UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.* PETER BELLI, Plaintiff, v. AMERICUS MORTGAGE CORPORATION, *et al.*, Defendants.	)	Case No. 11-CV-5443-VM
UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. AMERICUS MORTGAGE CORPORATION, *et al.*, Defendants.	)	

DEFENDANT ALLQUEST HOME MORTGAGE CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Defendant Allquest Home Mortgage Corporation, formerly known as Allied Home Mortgage Corporation (hereinafter "Allied Corporation" to facilitate comparison with the Amended Complaint), respectfully moves to dismiss the government's Amended Complaint (the "Complaint"),[1] pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6). The Complaint has failed to establish that this Court has personal jurisdiction over Allied Corporation, or that venue is proper in this District. The Complaint fails to allege any actions taken by Allied Corporation, either in this District or in connection with any false claim or statement to the government.

For all claims against Allied Corporation, the Complaint relies on conclusory statements that it is the "successor entity to, and a mere continuation of," Americus Mortgage Corporation, formerly known as Allied Home Mortgage Capital Corporation ("Allied Capital"), a co-defendant in this matter. The Complaint does not and cannot show, however, that Allied Corporation should be liable as a successor to Allied Capital.

The Complaint also fails to allege any fraudulent act by Allied Corporation with particularity, as required by Fed. R. Civ. P. 9(b). For these reasons, Allied Corporation respectfully requests that this Court dismiss the Complaint in its entirety with prejudice.

BACKGROUND

For the purposes of this motion only, Allied Corporation accepts the allegations in the Complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009). The Complaint alleges that Allied Capital — not Allied Corporation — violated the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA"), and the Financial Institutions Reform, Recovery, and

[1] In an effort to avoid an excessive repetition of facts and arguments, Allied Corporation incorporates by reference, as if restated herein, the Memorandum in Support of Motion to Dismiss that was filed concurrently by Allied Capital in this action.

Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1833a. Compl. ¶ 1. The Complaint alleges that Allied Capital — not Allied Corporation — submitted "hundreds of false certifications and other false statements" to HUD to obtain government-sponsored mortgage-insurance payments. Compl. ¶ 12. While the Complaint spans 41 pages and 149 paragraphs, it does not specify even one claim that gives rise to liability under the FCA or FIRREA, who submitted such unspecified claims, where the claims were submitted, or why the claims were allegedly false.

Throughout the Complaint's lengthy exposition, the only substantive allegations made against Allied Corporation are that it is liable as the successor to Allied Capital. Compl. ¶¶ 19, 50, 135, 141. The Complaint fails to allege any action taken by Allied Corporation that allegedly violates either the FCA or FIRREA, nor does it state any facts in support of its legal conclusion that Allied Corporation has liability as the successor to Allied Capital. Rather, the allegations, conclusory as they are, all concern Allied Capital. *See* Compl. ¶¶ 1-12, 38-113.

LEGAL STANDARD

Fed. R. Civ. P. 12(b)(2) allows a party to move to dismiss based on a lack of personal jurisdiction. The plaintiff bears the burden of establishing that the court has personal jurisdiction over a defendant. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003). To determine whether the plaintiff has made this showing, the court is not obligated to draw "argumentative inferences" in the plaintiff's favor. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). But the pleadings and affidavits are construed in the light most favorable to the plaintiff. *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). Courts may rely on affidavits submitted by the parties in deciding a Rule 12(b)(2) motion to dismiss. *Langenberg v. Sofair*, No. 03-CV-8339, 2006 U.S. Dist. LEXIS 65276, at *6 (S.D.N.Y. Sep. 11, 2006).

Fed. R. Civ. P. 12(b)(3) allows a party to move to dismiss based on improper venue. The plaintiff bears the burden of establishing that venue is proper. *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 762 F. Supp. 2d 543, 551 (E.D.N.Y. 2011). The court applies the same standards to a motion to dismiss for improper venue as it does to a motion to dismiss for lack of personal jurisdiction. *Gulf Ins. Co. v. Glassbrenner*, 417 F.3d 353, 355 (2d Cir. 2005).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While courts must accept the Plaintiffs' well-pleaded allegations as true and draw all reasonable inferences in their favor, the court need not accept unsupported legal conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937, 1950 (2009). Conclusory allegations or legal conclusions masquerading as factual assertions are not sufficient to maintain a cause of action. *Id.*

Thus, a plaintiff needs "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). A complaint fails "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals" of nothing more than the elements of a claim, "supported by mere conclusory statements," are not enough to state a claim under Rule 12. *Id.* Moreover, Fed. R. Civ. P. 9(b) requires that allegations of fraud state with particularity the circumstances constituting the alleged fraud, including: 1) the allegedly false or fraudulent statement; 2) the speaker; 3) where and when the statement was made; and 4) the reason it was fraudulent. *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004).

