuit is Civil No. 93-165-P-H. On September 15, 1995, I ruled, over the objection of the lawyer defendants, that the private relators could file a separate action against them. The private relators then filed and served an amended complaint naming as defendants Verrill & Dana, Zuckerman, Dufour and Bierbaum. That lawsuit is Civil No. 95-321-P-H.

[3] Recoll is a wholly-owned subsidiary of Fleet Norstar Financial Group, Inc. and was organized to administer the assets pool of various bridge banks in Maine, Connecticut, Rhode Island and Massachusetts in connection with a number of bank failures.

Fleet, a defendant in the government's lawsuit, now has filed a motion to consolidate the two cases and the private relators in the companion lawsuit have joined in the motion. The lawyer defendants have opposed consolidation. The lawyer defendants have also moved to dismiss the lawsuit against them or for summary judgment. The private relators have opposed those motions and have sought additional discovery, relying in part on Fed R. Civ. P. 56(f). There are also a variety of other motions dealing with discovery, the scheduling order, page limits and time limits. For ease of understanding I deal with the various issues, not motion by motion, but by subject matter.

CLAIM SPLITTING

When the government entered the original *qui tam* action, it asserted claims against the defendants Fleet and Recoll, but declined to assert any claims against the lawyer defendants. At the same time, it declined to dismiss the lawyer defendants from the lawsuit. Instead, it argued that the private relators should be permitted to proceed against the lawyer defendants in a separate lawsuit so that the government could maintain full control over its own claims against Fleet and Recoll without interference from the private relators. In its legal papers and at oral argument the government argued that the private relators' right to proceed independently was constrained by the legal doctrine prohibiting claim splitting. In my Order of September 15, 1995, allowing the private relators to file a separate action against the lawyer defendants, I stated that their right to do so was subject to the limitations of claim splitting.[4] Now that the private relators' separate complaint

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[4] The pertinent language reads as follows:

> For these reasons, I conclude that the proper construction of the False Claims Act is as follows. When a private relator or relators sues more than one defendant, and the Government limits its intervention to fewer than all the defendants, the action may be severed into two parts: the Government's claims against one or more

(continued...)

against the lawyer defendants has been filed, the lawyer defendants have moved to dismiss it, arguing that it violates the prohibition on claim splitting.

I conclude that I spoke too broadly on the subject of claim splitting in my previous Order. Claim splitting is a prohibition that comes into play only after a judgment has been entered in one of the lawsuits. Kale v. Combined Ins. Co. of Am., 924 F.2d 1161, 1165 (1st Cir.), cert. denied, 502 U.S. 816 (1991). The prohibition on claim splitting, moreover, is subject to relaxation when the claim splitting takes place in response to a court requirement rather than at the plaintiff's own initiative. See 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4412 at 93 (1981) ("It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined . . . , and even clearer that no such penalty should be inflicted if a deliberate effort to combine such matters has been expressly rejected."); see also United States v. American Heart Research Found., 996 F.2d 7, 11 (1st Cir. 1993) ("Res judicata [of which claim-splitting is a part] is nevertheless a judge-made doctrine based upon

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[4] (...continued)

> defendants; and the private relator's claims against one or more defendants—subject always to the prohibition against claim splitting and the restriction of section 3730(e)(3). This outcome has the virtue of keeping the matters separate for two additional important reasons: to permit the Government to proceed without interference from the private relators and to make it easier to assess any ultimate awards, the calculation of which differs in the two cases. See 31 U.S.C. § 3730(d).
>
> I cannot assess claim splitting on this record or make a final determination of the effect of section 3730(e)(3) because the private relators will presumably amend their complaint to assert whatever they believe is left against the lawyer[ ] defendants now that the Government has filed its own complaint against Fleet and Recoll.
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> Accordingly, I **GRANT** the relators' motion to sever and proceed. I assume that service of process will be waived by the lawyer defendants, but if it is not, the private relators shall have thirty (30) days from today in which to serve process.

Order of September 15, 1995 at 6-7.

practical concerns: . . . . The doctrine is not to be applied where other practical concerns outweigh the traditional ones and favor separate actions.”). Here, the private relators originally sought to present their claims in the same lawsuit as the government’s claims. They resorted to a separate lawsuit only as a second alternative when they were not permitted to proceed in the original lawsuit. Accordingly, the lawyer defendants’ motion to dismiss on grounds of claim splitting is **DENIED**.

CONSOLIDATION

The lawyer defendants oppose the motion to consolidate, arguing that severance occurred originally at the private relators’ behest and, additionally, that consolidation would prejudice the lawyer defendants’ claim splitting defense. Because I have rejected the claim splitting defense, the second argument is no longer viable. I also conclude that the private relators’ earlier request for severance does not prevent their, or Fleet’s, request for consolidation now. As I have stated, the private relators sought severance only as a last resort to preserve their lawsuit. They gave full notice at the September hearing that they later would seek consolidation if their amended complaint were allowed to proceed. If the reverse false claim survives (a matter I discuss below), the two lawsuits obviously are closely related. Severance has served its purpose in articulating the scope of the private relators’ complaint against the lawyer defendants and the two cases could more properly be managed on a consolidated basis at least for discovery purposes. At this time, however, I reserve decision on the motion to consolidate pending my decision on the reverse false claim.

REVERSE FALSE CLAIM

The False Claims Act prohibits not only direct false claims, but also assigns liability to anyone who “knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). This basis for liability has come to be known as a "reverse false claim." The private relators' theory is that the May 1992 put was fraudulent or at least improper, that Fleet accordingly had a contractual obligation under the Assistance Agreement to repay the $1.6 million it received from the FDIC, and that the lawyer defendants knowingly made false statements or used false records to conceal Fleet's contractual obligation to pay.

The lawyer defendants argue that they are entitled to summary judgment on this reverse false claim because the FDIC reviewing officer, Julie Purcell, has testified at deposition that in her opinion the May 1992 put was proper, that she was provided with sufficient records and information to make that judgment, and that she stands by that conclusion after a second review. Purcell's deposition was taken as part of discovery in the original collection lawsuit in which the FDIC, represented by Verrill & Dana and FDIC attorney Bierbaum, tried to collect from the private relators the amounts outstanding on the line of credit. (That collection lawsuit eventually was settled.) The lawyer defendants contend that the private relators' lawyer in the collection case, Jeffrey Bennett, (the same lawyer as in this *qui tam* action) had the opportunity to and did examine Purcell fully on the issues at stake here.

I conclude that Bennett did not examine Purcell fully on the claims of the *qui tam* lawsuit at her deposition. Indeed, Zuckerman made it clear that he would object to Bennett's questions if he strayed beyond the scope of the collection case. See Transcript of the Deposition of Julie R. Purcell ("Purcell Dep.") at 131-36 (Ex. C to Aff. of Thomas N. O'Connor). Although Purcell stated somewhat argumentatively that she knew what she needed to see and could not imagine any additional information that she would have wanted, she was not confronted directly with all the alleged defects in the original put. If her testimony were the only basis for the lawyer defendants' request for summary judgment, I would conclude that the private relators are entitled at least to retake the deposition of Julie Purcell to present to her all their evidence of defects in the May 1992 put and to inquire about her view of the put in light of that evidence before summary judgment could be considered.

FDIC staff lawyer defendant Bierbaum argues that she is separately entitled to summary judgment because she acted within the scope of her employment as a government employee. She has filed her affidavit stating that all her actions were within the scope of her employment. Bierbaum maintains that the private relators' *qui tam* action is, in essence, an action by the government (the private relators stand in the shoes of the government) against itself, not a case or controversy under Article III of the United States Constitution. See Juliano v. Federal Asset Disposition Ass'n, 736 F. Supp. 348, 352 (D.D.C. 1990), aff'd, 959 F.2d 1101 (D.C. Cir. 1992). I **DENY** Bierbaum's motion to the extent it is based on this argument. The lawsuit is brought against Bierbaum individually, not in her capacity as a government employee.[5] If Bierbaum participated knowingly in a reverse false claim, by definition that is an action not within the scope of her employment. Moreover, the False Claims Act contemplates specifically that government employees will sometimes be held liable, see 31 U.S.C. § 3730(e)(2), a logical provision for a statute that is concerned with fraud against the Government.

Finally, all the lawyer defendants have moved to dismiss the private relators' reverse false claim for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). The parties' legal memoranda on this issue are inadequate for me to resolve the matter.

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[5] Juliano, 736 F. Supp. 348, does not help Bierbaum. There, the complaint failed to allege acts that would make the defendants individually liable, id. at 353. Moreover, the court permitted the *qui tam* plaintiff to proceed against the remaining defendants, including numerous employees of FADA, id., which it described as "a government agency." Id. at 350.

The lawyer defendants cite Wilkins ex rel. United States v Ohio, 885 F. Supp. 1055 (S.D. Ohio 1995), for the proposition that there can be no liability for a reverse false claim under section 3729(a)(7) unless they made a false "claim" upon the FDIC certifying that the May 1992 put was proper, and that the private relators have failed to allege such a claim. See § 3729(c) (defining "claim" as a demand or request for money). According to Wilkins, the legislative history of the Act "supports the conclusion that in order to have a 'reverse false claim,' the government has to be made aware of the false statement, misrepresentation or misleading omission in some fashion, i.e., there has to be a 'claim.'" Id. at 1064 (citing S. Rep. No. 345, 99th Cong. 2d Sess. 15 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5280, 5283). Wilkins was concerned with destruction of documents, covering up of fund misuse, failure to conduct proper audits and failure to inform the government about improper use of funds. All of these, according to Wilkins, "without more, are insufficient to state a claim under" section 3729(a)(7). "The bare allegation that 'defendants did not tell the United States Government about the misuse of federal funds and they all acted to prevent repayment to the United States Government' is not sufficient to state a claim under § 3729(a)(7)." Id. at 1065.

Wilkins's use of the term "claim" is ambiguous. The context makes it unclear whether the term is being used as defined in section 3729(c) or as a synonym for "assertion" or "statement" in a context where there is a duty to disclose. To the extent Wilkins holds that a reverse false claim requires breach of a specific duty on the part of the defendant in question to disclose information to the government, the private relators have adequately alleged such a duty arising out of the lawyers' ethical and professional duty to their client, the FDIC, to reveal to it all information consistent with its best interests. If Wilkins's language is to be interpreted more broadly, as meaning that the defendants in a reverse false claim action actually must make their own section 3729(c) "claim" upon the government, then I decline to follow it. There is nothing in section 3729(a)(7) to require the presentation of such a claim. By its terms, section 3729(a)(7) requires only that a defendant have made or used a false record or statement to conceal an "obligation to pay" the government. I conclude that the fact that the lawyers did not make their own section 3729(c) "claim" on the FDIC in connection with covering up any improprieties in the May 1992 put does not absolve them of responsibility for a reverse false claim, if the other False Claims Act requirements are met.

On the other hand, the private relators' theory for their reverse false claim seems highly problematic. The private relators recognize that, under the plain language of the statute, an underlying requirement for any reverse false claim is, first, the existence of an appropriate "obligation to pay" the government. Relators' Opp'n to the Verrill & Dana Defs.' Mot. to Dismiss ("Relators' Opp'n") at 19, 21-23. They find this "obligation to pay" in the contractual obligation of section 10.2(g) of the Assistance Agreement. Section 10.2(g) provides:

> In the event that the [FDIC] purchases an Asset that it is not required to purchase pursuant to this Section 10.2, [Fleet] shall repurchase such Asset from the [FDIC] at the Transfer Value that the [FDIC] paid [Fleet], <u>plus</u> (v) interest at the rate of the Cost of Carry plus 50 basis points, (w) advances made while the Asset was in the Pool, and (x) expenses incurred on the Asset while it was in the Pool, but <u>less</u> (y) Related Liabilities, and (z) collections. [Fleet] shall also reassume Related [L]iabilities related to such Asset, if any, previously assumed by the [FDIC].

The private relators maintain that, in paying for the May 1992 put, the FDIC purchased an asset it was not required to purchase under section 10.2 because of the alleged defects in the put. This created a contractual "obligation to pay" on Fleet's part that the lawyer defendants allegedly "concealed" within the meaning of the reverse false claim provision. Relators' Opp'n at 19, 21-23.

I have serious doubts about the private relators' interpretation of section 10.2(g) of the Assistance Agreement. Specifically, my concern is this: Section 10.2(e) appears to provide the framework for final decisions, so far as contractual obligations are concerned, on whether a put is proper.[6] (Like most contracts, the Assistance Agreement does not contemplate or specify what happens in the event of fraud. Presumably that is left to common law remedies, statutory remedies like the False Claims Act or criminal law enforcement.) Section 10.2(c) permits Fleet initially to make a put by sending the FDIC a "subsequent bank notice" and in that connection requires it to send a "loan information package" (the contents of which are defined in the Assistance Agreement and one of its exhibits, see Assistance Agreement at 17 & Ex. 11). The FDIC is then entitled to demand "copies of [Fleet's] Credit Files, records generated by computer or other electronic data processing records, journals of transaction history and such additional information relating to the subject matter of the Subsequent Bank Notice as the [FDIC] may request in writing" as well as "full

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[6] Section 10.2(e) reads as follows:

> FDIC Reply Notice. Within sixty (60) days after the [FDIC] receives the Supporting Documentation related to a Subsequent Bank Notice listing Additional Pool Assets submitted prior to or concurrently with such Supporting Documentation, the [FDIC] will deliver to [Fleet] a written notice ("FDIC Reply Notice") setting forth its concurrence or non-concurrence as to whether the [FDIC] is required to repurchase each Asset specified in the Subsequent Bank Notice pursuant to Section 10.2(a) or (b), and its concurrence or non-concurrence with the estimated Transfer Value. If the [FDIC] indicates in the FDIC Reply Notice its non-concurrence with [Fleet's] determination that a Loan should be a Classified Loan, and if [Fleet] notifies the [FDIC] in writing within fifteen (15) days after [Fleet] receives such FDIC Reply Notice that [Fleet] disputes such determination by the [FDIC], the dispute will be referred to the OCC [Office of the Comptroller of the Currency] for determination pursuant to Section 11.2 in accordance with the OCC's then current written examination procedures and criteria. If the [FDIC] indicates in the FDIC Reply Notice its non-concurrence with [Fleet's] determination that a Loan satisfies the other criteria specified in Section 10.2(b) permitting [Fleet] to require the [FDIC] to repurchase such Asset, and if [Fleet] notifies the [FDIC] in writing within fifteen (15) days after [Fleet] receives such FDIC Reply Notice that [Fleet] disputes such determination by the [FDIC], the dispute will be referred to a Review Board pursuant to Section 11.1. The [FDIC]'s determination as to any Loan as provided in the FDIC Reply Notice shall be conclusive and binding on the parties to this Agreement and not subject to further dispute except to the extent [Fleet] indicates it disputes such determination in a notice given within the period specified above. Any determination made by the OCC pursuant to Section 11.2 or by the Review Board pursuant to Section 11.3 shall be conclusive and binding on the parties to this Agreement and not subject to further dispute, and judgment may be entered on said determination in accordance with applicable arbitration law in any court having jurisdiction thereof.

access to all other relevant books and records." Section 10.2(c) (referred to as "Supporting Documentation"). In other words, the Assistance Agreement gives the FDIC access to whatever information it believes is necessary to evaluate Fleet's put. The FDIC then must send Fleet a written "concurrence" or "non-concurrence" as to the put within 60 days after the FDIC receives the supporting documentation. Section 10.2(e). Under section 10.2(f)(2), however, the FDIC is required to pay the value of the put asset or loan (calculated under a separate provision) within 60 days of the subsequent bank notice, not the date of receipt of the supporting documentation. Thus, payment may be due before the decision on concurrence or non-concurrence. Nothing in the Assistance Agreement otherwise specifies the sequence in which payment and concurrence/non-concurrence take place, and nothing says that the mere fact of an initial non-concurrence or the request for supporting documentation avoids or delays the FDIC's duty to pay.

If the FDIC provides a written *concurrence*, that decision is final on the put, according to the language of section 10.2(e). ("The [FDIC's] determination as to any loan as provided in the FDIC Reply Notice shall be conclusive and binding on the parties to this Agreement and not subject to further dispute except to the extent that [Fleet] indicates it disputes such determination . . . .") If the FDIC sends a written *non-concurrence*, then Fleet has 15 days to request review by a Review Board or the Office of the Comptroller of the Currency, depending on the nature of the controversy. If Fleet does not request such further proceedings within the 15 days, the FDIC's non-concurrence becomes final under section 10.2(e). If Fleet does seek timely review, then the review decision, once made, is final under the terms of section 10.2(e) ("conclusive and binding on the parties to this Agreement and not subject to further dispute") and indeed can be enforced in court.

All of these procedural steps obviously take time, and it appears that the payment requirement (10.2(f)) is not tolled during their implementation. In other words, the Assistance Agreement appears to be drafted to ensure that payment occurs for the put without being delayed by disputes or requests for additional records—not a surprising consequence given the complex accounting demands of the Assistance Agreement. If that reading is correct, then section 10.2(g), providing for reversals, is designed to cover instances where the FDIC pays for a put within 60 days of the subsequent bank notice, but ultimately (and subsequently) Fleet agrees to the FDIC non-concurrence or the review mechanism concludes that the FDIC was correct in the non-concurrence. In those circumstances, section 10.2(g) provides that the payment is reversed and also provides a formula for such items as interest and expenses. This reading gives effect to both section 10.2(e)'s finality language and section 10.2(g)'s reversal language. The private relators' reading, on the other hand, appears to remove any finality from the 10.2(e) process and thereby flies in the face of the plain language of the provision. As I understand the private relators' argument, they believe that 10.2(g) is an ongoing obligation that can come into play at any time the FDIC concludes that it earlier made an incorrect decision or did not have sufficient information or was defrauded—arguably even after an arbitration decision and enforcement in court. If on the other hand, 10.2(e)'s finality language means what it says, and if 10.2(g)'s reversal language is designed only for instances where payment occurs before the finality stage of the concurrence/non-concurrence process is reached, then Fleet would have no contractual obligation under 10.2(g) once the FDIC provided its written concurrence.[7]

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[7] The private relators also suggest that section 10.3 somehow creates an obligation to pay because three later Prawer notes were "related loans" that Fleet failed to identify within 60 days of the put, thereby triggering section 10.2(g). See § 10.3(a)(v). Section 10.3 deals with related loans and undiscovered assets. For the reasons I have given above, see footnote 2, these notes are credit documents evidencing the loan between Fleet and the private relators, not separate but "related loans." They certainly are not "undiscovered assets" and the private relators do not contend that they are. (Even if the later transferred notes were "related loans" and therefore ineligible for transfer under 10.3(a)(v) because they were untimely, 10.3(a)(v) gives the FDIC only the "option" of retransferring them from the pool to Fleet and refers to section 10.2(g) as establishing the price. There is no suggestion anywhere in the record that the FDIC has ever exercised this option, and thus no obligation to pay could have arisen.)

For the basis of their reverse false claim against all the lawyer defendants, the private relators have not alleged any Fleet "obligation to pay" the government other than the contractual obligation to repay under 10.2.(g).[8] Because the Assistance Agreement is lengthy and complex, however, and because the parties have not focused on this subject, I invite written argument on this issue of whether there was a Fleet obligation to pay or transmit money or property that could serve as the basis for a reverse false claim within the meaning of section 3729(a)(7). The parties shall file simultaneous written memoranda of no more than fifteen (15) pages no later than July 8, 1996. Any replies (no more than ten (10) pages) shall be filed by July 19, 1996.[9]

CONSPIRACY

The False Claims Act assigns liability to anyone who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). The private relators' argument for conspiracy liability against the lawyer defendants is that their role in assigning Prawer

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[8] The private relators also have alleged a reverse false claim against the Verrill & Dana defendants based upon C&S's potential obligation to pay the government for violating the Maine Bulk Sales Act. See Compl. (Civil No. 95-321-P-H) ¶ 1, 66. The parties have not addressed this claim in their respective memoranda at all.

