

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

O

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex)	Case No. CV 12-03624 DDP (SSx)
rel BRIAN HASTINGS,)	
)	ORDER GRANTING JOINT MOTION TO
Plaintiff,)	DISMISS PLAINTIFF'S FIRST AMENDED
)	COMPLAINT
v.)	
)	[DOCKET NUMBER 72]
WELLS FARGO BANK, NATIONAL)	
ASSOCIATION (INC.),)	
individually as s/b/m with)	
WELLS FARGO HOME MORTGAGE,)	
INC.; COUNTRYWIDE HOME)	
LOANS, INC.; COUNTRYWIDE)	
HOME LOANS SERVICING, LP)	
n/k/a BAC HOME LOANS)	
SERVICING, LP; et al.,)	
)	
Defendants.)	

Before the court is Defendants' Joint Motion to Dismiss Plaintiff Brian Hastings' First Amended Complaint. (Dkt. No. 72.) The motion is fully briefed. Having considered the parties' submissions and heard oral argument, the court adopts the following order.

I. Background

Plaintiff-relator Brian Hastings ("Plaintiff") is a real estate agent who seeks to bring this action on behalf of the United

1 States for alleged violations of the False Claims Act, 31 U.S.C. §§
2 3729 et seq. Defendants are lending institutions that have been
3 approved by the Federal Housing Administration ("FHA"). Plaintiff's
4 First Amended Complaint ("FAC") alleges that Defendants have made
5 false claims to the government in relation to federal mortgage
6 insurance policies issued pursuant to the National Housing Act
7 ("NHA"), 12 U.S.C. § 1709(a). The United States has declined to
8 intervene to prosecute the claim. (Dkt. No. 18.)

9 The FHA, part of the Department of Housing and Urban
10 Development ("HUD"), is authorized to provide mortgage insurance
11 for single-family home loans to help low and moderate income
12 families purchase a home. See 12 U.S.C. § 1709(a). The FHA does
13 this by providing mortgage insurance on single-family home mortgage
14 loans originated by FHA-approved lenders under prescribed terms.
15 Id. To obtain an insurance certificate, an FHA-approved lender must
16 certify that the mortgage is compliant with applicable statutes and
17 HUD regulations. See 12 U.S.C. § 1715Z-21(e); 24 CFR § 203.5(a)-
18 (c). Once an insurance certificate is issued, if a borrower
19 subsequently defaults on its payment obligation under the mortgage,
20 the FHA-approved lender may submit a claim for insurance benefits
21 to HUD.

22 **A. Plaintiff's First Amended Complaint**

23 Plaintiff's FAC alleges that Defendants have submitted claims
24 for insurance benefits to HUD based on false certifications of
25 compliance with a provision of the NHA that, during the relevant
26 period, mandated that borrowers made at least a 3 percent down
27 payment on the property before a mortgage may be issued. See 12
28

1 U.S.C. § 1709(b)(9) (“[T]he mortgagor shall have paid on account of
2 the property ... at least 3 per centum”).¹

3 Under HUD’s rules and regulations, the required 3 percent down
4 payment may be made through the use of a gift from certain
5 designated sources, including charitable organizations. See HUD
6 Handbook 4155.1, Revision 4, Change 1, Paragraph 2-10(C) (“HUD
7 Handbook 4155.1”). Importantly for this action, however, “[n]o
8 repayment of the gift may be expected or implied.” Id. Since 2000,
9 HUD has had a policy that “[m]ortgage lenders are responsible for
10 assuring that the gift to the home buyer from the charitable
11 organization meets the instructions described in HUD Handbook
12 4155.1, Rev. 4, Change 1 (e.g. no repayment implied, etc.).” HUD
13 Mortgagee Letter 00-8 (Mar. 3, 2000) at 4-5 (FAC Ex. C).
14 Specifically, the lender must document the transfer of the funds
15 from the donor to the borrower, including placing a gift letter
16 signed by the donor and borrower in the loan file submitted to FHA
17 specifying the dollar amount and stating that no repayment is
18 required. See HUD Handbook 4155.1.

19 The gravamen of Plaintiff’s FAC is that Defendants have
20 falsely certified compliance with the 3 percent down payment
21 requirement by endorsing loans made possible through down payment
22 assistance gift programs (“DAPs”) which Plaintiff alleges
23 circumvented the 3 percent requirement. (See FAC ¶¶ 63-84.) Under
24 the DAP model, which was pioneered by a non-profit charity
25 organization called the Nehemiah Corporation of America

26
27 ¹ In 2008, the requirement was modified to 3.5 percent. See
28 Housing and Economy Recovery Act of 2008, Public Law 110-289
Section 2113 (July 30, 2008).

1 ("Nehemiah"), the charity provides the borrower with funds to pay
2 the down payment. After the loan closes, the lender then pays the
3 charity a service fee or contribution that is equivalent to or
4 exceeds the amount given to the borrower by the charity. Plaintiff
5 alleges that, under these programs, the sales price of the home is
6 increased to account for the contribution the seller makes to the
7 charity to reimburse the charity's gift to the borrower. The
8 borrower thus ultimately ends up paying the down payment over the
9 course of the mortgage, making the charity's contribution to the
10 borrower a "false gift." (See, e.g., FAC ¶¶ 65-66, 75, 85.)
11 Plaintiff contends that this "sales price manipulation" renders
12 fraudulent the gift letters submitted by Defendants to obtain
13 insurance from FHA for the loans it has endorsed. (Id.)

14 Plaintiff makes various allegations to show that Defendants
15 were aware that sellers increased prices to finance DAPs. Plaintiff
16 alleges that the Nehemiah Program was explicitly presented to
17 mortgage lenders and real estate agents as designed to ensure that
18 the seller can "net the same amount" of money as it would have
19 received had the seller sold the home to an FHA-financed buyer who
20 did not need down payment assistance by shifting the cost of
21 participation in the program to the buyer through a higher sales
22 price. (Id. ¶¶ 65, 73.) Nehemiah's "Standard Program Guidelines"
23 from July 2000 explicitly contemplated how the program can be used
24 to "assist [the real estate agent] in obtaining a full price offer
25 on the home that can offset the costs of participating." (Id. ¶
26 68.) Plaintiff also cites the internal underwriting guidelines of
27 various Defendants which he contends show that they were aware that
28 Nehemiah-style programs do not provide true gifts for which

1 repayment is not required. (See id. ¶¶ 119-187.) Plaintiff points,
2 for example, to a Suntrust underwriting guidance document dated
3 August 29, 2005 noting that Nehemiah-style "seller funded non-
4 profit down payment assistance programs" "should not be confused
5 with other non-profit housing agencies that provide true gifts or
6 secondary financing to eligible borrowers." (See id. ¶ 121 and Ex.
7 K1.) Additionally, Plaintiff included as exhibits to his FAC a set
8 of real estate postings from August 1999 with comments from brokers
9 appearing to indicate that a higher sales price would apply in the
10 case of funding from a DAP. (See FAC Ex. U). The listings were
11 culled from a Multiple Listing Service ("MLS"), a mass database of
12 mortgage listings used by brokers. (FAC ¶ 10, 279.)

13 In relation to these allegations, Plaintiff asserts that
14 Defendants engaged in, *inter alia*, the following fraudulent
15 conduct:

- 16 • Defendants knowingly presented fraudulently obtained mortgage
17 insurance certificates and fraudulent claims to HUD to claim
18 and secure cash mortgage insurance benefits for noncompliant
19 mortgages. (Id. ¶¶ 104-17.)
- 20 • Defendants knowingly presented fraudulent claims that violated
21 HUD's regulation requiring compliance with the Federal Truth
22 in Lending Act, 15 U.S.C. §§ 1601 et seq., which provides that
23 all finance charges levied directly or indirectly on the buyer
24 must be disclosed to the buyer. (Id. ¶¶ 298-302.)
- 25 • Defendants prohibited gifts from Nehemiah-type programs with
26 conventional loans while allowing their use with FHA loans,
27 which amounted to "misrepresentative advertising" in violation
28 of HUD Handbook 4060.1, Paragraph 2-17. (Id. ¶¶ 328-30.)
- Defendants knowingly violated HUD regulations, 24 CFR §
203.5(c) and HUD Handbook 4000.4, Paragraph 2-5, which require
an FHA-approved lender to exercise the same level of care in
originating an FHA-insured loan as it would in originating a
loan in which the lender would be entirely dependent on
property as security to protect its investment. (Id. ¶¶ 30,
120-22, 411.)

1 • Defendants knowingly violated HUD's requirement of compliance
2 with state consumer protection laws, including Cal. Bus. &
3 Prof. Code §§ 17537 et seq., by falsely using the term "gift"
in representations to the public despite expecting repayment
of that "gift." (Id. ¶¶ 306-30.)

4 Plaintiff attached as appendices to his FAC lists of
5 foreclosure conveyance claims to HUD for dozens of mortgages
6 originated in 2007 and 2008 utilizing Nehemiah or Nehemiah-like
7 DAPs where the borrower ultimately defaulted. (FAC Apps. B & C.)
8 Plaintiff contends that these are representative of 35,201
9 fraudulent claims for insurance benefits by Defendants since May
10 20, 2009. (See FAC ¶ 364.) The contention that these claims are
11 false appears to rest on the assumption that any mortgage
12 originated with a Nehemiah-style DAP involved a "false gift" which
13 the buyer was required to repay through higher mortgage payments,
14 and thus the lender's certification of compliance with HUD
15 regulations, including the Handbook 4155.1's prohibition on gifts
16 that must be repaid, was fraudulent.

17 Based on the above allegations, Plaintiff's *qui tam* action
18 asserts sixteen False Claims Act claims, each against all
19 Defendants, on behalf of the United States. (Id. ¶¶ 383-438.) He
20 alleges approximate damages of \$7.48 billion plus civil penalties.
21 (Id. ¶¶ 365-74.)

22

23 **B. Judicially Noticeable Facts Cited by Defendants**

24 The utility and legal status of Nehemiah and Nehemiah-like
25 programs have been the subject of considerable debate within the
26 government since at least 1997. Defendants have pointed to the
27 following judicially noticeable facts which are relevant to the

28

1 court's analysis, particularly the jurisdictional inquiry that
2 decides this motion:

3 In December 1997, Nehemiah brought suit against HUD to obtain
4 a declaration that its DAP complied with HUD's down payment rules
5 and that mortgages using its DAP were eligible for FHA insurance.
6 See Nehemiah Progressive Hous. Dev. Corp. v. Coumo, No. 97-2311
7 (E.D. Cal.); (Brown Decl. Exs. 9 to 16.). Nehemiah complained that
8 after initially granting Nehemiah conditional approval, HUD then
9 indicated that the program was not compliant with HUD regulations.
10 (See Brown Decl. Ex. 9 ¶¶ 20-33.) HUD and Nehemiah settled the suit
11 on April 6, 1998. The settlement stated:

12 HUD has determined that plaintiff's down payment assistance
13 program ("DAP") is not in conflict with HUD's regulations and
14 administrative requirements. Plaintiff may operate that DAP
15 throughout the United States, in accordance with the approval
16 set forth herein and with HUD's existing regulations,
17 handbook, mortgage letters and other governing documents...
18 (Id. Ex. 17 at 1-2.)

19 However, HUD was apparently internally conflicted about the
20 DAPs. On September 14, 1999, HUD published for public comment a
21 proposed regulation that would have changed the down payment
22 requirements for FHA loans so as to prohibit the use of DAPs. See
23 64 Fed. Reg. 49956 (Sept. 14, 1999). HUD explained in proposing the
24 regulation that DAPs caused concern in part because when a borrower
25 uses a DAP, "the sales price is often increased so that the
26 seller's net proceeds are not diminished," which results in
27 increased risk to the FHA through potentially higher rates of
28 default on insured loans. Id.

On March 31, 2000, HUD's Office of the Inspector General ("HUD
OIG") issued a public audit on DAPs. It found that:

1 The programs do not meet the intent of FHA requirements in
2 that the assistance is not a true gift to the home buyer, and
3 because the nonprofit is reimbursed for the assistance by the
4 seller or builder. . . . In addition, some sellers increased the
5 house prices to cover fees paid to the nonprofit
6 organizations, which results in higher loan amounts and less
7 equity for the home buyer, and increases the risk to the FHA
8 insurance fund.

9 (Brown Decl. Ex. 18 at 7.) HUG OIG nevertheless acknowledged that
10 HUD had allowed the programs to operate and recommended that HUD
11 implement the then-still-pending proposed regulation. (Id. at 29,
12 36.)

13 In 2001, notwithstanding HUD OIG's recommendation, HUD
14 withdrew the proposed regulation after comments leaned decidedly
15 against the rule's adoption. See 66 Fed. Reg. 2851 (Jan. 12, 2001)
16 (noting that only 21 of 1,871 comments favored the rule).

17 On September 25, 2002, HUD OIG issued a second audit report
18 concerning the DAPs. (Brown Dec. Ex. 19.) The report noted a high
19 default rate among DAP assisted loans and reiterated its advice
20 that HUD adopt a rule largely prohibiting the use of DAPs. (Id. at
21 8-10.)

22 In November 2005, the Government Accountability Office ("GAO")
23 issued a report evaluating DAPs. (Brown Dec. Ex. 25.) The report
24 noted:

25 [P]roperty sellers often raised the sales price of their
26 properties in order to recover the contribution to the seller-
27 funded nonprofit that provided the down payment assistance. In
28 these cases, homebuyers may have mortgages that were higher
than the true market value price of the house and would have
acquired no equity through the transaction.

(Id. at 19-20.) The GAO also noted that "[m]arketing materials from
seller-funded nonprofits often emphasize that property sellers

1 using these down payment assistance programs earn a higher net
2 profit than property sellers who do not." (Id. at 14.)

3 In May 2007, HUD proposed, for the second time, a regulation
4 that would have prevented the use of DAPs in FHA-insured mortgages.
5 See 72 Fed. Reg. 27048 (May 11, 2007). In explaining the need for
6 the regulation, HUD stated that its "primary concern with these
7 transactions is that the sales price is often increased to ensure
8 that the seller's net proceeds are not diminished, and such
9 increase in sales price is often to the detriment of the borrower
10 and FHA." Id.

11 Despite opposition from members of Congress, HUD adopted the
12 proposed regulation in October 2007. See 72 Fed. Reg. 56002 (Oct.
13 1, 2007). However, within several months, two district courts
14 enjoined HUD from enforcing it. See Penobscot Indian Nation v. HUD,
15 539 F. Supp. 2d 40, 47 (D.D.C. 2008); Nehemiah Corp. of Am. v.
16 Jackson, 546 F. Supp. 2d 830, 848-49 (E.D. Cal. 2008); see also 73
17 Fed. Reg. 80297 (Dec. 19, 2008) (formally vacating the enjoined
18 regulation).

19 On July 30, 2009, Congress enacted the Housing and Economic
20 Recovery Act ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654. Section
21 2113 of HERA effectively barred DAPs by prohibiting a seller from
22 reimbursing "directly or indirectly" any third party contributing
23 to a borrower's down payment. 12 U.S.C. 1709(b)(9)(C). This
24 restriction applies to mortgages for which the mortgagee has issued
25 credit approval for the borrower on or after October 1, 2008. Id.

26 ///

27 ///

28 ///

1 **C. Procedural History**

2 This is the second FCA claim Plaintiff has filed in relation
3 to mortgages originated with DAP gifts. In an action initiated on
4 June 15, 2007, Plaintiff filed three complaints against 12 mortgage
5 lenders (including some of the defendants in the present case) with
6 allegations similar to those in the instant action. See United
7 States ex rel. Hastings v. Countrywide Home Loans, Inc., No. 07-
8 3897-JFW-PLA (C.D. Cal.) (Dkt. Nos. 1, 6, 23) ("2007 Action").
9 As in the present case, the 2007 Action alleged that the lenders
10 submitted false claims to the government on loans where the
11 borrower's down payments came from DAPs. As here, Plaintiff alleged
12 that the defendants had falsely certified that the loans were
13 compliant with the requirement that the borrower provide a 3
14 percent cash down payment as then required by 12 U.S.C. §
15 1709(b)(9) and HUD Handbook 4155.1's prohibition on down payment
16 assistance gifts where repayment of the gift is expected or
17 implied. (See 2007 Action, SAC ¶¶ 25, 27, 32, 35.) However, whereas
18 the instant case alleges an implied requirement that borrowers
19 repay the gift through a higher sales price, the earlier case
20 focused only on the seller who was allegedly contractually
21 obligated to reimburse the charity for the gift. (See id. ¶ 32.)
22 After the government declined to intervene, Plaintiff voluntarily
23 dismissed the action without prejudice under Federal Rule of Civil
24 Procedure Rule 41(a)(1)(A)(i) in June 2009. (Id. Dkt. No. 47.)

25

26 **II. Legal Standard**

27 Defendants moved to dismiss Plaintiff's FAC under both Federal
28 Rule of Civil Procedure 12(b)(1) (lack of subject matter

1 jurisdiction) and Rule 12(b)(6) (failure to state a claim upon
2 which relief may be granted).

3 **A. Rule 12(b)(1)**

4 A Rule 12(b)(1) dismissal is appropriate when the amended
5 complaint or extrinsic evidence fails to establish the court's
6 subject matter jurisdiction over the action. Roberts v. Corrothers,
7 812 F.2d 1173, 1177 (9th Cir. 1987). A plaintiff always bears the
8 burden of establishing subject matter jurisdiction, and the court
9 presumes a lack of jurisdiction until Plaintiff proves otherwise.
10 Stock W. Inc. v. Confederated Tribes of the Colville Reservation,
11 873 F.2d 1221, 1225 (9th Cir. 1989).

12 A Rule 12(b)(1) motion may challenge a complaint's allegations
13 on their face or by pointing to evidence outside of the complaint.
14 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.
15 2004); Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp.,
16 594 F.2d 730, 733 (9th Cir. 1979). In a factual challenge, once the
17 moving party has presented evidence tending to show a lack of
18 subject matter jurisdiction, the burden shifts to "the party
19 opposing the motion [to] furnish affidavits or other evidence
20 necessary to satisfy its burden of establishing subject matter
21 jurisdiction." Safe Air, 373 F.3d at 1309 (citations omitted). If
22 Plaintiff cannot establish the jurisdiction it seeks to invoke, the
23 court must dismiss the case under Rule 12(b)(1).

24 **B. Rule 12(b)(6)**

25 A complaint will survive a motion to dismiss under Rule
26 12(b)(6) when it contains "sufficient factual matter, accepted as
27 true, to state a claim to relief that is plausible on its face."
28 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl.

1 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). When considering a
2 Rule 12(b)(6) motion, a court must "accept as true all allegations
3 of material fact and must construe those facts in the light most
4 favorable the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th
5 Cir. 2000). Although a complaint need not include "detailed
6 factual allegations," it must offer "more than an unadorned, the-
7 defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at
8 678. Conclusory allegations or allegations that are no more than a
9 statement of a legal conclusion "are not entitled to the assumption
10 of truth." Id. at 679. In other words, a pleading that merely
11 offers "labels and conclusions," a "formulaic recitation of the
12 elements," or "naked assertions" will not be sufficient to state a
13 claim upon which relief can be granted. Id. at 678 (citations and
14 internal quotation marks omitted).

15

16 **III. Discussion**

17 **A. The False Claims Act's Jurisdictional Bar**

18 Federal courts have no power to consider claims for which they
19 lack subject matter jurisdiction. Bender v. Williamsport Area Sch.
20 Dist., 475 U.S. 534, 541 (1986). Accordingly, before considering
21 Defendants' argument that Plaintiff has failed to state a claim
22 upon which relief may be granted, the court must first consider
23 Defendants' contention that the court lacks subject matter
24 jurisdiction over Plaintiff's claims.

25 The False Claims Act deprives a district court of jurisdiction
26 over any *qui tam* action that is based upon allegations or
27 transactions already disclosed in certain public fora, unless the

28

1 relator is the original source of the information underlying the
2 action. Specifically, 31 U.S.C. § 3730(e)(4)(A) states:

3
4 No court shall have jurisdiction over an action under this
5 section based upon the public disclosure of allegations or
6 transactions in a criminal, civil, or administrative hearing,
7 in a congressional, administrative, or Government Accounting
8 Office report, hearing, audit, or investigation, or from the
9 news media, unless the action is brought by the Attorney
10 General or the person bringing the action is an original
11 source of the information.

12 In analyzing whether a claim is barred under this provision, a
13 court must conduct a two-tiered inquiry. First, the court must
14 determine whether there has been a prior "public disclosure" of the
15 "allegations or transactions" upon which the *qui tam* suit is based.
16 A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1243 (9th
17 Cir. 2000). Second, if there has been a qualifying public
18 disclosure, the court must inquire whether the relator is the
19 "original source of the information" contained in the disclosure.
20 Id. The *qui tam* relator bears the burden of establishing subject
21 matter jurisdiction by a preponderance of the evidence. See United
22 States v. Alcan Elec. & Eng'g, Inc., 197 F.3d 1014, 1018 (9th Cir.
23 1999).

24 **1. Public Disclosure**

25 "The 'public disclosure' standard is met if there were either
26 (1) public allegations of fraud 'substantially similar' to the one
27 described in the FCA complaint, or (2) enough information publicly
28 disclosed regarding fraudulent transactions so that the government
is on notice to either investigate further or to make a decision to
proceed with its own claim. It is not necessary for the public

1 disclosures to have specifically named a defendant, to have
2 provided explanatory details, or to have alleged overcharging,
3 false-invoicing, false certification, or any other specific fraud.”
4 Amphastar Pharm. Inc. v. Aventis Pharma SA, 2012 WL 5512466 at *6
5 (C.D. Cal. Nov. 14, 2012) (citing Alcan Elec., 197 F.3d at 1018
6 (9th Cir. 1999)); see also A-1 Ambulance, 202 F.3d at 1245.

7 Defendants contend that this court lacks jurisdiction of the
8 instant claims because numerous public disclosures discussing the
9 DAPs and the increases to sales prices associated with them
10 occurred prior to the filing of the instant complaint. (Motion at
11 17.) Indeed, as discussed above, Defendants point to numerous
12 public documents long before this action was filed in 2012
13 discussing the DAPs and their legal status under the National
14 Housing Act and HUD/FHA rules, including discussion of the practice
15 of sellers passing on the cost of financing DAP “gifts” through
16 higher sales prices.

17 For example, as to disclosures from administrative agencies,
18 as noted above, HUD OIG’s March 2000 report found that “some
19 sellers have raised the sales prices of properties to cover the
20 cost of the down payment assistance programs causing buyers to
21 finance higher loan amounts.” (Brown Decl. Ex. 18 at 1 (“HUD OIG
22 Report”).) Likewise, as noted above, the Government Accounting
23 Office’s 2005 report on DAPs found that homes with seller-funded
24 assistance tend to have higher sales prices. (Id. Ex. 25 at 19-20.)
25 Defendants point to similar public references to increased sales
26 prices associated with DAPs made in (i) other federal reports (see
27 id. Exs. 23 at 16; 24 at 36; 25 at 19-20); (ii) at Congressional
28 hearings (see id. Exs. 22 at 33; 27 at 12-13, 14, 28, 29; 29);

1 (iii) in Federal Register notices such as 72 Fed. Reg. 27048 (May
2 11, 2007) and 72 Fed. Reg. 56002 (Oct. 1, 2007); and (iv) in
3 judicial opinions, see Penobscot Indian Nation v. HUD, 539 F. Supp.
4 2d 40, 44-45 (D.D.C. 2008); Nehemiah Corp. of Am. v. Jackson, 546
5 F. Supp. 2d 830, 841 (E.D. Cal. 2008).

6 Defendants also point to articles in the news media. At least
7 one of the articles cited by Defendants squarely considered the
8 impact of DAPs on sales prices at a stage early in the development
9 of DAPs. A February 27, 1999 article in the Washington Post stated,
10 The Nehemiah program works only with the cooperation of
11 sellers, who pay a 4 percent fee to the nonprofit group. The
12 fee covers administrative costs and a 3 percent gift to the
13 buyer that the buyer uses for a down payment. Like other
14 seller-assisted sales, the costs are usually shifted to the
15 buyer via an increased price on the house.

16 (Brown Decl. Ex. 8 at 2.)

17 Plaintiff contends that these disclosures were not sufficient
18 under 31 U.S.C. § 3730(e)(4)(A) on several grounds, each of which
19 the court finds unconvincing. First, Plaintiff contends that the
20 public disclosures are insufficient because they do not refer to
21 the DAPs as "fraudulent" or mention the "sales price manipulation
22 scheme." (Opposition at 36-37.) However, such explicit reference to
23 fraud is not required for a disclosure to qualify under the
24 statute. Rather, as noted above, all that is required is that the
25 disclosures "contain[] enough information to enable the government
26 to pursue an investigation." Alcan Elec., 197 F.3d at 1019. As
27 discussed above, documents from HUD, GAO, the press, and
28 congressional hearings specifically considered DAPs in reference to
their impact on sale prices well before this action was filed.
These disclosures gave the government adequate notice to pursue

1 potential FCA claims against Defendants under the theory advanced
2 by Plaintiff in this action.

3 Second, Plaintiff contends that the prior disclosures are not
4 sufficient because they did not accuse any particular Defendant in
5 the present case of engaging in the alleged fraud. (Opp. at 38.)
6 This argument fails because, as noted above, it is "not necessary
7 for the public disclosures to have specifically named a defendant,"
8 so long as the disclosures provided the government with sufficient
9 notice of the alleged wrongdoing to enable it to investigate.
10 Amphastar, 2012 WL 5512466 at *6. The disclosures did so here.
11 Plaintiff contends that there are too many FHA lenders in the
12 marketplace for the earlier disclosures to have enabled the
13 government to investigate the conduct of Defendants in the instant
14 action. (Opp. at 37-38.) However, Plaintiff concedes in his FAC
15 that Defendants "dominate the FHA lending marketplace with the
16 majority market share." (FAC ¶ 270.) Defendants thus would have
17 been obvious targets of investigations of potential claims had the
18 government been inclined to pursue such investigations. (See Reply
19 at 5-6.)

20 Third, Plaintiff contends that the government reports,
21 inquiries, and actions cited by Defendants are insufficient because
22 they were motivated by and focused on high default rates, rather
23 than "sales price manipulation." (Opp. at 37.) However, the focus
24 of a document containing a disclosure is not relevant, so long as
25 the disclosure contains sufficient information to enable the
26 government to investigate the alleged fraud, which was plainly the
27 case here. See Amphastar, 2012 WL 5512466 at *6.

28

1 In short, the contention that DAPs resulted in higher prices
2 for consumers was part of a robust public debate well before
3 Plaintiff's FAC was filed. These disclosures were sufficient to put
4 the government on notice of the conduct of Defendants that
5 Plaintiff alleges violated HUD regulations under his inflated sales
6 price theory.

7 **2. Original Source**

8 Once the court finds that the allegations underlying the fraud
9 have been publicly disclosed, it only has subject matter
10 jurisdiction over the claim if the relator is an "original source
11 of the information." 31 U.S.C. § 3730(e)(4)(A). To be considered an
12 original source, the relator must show that "(1) he has direct and
13 independent knowledge of the information on which his allegation is
14 based; (2) he has voluntarily provided the information to the
15 Government before filing his *qui tam* action; and (3) he had a hand
16 in the public disclosure of allegations that are a part of the
17 suit." Meyer, 565 F.3d at 1201 (quoting United States v. Hughes
18 Aircraft Co., 162 F.3d 1027, 1033 (9th Cir. 1998)).

19 A relator has "direct and independent knowledge" for purposes
20 of § 3730(e)(4) where he "discovered the information underlying his
21 allegations of wrongdoing through his own labor." United States ex
22 rel. Devlin v. State of Cal., 84 F.3d 358, 360 (9th Cir. 1996)
23 (footnote omitted). The relator must have "firsthand" knowledge of
24 the alleged fraud. Id.

25 In Wang ex rel. United States v. FMC Corp., the Ninth Circuit
26 held that an engineer-relator who had been called in to study a
27 problem with a product had "direct and independent" knowledge of
28 the problem because "he saw [it] with his own eyes" and his

1 knowledge was "unmediated by anything but [his] own labor." 975
2 F.2d 1412, 1417 (9th Cir. 1992). Similarly, the court held in
3 United States ex rel. Barajas v. Northrop Corp. that an employee of
4 a government subcontractor who brought a *qui tam* action alleging
5 falsified testing had "direct and independent knowledge" of the
6 allegations because "he acquired [his knowledge] during the course
7 of his employment [by the subcontractor]." 5 F.3d 407, 411 (9th
8 Cir. 1993), cert. denied, 511 U.S. 1033 (1994).

9 By contrast, in Devlin, in the case of a *qui tam* action
10 brought by individuals who were informed by a state Department of
11 Social Services employee that the department had defrauded the
12 United States government by inflating client statistics to qualify
13 for increased federal funding, the court held that "the relators'
14 knowledge was not direct and independent because they did not
15 discover firsthand the information underlying their allegations of
16 fraud." 84 F.3d at 361. The court explained that relators "did not
17 see the fraud with their own eyes or obtain their knowledge of it
18 through their own labor unmediated by anything else, but derived it
19 secondhand from [an employee of the alleged department-perpetrator
20 of fraud], who had firsthand knowledge of the alleged fraud as a
21 result of his employment at [the department]." Id. The relator had
22 supplemented the information he obtained from the insider by
23 confirming with the parties for whom the perpetrator had
24 purportedly done work that the work was not in fact performed. Id.
25 But the court explained the relator "did not make a genuinely
26 valuable contribution to the exposure of the alleged fraud" because
27 "federal investigators would have done precisely the same thing
28

1 once the information provided by [the insider] had been made
2 public." Id.

3 In the instant case, Plaintiff's contention that he is an
4 original source is unsuccessful. With respect to the FAC, the facts
5 alleged fall well short of establishing original source status
6 because, among other things, the allegations lack dates (or even
7 rough time periods) for any alleged communications with the
8 government regarding allegations of fraud.² (See FAC ¶¶ 76-79.)
9 Plaintiff has alleged more specific facts in his Opposition and has
10 submitted with the Opposition various unauthenticated exhibits. As
11 Defendants point out, neither assertions made in motions nor
12 unauthenticated exhibits are admissible factual evidence under
13 Local Rule 7-6 and Federal Rule of Evidence 901. Moreover, even if
14 Plaintiff's contentions were offered in the form of admissible
15 evidence, they would not suffice to establish that Plaintiff is an
16 original source.

17 Plaintiff asserts that he learned of the Nehemiah program
18 operating in the resale home market on March 6, 1997 when he
19 received marketing materials from Nehemiah regarding the program,
20 which were apparently faxed throughout the Sacramento Realtor Board

21
22 ² Plaintiff alleges in the FAC that he criticized Nehemiah-
23 like programs in a patent application he filed on April 20, 1999.
24 (Id. ¶ 77-78.) However, in opposing Defendants' Joint Motion to
25 Dismiss, Plaintiff appears to abandon this basis for establishing
26 his original source status. In any case, a patent application
27 submitted to the Patent and Trademark Office, which has no
28 authority the FHA loan program, does not constitute an adequate
disclosure to the government in this case. See United States v.
Bank of Farmington, 166 F.3d 853, 866 (7th Cir. 1999) (explaining
that notice to the "United States Attorney, the FBI, or other
suitable law enforcement office of the information which is the
basis for the action, or by informing the agency or official
responsible for the particular claim in question" would constitute
adequate disclosure).

1 Area. (Opp. at 29-30, 31) Plaintiff then sent a letter to HUD on
2 March 10, 1997 in which he outlined his criticisms of the program
3 and enclosed the marketing materials. (Id.; Opp. Ex. 7.) He
4 contends that this establishes him as the original source of the
5 information on which his allegations are based. (Opp. at 31.)

6 Plaintiff's contentions fail for multiple reasons. First,
7 Plaintiff did not "discover firsthand the information underlying
8 [his] allegations of fraud." Devlin, 84 F.3d at 361. The only
9 factual information Plaintiff purports to have "discovered" was the
10 overall structure of the Nehemiah program as described by Nehemiah
11 itself in marketing materials it apparently sent to Plaintiff's
12 office (as well as numerous other realtors in the area), which
13 Plaintiff purportedly then forwarded to HUD. Even if the
14 information included sufficiently detailed information to
15 constitute alleged acts of fraud, Plaintiff's knowledge of the
16 Nehemiah program was secondhand and therefore not "direct." See
17 Devlin, 84 F.3d at 362; U.S. ex rel. Casady v. Am. Int'l Grp.,
18 Inc., 2013 WL 1702777 (S.D. Cal. Apr. 19, 2013) (relator may not
19 rely on information from third-party insider from the mortgage
20 industry to qualify as an original source of information); United
21 States ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703
22 (8th Cir. 1995) ("[A] person who obtains secondhand information
23 from an individual who has direct knowledge of the alleged fraud
24 does not himself possess direct knowledge and therefore is not an
25 original source under the [FCA].").

26 Second, it appears likely from Plaintiff's own exhibits that
27 the government was already well aware of the information Plaintiff
28 related to it. Plaintiff points to an email he purportedly sent to

1 HUD on March 20, 1997 alleging that seller funded DAPs resulting in
2 increased total transactions costs would violate HUD regulations.
3 (Opp. Ex. 8.) However, that letter refers to an earlier (undated)
4 letter sent by HUD to Nehemiah, which indicates that HUD had
5 previously been in communication with Nehemiah regarding the
6 contours of its DAP and expresses HUD's concerns regarding the
7 program's compliance with HUD rules. (See id. Ex. 5 (Letter from
8 HUD official to Nehemiah president commenting on "recent revisions"
9 to the program).) As HUD was apparently already closely monitoring
10 the Nehemiah program, Plaintiff seems to have related to the
11 government little if any factual information of which it was not
12 already aware or would have inevitably have learned. Plaintiff's
13 relaying of the information thus could not have made "a genuinely
14 valuable contribution to the exposure of the alleged fraud."
15 Devlin, 84 F.3d at 361.

16 The fact that, in addition to forwarding to HUD Nehemiah's
17 solicitation materials, Plaintiff also offered his view to HUD that
18 Nehemiah program violated HUD standards does not alter this
19 conclusion. (See Opp. at 42.) Identifying the legal consequences of
20 information already in the public domain does not constitute
21 discovery of fraud. See In re Natural Gas Royalties, 562 F.3d 1032,
22 1045 (10th Cir. 2009) ("A relator's ability to recognize the legal
23 consequences of a publicly disclosed fraudulent transaction does
24 not alter the fact that the material elements of the violation
25 already have been publicly disclosed."); United States v. Alcan
26 Elec. & Eng'g, Inc., 197 F.3d 1014, 1020 (9th Cir. 1999) (holding
27 that relator did not have "direct" knowledge because "his
28 investigation merely added a legal name to describe the alleged

1 circle of facts"); United States ex rel. Kreindler & Kreindler v.
2 United Technologies Corp., 985 F.2d 1148, 1159 (2d Cir. 1993)
3 (neither "collateral research and investigations" nor "background
4 knowledge that enabled him to understand the significance of the
5 information acquired" were sufficient to establish relator's direct
6 and independent knowledge of the allegedly fraudulent claims),
7 *cert. denied*, 508 U.S. 973 (1993); Wang, 975 F.2d at 1418 ("[W]here
8 the public knows of information proving an allegation, it
9 necessarily knows of the allegation itself."); Wood ex rel. U.S. v.
10 Applied Research Assocs. Inc., 2008 WL 2566728 at *3 (S.D.N.Y.
11 2008) ("[A relator's] personal hypothesis about what should be
12 concluded from publicly disclosed information does not qualify [the
13 relator] as an original source of information in order to sustain
14 an individual FCA claim on behalf of the government").³

15 Third, Plaintiff's observations to HUD in 1997 about the
16 likely consequences of the Nehemiah program does not constitute
17 direct and independent knowledge because it was excessively
18 speculative. Plaintiff's communications to HUD in 1997 only
19 described the Nehemiah program in general and the possibility that
20 the program would result in fraudulent claims; they did not include
21 any factual allegations of fraudulent claims. (See Opp. Exs. 5, 8,
22 11.) Indeed, as the Nehemiah program was apparently in its infancy
23 in 1997, Plaintiff likely could not have had knowledge of any
24 actual false claims to the government until years later. (See FAC

25
26 ³ As Defendants note, Hastings heavy reliance on U.S. ex rel.
27 Fine v. Chevron, USA, Inc., 39 F.3d 957 (9th Cir. 1994) is
28 misplaced because that opinion was vacated after the Ninth Circuit,
sitting *en banc*, held that the relator was not an original source.
See U.S. ex rel. Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 742
(9th Cir. 1995).

1 App'x A (listing mortgages originated in 2007 and 2008).)
2 "[B]ecause the purpose of the FCA is to encourage individuals with
3 true 'knowledge' of alleged wrongdoing to come forward and provide
4 such information to the Government, the purposes of the Act would
5 not be served by allowing a relator to maintain a *qui tam* suit
6 based on pure speculation or conjecture." United States ex rel.
7 Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 525-26 (9th
8 Cir. 1998).

9 Finally, to the extent that Plaintiff asserts that his
10 original source status derives from his submission of documents to
11 the government shortly before filing his Complaint in the instant
12 action (see Opp. at 41), this argument too is unsuccessful. Among
13 other exhibits, the FAC included records Plaintiff asserts he
14 obtained from a Multiple Listing Service, to which he had access as
15 a real estate agent in the employ of a real estate broker. (Id.) As
16 noted above, these records include a set of real estate postings
17 from August 1999 with comments marked "confidential," apparently
18 from brokers, appearing to indicate that a higher sales price would
19 apply in the case of funding from Nehemiah or a Nehemiah-like
20 program. (See FAC Ex. U). Plaintiff has also submitted as
21 appendices to his FAC lists of mortgages issued by Defendants that
22 were originated with Nehemiah assistance that have open liabilities
23 or foreclosure conveyance claims originated in 2007 and 2008,
24 apparently also obtained from the Multiple Listing Service
25 (although the origin is not specified). (See FAC Apps. A-C.)
26 Additionally, Plaintiff submitted corporate underwriting guidelines
27 issued by the Defendants which he contends demonstrate that
28 Defendants had knowledge that the gifts provided in DAPs were

1 false. (See FAC Exs. K1-K9.) Plaintiff asserts that he disclosed
2 some or all of the materials included with his FAC in a
3 communication delivered to office of HUD Inspector General David
4 Montoya on March 1, 2012; he filed his Complaint in the instant
5 action on April 26, 2012. (See Opp. Ex. 10; Dkt. No. 1.)

6 There are at least two reasons why these records do not
7 suffice to establish Plaintiff's original source status. First,
8 Plaintiff's knowledge obtained from sources such as a Multiple
9 Listing Service or like databases that are accessible to the public
10 or large numbers of real estate agents cannot be described as
11 firsthand. To hold otherwise "would mean that anyone - an insider
12 or an outsider - who conducts an investigation and learns of
13 alleged fraud from whatever sources [could] maintain a *qui tam*
14 action." U.S. ex rel. Hansen v. Cargill, Inc., 107 F. Supp. 2d
15 1172, 1185 (N.D. Cal. 2000), aff'd, 26 F. App'x 736, 737 (9th Cir.
16 2002). Second, the various reports cited by Defendants documenting
17 government concern regarding increased sales prices associated with
18 Nehemiah and Nehemiah-like DAPs, starting with the HUD OIG's March
19 31, 2000 report, (Brown Decl. Ex. at 7), demonstrate that the
20 government had sufficient information to investigate the claims
21 asserted here long before Plaintiff submitted the materials
22 included in his FAC to HUD in March 2012.

23 For these reasons, the court finds that Plaintiff has not
24 demonstrated that he is an "original source" of the many qualifying
25 public disclosures that preceded his filing of the instant action.
26 Accordingly, the court must dismiss this *qui tam* action for lack of
27 subject matter jurisdiction.

28

1 The court does not reach and states no opinion with respect to
2 Defendant's additional arguments in support of their Joint Motion
3 to Dismiss.

4

5 **IV. Conclusion**

6 For the reasons stated herein, Defendant's Motion is GRANTED
7 and the claim is dismissed for lack of subject matter jurisdiction.
8 Because amendment would be futile, the First Amended Complaint is
9 dismissed with prejudice. In addition, the Motion to Dismiss
10 (**DOCKET NUMBER 70**) is vacated as moot.

11

12 IT IS SO ORDERED.

13

14 Dated: July 15, 2014

15

16



DEAN D. PREGERSON

United States District Judge

17

18

19

20

21

22

23

24

25

26

27

28