IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *ex rel.* ERVIN AND ASSOCIATES, INC.	)
Plaintiffs,	)
v.	) Civ. Action No. 1:96-CV-1258 (LFO)
THE HAMILTON SECURITIES GROUP, INC. *et al.*	) Plaintiff/Relator's Response to) Defendant Hamilton's Motion to) Dismiss or, in the Alternative,) for Summary Judgment
Defendants.	)

PLAINTIFF/RELATOR'S RESPONSE TO DEFENDANT HAMILTON'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Plaintiff/Relator, Ervin and Associates, Inc., through undersigned counsel, submits this response to defendants Hamilton Securities Group, Inc.'s and Hamilton Securities Advisory Services, Inc.'s Motion to Dismiss or, in the alternative for Summary Judgment, and respectfully requests that this Court deny defendants' motions. Plaintiff/Relator also respectfully requests that the Court grant an oral hearing on this matter.

INTRODUCTION

This case involves allegations of fraud brought by plaintiff/relator Ervin and Associations, Inc. ("Ervin") against defendants Hamilton Securities Group, Inc., Hamilton Securities Advisory Services (hereinafter "Hamilton") and Williams, Adley & Company ("Williams, Adley") under the *qui tam* provisions of the federal False Claims Act, 31 U.S.C. §§ 3729-3733. Ervin alleges, among other claims, that defendant Hamilton played a major role in a bid rigging scheme which plagued the Department of Housing and Urban Development's

("HUD") mortgage loan sale program and resulted in the submission of false claims to the United States government.

In the pending motion, defendant Hamilton seeks to dismiss this lawsuit in its entirety on a number of alternative grounds, namely that this Court lacks subject matter jurisdiction over these claims, that Ervin has failed to state a legally cognizable claim, and that Ervin has failed to state its claims with particularity as required by Fed. R. Civ. P. 9(b). Alternatively, Hamilton moves for summary judgment, but it is unclear what facts Hamilton contends are undisputed and entitle it to judgment as a matter of law. Hamilton's motions have no basis in law or fact, and Ervin respectfully requests that they be denied.

PROCEDURAL REQUIREMENTS AND LEGAL STANDARDS

As an initial matter, Hamilton's motion for summary judgment, whatever its basis, is defective and must be denied. Hamilton has failed to submit a statement of material facts which it contends are not in dispute as required by the local rules of this Court. *See* L. Cv. R. 56.1. Thus, it is impossible for Ervin to prepare its own statement of disputed facts and properly respond to this motion.

Hamilton's statement about the nature of Ervin's burden in establishing subject matter jurisdiction is incomplete. While this Court has the power to review evidence outside the pleadings and decide facts that go to the basis for subject matter jurisdiction whenever a movant makes a factual challenge to subject matter jurisdiction, as Hamilton has in this case, the party opposing the motion may present affidavits or any other evidence to contradict these facts and satisfy its burden. *See New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). Ervin has done that in this case.

Finally, Hamilton's opinion about the merits of Ervin's allegations of fraud are entirely irrelevant to Hamilton's Rule 12(b)(1) motion, a fact which Hamilton ignores throughout its brief. *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 655 n. 10, (D.C.Cir. 1994). Furthermore, when ruling on Hamilton's 12(b)(6) motion, even Hamilton agrees that this Court must accept all averments of fact in Ervin's Amended Complaint as true and draw all inferences in its favor. Memorandum of Points and Authorities in Support of Hamilton's Motion to Dismiss, or in the Alternative for Summary Judgment (hereinafter "Mem.") at 4, *citing Hishone v. King & Spaulding*, 467 U.S. 69, 73 (1984). Thus, Ervin respectfully requests that this Court disregard Exhibit 12 to Hamilton's Memorandum in Support, which Hamilton offers as evidence in connection with the merits of Ervin's allegations.[1]

FACTUAL BACKGROUND

This case began on June 6, 1996 when plaintiff/relator Ervin filed a forty-seven page Complaint alleging several violations of the federal False Claims Act in connection with HUD's mortgage note sale program. The program, which was started in 1994, was HUD's attempt to dispose of a portfolio of approximately 2,500 multifamily and 90,000 single family loans which had become owned by HUD as a result of insurance claims paid on defaulted mortgages.

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[1] It is also irrelevant for purposes of ruling on these motions that the government declined to intervene in Ervin's *qui tam* lawsuit, and Ervin respectfully requests that this Court ignore Hamilton's often-repeated references to this point. The False Claims Act specifically provides that the government may reconsider this initial decision and intervene at a later date. *See* 31 U.S.C. § 3730(c)(3). In this case, the Assistant United States Attorney for the Department of Justice in charge of the civil investigation in this matter informed Ervin and Associates that the decision not to intervene was not a statement about the merits of Ervin's allegations. *See* Exhibit 1 at 1. In addition, the government specifically informed this Court that it was reserving its right to determine at a later date whether to intervene following a review of records subject to an Inspector General subpoena which Hamilton had failed to provide to the government at the time of its intervention decision. *See* Exhibit 2 at 2.

Amended Complaint (hereinafter "Amd. Comp.") ¶¶ 22-23. HUD had never before conducted such a sale to the private sector and, on September 30, 1993, hired defendant Hamilton to be the HUD financial advisor to direct the note sale program. Amd. Comp. ¶¶ 22-23, 31. In the period leading up to June 1996, plaintiff Ervin uncovered substantial and direct evidence, independent of any alleged "public disclosure," that defendant Hamilton as well as BlackRock Capital Finance ("BlackRock") and Goldman Sachs had defrauded the government by rigging bids in the notes sales. Ervin continued to investigate these allegations after filing its original *qui tam* Complaint and filed an Amended Complaint on September 3, 1999.

A. Ervin's Discovery of Bid Rigging

Between March 1995 and June 1996, when Ervin filed its *qui tam* Complaint, Hamilton conducted six major note sales on behalf of HUD. The third of these, the West of the Mississippi multifamily note sale, occurred on September 19, 1995, (Amd. Comp. ¶ 163), and resulted in Hamilton awarding Goldman Sachs a series of individual notes which had a total unpaid principal balance ("UPB") of $164 million.[2] Amd. Comp. ¶ 166.

Ervin first uncovered evidence of bid-rigging and insider trading during the events surrounding the first single family note sale which occurred on October 25, 1995 (Amd. Comp. ¶ 108), though Ervin would not understand the full implications of this information until later. In this auction, which consisted of a sale of both performing and non-performing loans, BlackRock with Goldman Sachs and Cargill, another investment firm, teamed together to submit a full-pool

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[2] After the filing of its original *qui tam* Complaint, Ervin uncovered direct evidence that Hamilton knowingly excluded an otherwise winning bid to throw the sale to Goldman Sachs. *See infra* at p. 9-10. This allegation of fraud is set forth in detail in ¶¶ 163-170 of the Amended Complaint.

bid -- that is a bid seeking to purchase all of the approximately 15,600 loans offered for sale.[3] Only the BlackRock team and one other bidder submitted full-pool bids. Hamilton could not award the full pool to BlackRock's team, however. Shortly before the auction, the Office of Management and Budget ("OMB") had calculated the value of this portfolio to the government and set an undisclosed minimum bid floor to assure that the government received a price at least equal to the value of the portfolio if held by the government. All of the bidders failed to meet this floor, including the BlackRock team. Amd. Comp. ¶¶ 112-113. To avoid embarrassment, HUD decided to award all of the performing loans to EMC Mortgage (which had submitted the highest bid that included only performing loans), some of the non-performing loans to other firms, and re-offer the remaining unsold non-performing loans on November 6, 1995. Amd. Comp. ¶¶ 120-121. In the reoffering, the BlackRock team submitted a bid which won 3,111 non-performing loans. Amd. Comp. ¶ 123.

A few days following the October 25, 1995 initial offering, Ervin learned through an inside source that Hamilton had given BlackRock the ability to win the sale and avoid a failed initial offering. Specifically, Terry DeWitt, a member of J-Hawk Corporation, told Michael Nathans, an Ervin consultant, that Jeff Parker of Cargill had informed him that Hamilton had approached the BlackRock bidding team prior to the reoffering and gave them an opportunity to increase their bid to meet the OMB-imposed bid floor and win all the assets. Exhibit 3 (Declaration of John J. Ervin) (hereinafter, "Exh. 3, Ervin Dec.") ¶ 3[4]; Original Complaint

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[3] Ervin respectfully refers this Court to ¶¶ 99-107 of its Amended Complaint for a definition of "performing" and "non-performing" loans.

[4] Exhibit 3 currently contains a facsimile bearing the signature of the declarant. Ervin will promptly file the document with original signature immediately upon its receipt.

("Orig. Comp.") ¶ 67; Amd. Comp. ¶ 114. Not offering an opportunity to both full-pool bidders was contrary to the interests of the government which would profit more in a competition between bidders.[5] Orig. Comp. ¶ 68; Amd. Comp. ¶¶ 116-118. Thus, Hamilton was putting the interests of BlackRock over those of its client, the Government.

On November 7, 1995, the same day that Hamilton informed the BlackRock bidding team they were successful in the single family note sale reoffering, Ervin employees John Ervin, Mike Nathans and Lucie Du met with representatives of BlackRock and Goldman Sachs in New York. At this meeting, BlackRock and Goldman Sachs representatives informed Ervin that the two firms were working as partners on all HUD business and were to be considered "one and the same" for purposes of *all* HUD note sales and restructuring activities. Exh. 3, Ervin Dec. ¶ 4; Orig. Comp. ¶ 47; Amd. Comp. ¶ 45.

Subsequently, Ervin learned that BlackRock was a subcontractor to Hamilton on the Partially Assisted Note Sale. Exh. 3, Ervin Dec. ¶ 6 and Attachment 1 to Exh. 3, Erv. Dec. at 4. Ervin knew that Goldman Sachs intended to bid in that sale and also intended to be a major participant in HUD's state agency and Mark-to-Market initiatives for subsidized loans. Therefore, based upon the fact that Ervin had been told privately that Goldman Sachs and BlackRock were partners for the purchase of all HUD loans, Ervin concluded that there was an irreconcilable conflict of interest that created the possibility for insider trading and potential violations of federal securities laws and regulations. Because Hamilton permitted this conflict situation to exist, and permitted BlackRock and its partner Goldman to bid on note sales, Ervin

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[5] BlackRock rejected the offer. Each bidder had to submit a sealed bid deposit of at least 10% of its bid. If BlackRock raised its bid, its deposit would have been too low, and anyone who sought later access to the bid deposits might surmise what had happened. Amd. Comp. ¶ 115.

also concluded that Hamilton was involved as well. Exh. 3, Ervin Dec. ¶ 6.

On March 20, 1996, Hamilton held the second single family auction, and BlackRock, apparently bidding without Goldman Sachs, was again declared a winner, this time winning all of the assets offered for $620 million. Exh. 3, Ervin Dec. ¶ 8; Orig. Comp. ¶ 74; Amd. Comp. ¶ 129. At the closing of this sale, assets were distributed to Goldman Sachs. Amd. Comp. ¶¶ 83-85.

On March 29, BlackRock representatives told, Lucy Du (an Ervin employee) that BlackRock intended to use its subcontract on the Partially Assisted note sale as an opportunity to gather more information about HUD's subsidized mortgage portfolio so that it would have an advantage in future sales of subsidized mortgages. Amd. Comp. ¶ 175.

Thus, by March 1996, Ervin had information from non-public sources which supported the conclusion that there was a strong potential for the trading or transfer of inside information in connection with HUD note sales between BlackRock, Goldman and Hamilton, particularly on the upcoming Partially Assisted and subsidized state agency note sales. On March 29, 1996, John Ervin disclosed this information to William Richbourg, a HUD employee directing the note sales. Exh. 3, Ervin Dec. ¶ 9. Importantly, it was only after Ervin disclosed this concern about insider trading that Mr. Richbourg informed Mr. Ervin about a letter from the Asset Strategies Group to HUD (most likely the Burstein letter to which Hamilton refers). Exh. 3, Ervin Dec. ¶ 10. According to Richbourg, the letter suggested that BlackRock, in its capacity as a subcontractor to Hamilton, had been present at a planning meeting relating to the first single family note sale. Exh. 3, Ervin Dec. ¶ 10. Mr. Richbourg did not give Mr. Ervin a copy of the letter, nor did he reveal any more of the contents of the letter to Mr. Ervin. Exh. 3, Ervin Dec. ¶

10. In a subsequent conversation on May 22, 1996, William Richbourg told John Ervin that a BlackRock employee had been stationed throughout bid day in the lobby of the hotel in which bids on the second single family note sale were being received, and that the employee did not submit BlackRock's bid until very close to the bid deadline. Exh. 3, Ervin Dec. ¶ 11; Amd Comp. ¶ 131.

Hamilton has produced no evidence, because none exists, that Richbourg or any other HUD official gave this letter to anyone outside of HUD or discussed its contents with anyone (other than as stated above) before Ervin filed its *qui tam* Complaint. *See infra,* Section I.B. Contrary to Hamilton's misstated facts, Ervin did not derive its allegations of insider trading and bid rigging from this letter or any publicly disclosed information for that matter. As set forth in the attached Declaration of John J. Ervin, Ervin and Associates had independent knowledge, obtained directly from non-public sources, of the information upon which it based its allegations. This is evident from both the facts set forth above as well as the fact that the Asset Strategies letter contains none of the detailed allegations that Ervin articulated in its first Complaint. Moreover, Ervin disclosed its concerns to HUD employee William Richbourg before the existence of this letter was disclosed.

B. The Filing of the Original *Qui Tam* Complaint

On June 6, 1996, Ervin filed its original *qui tam* Complaint in which it brought forth these specific allegations of bid rigging and contract fraud:

- The government was being defrauded through an on-going scheme involving Hamilton, BlackRock and Goldman Sachs to direct government assets (i.e., HUD-held mortgage notes) to BlackRock and Goldman in HUD-held asset sales. Orig. Comp. ¶¶ 10-11. As part of this conspiracy, Hamilton gave BlackRock and Goldman Sachs access to information about the note sales Hamilton received

through its financial advisor status. Orig. Comp. ¶ 48.

- Hamilton hired BlackRock, a note sale bidder, as a subcontractor to help with the Partially Assisted note sale which provided Hamilton the means to direct inside information to BlackRock. Orig. Comp. ¶ 58.

- Ervin was informed directly by Goldman Sachs and BlackRock that "for the purposes of any HUD note sale efforts," they should be considered as a single entity. Orig. Comp. ¶ 47. Goldman Sachs had bid on the Partially Assisted note sale despite the fact that BlackRock worked as a subcontractor to Hamilton on the sale. Orig. Comp. Exhibit A at 11. Ervin predicted that Goldman Sachs would win the Partially Assisted sale.

- After the failure of the first single family note sale, Hamilton approached the BlackRock bidding team and offered an improper opportunity to raise its bid to meet the bid floor. Orig. Comp. ¶¶ 66-70.

- In the second single family note sale, BlackRock knew the amount of the bid deposit of its next highest competitor which enabled Black Rock to narrowly defeat that bid. The fact that Hamilton never performed a best-and-final-offer round of negotiations between the two bidders, even though the bids were less than 5% apart, supports this conclusion. Hamilton thereby enabled BlackRock to submit a bid $50 million below what it was otherwise prepared to submit and, thereby, defrauded HUD of approximately $50 million in profit on the note sale. Orig. Comp. ¶¶ 71-78 and Exhibit A 2-3.

- Hamilton misrepresented the true nature of the single family note portfolios, misclassifying numerous loans as non-performing and generally referring to the portfolios as consisting of non-performing mortgages when, in fact, the majority of the notes were performing. Orig. Comp. ¶¶ 86, 88.

- Hamilton improperly helped HUD to prepare a "crosscutting" task order which would enable it to maintain control over the note sale process. Award of the task order was rigged so that Hamilton would win. Orig. Comp. ¶¶ 101-102.

B. The Allegations In Ervin's First Amended Complaint

After the filing of its June 1996 Complaint, Ervin continued to pursue its investigation and uncovered additional evidence to support its claims of contract fraud and bid rigging, particularly its allegation that Hamilton was working on behalf of BlackRock and Goldman

Sachs to enable them to win HUD assets unfairly. For example, Ervin discovered a document which proved that Hamilton had knowingly excluded or ignored an otherwise winning bid from ALI when it awarded assets to Goldman Sachs as the winner on the West of the Mississippi multifamily sale in September 1995. If this bid had not been excluded, Goldman Sachs would not have been awarded any assets because it would have failed to win enough assets to reach its self-imposed bid floor. Amd. Comp. ¶¶ 165-168.

On September 3, 1999, Ervin amended its *qui tam* Complaint, without objection from the government, to provide the following additional allegations:

- On the first single family mortgage sale, the BlackRock team's bid deposit (7.3% of the portfolio's UPB) was greater than ten percent of its actual bid (72.07% of UPB). The bid deposit of the second highest full pool bidder, EMC Mortgage, was exactly ten percent of its bid (7.201% and 72.01% of UPB). The BlackRock team's bid beat out EMC's bid by only .06% of UPB. This information is consistent with the allegation that BlackRock may have had access to EMC's bid deposit. Amd. Comp. ¶¶ 109-111. A similar pattern occurred on the second single family sale. Amd. Comp. ¶¶ 129-130.

- Prior to the first single family note reoffering, Hamilton disclosed the secret OMB bid floor to BlackRock. BlackRock's reoffer bid was .89% of UPB below the publicly announced floor of 74%, but only .01% above the real floor of 73.1% which HUD intended to use. Comp. ¶ 123.

- The fact that Hamilton did not perform a best-and-final-round negotiation on the second single family note sale, even though BlackRock's bid was within .5% of Lehman's and it was clearly in the government's best interest to do so, is additional evidence that Hamilton provided an advantage to BlackRock. Amd. Comp. ¶¶ 129-133.

- In the third single family note sale (held September 4, 1996) BlackRock's bid on non-performing loans was far below what it knew to be the true value of the notes, yet its bid exceeded the next highest bid by merely one one-hundredth of one percent (.01%) of the portfolio's UPB. And again, no best-and-final round was conducted. Amd. Comp. ¶¶ 143-145. This indicates that Hamilton may have provided an advantage to BlackRock.

- Goldman Sachs was not the true winner of the West of the Mississippi multifamily sale (September 19, 1995). Hamilton knowingly excluded an otherwise-winning ALI bid from consideration which enabled Goldman Sachs to exceed a self-imposed bid floor. Amd. Comp. ¶¶ 163-168. This act of bid-rigging cost the government at least $2.55 million.[6]

- Later, Hamilton attempted to cover up bid-rigging on the West of the Mississippi sale and misrepresented that the selection of Goldman Sachs was due to a flaw in its optimization model. Amd. Comp. ¶ 170.

- Goldman Sachs, the self-described partner of BlackRock for *all* HUD note sales, won the Partially Assisted note sale (May 1996), with the aid of Hamilton and BlackRock, who structured the sale. Amd. Comp. ¶¶ 171-180.

Ervin's Amended Complaint also provided this additional detail to the following allegations of contract fraud:

- Hamilton performed "crosscutting" services that fell outside the scope of any task order issued under its first financial advisor contract, but falsely billed HUD for these services on an hourly basis as if they were task order services. In 1995, Hamilton successfully sought to have the financial advisor contract modified to change the fee structure and increase the amount of award. Hamilton falsely represented that the cost and pricing data submitted in support of this request included only task order services when, in fact, it included unauthorized, crosscutting services. Amd. Comp. ¶ 191-197.

- As HUD was about to award a second round of financial advisor contracts, Hamilton ghost wrote a memorandum for Helen Dunlap and Chris Peterson to the FHA Commissioner stating the need for a "crosscutting" task order and arguing that it should be awarded to the current financial advisor (*i.e.*, Hamilton). Kathryn Rock, a HUD employee who had earlier sought a job at Hamilton, used her influence on HUD's Source Evaluation Board to disqualify the only other financial advisor to bid on the cross cutting task order. Amd. Comp. ¶¶ 204-213.

- Hamilton knew in advance that HUD intended to award a contract to perform due diligence on the note sales to a minority contractor under the 8(a) program. Hamilton offered to assist Williams, Adley in winning the contract in exchange for the opportunity to perform as a subcontractor on the contract. Hamilton drafted all of the task orders under the contract. Hamilton and Williams, Adley

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[6] Ervin provided detailed evidence to support this allegation to the government on June 23, 1998. *See* Exhibit 4.

then approached HUD with a request to double the original $15 million contract award only a few months after it was issued. Hamilton and Williams, Adley submitted false and inflated cost and pricing data in support of its contract proposals. Amd. Comp. ¶¶ 199-203.

ARGUMENT

Contrary to the arguments presented by Hamilton in its Motion to Dismiss, none of the claims contained in either of Ervin's *qui tam* Complaints are based upon "allegations or transactions" of fraud disclosed to the public, and this Court clearly has jurisdiction to hear this *qui tam* lawsuit. Moreover, the detailed and specific allegations in the Amended Complaint do not run afoul of Rule 9(b) of the Federal Rules of Civil Procedure as Hamilton contends and state cognizable claims for relief under the federal False Claims Act. Finally, there is absolutely no merit to Hamilton's claims that it was not served properly with the Amended Complaint in this action or that it is entitled to costs and attorneys fees.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER ERVIN'S *QUI TAM* LAWSUIT

Hamilton contends that Ervin's *qui tam* lawsuit is barred by section 3730(e)(4) of the FCA, commonly known as the public disclosure bar. Section 3730(e)(4) states:

> (A) No court shall have jurisdiction over an action under this section 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 person bringing the action is an original source of the information.
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> (B) For purposes of this paragraph "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

It is widely acknowledged that Congress enacted the public disclosure bar in 1986 to overturn the undesirable chilling effect on *qui tam* suits brought about by the previous jurisdictional bar, which precluded suits "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (superseded). *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 1877, 138 L.Ed. 2d 135 (1997) (Congress eliminated the government knowledge bar to expand the circumstances under which *qui tam* relators may pursue actions.); *see also Springfield Terminal Ry.*, 14 F.3d at 649-651. Indeed, one important reason Congress changed the law was to use *qui tam* lawsuits to "prod the government into action" whenever it chooses to ignore allegations of fraud that have not been publicly disclosed. *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684 n. 4 (D.C.Cir. 1997). Such a need for a *qui tam* case was never more apparent than here where the evidence shows that this is exactly what occurred. *See infra*, Section I.B.

A. The September 6, 1995 Burstein Letter Was Never Disclosed to the Public

Hamilton's first, and most heavily emphasized, jurisdictional argument is that Ervin's Amended Complaint "merely reformatted . . . allegations made by others that were already under investigation." Mem. at 7. By this, Hamilton primarily means the September 6, 1995 Karen Burstein letter. Mem. at 8-10. But Hamilton has provided no evidence (because none exists) that this letter, and hence any "allegations" contained in it, was disclosed to the public. Without this evidence, the fact that HUD *received* this letter is irrelevant to this jurisdictional question. *Springfield Terminal Ry.*, 14 F.3d at 654 ("Section 3730(e)(4)(A)'s bar focuses . . . on the quantum of information *already in the public sphere* . . . .") (emphasis added).

Ervin itself did not obtained this letter from William Richbourg, or anyone else in the

government, but received it privately from Asset Strategies in July 1996, a full month *after* Ervin brought this *qui tam* suit. *See* Exhibit 5. The truth is, this letter sat in the files of the Office of Housing and did not see the light of day until Ervin discovered it and promptly gave it to the Department of Justice. *See infra*, Section I.B. Hamilton has produced no evidence that anyone at HUD gave the letter to anyone outside the government. Hamilton, therefore, would have this Court dismiss Ervin's *qui tam* lawsuit as one based on "government knowledge," not publicly disclosed allegations of fraud. This is simply not the law.

Thus, Hamilton's extensive exercise in which it attempts to cross reference portions of the Burstein letter with Ervin's Amended Complaint is misdirected. Mem. at 8-10. Ervin had direct information in connection with fraud independent of this letter as demonstrated by the fact that it filed the *qui tam* suit a month before it saw the letter. *See* Exhibit 5; *see also* discussion at pp. 4-8 *supra*. Because the letter was never publicly disclosed before the filing of the Complaint, there is nothing which prevents Ervin from using the evidence contained in it to amend its Complaint.[7] *See United States ex rel. Schumer v. Hughes Aircraft Co.*,63 F.3d 1512, 1520 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 939 (1997) (reliance upon audit reports disclosed only after filing of original *qui tam* complaint was permissible).

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[7] Hamilton also argues that Ervin based its lawsuit on "general allegations of favoritism" contained in Ernst & Young's bid protest. Mem. at 10. There is nothing to this argument. In fact, Ernst & Young alleged that HUD treated it differently than its competitors in the award of the second round of financial advisor contracts and said nothing about bid rigging on the note sales. *Id.* Moreover, Ervin's complaint does not allege that fraud tainted the award of these contracts. Rather, Ervin alleges fraud in the award of the cross-cutting task order arising from these contracts. Amd. Comp. ¶¶ 204-213. This allegation does not appear in Ernst & Young's bid protest, and for good reason; it never bid on the cross-cutting task order.

B. Ervin's Conversations With Richbourg Do Not Trigger the Public Disclosure Bar

Hamilton next contends that, "[a]s a result of those prior allegations by other individuals [*i.e.*, Burstein] . . . the OIG initiated an intensive audit/investigation," (Mem. at 7) and that William Richbourg disclosed to John Ervin the allegations in this letter as well as "rumor and innuendo" in connection with the OIG investigation which Ervin repackaged into his lawsuit. Mem. 7, 14-15. In fact, the opposite is true. It was Ervin who first came to Richbourg with information in connection with insider dealing on the note sales. *See supra* at 7-8. There was no such OIG investigation at the time, and there is nothing jurisdictionally significant about the fact that Ervin disclosed the possibility of bid rigging with Richbourg.

1. There Was No HUD OIG Investigation Into Note Sale Bid Rigging or Contract Fraud Allegations Before Ervin Filed Its 1996 Complaint

As Hamilton now sees it, the Burstein letter began this alleged "intensive" OIG investigation. Mem. at 7. Yet, HUD has admitted in more than one context that nobody gave this letter to the HUD OIG. Moreover, despite the fact that Ervin provided his concerns about insider dealings between Hamilton, BlackRock and Goldman Sachs to HUD as early as March 1996, there was no OIG investigation into bid rigging and contract fraud until well after Ervin filed its *qui tam* suit. In fact, the evidence shows that HUD sat on the Burstein letter and did nothing with it.

The government has admitted that it was Ervin's *qui tam* Complaint and *Biven's* action, not the letter, which led the OIG to investigate allegations of bid rigging and contract fraud.[8] In

[8] On July 5, 1996, Ervin filed a Complaint in this Court against HUD and Helen Dunlap seeking declaratory and injunctive relief arising from numerous actions HUD and Dunlap had taken against Ervin. *Ervin and Associates v. Helen Dunlap, et al.*, 1:96CV01253 (WBB) (also referred to as the *"Biven's"* action). This action has recently been settled to the satisfaction of

an October 1996 interview with U.S.News Online, then-Secretary Cisneros was asked about the "Inspector General's investigation." In reply, he stated, "Do you want to get into bid rigging? And steering to Wall Street? Because those are very important points . . . ." Cisneros also identified June 1996, the date of Ervin's lawsuits, as the time when the investigation began. *See* Exhibit 7 at 2. Later, in support of its motion to seal the proceedings in a related OIG subpoena enforcement action, the government also stated that "[i]n July 1996, the OIG, at the request of the United States Attorney's Office, began an investigation of the allegations in the qui tam complaint, as well as certain of the allegations in the Biven's action." *See* Exhibit 8 at 2.[9]

In Ervin's *Biven's* lawsuit, the government provided verified explanations about how it responded to the Burstein letter. In Interrogatory No. 18, Ervin requested the government to

> "[d]escribe each instance prior to November 17, 1997, in which any HUD employee was informed or received information of . . . complaints concerning bidders' access to inside information . . . and for each instance described, state the date such employee first learned of the information, identify all persons made aware of such information, and describe *all* actions taken by such person with respect to such information." (emphasis added).

Exhibit 9 at 2.

Certainly if, as Hamilton believes, the Burstein letter led to "an intensive audit/investigation," there would be some mention of this fact in the government's response or at least some acknowledgment that the letter was given to the OIG. However, the government merely acknowledged that then-Assistant Secretary Cuomo received the Burstein letter and provided it *only* to Nic Retsinas, Assistant Secretary for Housing. Retsinas then provided it to

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the parties and a stipulation of dismissal entered with this Court. *See* Exhibit 6.

[9] The seal in the subpoena enforcement action was subsequently lifted by a court order dated October 9, 1998, and the attached Exhibit is no longer under seal.

Chris Peterson. Neither Mr. Retsinas nor Mr. Peterson are identified as HUD OIG employees. *Id.* at 3.[10] In Request for Admission No. 240, Ervin asked the government to admit that "Secretary Cuomo never provided a copy of the Karen Burstein letter dated September 6, 1995 to the HUD Inspector General." In response, the government admitted that "then-Assistant Secretary Cuomo did not specifically direct that the Burstein letter be sent to the HUD Inspector General. . . ."[11] Exhibit 10 at 3. Finally, Ervin recently requested through the Freedom of Information Act that the HUD OIG provide any documents associated in any way with any investigation it conducted prior to June 1996 of any information set forth in the Burstein letter and the Housing Affairs News letters. *See* Exhibit 11. The OIG has responded that there are no such documents. *See* Exhibit 12.

Finally, Hamilton's new-found belief that an "intensive" OIG investigation began *prior* to Ervin's original *qui tam* lawsuit is sharply contradicted by allegations of fact it has made in its meritless civil action against Ervin and Associates and John J. Ervin for tortious interference with contract. In that case, Hamilton contends that [i]n *August 1996*, the HUD Office of the Inspector General opened civil and criminal investigations, ostensibly in response to various of Ervin's allegations." Exhibit 13 at 6, ¶ 22 (emphasis added). The "allegations" to which Hamilton refers are the *Biven's* and *qui tam* lawsuits. *Id.* at 5, ¶¶ 18-20.

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[10] At the time this letter was written, Nicolas Retsinas was the Secretary for Housing-Federal Housing Commissioner. Amd. Comp. ¶ 122.

[11] Apparently to provide cover to Mr. Cuomo, the government added that he did give his staff assistant direction to forward it to any other "appropriate officials" within HUD. Of course, if the letter had actually gotten to the OIG, the government would have denied the request outright.

2. There Have Been No Public Disclosures of "Allegations" in an "administrative investigation"

Courts uniformly have held that, section 3730(e)(4)(A) sets forth an exclusive list of fora in which a publicly disclosed "allegation of fraud" or fraudulent "transaction" must appear for the jurisdictional bar to apply. Thus, if the publicly disclosed allegation does not appear in a "criminal, civil or administrative hearing," or a "congressional, administrative or Government Accounting Office report, hearing, audit or investigation," or "the news media," it cannot bar a *qui tam* suit. *See, e.g., United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2nd Cir. 1992); *United States ex rel. LaBlanc v. Raytheon Corp.*, 913 F.2d 17, 20 (1st Cir. 1990). As stated above, there was no "intensive OIG audit/investigation," so it was impossible for William Richbourg, or anyone else for that matter, to have disclosed allegations in an "administrative investigation" to Ervin as Hamilton argues.[12] Therefore, from the perspective of the public disclosure bar, there is nothing significant about the fact that John Ervin and William Richbourg exchanged "rumors" and "innuendo" (as Hamilton describes it) about Hamilton's contracts, the note sales or anything else. Mem. at 14-16.

The fact that William Richbourg provided some information which Ervin alleged in its complaint and subsequently disclosed to the Department of the Justice (*see* Mem. at 15) is also irrelevant. Hamilton has cited nothing in the public disclosure bar, or in the case law interpreting

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[12] For the same reason, it is also impossible for the Housing Affairs newsletter or the so-called September 29, 1995 "audit report" to have disclosed information from this non-existent investigation, as Hamilton argues. Mem. at 11-14. In addition, none of these records discloses any "allegations of fraud" or "fraudulent transaction," and they cannot bar Ervin's lawsuit. *See infra* at Section I.C.

it, that prevents a *qui tam* relator like Ervin from using information received from a government witness to confirm original allegations of fraud when there is no government investigation.[13] To hold otherwise would promote the very standard -- information in the possession of the government -- that Congress abandoned when it amended the *qui tam* provisions in 1986. Just as Congress recognized, the fact that there was no investigation in this case, because HUD officials looked the other way, is all the more reason to permit a relator like Ervin to use this type of information in order to "prod the government into action." *See United States ex rel. Findley, supra* at n. 4.

For similar reasons, Hamilton's argument that Richbourg's and Ervin's private conversations are "public" disclosures also must fail. While Hamilton cites *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992), and *United States ex rel. Fine v. Advanced Sciences, Inc.*, 879 F.Supp. 1092 (D.N.M. 1995), for the proposition that a disclosure is "public" even if it goes to only one person (Mem. at 7), that view has been criticized, and it is not followed in all circuits. *See United States ex rel. Schumer,* 63 F.3d at 1518 ("Under a 'practical commonsense interpretation' . . . information that was 'disclosed in private' has not been publicly disclosed."), *quoting, United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3rd Cir. 1991) (information "hidden in files" and "disclosed in private" is not publicly disclosed). Moreover, neither *John Doe Corp.* nor

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[13] Indeed, courts have held that government employees may use information learned through their employment to pursue their own *qui tam* claims. *See, e.g., United States ex rel. Williams*, 931 F.2d at 1496 n. 7 and1501 (concluding that government employee can proceed with a *qui tam* action even if there was an on-going investigation); *United States ex rel. Hagood v. Sonoma County Water Agency et al.*, 929 F.2d 1416, 1419-1420 (9th Cir. 1991). There is no reason why Congress would allow a government employee to use this information, but not allow a private citizen with independent evidence of fraud.

Advanced Sciences, Inc. involved the situation here where, in the absence of a government investigation, the alleged "public" disclosure occurred *after* the private *qui tam* relator provided the government with its information in connection with fraud.

3. Ervin is an Original Source of Any Possible Allegations of Fraud Disclosed By William Richbourg

Even if, contrary to fact, there was an OIG investigation that preceded Ervin's original Complaint and William Richbourg "publicly" disclosed "allegations of fraud" from that investigation in his private conversation with Ervin, as Hamilton contends, this Court would still have jurisdiction to hear Ervin's claims because Ervin is an original source of the information upon which his allegations are based. *See* 31 U.S.C. § 3730(e)(4)(B).

Of all the "rumors and innuendos" (Hamilton's own words) which Hamilton repeats in its Memorandum, there are only two pieces of information which have any significant bearing on Ervin's claims: the fact that Richbourg told Ervin that the Burstein letter contained a reference to BlackRock's attendance at a planning meeting on the first single family sale and that a BlackRock employee was stationed in the hotel lobby throughout the day of the second single family note sale.

As an initial matter, while this information is certainly significant, it constitutes neither an "allegation of fraud" nor discloses the "essential elements of fraudulent transactions." Therefore, even if this information were in the public domain, it still would not trigger the public disclosure bar.[14] Moreover, this information cannot possibly be said to have disclosed Ervin's allegations of fraud on the *later* single family note sales (Nos. 3-5), the West of the Mississippi ***multifamily***

[14] *See infra*, Section I.C. and the discussion of the quantum of information which must exist in the public domain to invoke the public disclosure bar.

note sale, the Partially Assisted note sale or any of Ervin's allegations of contracting fraud.

But even so, Ervin brought his concerns about insider dealings to HUD *prior* to receiving any of this evidence (*i.e.*, before any alleged "public disclosure"). Exh. 3, Ervin Dec. ¶ 3-11. Moreover, Ervin had "direct and independent" knowledge of at least some of the information upon which he based this allegation.[15] *See Springfield Terminal Ry.*, 14 F.3d at 656. He reached this conclusion after BlackRock and Goldman privately told Ervin they were "partners" for purposes of all HUD sales and learning that BlackRock was a subcontractor to Hamilton on the Partially Assisted sale. This conclusion was also supported by the fact that Hamilton had already tried, on the first single family note sale, to rig a note sale for BlackRock. Exh. 3, Ervin Dec. ¶ 3-11.

C. Neither the Housing Affairs News Letters nor HUD's Audit Related Memorandum Disclose "Allegations of Fraud" or Expose "Fraudulent Transactions"

Hamilton's remaining jurisdictional arguments also fall wide of the mark. First, Hamilton places great reliance on the Housing Affairs news letters which, according to Hamilton, "specifically disclose the existence of an ongoing OIG investigation." Mem. at 11. In fact, the news letters are wrong (there was no such investigation, *see supra*), and none of the information contained in them precludes jurisdiction in this case.

The law in this circuit is clear: "'*qui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction . . . or the allegation

[15] The original source rule does not require the relator to know *all* of the "vital ingredients" to a fraudulent transaction. It must only have direct and independent knowledge of *any* of the essential details to a fraudulent transaction. *See Springfield Terminal Ry.*, 14 F.3d at 656-657.

of fraud. . .'" set forth in the lawsuit. *United States ex rel. Findley*, 105 F.3d at 686, *citing*, *Springfield Terminal Ry.*, 14 F.3d at 654. The "remedial purposes of the FCA are inadequately served by an expansive interpretation of the jurisdictional bar that prevents *qui tam* suits when only innocuous or spotty information -- insufficient in itself to constitute an allegation of fraud or to reveal the essential elements of a fraudulent transaction -- exist in the public domain." *Springfield Terminal Ry.*, 14 F.3d at 657.

Ervin has brought several allegations of fraud in this case: 1) bid rigging by means of bid deposit and bid information on *single* family note sales; 2) bid rigging by means of exclusion of a bid on the West of the Mississippi auction, a *multifamily* note sale; 3) bid rigging by means of trading inside information on the Partially Assisted note sale; 4) submission of false invoices on Hamilton's first financial advisor contract; 5) submission of false cost and pricing data on the modifications to Hamilton's financial advisor contract and the due diligence contract; and 6) violation of procurement regulations in connection with the award of the cross-cutting task order. In addition, Ervin specifically names all of the responsible parties (Hamilton, BlackRock, Goldman Sachs, Ocwen, and Williams, Adley), and sets forth in specific detail the role of each in these fraudulent transactions.

In contrast, none of these allegations of fraud is repeated in any of Hamilton's "news articles." The closest they come to making an "allegation of fraud" is to state that the IG is investigating whether "anyone in Retsinas' office" has shown "favoritism" to bidders "in violation of law." Mem. *citing* Exhibit 6 at 1. First, the newsletters identify a different responsible party (Retsinas' Office of Housing) than the one Ervin accuses (Hamilton). In addition, a charge of "favoritism" falls short of an "allegation of fraud" against the government.

HUD may favor a bidder (and violate the law) without defrauding the government, such as allowing a bidder additional time to submit a bid. Thus, these statements are more likely about giving bidders an unfair advantage as to each other rather than defrauding the government. In short, Hamilton wants this Court to read "bid rigging" where the newsletters say "favoritism," but the news reports stop far short of that allegation.

Finally, the newsletters only mention the multifamily auction program. They say nothing about the single family note sales or the Partially Assisted sale. These are entirely different transactions in which Ervin also alleges bid rigging.[16] Furthermore, it is impossible for the news letters to have disclosed the same allegation of fraud on the multifamily note sales as contained in Ervin's Amended Complaint. Ervin alleges that Hamilton knowingly excluded an otherwise winning bid (the ALI bid) from consideration on the West of the Mississippi sale in September 1995 in order to allow Goldman Sachs to win. Amd. Comp. ¶¶ 163-168. Hamilton admits that ALI should have won (in fact, it is the reason that HUD terminated Hamilton's financial advisor contract, Amd. Compl. ¶¶ 169-170), but Hamilton didn't reveal this fact to anyone at HUD until December 1996, practically a year *after* these news letters were published. *Id; see also* Exhibit 14. Furthermore, Hamilton's story at that time was that this was all an innocent mistake resulting from an error in the computer program used to select winning bids, not fraud.[17] *Id.* Because nobody outside of Hamilton was aware that Goldman Sachs should *not* have won the West of the

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[16] The newsletters also say nothing about any contracting fraud -- false invoices, submission of false cost and pricing data, etc., -- of the type Ervin alleges against Hamilton and Williams, Adley.

[17] In fact, there is evidence that Hamilton knowingly excluded the ALI bid from consideration in order allow Goldman Sachs to win. Amd. Compl. ¶ 168.

Mississippi sale until long after these news letters were written, they cannot possibly have disclosed the same allegation of fraud as contained in Ervin's Amended Complaint.

In short, none of the information in the news letters reveals a "fraudulent transaction" or constitutes an "allegation of fraud" with such specificity that it would "enable [the government] adequately to investigate the case and make a decision whether to prosecute." *Springfield Terminal Ry.*, 14 F.3d at 654. This is apparent from the fact that the government was also aware of these news letter statements, but did nothing to follow up on them. *See* Exhibit 9 at 2.

Finally, Hamilton relies on a September 29, 1995 audit report from HUD's Financial Audit Division, suggesting that its presence somehow jurisdictionally bars Ervin's case. Mem. at 13. But again, this could only be true if it disclosed "allegations of fraud" or revealed "fraudulent transactions" identified in Ervin's lawsuit. It does not.

The only portion of the document on which Hamilton relies refers to an audit inquiry as to whether task orders on two of Hamilton's contracts overlap in such a way that it *may* give the contractor an opportunity to seek "duplicate compensation." Mem. *citing* Exhibit 11 at 9. Importantly, there is no allegation in this document that Hamilton actually did seek duplicate compensation nor does it investigate whether this occurred. Thus, it does not disclose an "allegation of fraud." More important, none of Ervin's contract fraud allegations involve the "duplication of task orders." In fact, Ervin alleges that Hamilton was performing work that was not covered by *any* task order and then falsely billing for such work as if it was. Amd. Comp. ¶ 193. Later, Ervin alleges, Hamilton used this false information as the basis for its inflated cost and pricing data submitted in connection with the modification of its financial advisor contract. Amd. Comp. ¶¶ 195, 203. These allegations, of course, say nothing about "overlapping task

orders."

Next, Hamilton implies that this "overlapping task order" issue was somehow addressed and presumably resolved in an unidentified "audit of Housing's mortgage sales program." Hamilton's hope is that this Court might believe that this latter "audit" was also publicly disclosed. But Hamilton has provided absolutely no factual support that this, an omission that is underscored by the fact that Hamilton does not attach a copy of the document to which it refers.

D. Section 3730(e)(3) Does Not Bar Ervin's Lawsuit

Hamilton next argues that this lawsuit is barred by 31 U.S.C. § 3730(e)(3), which states that a *qui tam* relator may not bring an action "which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party." 31 U.S.C. § 3730(e)(3). According to Hamilton, both Ervin's *qui tam* lawsuit and its *Biven's* lawsuit against the United States "involve the same allegations and underlying transactions concerning contracting and bidding" and, therefore, the *qui tam* suit is barred.

Courts have rejected exactly the interpretation of section 3730(e)(3) that Hamilton presses here. Section 3730(e)(3) bars "only '*qui tam* action[s] based upon allegations or transactions pleaded *by the government* in an attempt to recover for fraud committed against it.'" *See United States ex rel. Costner v. URS Consultants, Inc.*, 153 F.3d 667, 676 (8th Cir. 1998), *citing, United States ex rel. S. Prawer and Co v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994). According to the court in *Prawer*, the purpose of the FCA as a whole clearly suggests that section 3730(e)(3) was enacted to bar lawsuits that are "receiving 'support, advantage, or the like'" from the case in which the government is a party "'without giving any useful or proper return'" to the government

(or at least having the potential to do so).'" *Prawer*, 24 F.3d at 327-328. A *qui tam* suit that is "seeking to remedy fraud that the government has not yet attempted to remedy" is not "parasitic" and "is wholly unlike the one the drafters of § 3730(e)(3) almost certainly had in mind and sought to preclude."[18] *Prawer*, 24 F.3d at 328.

In the *Biven's* action, the government is the defendant and has never sought to remedy any of Ervin's allegations of fraud. Hamilton has not, and cannot, present any evidence to the contrary. The mere fact that Ervin is currently litigating a related lawsuit against the government simply does not bar this *qui tam* suit under section 3730(e)(3).

II. ERVIN'S AMENDED COMPLAINT STATES VIABLE FALSE CLAIMS ACT CLAIMS

Hamilton argues that the Amended Complaint fails to state proper FCA claims because it does not allege that Hamilton's fraudulent conduct caused a loss to government.[19] Mem. at 20. First, Hamilton contends that a BlackRock employee had been stationed throughout bid day in

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[18] The court in *Springfield Terminal Ry.* noted in passing that the *qui tam* relator had dismissed a government entity from an earlier filed civil action, and section 3730(e)(3) was not implicated, therefore. *Springfield Terminal Ry.*, 14 F.3d at 648 n.3. There is no indication that the court interpreted this section or that it was essential to the court's holding, and this *dicta* is not controlling here.

[19] Hamilton argument is, in part, based upon a misstatement of law. Several of Ervin's claims (Counts XI, XIII and XV) allege violations of 31 U.S.C. § 3729(a)(1) (submission or causing the submission of false claims), and many of its "reverse" false claim bid rigging counts can be restated as (a)(1) claims. *See Brown v. United States*, 524 F.2d 693 (Cl. Ct. 1975). The majority of courts have held that a cause of action under this section does not require that damages be proven because liability attaches to the submission of the claim. *See, e.g., Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1371 (Fed. Cir. 1998); *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 681 (10th Cir. 1998); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1525 (9th Cir. 1995), *rev'd in part on other grounds* 520 U.S. 939 (1997); and *United States v. Rinera*, 55 F.3d 703, 709 (1st Cir. 1995). This error is ultimately irrelevant because Ervin's complaint does allege loss by the government.

the lobby of the hotel in which bids on the second single family note sale were being received, and that the employee did not submit BlackRock's bid until very closing to the bid deadline. hat Ervin's contracting claims fail to allege any loss because there are no allegations that "on any given day Hamilton submitted invoices to the Government for work that it did not do." Mem. at 21.

Of course, it is possible for Ervin to allege loss through contracting fraud without this level of detail, and it has.[20] As to the first financial advisor contract, Ervin alleged that Hamilton provided "unauthorized services that were not included in any task order" (Amd. Comp. ¶ 193) -- that is, services for which it had no right to payment -- yet charged HUD for these services. Amd. Comp. ¶¶ 258, 262 (Counts XI) and ¶¶ 263, 267 (Count XII). Ervin also alleged that Hamilton submitted inflated "cost and pricing estimates" to HUD and as a result received excessive fees on modifications to the contract. Amd. Comp. ¶¶ 195, 260, 262 (Count XI) and ¶¶ 265, 267 (Count XII). On the due diligence contract, Ervin alleges that Williams, Adley and Hamilton falsified records overstating the need for a non-competitive award (thereby raising the contract price) and submitted inflated cost and pricing estimates to HUD in connection with the negotiation of task orders and subcontracts and thereby received inflated fees. Amd. Comp. ¶ ¶ 203, 272, 273, 275, and 284 (Counts XIII and XIV). Ervin also alleges that Hamilton caused Williams, Adley to submit payment for services to HUD that were not part of any task order on the due diligence contract. Amd. Comp. ¶ 271 (Count XIII). Finally, on the cross-cutting task order, Ervin alleges that Hamilton submitted inflated cost and pricing estimates resulting in an

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[20] In fact, even Rule 9(b) of the Federal Rules of Civil Procedure does not require Ervin to allege this level of detail. *See, infra,* Section III.

inflated contract price (Amd. Comp. ¶¶ 213, 288), and as a result submitted inflated invoices to the government. Amd. Comp. ¶ 290.

Hamilton next contends that the bid rigging schemes "[i]n fact . . . resulted in more money for the Government, not less." Mem. at 21. Hamilton, however, acknowledges that what it *asserts* to be fact is simply not relevant to this Court's consideration of this Rule 12(b)(6) motion, and this Court must accept Ervin's averments of fact as true and draw all inferences in Ervin's favor. Mem. at 4, *citing Hishone v. King and Spaulding*, 467 U.S. 69, 73 (1984) and *Harris v. Ladner*, 127 F.3d 1121, 1123 (D.C. Cir. 1997). Thus, Ervin respectfully requests that this Court ignore Hamilton's factual assertion as well as exhibits 14, 15 and 16 of its memorandum which Hamilton claims support this point.

In any event, Ervin does allege that Hamilton's bid rigging caused the government to lose money because it received considerably far less than it otherwise would have in the note sales. For example, in the first single family note sale reoffering, BlackRock's knowledge that the undisclosed bid floor was 73.1% rather than 74% allowed BlackRock to win notes with a bid of 73.11%, meaning that the government received .89% less than it otherwise would have. Amd. Comp. ¶¶ 123, 221, 223 (Count II). Similarly, in the second single family sale, Ervin alleges that BlackRock knew the bid deposit of the next highest competitor (Amd. Comp. ¶¶ 129-132) and in the third single family sale may have known the actual bid itself (Amd. Comp. ¶¶ 143-144, 221). The fact that BlackRock had this information, that Hamilton would not perform a best-and-final round of negotiations in order to assure that BlackRock won the sales (Amd. Comp. ¶¶ 133-134, 144), and that Hamilton knowingly misclassified loans (Amd. Comp. ¶ 137) resulted in substantial losses to the government. Amd. Comp. ¶¶ 137-139, 145, 158, 228 and 232 (Counts II

and III). On the West of the Mississippi sale Ervin contends that, if Hamilton had not knowingly excluded the ALI pool bid in order to throw the sale to Goldman Sachs, the government would have received far more for the notes than it actually did. Amd. Comp. ¶¶ 165-167, 169, 243, 244 (Count VII). Hamilton's cover up of this scheme also caused the government to lose money on the North and Central Sale. Amd. Comp. ¶¶ 185, 251, 253 (Count IX). Finally, Ervin alleges that as a result of the trading of inside information on the Partially Assisted note sale and the fact Hamilton structured the deal (or allowed BlackRock to) so that only Goldman Sachs could win it, the government lost considerable funds. Amd. Comp. ¶¶ 177-183, 246-249 (Count VIII).

It appears, though it is far from clear, that Hamilton is asking this Court to convert its Rule 12(b)(6) motion on this point to one for summary judgment, relying upon Exhibits 14, 15 and 16 to its Memorandum. If so, Ervin respectfully requests that this Court deny this motion. First, Hamilton has failed to submit a statement of material facts not in dispute, as the local rules of this Court require, and Ervin is unfairly prejudiced because it cannot prepare a statement of disputed facts with supporting affidavits in response. *See* L.Cv.R. 56.1. Furthermore, the issue of financial loss to the government is heavily disputed by Ervin. Ervin submits that additional discovery is necessary on this point and respectfully requests that this Court delay ruling on any such possible motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure.

Finally, Hamilton contends that Ervin has failed to allege that Hamilton received any of the below-market-rate notes that BlackRock and Goldman Sachs received. Mem. at 21-22. There is no support for this argument. Congress passed the False Claims Act "to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the

government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544; *see also United States v. Neifert-White*, 390 U.S. 228, 232, 88 S.Ct. 959, 961, 19 L.E2d 104 (1968) ("[T]he Act was intended to reach all types of fraud that might result in financial loss to the Government."). Despite the fact that Hamilton never purchased notes, Ervin certainly contends that Hamilton benefitted from the scheme in the sense that it continued to receive payment (exorbitant payments, in fact) under its financial advisor contracts when it should not have and it attempted to sell its advisory position with HUD in exchange for anticipated lucrative "network neighborhood" business with properties purchased by BlackRock and Goldman Sachs. Amd. Comp. ¶¶ 54-58. In any event, there is no requirement that Hamilton benefit from its actions in order to be held liable under the FCA. *See United States v. Venziale*, 268 F.2d 504 (3d Cir. 1959); *see also Smith v. United States,* 287 F.2d 299, 303 (5th Cir. 1961).

III. THE AMENDED COMPLAINT HAS MET THE REQUIREMENTS OF RULE 9(B)

Hamilton contends that Ervin's allegations -- all 295 paragraphs and 67 pages -- lack the specificity required under Rule 9(b) of the Federal Rules of Civil Procedure. Yet, Hamilton's only attempt to support this statement is to pull a self-serving sample of eleven paragraphs from the Amended Complaint which it contends lack "sufficient specificity." Mem. at 23-25. Ironically, these few paragraphs are quite specific in their allegations, far more specific than is required.

For example, Hamilton takes issue with ¶¶114-115 of the Amended Complaint, relating to Ervin's allegations that Hamilton attempted to rig the first single family sale in favor of the BlackRock team by giving it a secret opportunity to raise its bid. In these paragraphs, Ervin

states the time of the fraudulent conduct (shortly after the failed initial offering) and who was involved (Hamilton and BlackRock). Amd. Comp. ¶¶ 114-115. Ervin also provides the details of the conduct: Hamilton gave BlackRock the opportunity to raise its bid, but BlackRock had to reject it because its bid deposit would then be less than 10% of its bid, leaving a paper trail to be discovered by anyone who got access to the bid deposit information. *Id.* Hamilton did not provide the other full pool bidder with the same opportunity. Amd. Comp. ¶¶ 114-118. This level of detail is certainly sufficient to put Hamilton on notice of the charge against it (an opportunity to raise a bid) and give it a fair opportunity to defend itself. To determine the truth of this, for example, all Hamilton need do is interview the Hamilton employees who conducted the first single family sale. Alternatively, Hamilton could produce evidence that the other bidder was given the same chance to raise its bid.

Another example of detail, where Hamilton refuses to see it, are the allegations surrounding the second single family sale. Oddly enough, Hamilton attacks paragraph No. 131 of the Amended Complaint, where Ervin alleges a specific means by which Hamilton and BlackRock could have rigged this sale. Mem. at 24-25. In fact, this paragraph, as well as the remaining allegations concerning the second single family note sale, provide more particularity than is required, and Ervin submits them as an example of the level of detail included in all of its bid sale allegations. As to this sale, Ervin alleges: On March 20, 1996 (Amd. Compl ¶ 127), BlackRock submitted a full-pool bid of $619,657,721 (83.57% of the portfolio's UPB), beating out the next highest bidder by only $2 million. Amd. Compl ¶ 129. BlackRock's bid deposit, however, was 9.044% of the UPB, far more than 10% of its bid. Amd. Comp. ¶ 129. The next highest bidder submitted a bid of $618 million and a bid deposit of $61.8 million, exactly 10% of

its bid. Amd. Comp. ¶ 132. Ervin alleges that BlackRock had inside information when it bid on this sale, most likely the amount of the bid deposit. Amd. Comp. ¶ 226. This allegation is supported by additional allegations: 1) a BlackRock employee was stationed throughout bid day in the lobby of the hotel were bid deposits were being verified and bids accepted and waited until the last possible moment to submit BlackRock's bid (Amd. Comp. ¶ 131); 2) BlackRock was a subcontractor to Hamilton on another sale and worked out of their offices, which would also give BlackRock access to such information (Amd. Comp. ¶ 53); and 3) Hamilton did not conduct a best-and-final round of negotiations between BlackRock and the next highest bidder, even though the bids were remarkably close, the other bidder's per-pool price was higher and it would clearly have been in the government's interest to do so (Amd. Comp. ¶¶ 132-133); 4) under similar circumstances on the first single family sale, Hamilton had given BlackRock an opportunity to increase its bid, but did not give the same to the other full-pool bidder (Amd. Comp. ¶ 114); and 5) the offering documents for this sale reveal that 1,453 of the loans were misdescribed as lower-value non-performing loans (Amd. Comp. ¶ 137), a piece of information to which BlackRock could have obtained through its relationship with Hamilton (Amd. Comp. ¶ 53). Ervin, therefore, provides Hamilton with all the essential information necessary – the "who, what, when, and where" – to understand the allegation, and defend itself against it.

Ervin's allegations concerning the West of the Mississippi sale provide another example of pleading which meets the requirements of Rule 9(b). Here, Ervin alleges that Goldman Sachs submitted individual bids of $205 million in UPB in loans, but set a self-imposed bid floor of $145 million in UPB (*i.e.*, Goldman would agree to the sale only if it received at least $145 million in UPB). Amd. Comp. ¶¶ 164-165. Goldman won only $143 million in UPB in loans.

Amd. Comp. ¶ 165. In order to have Goldman Sachs meet its self-imposed bid floor, Hamilton did not consider and ignored a winning pool bid from ALI so that certain loans in that bid could be awarded to Goldman Sachs, and Goldman Sachs would then received over $145 million. Amd. Comp. ¶¶ 166-167. In fact, this allowed Goldman Sachs to win $164 million in UPB in loans. Amd. Comp. ¶ 166. On September 28, 1995, Michael Brocks, an employee of Hamilton's subcontractor Coopers & Lybrand, sent a facsimile to Henry Fan of Hamilton, asking why the ALI bid should not be considered a winning bid. Amd. Comp. ¶ 168. Hamilton refused to consider the ALI bid because that would have meant that Goldman Sachs would have lost the sale. *Id.* Again, the level of particularly in these allegations provides more than enough detail put Hamilton on notice of the charges against it.

Ervin's contracting fraud allegations are just as specific. For example, Ervin has alleged that Hamilton submitted false requests for payment on the first financial advisor contract. Specifically, Ervin alleges that: 1) Hamilton provided a number of personal services -- referred to as cross cutting services -- to HUD officials that were not covered under any task order to the financial advisor contract (Amd. Comp. ¶ 193); 2) in the summer of 1994, Hamilton threatened that it would no longer provide financial advisor services without increased compensation (Amd. Comp. ¶ 194); 3) Hamilton submitted false cost and pricing estimates in support of this request to modify the contract for greater fees (Amd. Comp. ¶ 195); 4) the estimates were false because they included the costs to Hamilton of providing cross cutting services, services that were not pertinent to any task order (Amd. Comp. ¶ 195); 5) as a result, Hamilton's financial advisor contract was inflated from $5 million to $19 million. Amd. Comp. ¶ 197.

In sum, Hamilton's Rule 9(b) motion amounts to nothing more than an argument that

Ervin's Amended Complaint is founded only on rumors and second-hand knowledge (or so Hamilton believes). Mem. at 25. However, Ervin is not required, in response to a Rule 9(b) motion, to prove the allegations that it is has made or even to disclose the evidence on which it wishes to go forward. Ervin must only show that its allegations give Hamilton fair notice of the charges against it, which they clearly do.[21]

VI. HAMILTON WAS TIMELY SERVED WITH THE COMPLAINT

Under the Act, prior to the unsealing of the Amended Complaint and the decision by the United States to decline intervention in this case, Ervin had no right or ability to serve Hamilton or the other defendants in this case. Consequently, Ervin's right and obligation to serve the Complaint dates from, at the earliest, the date upon which the Amended Complaint was unsealed: *i.e.* April 21, 2000. At a hearing on May 23, 2000, counsel for Relator expressly represented to the Court that Ervin believed its service obligations were controlled by Fed. R. Civ. P 4(m), and that Ervin would make service of the Compliant upon defendants within 120 days of the unsealing of the Complaint. Counsel for Hamilton acquiesced, in open Court, to this position. It was not until Relator moved for an enlargement of time to serve the Amended Complaint that Hamilton first raised the notion that some time frame other than 120 days should control the service of the complaint.

The Act provides "that the complaint shall not be served on the defendant until the Court so orders." 31 U.S.C. § 3730(b)(2). In this case, as Hamilton concedes, the Court never entered

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[21] In the unlikely event that this Court finds that any of Ervin's well-pleaded allegations are not sufficiently particular, Ervin respectfully requests that this Court treat Hamilton's motion as one for a more definite statement pursuant to Rule 12(e) and permit Ervin to amend the current complaint to repair any ambiguities or vagueness.

an express order requiring that defendants be served. In light of the colloquy amongst counsel and this Court on May 23, all of the parties and this Court were operating under the acknowledged premise that Relator would have 120 days under Fed.R.Civ.P. 4(m) to decide whether to prosecute this case and if so against whom. Hamilton cites no authority for the proposition that any rule other than 4(m) should control service of a *qui tam* complaint by a Relater once the United States has declined to intervene.

Further, the notion that Ervin was not justified in serving the Mayor of the District of Columbia is specious. D.C.Code Section 29-399-9(b) provides that whenever a foreign corporation fails to maintain a registered agent in the District of Columbia, or whenever a registered agent cannot, with reasonable diligence, be found at the registered office of the corporation in the District of Columbia, the Mayor shall be an agent of the foreign corporation upon whom any service of process against the corporation may be made.

As described in the attached Affidavit in support of Substituted Service (*See* Exhibit 15), at the time Relator attempted to make service, Hamilton's filing with the D.C. Consumer of Department of Regulatory Affairs showed that its registered agent was C. Austin Fitts at an address on Fraser Court in the District. Through reasonable diligence, Relator discovered that Fitts no longer resided at that address and that attempted service upon her there would be futile.

On August 9, 2000 counsel for Ervin left a telephone message for Hamilton's counsel and again on August 10, 2000 (prior to the time that Ervin had learned that this Court had denied the Relator's motion to enlarge the time for service), counsel for the Ervin sent a letter by telecopier to Hamilton's counsel, informing him that Hamilton did not have a current address on file for its registered agent and that unless a good address could be provided, Ervin would service the

Mayor. A copy of this letter is appended to the Affidavit in Support of Substituted Service attached hereto. Exhibit 16. Mr. McManus never returned that telephone call or responded to the letter. Given Hamilton's failure to comply with its obligation to make available for service of process a resident agent and given counsel's refusal to correspond with counsel for Ervin to provide information regarding service of an authorized agent, Hamilton should not be heard to complain that it was served by substituted service.

Hamilton's argument that Relator was obligated to serve Hamilton's secretary/treasurer, Oswald Blake at 802 Rhode Island Avenue, or upon its registered agent in its state of incorporation, *i.e.* Delaware, is not supported by the applicable authority. See. D.C. Code Section 29-399-9(b) cited above. Mr. Blake was not, as of August 16, 2000, the registered agent of Hamilton under D.C. law. Hamilton has no response to the fact that Hamilton did not comply with the law of the District of Columbia or that its counsel failed to extend the courtesy of a reply to Ervin's counsel's telephone message and letter.

Lastly, the purpose of service of process under Fed. R. Civ. P. 4 is, *inter alia,* to obtain personal jurisdiction over a party. In this case, Hamilton voluntarily submitted itself to the jurisdiction of this Court on May 21, 1999 when it filed its motion to unseal the file. Moreover, C. Austin Fitts and her counsel personally appeared on this Court for a hearing on April 21, 2000, *before* this case was unsealed, and received actual copies of the Complaint and Amended Complaint by Order of this Court dated May 1, 2000. Consequently, this Court has personal jurisdiction over Hamilton and Hamilton cannot claim prejudice or surprise by the manner in which service was made upon it in this case.

V. HAMILTON'S REQUEST FOR COSTS AND ATTORNEYS' FEES SHOULD BE DENIED

Section 3730(d)(4) of the FCA provides for an award of attorneys' fees and costs to a defendant *only* if a court finds that the claim of the person bringing the action "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4). In the event that this Court denies Hamilton motions, which Ervin respectfully requests that it should, there would be no basis for an award of attorneys' fees and costs under this provision.

In the unlikely event that Hamilton is successful in its motions, an award would still not be appropriate. Hamilton has offered no proof whatsoever that Ervin brought these claims, knowing them to be baseless and merely to harass Hamilton. Hamilton's only argument that they are frivolous is based on Hamilton's belief that Ervin has no more than rumor and second-hand news as evidence. Mem. at 29. At this stage of proceedings, however, Hamilton has done no discovery and therefore has next to no knowledge of the evidence which supports Ervin's claim. Hamilton has not submitted a single discovery request. Moreover, the evidence which Ervin pleads in its Amended Complaint -- such as BlackRock's bid deposits, the bid deposits of its competitors, the facsimile from Michael Brock's of Coopers & Lybrand asking why ALI's bid was excluded -- certainly is not the stuff of "rumors" and "second-hand news." Finally, if Ervin's allegations were as frivolous and baseless as Hamilton claims (without support), the Department of Justice would not have conducted a four-year investigation and informed this Court at the end of it that it may elect to intervene based upon further review of records which the Department has subpoenaed, but Hamilton is withholding. Exhibit 2 at 2.

CONCLUSION

For the foregoing reasons, plaintiff/relator Ervin and Associates, Inc. respectfully requests that this Court deny defendant Hamilton's motions.

Respectfully submitted,

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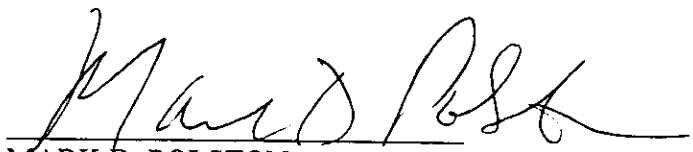
Attorney for Plaintiff/Relator

Dated: October 24, 2000

CERTIFICATE OF SERVICE

I certify that on this 24th day of October, 2000, I caused to be placed in the United States mail, postage prepaid, a true and correct copy of the foregoing Plaintiff/Relator's Response to Defendant Hamilton's Motion to Dismiss or, in the Alternative, for Summary Judgment and attached Exhibits to the following addressee:

Michael J. McManus
DRINKER, BIDDLE & REATH LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005-1209



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