[9] Unless the Assistance Agreement is ambiguous, I do not find helpful the affidavits of various FDIC personnel as to what they think the Agreement means. (The same would hold true for Fleet personnel's interpretations.) Such parol evidence is admissible only when the written terms of an integrated agreement are ambiguous.

notes (originally not included in the May 1992 package) to the FDIC in June 1993[10] amounts to "getting a false or fraudulent claim allowed or paid."[11]

Whether or not the May 1992 put was proper at the time it was made, the FDIC paid it soon thereafter. Thus, the "false or fraudulent claim" was "paid" at that time. Furthermore, it was "allowed" when the FDIC sent out its written concurrence.[12] No additional money changed hands later with respect to the Prawer account. Accepting the private relators' argument that Fleet and the lawyers improperly assigned other Prawer notes to the FDIC later when they recognized that some

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[10] Verrill & Dana did not represent the FDIC until late October 1992, although it had represented Fleet previously. Relators' Stmt. of Facts in Opp'n to Verrill & Dana's Mot. at 32, ¶ 44. The relators at one point assert that, "Bierbaum, along with Verrill & Dana, P. Benjamin Zuckerman, . . . and Anne M. Dufour . . . , knew as early as January 25, 1992, that the purported $1.6 million 'book value' of the Prawer loan was falsely inflated and that fraudulent bank records were manufactured to support this falsely inflated value and the 'put,'" Relators' Opp'n to Def. Bierbaum's Mot. at 5, citing ¶ 78 of their Amended Compl. in Civil No. 93-165-P-H. However, the amended complaint provides no support for the allegation as to the timing of the defendants' knowledge. The *original* complaint (eventually dismissed) in the first *qui tam* action cites the Affidavit of P. Benjamin Zuckerman in Support of Plaintiff's Motion for Default [in the collections case], see Civil No. 93-165-P-H, Appendix to Compl. and Jury Demand (vol. IV), Ex. 26, in support of the timing allegation; but the Zuckerman Affidavit is dated January 25, 199*3*. Moreover, in this action the relators themselves state, "Bierbaum was assigned to the Collections Case as inside litigation counsel for the FDIC in December 1992 and remained on the case until its termination." Relators' Opp'n at 21, n.21.

[11] The word "paid" is self-explanatory. "Allowed" is perhaps less clear, although the lay definition most relevant to this context is: "**4.** to admit; acknowledge; concede: *to allow a claim*." The Random House Dictionary of the English Language 57 (2d Ed. 1987); see also Black's Law Dictionary 76 (6th Ed. 1990) (". . . [T]o bestow or assign to any one as his right or due. To approve of, accept as true, admit, concede, adopt, or fix."). Use of the term in the False Claims Act dates to the original act. See An act to prevent and punish fraud upon the government of the United States, ch. 67, 12 Stat. 696, 697, § 1 (1863) (" . . . [B]y obtaining, or aiding or assisting to obtain, the payment or allowance of any false or fraudulent claim."). At that time, the term already was in use in federal bankruptcy law, where its significance seems to have been consistent with its meaning today. See The Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, 445 (1841) (" . . . all creditors . . . , shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; . . . but such court shall have full power to set aside and disallow any debt, . . . "); see also The Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867) (proliferation of such usage of "allowed" throughout the code). Accord Bursch v. Beardsley & Piper, 971 F.2d 108, 114 (8th Cir. 1992) ("Where a claim is discharged, the debt is recognized in bankruptcy--that is, allowed--but the debtor is relieved of responsibility for it."); Commissioner of Internal Revenue v. Lyne, 90 F.2d 745, 747 (1st Cir. 1937) ("'An allowed claim against an estate is familiar in both probate and bankruptcy law. It is a debt or charge which is valid in law, and in law is entitled to enforcement. Its legal existence as a debt or claim is not at all affected by its actual collectability, the extent to which there may be assets to meet it.'") (citing Commissioner v. Windrow, 89 F.2d 69, 70 (5th Cir. 1937)).

[12] There are no precise payment or concurrence dates in the summary judgment record. However, the parties do not dispute that the FDIC paid Fleet for the Prawer loan in 1992, or that the FDIC concurred in the put within fifteen days. See Donson Decl., Ex. 28 (FDIC "Put Purchase Price Worksheet"); Purcell Dep. at 188-89 (concurrence decision made prior to May 21, 1992).

of the notes in the May 1992 package previously had expired or been paid and could not be collected upon, I conclude that such activity cannot amount to a conspiracy to get a false or fraudulent claim "allowed or paid" by the government; the action of allowance and payment had already occurred.[13] See also United States v. American Heart Research Found., 996 F.2d 7, 9-10 (1st Cir. 1993) (claim under the statute is a demand for money or property). In their Fed. R. Civ. P. 56(f) motion and declaration, the private relators' have not shown how discovery could help them surmount this hurdle. I conclude, therefore, that the lawyer defendants are entitled to summary judgment on the conspiracy claim.[14]

ATTORNEY FEES
(VERRILL & DANA DEFENDANTS ONLY)

The private relators claim that the Verrill & Dana defendants' legal billings to the FDIC in the collection action amounted to both a direct and reverse false claim because Verrill & Dana had an undisclosed and impermissible conflict of interest. This matter has not been adequately briefed and I **DENY** the motion to dismiss or for summary judgment on this claim at this time. The Verrill & Dana defendants did not even mention this claim in their original motion or memorandum; the private relators raised it in their response and the Verrill & Dana defendants then mentioned it briefly in their reply. Neither party, however, has developed the caselaw appropriately. As I read the

[13] Because loans—not notes—are put under the terms of the Assistance Agreement, see footnote 2, the June 1993 transfer of three replacement notes to the FDIC would not constitute a new put, but merely the transfer of credit documents to which the FDIC was entitled under the original put. For the same reasons, I reach the same conclusion for any direct false claim allegation based solely on the later transfer of the notes.

[14] The lawyer defendants have asked me to rule on all their arguments for purposes of efficiency in the event of appeal. Accordingly, I state that I would not award them summary judgment on their argument that the lawyers could not "conspire" within the meaning of the Act among themselves or with their client. The conspiracy cases they cite to me from other contexts are not persuasive within the remedial context of the False Claims Act. I also would not award summary judgment or dismiss the complaint on grounds of vagueness. The private relators have stated enough to survive a Rule 12(b)(6) motion on the conspiracy claim.

pertinent cases (not cited by the parties), economic damage is not a prerequisite for a False Claims Act claim. See Rex Trailer Co., Inc. v. United States, 350 U.S. 148, 152-53 & n.5, 76 S. Ct. 219, 222, 100 L. Ed. 2d 149 (1956). Specifically, there may be grounds for a direct false claim even though all the billed services actually were rendered—*if* the person making the claim for payment was not eligible. Thus, if a person or company materially misrepresents something in order to become eligible for government payments or employment and then makes a claim for payments or receives compensation, there may be direct False Claims Act liability even though the services were rendered at full value. United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456, 460-61 (5th Cir. 1977), cert. denied, 434 U.S. 1035, 98 S. Ct. 768, 54 L. Ed. 2d 782 (1978); United States v. Johnston, 138 F. Supp. 525, 527-28 (W.D. Okla. 1956); United States ex rel. Pogue v. American Healthcorp, Inc., 914 F. Supp. 1507, 1513 (M.D. Tenn. 1996) (collecting cases); see also United States v. Neifert-White Co., 390 U.S. 228, 233, 88 S. Ct. 959, 962, 19 L. Ed. 2d 1061, 1065-66 (1968). Here, the Guide for Legal Representation arguably provided that a law firm was not eligible to be hired by the FDIC if it had a conflict of interest at the outset.[15] Donson Decl., Ex. 35, App. E, § 1(B)(1) at 5; see also Ex. 35, § 5.4 at 26. On this line of reasoning, if Verrill & Dana had such a conflict and if that is the proper interpretation of the Guide, so that Verrill & Dana was not eligible for hire in the first place, then Verrill & Dana may have liability for a direct false claim even though

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[15] The Guide for Legal Representation refers to an "Employment of Counsel Letter" and a "Legal Services Contract" as items setting forth further terms "under which [counsel] are engaged." Appendix E begins with a document entitled "Legal Representation," Exhibit 1 of which is entitled "Legal Services Agreement." See Donson Decl., Ex. 35, App. E. According to the former, the latter is to be executed between the "Servicer" (Recoll) and outside counsel "approved by the FDIC to perform legal services in connection with this Agreement." See "Legal Representation" ¶ 3 ("Outside Counsel"). It is entirely possible that the "Legal Services Agreement" is the "Legal Services Contract" referred to by the Guide; at any rate, neither the "Legal Services Agreement" nor the "Legal Representation" document say anything about conflicts of interest, though the latter does refer to the Guide, which does not address conflicts of interest, as something that is to be provided to all outside counsel. Id. According to the relators, 'the Legal Services Agreement,' . . . and its attachments is [sic] in Verrill & Dana's possession and has yet to be produced." Relators' Stmt. of Facts in Opp'n to Verrill & Dana's Mot. at 22, ¶ 2.

the lawyers rendered full value for the amounts for which they billed. The private relators' reverse false claim theory on legal billings has not been developed in the legal memoranda. Accordingly, the motion to dismiss or for summary judgment on the private relators' direct and reverse false claims against the Verrill & Dana defendants for their legal bills is **DENIED**.

MISCELLANEOUS AND SUMMARY

I have read all the filings that have been made, but I have relied only on factual assertions that are competent and material and can properly be relied upon for motions under Fed. R. Civ. P. 12 and 56. Therefore, the various motions to exceed page limits or to accept late filings or substituted pages are all **GRANTED**,[16] and the motions to strike are **DENIED**. I have previously lifted all discovery and scheduling order deadlines pending my ruling on these motions. As a result, all the other pending motions concerning discovery or the court's scheduling orders are **MOOT**. Further amendments to the pleadings will not cure the problems I have addressed and, in light of the fact that this is the third complaint, no general permission to amend is granted. In Civil No. 95-321-P-H, the defendants' motions to dismiss or for summary judgment are **GRANTED** on the conspiracy claim, and decision is **DEFERRED** on the reverse false claim pending further briefing. The Verrill & Dana defendants' motion on the direct and reverse false claim for legal billings is **DENIED**.

The objections to the Magistrate Judge's Orders are **OVERRULED**. The Orders are neither clearly erroneous nor contrary to law. See Fed. R. Civ. P. 72(a).

As a result of my rulings in this Order, the remaining claims are the direct false claims by the government against Fleet and Recoll (Civil No. 93-165-P-H); the private relators' direct and reverse

[16] However, I **DENY** the private relators' May 9, 1996, request to file supplemental material. Neither of the documents they wish to submit would affect the outcome of this Order.

false claims against the Verrill & Dana defendants in connection with the alleged conflict of interest (Civil No. 95-321-P-H); and, depending on my ruling after briefing, perhaps the reverse false claims against all the lawyer defendants arising out of the May 1992 put; and perhaps the reverse false claim against the Verrill & Dana defendants based upon the alleged C&S violation of the Maine Bulk Sales Act (both in Civil No. 95-321-P-H). The parties also shall address the status of this last claim in their memoranda.

The prohibition on further filings except for the specified legal memoranda remains in effect, and all discovery and motion practice continues to be **STAYED**.

SO ORDERED.

DATED THIS ______ DAY OF JUNE, 1996.

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D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE