

City of New York v Siemens Elec., LLC
2020 NY Slip Op 31136(U)
April 2, 2020
Supreme Court, New York County
Docket Number: 104330/2012
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 104330/2012

CITY OF NEW YORK, STATE OF NEW YORK, CITY OF
NEW YORK EX REL. CLIFFORD WEINER,

MOTION DATE _____

Plaintiffs,

**MOTION SEQ.
NO.** 007

- v -

SIEMENS ELECTRICAL, LLC. F/K/A SCHELESINGER-
SIEMENS ELECTRICAL, LLC, SIEMENS INDUSTRY, INC.
F/K/A SIEMENS ENERGY & AUTOMATION, INC.,
SCHLESINGER ELECTRICAL CONTRACTORS, INC.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342

were read on this motion to/for Amount of Award.

In this civil enforcement action, Clifford Weiner, the relator in this matter, moves pursuant to New York State Finance Law § 190(6)(a) and New York City Admin Code § 7-804(i)(1) for an order awarding him a twenty-five percent share of: 1) the proceeds recovered by the City of New York in the settlement of the New York State and New York City False Claims Act claims against Siemens Electrical, LLC; 2) the payment by Siemens Electrical, LLC to the State of New York under the Deferred Prosecution Agreement; 3) the off-set from Siemens Electrical’s contractual claims against the City; and (4) the future interest in the proceeds of a 2018 lawsuit by Siemens Electrical against the City. The City partially opposes the relator’s motion.

FACTS

The factual background of this action was addressed in a previous decision by this court.¹ Accordingly, this Decision and Order solely discusses the facts underlying the relator’s instant motion.

¹ *City of New York v Siemens Elec., LLC.*, 65 Misc 3d 333 (Sup Ct, NY County, 2019).

In February 2012, the relator filed the instant action alleging that defendants, Siemens Electrical, LLC (Siemens Electrical) f/k/a Schlesinger-Siemens Electrical, LLC; Siemens Industry, Inc., f/k/a Siemens Energy & Automation, Inc., and Schlesinger Electrical Contractors, Inc., violated the New York State False Claims Act (NYSFCA) and New York City False Claims Act (NYCFCA).² The relator alleged, first, that Siemens Electrical falsely represented itself as a business with a licensed Master Electrician who had a responsibility for supervising employees that did electrical work on the Department of Environmental Protection (DEP) projects, in violation of the New York City Electrical Code (Electrical Code) (Admin Code § 27-3017[a][1]). And second, the relator alleged that Siemens Electrical falsely submitted reports overstating the participation of Minority Business Enterprises (MBE). The City of New York investigated the relator's allegations and intervened in the relator's *qui tam* action. In November 2015, the City filed the Superseding Complaint (NYSCEF # 305, Superseding Complaint).

In the interim, Siemens Electrical commenced three actions against the DEP for damages related to the contracts between the parties: (i) contract 26W-12E;³ (ii) contract PO-87B-E;⁴ and (iii) contract WI-79E.⁵ The three contracts serving as the basis for Siemens Electrical's contract claims were also grounds for the FCA claims (*id.* at ¶ 21).

In July 2018, the City and Siemens Electrical entered into the Commercial Settlement Agreement, wherein the parties agreed to settle Siemens Electrical's claims against the City. The parties agreed that the value of Siemens Electrical's three contract claims, for the purpose of settlement, was \$6.15 million (NYSCEF # 291, Commercial Settlement Agreement at 2). The parties further agreed that Siemens Electrical would discontinue its contract claims against the City in exchange for the payment of \$4.65 million (*id.* at ¶¶ 2, 7).

Around the same time, the parties also entered into the Stipulation, Settlement Agreement, and Release settling the City's False Claims Act claims against Siemens Electrical (FCA Settlement Agreement). Pursuant to the FCA Settlement Agreement, the City released its False Claims Act claims against defendants in exchange for the payment of \$1.5 million, which was to be set-off against the payment due by the City in the Commercial Settlement Agreement (NYFCSF # 292, FCA Settlement Agreement at ¶¶ 2, 7).

² This Decision and Order's analysis under the NYSFCA is also applicable to the NYCFCA.

³ *Siemens Electrical, LLC v. The New York City Department of Environmental Protection*, Supreme Court of the State of New York, New York County, Index No. 650277/2013.

⁴ *Schlesinger-Siemens Electrical, LLC v. The New York City Department of Environmental Protection*, Supreme Court of the State of New York, New York County, Index No. 650968/2012.

⁵ *Siemens Electrical LLC v. The New York City Department of Environmental Protection*, Supreme Court of the State of New York, New York County, Index No. 653189/2015.

In November 2018, Siemens Electrical filed another action against the City for breach of contract, project delays, and disruptions related to the Croton Water Filtration Plant at Moshulu Golf Course. The contract serving as the basis for Siemens Electrical's claims, entitled CRO-312-E1, was also a contract that served as a basis for the FCA claims (NYSCEF # 305 at ¶ 23). The City's answer to Siemens Electrical's novel contract claim contains affirmative defenses alleging that Siemens Electrical failed to employ a Master Electrician and that it did not have employees of its own, in violation of the terms to of the contract and Admin Code § 27-2013 (NYSCEF # 293, City's Verified Answer and Counterclaim).

Subsequent to the relator's filing his qui tam action, the New York County District Attorney's Office (DANY) pursued criminal charges against Siemens Electrical related to the MBE and Electrical License fraud. In January 2013, Siemens Electrical and DANY entered into the Deferred Prosecution Agreement (DPA). Under the DPA, Siemens Electrical admitted that it knowingly violated the Electrical Code and that it misrepresented its compliance with the MBE requirements in the contracts it had with the DEP. Pursuant to the DPA, Siemens Electrical was required to pay the DANY \$10 million for the resolution of the DANY's criminal and forfeiture claims (NYSCEF # 278, DPA at 4).

DISCUSSION

The parties agree that the relator is entitled to a share of the proceeds the City received pursuant to the FCA Settlement Agreement; their disagreement is on the amount of the share and whether the relator is entitled to recovery beyond the FCA Settlement Agreement. Thus, it must be first determined whether the relator may receive a share of the recovery pursuant to the DPA, and whether the relator is entitled to a share of the savings, if any, to the City as a result of the settlement of Siemens Electrical's contract claims. Based on the ensuing analysis, the court finds that the relator is entitled to only a share of the FCA Settlement Agreement.

Whether the Relator is Entitled to a Share of the DPA

The relator contends that he is entitled to a portion of the \$10 million forfeiture paid by Siemens Electrical under the DPA. The relator argues that the DANY relied on information provided by the relator to enter into the DPA. In opposition, the City argues that the relator is not entitled to a share of the DPA proceeds because the City did not pursue a criminal action as an alternative to pursuing the FCA claims. The City contends that the relator is entitled to only the amount of proceeds recovered in the settlement of the FCA action.

The NYSFCA provides that a qui tam relator may recover a percentage of the recovery in a qui tam suit (State Finance Law § 190[6]). The NYSFCA also provides that the government may elect to pursue "any remedy available" to pursue false

claims (*id.* at § 190[5][c]). Where the government pursues such alternative remedy in another proceeding, “the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section” (*id.*; *see* 31 USC 3730[5]). The NYCFCA also contains a provision permitting a relator to a share of the City’s proceeds where the City pursues an “alternate action” (Admin Code § 7-804[f][2]). New York State courts have yet to address whether another proceeding constitutes an “alternate civil remedy.”

The federal False Claims Act (FCA) has a nearly identical provision – where the government seeks an “alternate remedy in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section” (31 USC 3730[c][5]). And the federal courts have spoken on this very issue. Hence, it is instructive to review federal jurisprudence in interpreting the NYSFCA (*State ex rel. Seiden v Utica First Ins. Co.*, 96 AD3d 67, 71 [1st Dept 2012]).

Federal courts have found that an “alternate remedy” may not exist where the government elected to intervene in a the relator’s *qui tam* action (*see United States ex rel. Bledsoe v Community Health Systems, Inc.*, 342 F3d 634, 647 [6th Cir 2003] [“We hold that ‘alternate remedy’ refers to the government’s pursuit of any alternative to intervening in a the relator’s *qui tam* action”]; *United States ex rel. Barajas v United States*, 258 F3d 1004, 1010 [9th Cir 2001] [“An alternate remedy under § 3730(c)(5) is a remedy achieved through the government’s pursuit of a claim after it has chosen not to intervene in a *qui tam* the relator’s FCA action”]; *United States ex rel. LaCorte v Wagner*, 185 F3d 188, 191 [4th Cir 1999] [“Section 3730(c)(5) simply preserves the rights of the original *qui tam* plaintiffs when the government resorts to an alternate remedy in place of the original action”). Indeed, the plain language of State Finance Law § 190(5)(c) states that a relator shall have the same rights as in an “alternative remedy” if the action would have proceeded under the NYSCFA, suggesting that that an “alternative remedy” is unavailable where government proceeds in the *qui tam* action (*id.* at § 190[5][c]; *see* 31 USC § 3730[5]).

Here, the DPA is not considered an “alternate remedy” as to the relator. Instead, the City elected to pursue its claims by intervening in the relator’s *qui tam* action and subsequently litigating and settling the action. That the criminal prosecution came before the City’s intervention is irrelevant in determining whether the DPA is an “alternative remedy” (State Finance Law § 190[5][c]; Admin Code § 7-804[f][2]). Accordingly, the relator is not entitled to a share of the DPA.

The relator cites to *U.S. ex rel. Bledsoe v Cmty. Health Sys., Inc.*, 342 F3d 634 (6th Cir 2003) and *United States v Bisig* (US Dist CT, SD Ind, 100 cv 335, Tinder, J., 2005) in support of his argument that a criminal proceeding may be a “alternate remedy” pursuant to 31 USC § 3730(c)(5). While that may be true, the

facts in both *Bledsoe* and *Bisig* are fundamentally distinct in that the government in those cases declined to intervene in the *qui tam* action. Thus, the portions of *Bledsoe* and *Bisig* cited by the relator are inapplicable herein.

The relator also seeks a share of any benefit the City receives from an action on Siemens Electrical's 2018 contract action against the City, which is currently pending before another court. The relator fails to cite any authority to support its request. To the extent that the relator relies on Admin Code § 7-804(f)(2), the relator fails to aver that Siemens Electrical's 2018 action or the City's counterclaim is an alternative remedy. In any event, it is not for this court to make any determination on a matter that is not before it.

Whether the Relator is Entitled to a Share of the Value of Siemens Electrical's Released Claims

The relator argues that he is entitled to a share of the savings that benefited the City as a result of the release of Siemens Electrical's contract claims against the City. But, the City contends that the FCA claims were released in exchange for Siemens Electrical's payment of \$1.5 million. Thus, the City argues, the release of the FCA claims were not part of the bargain to release Siemens Electrical's contract claims against the City. Both the City and the relator agree that "proceeds" pursuant to a settlement of False Claims Act claims may consist of consideration other than a cash payment.

In order "[f]or the value of the released claims to be included [in determining the relator's share], there must be an indication that they were released in return for the government's release of the FCA claims" (*United States v U.S. ex rel. Thornton*, 207 F3d 769, 771 [5th Cir 2000]; *accord U.S. ex rel. Barajas v United States*, 258 F3d 1004, 1013 [9th Cir 2001]; *United States ex rel. Nudelman v Int'l Rehab. Assocs., Inc.*, US Dist Ct, ED PA, 00 Civ 1837, Joyner, J., 2007; *U.S. ex rel. Burr v Blue Cross & Blue Shield of Fla., Inc.*, 882 F Supp 166, 169 [MD Fla 1995]). "The value of a non-cash proceed is its value to the government, which may be calculated by looking at what the government would otherwise pay for a particular good or service" (*United States ex rel. Grober v Summit Med. Grp., Inc.*, US Dist Ct, WD KY, May 5, 2006, Coffman, J, at 1).

The relator fails to demonstrate that he is entitled to the value of Siemens Electrical's released claims against the City. The relator only argues that he is entitled to the savings had by the City from settling Siemens Electrical's claims because the City relied on the relator's information in reaching a settlement of the NYSFCA claims. Whether the information provided by the relator assisted the City's claims against Siemens Electrical is irrelevant to the question of whether the release of Siemens Electrical's claims were made in exchange for the release of the NYSFCA claims.

In any event, neither the Commercial Settlement Agreement nor the FCA Settlement Agreement indicate that Siemens Electrical's claims were settled or released in exchange for the City's release of the NYSFCA claims. Instead, it is clear from the language of both agreements that the release of the City's and Siemens Electrical's claims against each other were made pursuant to cash payments. The Commercial Settlement Agreement clearly states that the release of Siemens Electrical's claims was made in exchange for the payment of \$6.15 Million from the City, and that Siemens Electrical's claims will be discontinued upon the payment of \$4.65 million (NYSCEF # 291 at ¶¶ 2, 7). Likewise, the City released the NYSFCA claims in exchange for a payment of \$1.5 million from Siemens Electrical (NYSCEF # 292 at ¶¶ 2, 7).

As such, the relator has failed to demonstrate that the release of Siemens Electrical's claims against the City was part of the bargain of the settlement to release the NYSFCA claims. Thus, the relator is not entitled to the value of Siemens Electrical's released claims. Accordingly, the relator is entitled to only a share of the total settlement amount of the NYSFCA claims.

The Relator's Share of the FCA Settlement

The relator contends that he is entitled to a twenty-five percent share of the settlement proceeds because he contributed to the prosecution of the City's NYSFCA claims. Specifically, the affirmation by the relator's counsel indicates that the relator and counsel's contribution consisted of: informing the City of the fraud; research and draft of two qui tam complaints; compilation, organization, and production of documents to the government; correspondence and meetings with government officials, including officials from the New York State Attorney General's Office and Corporation Counsel; preparation of legal memorandums; provision of updates on other related cases, including the criminal matter; preparation of power-point presentations, memos, and briefs regarding the facts and law establishing the claims; production of approximately 57,000 pages of documents; preparation of deposition outcomes, research and analysis for the Motion for Summary Judgment; preparation for and attendance at the relator's deposition; and expending time and effort to obtain the government's intervention (NYSCEF # 271, the relator's Memo of Law at 9-10).

In opposition, the City contends that the relator's contribution to the City's case was minimal after the relator filed the qui tam complaint. Rather, the City litigated the matter and subsequently settled it without the relator's assistance. The City submits two May 2018 correspondences it received from co-counsel for the relator that depict the relator's limited role in the case – specifically, counsel complained that the City has “kept [the relator] in the dark” throughout the

litigation (NYSCEF #332, May 17, 2018 e-mail from Michael Smikun to Brian Horan; NYSCEF # 331, May 3, 2018 letter from Gerald Lefcourt to Zachary Carter).

The City argues that the relator erected barriers to the resolution of the matter by objecting to seal extensions and by opposing negotiated settlement between the City and Siemens Electrical. To wit, the City points to the relator's Memo of Law in Opposition to the Settlement, which, without any basis, complained about the "procedural impropriety in the settlement, including improper consideration and, potentially, collusion" between the City and defendants (NYSCEF #334, The relator's Opp Memo at 44).

The City further argues that the relator's share should be reduced below fifteen percent because the relator was involved in the planning of the NYSFCA violations. To wit: the relator signed the operating agreement for Siemens Electrical's as a limited liability company, despite knowing that the company, as created, was incompatible with the Electric Code; the relator signed the bid for the 26th Ward Project misrepresenting Siemens Electrical as a joint venture, despite knowing that the company was actually an LLC; the relator submitted VENDEX documents that misrepresented Siemens Electrical as having its own workforce; and while the relator was Vice President of a company named Sepeco Electric, prior to working for Schlesinger or Siemens Electric, he employed the same scheme to use a no-show electrician in the same way as Siemens Electrical.

The NYSFCA and NYCFCFA both provide that where the government intervenes in a qui tam action, the relator shall be entitled to receive between fifteen and twenty-five percent of the proceeds of the settlement of the action depending on the extent to which the relator substantially contributed to the prosecution of the action (State Finance Law § 190[6][a]; Admin Code 7-804[i][1]). The statutes do not provide further guidance for determining the amount of a relator's share.

A review of federal court decisions indicate that in order to determine the share of settlement proceeds to which a the relator is entitled, courts may look to the Senate's Legislative history, the Department of Justice's internal guidelines and the relevant case law (*see e.g. U.S. ex rel. Alderson v Quorum Health Grp., Inc.*, 171 F Supp 2d 1323, 1332 [MD Fla 2001]). In determining the amount of a relator's share pursuant to the Legislative History, courts should consider: 1) the significance of the information provided to the government; 2) the contribution of the qui tam plaintiff to the result; and 3) whether the information in the suit provided was previously known to the government (*id.*).

The legislative factors also provide that the fifteen percent provided for in the False Claims Act is regarded as a finder's fee, and is awarded even if the relator does nothing more than file the action (*Roberts v Accenture, LLP*, 707 F3d 1011,

1016 [8th Cir 2013]; citing 132 Cong. Rec. H9382–03 [Oct 7, 1986]; *U.S. ex rel. Shea v Verizon Commc'ns, Inc.*, 844 F Supp 2d 78, 81 [DDC 2012]). The maximum twenty-five percent share is reserved for those situations where the relator “actively and uniquely assist[s] the government in the prosecution of the case” (*U.S. ex rel Burr v Blue Cross & Blue Shield of Fla., Inc.*, 882 F Supp 166, 168 [MD Fla 1995]).

Like its federal counterpart, the NYSFCA provides that the court may reduce the relator’s share of the proceeds of a qui tam action where the relator “planned or initiated the violation” (State Finance Law § 190[8]; see *Schroeder v United States*, 793 F3d 1080, 1085 [9th Cir 2015]; *U.S. ex rel. Stearns v Lane*, US Dist Ct, D Vt, 2:08 Civ 175, Sessions, J., 2010; *U.S. ex rel. Marchese v Cell Therapeutics, Inc.*, US Dist Ct, WD Wash, Dec. 14, 2007, Pechman, J.). “The DOJ guidelines are a list of factors that may be relevant in determining the extent to which [a the relator] ‘substantially contributed to the prosecution’ of [an] action” (*U.S. ex rel. Rille v Hewlett-Packard Co.*, 784 F Supp 2d 1097, 1100 [ED Ark 2011], *affd sub nom. Roberts v Accenture, LLP*, 707 F3d 1011 [8th Cir 2013]). Pursuant to the DOJ guidelines, some of the factors that a court may consider in increasing the percentage of a relator’s share include:

“[3]. The *qui tam* filing, or the ensuing investigation, caused the offender to halt the fraudulent practices . . . 6. The relator provided extensive, first-hand details of the fraud to the Government. 7. The Government had no knowledge of the fraud. 8. The relator provided substantial assistance during the investigation and/or pre-trial phases of the case. . . 11. The relator and his counsel supported and cooperated with the Government during the entire proceeding; . . . 13. The FCA recovery was relatively small. 14. The filing of the complaint had a substantial adverse impact on the relator.”

(*Alderson*, 171 F Supp 2d at 1333-1334).

Some factors for a decrease in the relator’s share include:

“1. The relator participated in the fraud. . . 8. The relator, or the relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Governments' position in litigation. . . .”

(*id.* at 1334).

Here, it is undisputed that the relator identified the fraud by Siemens Electrical, that the City was unaware of the fraud prior to the relator’s actions, and that the case ultimately resulted in a \$1.5 million settlement. The relator also provided the following support to the City’s prosecution of the NYSFCA claims:

disclosure of numerous documents related to the scheme; correspondence and discussion on the scheme with investigators, including the New York State Attorney General's Office, DANY, and New York City attorneys; and testimony. Evidently, the relator contributed more than the bare minimum to the City's prosecution of the action.

Despite the relator's disclosures to the City, the evidence does not demonstrate that the relator's contribution to the prosecution of this action was substantial. Indeed, the record shows that the relator was largely closed out of the prosecution of the action after he filed the *qui tam* complaint. For instance, in opposition to the City's motion to confirm the settlement, the relator noted that the City rejected the relator's efforts to contribute to the prosecution of the case after the City intervened in the action (NYSCEF # 334 at 10). In fact, the correspondence by the relator to the City underscores the stark differences between the City and the relator's respective vision of liability and damages in the action – the relator's belief that the damages in the action against Siemens Electrical could have been \$900 million as compared to the City's settlement of the matter for \$1.5 million.

While this action ultimately settled, the City conducted significant trial preparation in this matter, including exchanging hundreds of thousands of pages of documents, including electronic discovery and undertaking ten depositions, and successfully opposed defendants' motion for summary judgment (NYSCEF # 333, Brian Horan's Affidavit in Support of Motion to Confirm Settlement at ¶ 17). Further, the relator opposed the reasonableness of the settlement agreement and did not play a productive role in those negotiations. The relator also hampered the proceedings when he objected to extending the seal in the *qui tam* action (NYSCEF # 329, 330).

As to the City's contentions alleging the relator's participation in Siemens Electrical's fraud, there is no showing that the relator planned or initiated the scheme to represent Siemens Electrical as a joint venture rather than an LLC when the relator signed the bid for the 26th Ward Project. The relator's uncontroverted testimony demonstrates that at the time Siemens Electrical was formed, the relator had questioned the structure of Siemens Electrical as an LLC but was told by Siemens' Corporate Counsel that the LLC structure met the statutory requirements of a joint venture for the purposes of bidding on the DEP contracts (NYSCEF # 342, the relator transcript, 54:22-56:20). The relator relied on Siemens Corporate Counsel's assurance that Siemens Electrical qualified as a joint venture for the purpose of bidding on the DEP contracts (*id.* at 67:6-19; 89:21-90:5, 122:2-20).

Finally, the relator's employment with Siemens Electrical was terminated in September 2005, prior to Siemens Electrical's use of a no-show electrician. Thus, it is speculative as to what the relator would have done had he remained employed with Siemens Electrical. Accordingly, the City's request to reduce the relator's share

of the settlement proceeds on the basis that the relator was the principal wrongdoer of the violations at issue is denied.

In conclusion, while the relator is not entitled to the maximum recovery, he is entitled to award above the minimum recovery. The court finds that upon a review of the evidence submitted by the parties and the relevant factors, including the relator's interference hampering the resolution of this matter, the relator is entitled to a twenty percent share of the total settlement proceeds of \$1.5 million, or \$300,000.

Accordingly, it is hereby

ORDERED that the motion of the relator, Clifford Weiner, is granted to the extent that he is entitled to a twenty percent (20%) share of the \$1.5 million settlement proceeds paid to the City under the FCA Settlement Agreement, or \$300,000; it is further

ORDERED that the relator shall serve a copy of this order with notice of entry within twenty days of entry; and it is further

ORDERED that the Clerk of the Court shall enter judgment as written.

This constitutes the Decision and Order of the court.

MARGARET A. CHAN, J.S.C.

4/2/2020
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIE D	<input type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION	<input type="checkbox"/>	GRANTE D	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
: CHECK IF APPROPRIAT E:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE