

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

<p>UNITED STATES OF AMERICA EX REL.          JAMES R. ADAMS and PUOY K.          PREMSRIRUT, Relators,  <i>Plaintiffs-Appellants,</i></p> <p>v.</p> <p>AURORA LOAN SERVICES, INC.; BAC          HOME LOANS SERVICING, LP; BANK          OF AMERICA, N.A.; J.P. MORGAN          CHASE BANK, N.A., for itself and as          successor by merger to Chase Home          Finance LLC; CITIMORTGAGE INC.;          COUNTRYWIDE HOME LOANS INC.;          EMC MORTGAGE LLC, FKA EMC          Mortgage Corporation; NATIONSTAR          MORTGAGE, LLC; OCWEN LOAN          SERVICING, LLC; ONEWEST BANK,          FSB; PHH MORTGAGE          CORPORATION; U.S. BANK NA;          WELLS FARGO BANK, NA,  <i>Defendants-Appellees.</i></p>
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No. 14-15031

D.C. No.  
2:11-cv-00535-  
RCJ-PAL

OPINION

Appeal from the United States District Court  
for the District of Nevada  
Robert Clive Jones, District Judge, Presiding

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Submitted February 12, 2016\*  
San Francisco, California

Filed February 22, 2016

Before: Barry G. Silverman and Richard C. Tallman,  
Circuit Judges and Robert S. Lasnik,\*\* Senior District  
Judge.

Opinion by Judge Silverman

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**SUMMARY\*\*\***

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**False Claims Act**

The panel affirmed the district court's dismissal of an appeal brought by relators in a False Claims Act suit against various lenders and loan servicers.

Relators alleged that the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") were federal

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\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\* The Honorable Robert S. Lasnik, Senior District Judge for the U.S. District Court for the Western District of Washington, sitting by designation.

\*\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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instrumentalities for purposes of giving rise to liability under 31 U.S.C. § 3729(b)(2)(A)(i) of the Act.

The panel held that a claim presented to Fannie Mae or Freddie Mac was not presented to an “officer, employee, or agent” of the United States under 31 U.S.C. § 3729(b)(2)(A)(i), because Fannie Mae and Freddie Mac are private companies, albeit companies sponsored or chartered by the federal government.

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**COUNSEL**

Sigal Chattah, Las Vegas, Nevada, for Relators/Plaintiffs-Appellants.

Mark P. Guerrero, Sean C. Griffin, Sidley Austin LLP, Washington, D.C.; Mark E. Haddad, Douglas A. Axel, Sidley Austin LLP, Los Angeles, California, for Defendants-Appellees.

Stuart F. Delery, Assistant Attorney General, Daniel G. Bogden, United States Attorney, Michael S. Raab and Melissa N. Patterson, Attorneys, Appellate Staff, United States Department of Justice, Washington D.C., for Amicus Curiae United States of America.

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## OPINION

SILVERMAN, Circuit Judge:

The question presented by this appeal is whether the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) are officers, employees, or agents of the federal government for purposes of the False Claims Act, 31 U.S.C. § 3729(b)(2)(A)(i). Upon de novo review, *U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015) (en banc), we hold they are not.

The relators brought a False Claims Act suit against various lenders and loan servicers. In a nutshell, the relators alleged that defendants certified that loans purchased by Fannie Mae and Freddie Mac were free and clear of certain home owner association liens and charges when they were not. The relators alleged that these false certifications were made to Fannie Mae and Freddie Mac as instrumentalities of the United States.

As amended in 2009, the False Claims Act includes two definitions of the sort of “claim” that may give rise to liability under the statute. The first definition, in 31 U.S.C. § 3729(b)(2)(A)(i), requires that a demand or request for payment be “presented to an officer, employee or agent of the United States.” Relators allege that Fannie Mae and Freddie Mac are “federal instrumentalities” for the purposes of § 3729(b)(2)(A)(i) of the False Claims Act, either under our case law or as a result of the government’s conservatorship. Relators make no argument that the second definition of “claim,” found in § 3729(b)(2)(A)(ii), applies. To the extent the district court broadly held that claims made to Freddie

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Mac and Fannie Mae could never be “claims” within the FCA’s definition of that term, the district court was mistaken. A properly pled claim under § 3729(b)(2)(A)(ii) could give rise to FCA liability, but not as alleged in the three amended complaints pled here.

The district court properly held that a claim presented to Fannie Mae or Freddie Mac is not presented to an “officer, employee or agent” of the United States. And that’s because Fannie Mae and Freddie Mac are private companies, albeit companies sponsored or chartered by the federal government. 12 U.S.C. § 1716b (Fannie Mae is a “Government-sponsored private corporation”); 12 U.S.C. § 1452 (Freddie Mac is “a body corporate under the direction of a Board of Directors” elected annually by the voting common stockholders). *See also Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (charter disclaimer of government entity status dispositive for matters within Congress’s control); *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492 (D.C. Cir. 2004) (False Claims Act coverage is a matter within Congress’s control), *cert. denied*, 544 U.S. 1032 (2005). The United States filed a helpful and well-reasoned amicus brief agreeing with this conclusion.<sup>1</sup>

Our prior decision in *Rust v. Johnson*, 597 F.2d 174 (1979), where we held that Fannie Mae was a federal instrumentality for state/city tax purposes, does not change

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<sup>1</sup> We also agree with the government that provisions in 12 U.S.C. § 4617 abrogating federal status for “limited-life regulated entities” are inapplicable in this case, because there is no receivership in place, only a conservatorship. *Compare* 12 U.S.C. § 4617(b)(2)(D) *with* § 4617(b)(2)(E–F) (creation of limited-life regulated entity authorized by receiver but not conservator).

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the result, because *Rust* does not address Fannie Mae or Freddie Mac's status under the False Claims Act. As we have previously held, just because an entity is considered a federal instrumentality for one purpose does not mean that the same entity is a federal instrumentality for another purpose. *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1185 (9th Cir. 2004). Fannie Mae's federal instrumentality status for state tax purposes doesn't answer whether Fannie Mae and Freddie Mac are also government entities for False Claims Act purposes. See *Lewis v. United States*, 680 F.2d 1239, 1242–43 (9th Cir. 1982).

Nor does the Federal Housing Finance Agency's conservatorship transform Fannie Mae and Freddie Mac into federal instrumentalities. We agree that the FHFA has "all the rights, titles, powers and privileges of" Fannie Mae and Freddie Mac. *City of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 993 (9th Cir. 2013) (quoting 12 U.S.C. § 4617(b)(2)(A)(i)). However, this places FHFA in the shoes of Fannie Mae and Freddie Mac, and gives the FHFA *their* rights and duties, not the other way around.

Relators' further reliance on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, in support of their conservatorship argument does not change our view. In *Lebron*, the Supreme Court held that Amtrak was a part of the federal government for purposes of the First Amendment because, among other things, the government retained for itself permanent authority to appoint a majority of the corporation's directors. *Lebron*, 513 U.S. at 400. Even assuming that *Lebron* outlines the correct analytical framework for False Claims Act purposes, relators' argument still fails, because relators do not allege that the conservatorship represents the federal government's retention

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of permanent authority to control Fannie Mae and Freddie Mac.

We express no opinion about whether the relators could state a claim under 31 U.S.C. § 3729(b)(2)(A)(ii), which defines a claim as a request or demand made upon non-governmental third parties under certain conditions, because relators raised no argument on that point in the district court, nor here on appeal – not even after this possibility was pointed out in the government’s amicus brief. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

Likewise, relators do not contend that they should have been granted leave to file a fourth amended complaint. Their argument is solely that Fannie Mae and Freddie Mac are agencies or instrumentalities of the federal government for purposes of 31 U.S.C. § 3729(b)(2)(A)(i). As we have explained, they are not.

The judgment of the district court is **AFFIRMED**.

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:



- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

### United States Court of Appeals for the Ninth Circuit

### BILL OF COSTS

This form is available as a fillable version at:

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**Note:** If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

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Attorney for:

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Date

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