ARGUMENT

I. The Government Has Failed to Plead Facts Sufficient to Establish Personal Jurisdiction over Allied Corporation

The Complaint fails to allege any facts supporting general or specific jurisdiction over Allied Corporation. Instead, the Complaint relies on allegations about Allied Capital's activities. The only nexus to Allied Corporation is the vague and conclusory assertion that Allied Corporation has successor liability for Allied Capital's liabilities. *See, e.g.*, Compl. ¶ 19.

The Complaint essentially concedes that this Court does not have general jurisdiction over Allied Corporation. It states that Allied Corporation is incorporated in Texas and has its principal place of business in Texas (Compl. ¶ 18). The Complaint fails to allege any other facts about Allied Corporation's contacts with the state of New York, because there are none. Consequently, the Complaint fails to show that Allied Corporation transacts sufficient business to be subject to general personal jurisdiction in this District. *See, e.g.*, STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK § 2.4 (2012) (noting that general jurisdiction "may be found where the defendant's contacts with the state are unrelated to the cause of action, but are substantial, systematic and continuous."). Moreover, because the Complaint has failed to allege ***any*** activity by Allied Corporation related to its claims, it has also failed to establish the existence of specific personal jurisdiction in this District. The plaintiff bears the burden of establishing personal jurisdiction (*Robinson*, 21 F.3d at 507), and the Complaint has failed to establish personal jurisdiction over Allied Corporation on any basis.

"A relationship among the defendant, the forum, and the litigation is the essential foundation of specific jurisdiction." *Bangura v. Pennrose Mgmt. Co.*, No. 09-CV-4017, 2010 U.S. Dist. LEXIS 59450, at *6-7 (D.N.J. June 15, 2011) (*citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)) (internal quotations omitted). For specific

personal jurisdiction to exist, New York's long arm statute must authorize jurisdiction, and that exercise of jurisdiction must satisfy federal due process requirements. *Marsalis v. Schachner*, No. 01-CV-10774, 2002 U.S. Dist. LEXIS 10157, at *6-7 (S.D.N.Y. June 6, 2002). New York's long arm statute permits a court to exercise jurisdiction over a non-domiciliary defendant if the defendant transacts business in New York, and the cause of action arises out of that business activity. *Credit Lyonnais Sec., Inc. v. Alcantara & Cavelba, S.A.*, 183 F.3d 151, 153 (2d Cir. 1999). The exercise of specific jurisdiction "requires, at a bare minimum, that the complaint adequately allege a tortious act committed by [the defendant.]" *Shpak v. Curtis*, No. 10-CV-1818, 2011 U.S. Dist. LEXIS 109011, at *23 (E.D.N.Y. Sep. 26, 2011).

The Complaint fails to allege any acts by Allied Corporation in this jurisdiction. The only action that may plausibly be construed as an act committed in New York is a vague allegation that "at least one of the defendants transacts business in this judicial district, including by transferring and selling loans to other mortgagees and purchasers in this district, including J.P. Morgan Chase, and/or an act proscribed by 31 U.S.C. § 3729 occurred in this judicial district." Compl. ¶ 14. The Complaint never states which defendant conducted what business, when it was conducted, whether that business was even conducted in New York, or whether this claim properly arises out of that conduct. The Complaint's only substantive allegations against Allied Corporation are conclusory, and legally incorrect statements that Allied Corporation is the successor to Allied Capital, about whom the Complaint focuses all of its substantive allegations. *See, e.g.*, Compl. ¶¶ 19, 50, 135, 141. *See also Allied Home Mortg. Corp. v. Donovan*, No. 11-CV-3864, 2011 U.S. Dist. LEXIS 131396, at *21-26 (S.D. Tex. Nov. 15, 2011) (ruling that the Asset Purchase Agreement between Allied Corporation and Allied Capital did not make Allied

Corporation liable as a successor to Allied Capiltal); *McKee v. Am. Transfer & Storage*, 946 F. Supp. 485, 487 (N.D. Tex. 1996) (noting that Texas law does not recognize successor liability).

The Complaint never once states that Allied Corporation submitted any claims or papers to any government agency, let alone where those actions took place. Instead, the Complaint conflates the actions of Allied Capital and Allied Corporation by defining the two entities together as "Allied," and subsequently using this defined term to refer to conclusory violations. *See, e.g.*, Compl. at 2, and ¶¶ 1, 11.

The Complaint's allegations fail to establish any contacts with New York, let alone the minimum contacts required in order to "not 'offend traditional notions of fair play and substantial justice.'" *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 152 (2d Cir. 2001) (citation omitted). Even if this Court were to somehow construe the vague allegations of business with J.P. Morgan Chase as business transactions in the state (*see* Compl. ¶ 14), insinuations of doing business with companies in New York cannot meet the standards required for due process. *See Maranga v. Taj Maran Int'l Corp.*, 386 F. Supp. 2d 299, 308 (S.D.N.Y. 2005) ("Besides the telephonic and mail-based portions of the negotiation of the contract, the plaintiffs can only offer two other circumstances that they claim indicate transaction of business in New York: Defendants' placement of advertisements in Indian Abroad and Gujarat Times, and Defendants' acquisition of financial and banking information from the plaintiffs in a manner alleged to raise an inference that Defendants used New York banking institutions in undertaking their 'due diligence about the plaintiff's credit worthiness.' Neither is sufficient."); *Mortg. Funding Corp. v. Boyer Lake Pointe, LC*, 379 F. Supp. 2d 282, 287 (E.D.N.Y. 2005) (finding that defendants who had made two phone calls and one mailing to New York plaintiffs did not "actively project themselves into New York in this instance.").

Regardless of whether the government attempts to establish personal jurisdiction under 31 U.S.C. § 3732(a), or under 28 U.S.C. § 1331, it must allege specific facts regarding Allied Corporation that establish jurisdiction. *In re Magnetic Audiotapes Antitrust Litig.*, 334 F.3d at 206 ("the plaintiff's *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited ... would suffice to establish jurisdiction over the defendant."). Instead, the Complaint has not alleged any actions by Allied Corporation, and relies on repetition of the wholly conclusory allegation that Allied Corporation is the successor to Allied Capital. Because it has failed to allege any actions by Allied Corporation in New York, the Complaint has failed to establish the existence of personal jurisdiction over Allied Corporation. Thus, Allied Corporation respectfully requests that the Court dismiss the Complaint against it pursuant to Fed. R. Civ. P. 12(b)(2). *See United States ex rel. Watine v. Cypress Health Sys. of Fla., Inc.*, No. 1:09-CV-137, 2011 U.S. Dist. LEXIS 74768, at *16 n.3 (N.D. Fla. July 11, 2011) ("Because Plaintiff has failed to show that Cypress Wyoming is a proper party to this action, Plaintiff cannot use the jurisdictional grant of 31 U.S.C. § 3732 to establish personal jurisdiction. Consequently, and because Plaintiff has failed to show Cypress Wyoming has any minimum contacts with this forum, this Court also cannot say it has personal jurisdiction over Cypress Wyoming.").

II. The Government Has Failed to Establish that this District is an Appropriate Venue

The Complaint alleges that venue is proper in the Southern District of New York "because at least one of the defendants transacts business in this judicial district, including by transferring loans and selling loans to other mortgagees and purchasers in this district, including J.P. Morgan Chase . . . ." Compl. ¶ 14. The Complaint states no facts in support of this allegation. The only specific connection to New York ever mentioned in the Complaint is that

Allied Capital — not Allied Corporation — formerly held a New York mortgage license, and submitted information about its branches in connection with its license application. Compl. ¶ ¶ 17, 62, 63.

More importantly, the Complaint specifically concedes that all four named defendants are residents of Texas. Compl. ¶¶ 17-21. Further, the Complaint does not specify: any single claim for payment that was supposedly fraudulent; where any loans were originated; where the property associated with those loans was located; or where the claims were signed or submitted. Such bare allegations do not begin to establish that venue in this District is proper.

a. Because the Government Has Failed to Establish Personal Jurisdiction, Venue is Necessarily Improper

The test for proper venue is stricter than that for personal jurisdiction: "It would be error, for instance, to treat the venue statute's 'substantial part' test as mirroring the minimum contacts test employed in personal jurisdiction inquiries." *Glasbrenner*, 417 F.3d at 357. *See also Cold Spring Harbor*, 762 F. Supp. 2d at 553 ("'Substantiality' for venue purposes is more a qualitative than a quantitative inquiry, determined by assessing the overall nature of the plaintiff's claims and the nature of the specific events or omissions in the forum, and not by simply adding up the number of contacts."). Because the Complaint has failed to establish that this Court has personal jurisdiction over Allied Corporation, then venue is necessarily improper in this District as well. *See* § I, *supra*.

b. The Allegations Fail to Establish any Connection to New York

The requirements for venue in a case brought under federal question jurisdiction are stated in 28 U.S.C. § 1391(b):

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2)

> a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

The Complaint alleges that venue is appropriate based on 28 U.S.C. § 1391(b)(1) and § 1391(c).[2] Under section 1391(b)(1), venue would only be appropriate in Texas, since the Complaint concedes that all four defendants are residents of Texas. Compl. ¶¶ 17-21. *See Daniel v. Am. Bd. Of Emergency Med.*, 428 F.3d 408, 431 (2d Cir. 2005) ("Plaintiffs' reliance on § 1391(b)(1) merits little discussion because all defendants do not reside in New York state."); *Henneghan v. Smith*, No. 09-CV-7381, 2011 U.S. Dist. LEXIS 17755, at *11 n.3 (S.D.N.Y. Feb. 17, 2011) (noting that courts "prefer the more reasonable reading [of § 1391(b)(1)] that venue is proper in a judicial district where any defendant resides *in the state* in which all defendants reside.") (emphasis in original).

The only connection to New York alleged against Allied Corporation is a vague allegation that "one of the defendants" transacts business in this District. Compl. ¶ 14. While the Complaint asserts that "one of the defendants" transacts business with J.P. Morgan Chase, the Complaint never states why this would make venue appropriate in New York, or whether those business dealings are the impetus for this matter.

Venue may be proper in multiple districts, but only when a substantial part of the underlying events have taken place in those districts. *Glasbrenner*, 417 F.3d at 356. Here the Complaint does not rely on 28 U.S.C. § 1391(b)(2), but that section would not be availing to the government in any event. The Complaint has not alleged with any specificity any of the events allegedly giving rise to false claims.

[2] Section 1391(c) merely states that, for the purposes of venue, a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. The government has failed to allege facts sufficient to establish the existence of personal jurisdiction over Allied Corporation. *See* § I, *supra.*

To determine if venue is appropriate under § 1391(b)(2), a court must: 1) identify the nature of the claims and the alleged acts or omissions giving rise to the claims, and 2) determine whether a substantial part of the acts or omissions occurred in the district where the suit was filed. *Cold Spring*, 762 F. Supp. 2d at 553. The Court cannot perform that analysis in this case, because the Complaint fails to specify a single loan, who made the false statement about the loan, when the statement was made, where the statement was made, or how the statement was false. *See Rombach*, 355 F.3d at 170-171. Moreover, courts must "take seriously the adjective 'substantial.'" *Glasbrenner*, 417 F.3d at 357. "That means for venue to be proper, *significant* events or omissions *material* to the plaintiff's claim must have occurred in the district in question . . . ." *Id.* (emphasis in original). Because the Complaint has failed to allege any facts whatsoever supporting its claim of venue in this District, it has failed to establish that venue is proper in this District, and Rule 12(b)(3) requires dismissal.

c. Venue Is Improper Pursuant to the False Claims Act Because the Government Fails to Allege Concert of Action Amongst Defendants

The Complaint also alleges that venue is proper in this District pursuant to 31 U.S.C. § 3732(a). Compl. ¶ 14. Section 3732(a) is the venue provision of the FCA, and states: "[a]ny action under section 3730 [of the FCA] may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred."

The Complaint fails, however, to allege that Allied Corporation transacts any business in this District. The Complaint also fails to allege that Allied Corporation was involved with the alleged activities, instead alleging only that Allied Corporation is joined as a successor to Allied Capital.

Section 3732(a) does not authorize the joinder of multiple defendants where those defendants are not alleged to have participated in the alleged activity, and thus venue is improper in this District as to Allied Corporation under § 3732(a) as well. *United States ex rel. Smith v. Yale Univ.*, No. 3:02-CV-1205, 2006 U.S. Dist. LEXIS 12304, at *19-20 (D. Conn. March 7, 2006) ("Although the False Claims Act provides that if one defendant can be 'found' in a jurisdiction, venue is proper for all other defendants in the same action who are involved in the same false claims, this does *not* mean that defendants accused of similar but *unrelated* conduct may be sued in that same district.") *vacated on other grounds by* 2006 U.S. Dist. LEXIS 24847 (D. Conn. Apr. 28, 2006); *United States v. St. Joseph's Reg'l Health Ctr.*, 240 F. Supp. 2d 882, 886 (W.D. Ark. 2002) ("The Court does not find that the presence of the two Pennsylvania hospitals is sufficient to establish venue pursuant to 31 U.S.C. § 3732(a). As St. Joseph's points out, the Complaint . . . alleges no conspiracy or concert of action or joint and several liability between the defendants. Thus, there is no claim that would justify joinder of the relator's claims against St. Joseph's with its claims against the two Pennsylvania hospitals . . . .").

III. The Government Fails to State a Claim Against Allied Corporation

The Complaint bases its claims against Allied Corporation on some unspecified notion of "successor liability." A valid claim for successor liability is not stated, because Allied Corporation and Allied Capital are both Texas companies. Texas does not recognize successor liability. The Complaint also fails to allege any actions by Allied Corporation. This makes the claims for violations of the FCA and FIRREA implausible under the Supreme Court's rulings in *Twombly* and *Iqbal*. The failure to allege any actions by Allied Corporation also violates Rule 9(b)'s heightened pleading standard for fraud. Since the Complaint's bare allegations against

Allied Corporation do not state a valid claim within the meaning of Rule 12(b)(6), the Complaint should be dismissed, with prejudice, as to Allied Corporation.

a. The Government Has Failed to Establish Successor Liability

The government's case against Allied Corporation is based wholly on a theory of successor liability. *See, e.g.*, Compl. ¶ 19 ("Allied Corporation is also the successor entity to, and a mere continuation of, Allied Capital . . . ," relying on the purchase of branch offices by Allied Corporation from Allied Capital, and common officers, accounting, information technology, and quality control departments); ¶ 50 ("In late 2010 and early 2011, Allied switched all of its remaining approved branches from the ownership of Allied Capital to Allied Corporation . . . ."); ¶ 135 ("Allied Corporation (as successor to Allied) . . . "); ¶ 141 ("Allied Corporation (as successor to Allied) . . . ."). The foundation of the government's case is fundamentally flawed.

Strangely missing from the complaint is any mention of the Asset Purchase Agreement between Allied Capital and Allied Corporation. *Allied Home Mortg.*, 2011 U.S. Dist. LEXIS 131396, at *21-22. Pursuant to that Agreement, Allied Corporation acquired branch offices from Allied Capital, as Judge Harmon found. *Id.* at *22. Judge Harmon explained why Allied Corporation was not liable as a successor to Allied Capital. *Id.* at *22-26. Both Allied Home Mortgage Capital Corporation and Allied Corporation are Texas corporations, and "Texas law does not generally recognize successor liability for subsequent purchasers of corporate assets." *McKee*, 946 F. Supp. at 487.

Successor liability is determined by the law of the state in which the company is incorporated. *See Soviet Pan Am Travel Effort v. Travel Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991) ("Because a corporation is a creature of state law whose primary purpose is to

insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away."). *See also State of New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 207-210 (2d Cir. 2006) (applying state successor liability law under the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, because "a mere federal interest in uniformity is insufficient to justify displacing state law in favor of federal common law.") (citations omitted); *United States ex rel. Pilecki-Simko v. The Chubb Inst.*, No. 06-CV-3562, 2010 U.S. Dist. LEXIS 27187, at *50-53 (D.N.J. March 22, 2010) (applying New Jersey law to successor liability for false claims).

Both Allied Home Mortgage Capital Corporation and Allied Corporation are Texas corporations. Compl. ¶¶ 17-18. Thus, Texas law is the appropriate measure to determine the successor liability of Allied Corporation. Additionally, the asset purchase agreement specifically designates Texas in its choice of law clause. *Allied Home Mortg.*, 2011 U.S. Dist. LEXIS 131396, at *22 (finding that the asset purchase agreement between Allied Corporation and Allied Home Mortgage Capital Corporation should be construed under Texas law).

Under Texas law, "a person acquiring [all or part of the property of a domestic entity] may not be held responsible or liable for a liability or obligation of the transferring domestic entity that is not expressly assumed by the person." Tex. Bus. Org. Code § 10.254(b). Texas law also explicitly states that an asset purchase "is not a merger or conversion for any purpose." Tex. Bus. Org. Code § 10.254(a). Moreover, Texas has rejected the "mere continuation" exception to the Restatement's general principle that successor liability does not attach to an entity purchasing another entity's assets. *Mudgett v. Paxson Machine Co.*, 709 S.W.2d 755, 758 (Tex. App. 1986) ("Certainly if the de facto merger doctrine is contrary to the public policy of our state, so must be the mere continuation doctrine. In any event, we decline to impose liability

upon an acquiring corporation under either theory in the face of clear legislative intent to the contrary."). *See also Sitaram v. Aetna US Healthcare of N. Tex., Inc.*, 152 S.W.3d 817, 826 n.8 (Tex. App. 2004) (noting the Texas legislature's elimination of the Restatement's general exceptions of de facto merger and "mere continuation").

The Complaint's allegations against Allied Corporation are nothing more than "labels and conclusions, and a formulaic recitation of the elements" that cannot sustain a cause of action under Rule 12. *Twombly*, 550 U.S. at 555. Such "threadbare recitals" of nothing more than the elements of a claim, "supported by mere conclusory statements," must be dismissed. *Iqbal*, 129 S. Ct. at 1949. *See also Cypress Health Sys.*, 2011 U.S. Dist. LEXIS 74768, at *15-16 ("And, although plaintiff does allege that the current administrator and a few key personnel of Cypress Florida also happen to be members or executive officers of Cypress Wyoming, Plaintiff does not allege any facts which would establish that the two entities are indeed the same entity. Without such a showing, and without any independent allegations against Cypress Wyoming, Plaintiff has failed to show that Cypress Wyoming should be joined as a party in this action."); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 10-CV-302, 2011 U.S. Dist. LEXIS 53359, at *25 (C.D. Cal. Apr. 20, 2011) (finding bare allegation of successor-in-interest liability insufficient); *In re Pharm. Indus. Average Wholesale Price Litig.*, 538 F. Supp. 2d 367, 391 (D. Mass. 2008) ("Each wrongful act alleged by the Relator implicates only Ortho-McNeil, not Johnson & Johnson, the corporate parent. . . Because [plaintiff] has not set forth facts that support a cause of action against Johnson & Johnson, the claims against Johnson & Johnson are dismissed.").

b. The Government Has Failed to Allege Any Activity by Allied Corporation that Violates the False Claims Act or FIRREA

The Complaint alleges no actions taken by Allied Corporation in support or furtherance of any allegedly fraudulent activity. The case against Allied Corporation relies exclusively on

the conclusory statement that it is the "successor" to Allied Capital. *See, e.g.*, Compl. ¶¶ 19, 135. The Complaint fails to allege a single submission to any agency by Allied Corporation. Notably, nowhere in the Complaint is it ever alleged that Allied Corporation participated in any action, let alone one that would subject it to penalties under the False Claims Act or FIRREA. *See, e.g., Allied Home Mortg.*, 2011 U.S. Dist. LEXIS 131396, at *29 ("As noted there are plenty of broad-sweeping accusations against, but no evidence of wrongdoing by, [Allied Corporation] since its acquisition of [Allied Capital].").

The government's "obligation to provide the 'grounds' of [its] 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. Here, the Complaint has failed to even allege a formulaic recitation of the elements of any claim against Allied Corporation — the government has instead alleged no actions taken by Allied Corporation or any agent or representative of Allied Corporation at all. *See, e.g., United States ex rel. Thomas v. Siemens, A.G.*, 708 F. Supp. 2d 505, 515-16 (E.D. Pa. 2010) (dismissing claims against a parent corporation where it only asserted the company was the parent organization, and contained no factual allegations regarding the parent corporation's direct involvement in any purported fraud).

The Complaint has stated nothing more than the government wants relief from Allied Corporation. Consequently, "the complaint has alleged — but is has not 'show[n]' — that the pleader is entitled to relief." *Iqbal*, 129 S. Ct. at 1950. These statements are nothing more than an "unadorned, the-defendant-unlawfully-harmed-me accusation," and such deficient allegations cannot state the basis of any claim. *Iqbal*, 129 S. Ct. at 1949. *See also Glassman v. Arlington Cnty, Va.*, 628 F.3d 140, 145 (4th Cir. 2010) ("To determine whether a plausible claim has been

asserted, we consider the *factual* allegations of the complaint to determine whether they plausibly show an entitlement to relief.") (emphasis in original).

c. The Government Has Failed to Plead its Claims with Particularity

Because the False Claims Act "is an anti-fraud statute . . . claims brought under the [False Claims Act] fall within the express scope of Rule 9(b)." *United States ex rel. Pervez v. Beth Israel Med. Ctr.*, 736 F. Supp. 2d 804, 810 (S.D.N.Y. 2010). Not only are FCA claims subject to Rule 9(b), but the claims the government alleges under FIRREA are also subject to Rule 9(b). 18 U.S.C. § 1006 and § 1014 both fall into Chapter 47 of Title 18, which is titled "Fraud and False Statements." Section 1006 requires the "intent to defraud," and § 1014 requires the actor to "knowingly make [a] false statement or report. . . ." Any action that sounds in fraud, such as the claims alleged in the Complaint, is subject to the heightened pleading requirements of Rule 9(b): "By its terms, Rule 9(b) applies to 'all averments of fraud.' This wording is cast in terms of the conduct alleged, and is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action." *Rombach*, 355 F.3d at 171.

Rule 9(b) requires the plaintiff to: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach*, 355 F.3d at 170. This heightened pleading standard is to ensure that fraud claims are "responsible and supported, rather than defamatory and extortionate." *Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502, 507 (7th Cir. 2007) (citations omitted); *see also Rombach*, 355 F.3d at 171 ("Rule 9(b) serves to . . . prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.") (*quoting In re Stac Elecs. Sec. Litig.*, 89

F.3d 1399, 1405 (9th Cir. 1996)); *United States ex rel. Marlar v. BWXT Y-12, LLC*, 525 F.3d 439, 445 (6th Cir. 2008) ("Rule 9(b) is also meant to protect defendants from 'spurious charges of immoral and fraudulent behavior.'").

The Complaint's sparse allegations against Allied Corporation fail to allege any of Rule 9(b)'s requirements. The only substantive allegation made against Allied Corporation throughout the Complaint is that Allied Corporation is allegedly the successor entity to Allied Capital, about whom the Complaint devotes the entirety of its factual allegations. But, as demonstrated in § III(a), *supra*, Allied Corporation has no successor liability for the actions of Allied Capital.

The Complaint fails to allege any false or fraudulent statements made by Allied Corporation, fails to discern who at Allied Corporation made the statements, fails to state where or when those statements were made, and fails to explain why any of these unspecified statements were allegedly fraudulent. *See Apex Maritime Co. v. OHM Enters., Inc.*, No. 10-CV-8119, 2011 U.S. Dist. LEXIS 35707, at *5-6 (S.D.N.Y. Mar. 31, 2011) (stating that a fraud claim must "inform each defendant of the nature of his alleged participation in the fraud."); *In re Crude Oil Commodity Litig.*, No. 06-CV-6677, 2007 U.S. Dist. LEXIS 47902, at *19 (S.D.N.Y. June 28, 2007) ("where multiple defendants are alleged to have committed fraud, the complaint must specifically allege the fraud perpetrated by each defendant, and 'lumping' all defendants together fails to satisfy the particularity requirement.").

These are the exact type of defamatory and extortionate allegations Rule 9(b) was designed to prevent, and the damage that has already been done by such spurious allegations is well-demonstrated by HUD's actions immediately after the filing of this Complaint, where HUD suspended Allied Corporation's operations based on the specious allegations contained in this

Complaint. *See, generally, Allied Home Mortg.*, 2011 U.S. Dist. LEXIS 131396. Tellingly, the U.S. District Court for the Southern District of Texas enjoined that suspension shortly thereafter, exactly because of the lack of detail and effort put forth by the Complaint in this action and in HUD's suspension action. *Allied Home Mortg.*, 2011 U.S. Dist. LEXIS 131396, at * 27 ("The Complaint has not produced evidence demonstrating that [Allied Corporation] has violated the law since it acquired most of [Allied Capital's] assets. Indeed it acknowledged at the hearing that the history of [Allied Corporation] since its acquisition of assets of [Allied Capital] is short and that evidence about it thus far is limited. Nevertheless [Allied Corporation's] figures in HUD's Credit Watch or Neighborhood Watch performance numbers reflect it is better than average in comparison to other FHA-insured mortgage lenders across the country. Moreover the vague and conclusory nature of the allegations . . . in the *qui tam* complaint . . . serves to obfuscate which corporation is responsible for what violations.").

Rule 9(b) serves as a threshold through which the Complaint must allege specific facts to pass. The Complaint has utterly failed to allege any specific facts about Allied Corporation regarding any of the claims it has alleged against Allied Corporation, and all claims should accordingly be dismissed as against Allied Corporation.

d. <u>The Government's FIRREA Claims Have No Basis in Law</u>

Allied Corporation has not violated 18 U.S.C. § 1006, because it only applies to individuals in their capacity as officers of an applicable institution. Since Allied Corporation is neither an individual nor an applicable institution, no viable claim is stated for a violation of 18 U.S.C. § 1006 (2011). To state a claim under 18 U.S.C. § 1006, the Complaint must allege:

> (1) that the defendant is an officer or employee of a lending institution organized under the laws of the United States; (2) that the defendant participated, shared in or received, either directly or indirectly, money, profit or benefit by and through any transaction of such institution; (3) that the defendant did such act or acts with

> intent to defraud the association; and (4) that such act or acts were done knowingly and willfully.

United States v. Griffin, 579 F.2d 1104, 1108 (8th Cir. 1978); *see also United States v. Hykel*, 461 F.2d 721, 723 (3d Cir. 1972).

Allied Corporation is the lending institution, not an officer or employee of one. Compl. ¶ 17. Further, the statute explicitly requires the lending institution to be "authorized or acting under the laws of the United States . . . the accounts of which are insured by the Federal Deposit Insurance Corporation or by the National Credit Union Administration Board . . . ." 18 U.S.C. § 1006. Allied Corporation is not organized under the laws of the United States. Allied Corporation is a state-chartered lending company, which is not, nor is it alleged to be, authorized or organized under the laws of the United States. Compl. ¶ 17. Moreover, Allied Corporation is not insured, nor is it alleged to be insured by, either the Federal Deposit Insurance Corporation or the National Credit Union Administration Board. For these reasons alone, the government's allegations fail against Allied Corporation under § 1006. But the government also fails to allege that Allied Capital had any intent to defraud HUD, or that it did so knowingly. Nor, indeed, can it, because the Complaint concedes HUD knew of, and acquiesced to, the actions now alleged to violate FIRREA. *See, e.g.,* Compl. ¶¶ 39-42, 45, 57, 61, 72, 88, 91-92. Thus, the government's claim under § 1006 must fail.

Similarly, 18 U.S.C. § 1014 requires a knowing submission by anyone of a false statement or report to a laundry list of organizations, including the Federal Housing Administration. For the same reasons that the government's FCA claims failed to allege scienter and false statements, the government has failed to plead plausibly that Allied Capital knowingly submitted any false statement or report in violation of § 1014. *See* § I(d), *supra*.

Finally, the government's alleged violations of 18 U.S.C. § 1014 cannot be sustained for any alleged action prior to July 30, 2008, because § 1014 did not prohibit false or fraudulent statements made to the Federal Housing Administration prior to that date. *See* FHA Modernization Act of 2008, 110 Pub. L. 289 § 2129(1), 122 Stat. 2842 (July 30, 2008) ("Section 1014 of title 18, United States Code, is amended in the first sentence by (1) inserting "the Federal Housing Administration," before "the Farm Credit Administration"; and (2) by striking "commitment, or loan" and inserting "commitment, loan, or insurance agreement or application for insurance or a guarantee."). *See United States v. Vanoosterhout*, 898 F. Supp. 25, 30 (D.D.C. 1995) ("The predicate act charged in the proposed new Count Six is a violation of 18 U.S.C. § 1014 . . . . This very specific statute makes it a crime knowingly to make any false statement or report or willfully to overvalue any land, property or security for the purpose of influencing in any way the action of any of a list of enumerated agencies or persons. SBA is not mentioned by name and is not among the listed generic types of agencies, and it follows that the proposed Count Six could not stand even if leave were granted to file it.") (footnote omitted). Here, the government's only alleged submissions were in 2006 and 2007 (Compl. ¶ 110), and thus § 1014 does not apply to these submissions.

CONCLUSION

The federal rules of civil procedure require plaintiffs to allege plausible claims to relief and require any allegations sounding in fraud to be pled with specificity. These requirements are particularly important where the coffers and the long arms of the federal government are involved. The government's broad-sweeping claims of wrongdoing here do not meet the standards set by the Supreme Court in *Twombly* and *Iqbal*, and fail to meet the heightened pleading standard required under Rule 9(b). Because the government makes no allegations

regarding Allied Corporation's activities anywhere in the Complaint, the government has failed to establish personal jurisdiction, proper venue, or state a claim against Allied Corporation. The Complaint should be dismissed, with prejudice, as to Allied Corporation.

DATED: March 23, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of March, 2012, a copy of the foregoing Memorandum in Support of Motion to Dismiss was served upon all parties and counsel of record via the Court's CM/ECF system.

/s/ Bruce E. Alexander
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