People ex rel. FX Analytics v Bank of N.Y. Mellon Corp.
2020 NY Slip Op 33013(U)
September 14, 2020
Supreme Court, New York County
Docket Number: 114735/2009
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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PEOPLE OF THE STATE OF NEW YORK, STATE OF NEW YORK, EX REL. FX ANALYTICS

Plaintiff,

- v -

THE BANK OF NEW YORK MELLON CORP., THE BANK OF NEW YORK MELLON,

Defendant.

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INDEX NO. 114735/2009

MOTION DATE 08/01/2017

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 257, 258, 259

were read on this motion by QUI TAM RELATOR.

This action was commenced by FX Analytics (FX or the Relator), as qui tam plaintiff, against defendant The Bank of New York Mellon Corporation and its predecessors and subsidiaries (BNYM) for violation of the New York State False Claims Act (NY St Fin Law § 187 et seq. [NYFCA]). FX's complaint alleged that BNYM violated the NYFCA in connection with its execution of foreign exchange transactions for various New York City funds that provide pension and other benefits to New York City employees (the Funds). The Attorney General of the State of New York (the Attorney General), the Comptroller of the City of New York (the Comptroller), and the Funds elected to supersede and to convert the qui tam action into a civil enforcement action. They amended the complaint to add non-NYFCA claims against BNYM, including claims by the Comptroller and the Funds (together, the Funds) for breach of contract and breach of fiduciary duty.[1] By decision and order, dated August 5, 2013, this court dismissed

[1] In December 2011, the claims against Bank of New York Mellon Corporation were dismissed and Bank of New

the NYFCA causes of action against BNYM, but allowed many of the other claims to proceed, including the breach of fiduciary duty claim and portions of the breach of contract claim. (People ex rel. Schneiderman v Bank of N.Y. Mellon Corp., 40 Misc 3d 1232 [A], 2013 WL 4516209, * 17-29 [Sup Ct, NY County, Aug. 5, 2013] [the August 5, 2013 Decision].)[2] BNYM subsequently negotiated and entered into separate settlements with the Attorney General and the Funds. FX now objects, pursuant to NYFCA § 190 (5) (b) (ii), to the settlement between BNYM and the Funds. FX moves "for an order on [its] Objection and a determination of [i.e., that it is entitled to] the statutory award of 15% to 25% of the value of the settlement of the above-captioned action." (Notice of Motion [NYSCEF Doc. No. 189].)

BACKGROUND

Structure and Relevant Provisions of the New York False Claims Act

This motion requires familiarity with the general framework of the New York False Claims Act. This Act, which is modeled after the federal government's False Claims Act (31 USC § 3729 et seq. [FCA]), imposes civil liability upon "any person who . . . [among other things] knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval" by the State, or who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." (NYFCA § 189 [1] [a], [b].)

The NYFCA authorizes the government to commence an action to enforce its provisions. (Id. § 190 [1].) A private person, known as a "relator," may also bring a qui tam civil action on behalf of the State or a local government for violation of the Act. (Id., § 190 [2] [a].) In a qui tam action, after the relator serves upon the appropriate governmental parties the complaint and a

York Mellon was added as a defendant. (Aff. Of Melanie Ash [Asst. Corp. Counsel] In Opp., ¶ 9.)

[2] The details of BNYM's alleged wrongful conduct in connection with its execution of foreign exchange transactions for the Funds are set forth in the August 5, 2013 Decision and will not be repeated here.

"written disclosure of substantially all material evidence and information the person possesses" (id. § 190 [2] [b]), the State generally has sixty days to "elect to supersede or intervene and proceed with the action" (id.), "to authorize a local government that may have sustained damages to supersede or intervene" (id.), or to "decline[] to participate in the action or to authorize participation by a local government." (Id., § 190 [2] [f].)

If the State elects to supersede the qui tam action, the Attorney General generally must notify the Court within the sixty day period that it "intends to file a complaint against the defendant on behalf of the people of the state of New York or a local government, and thereby be substituted as the plaintiff in the action and convert the action in all respects from a qui tam civil action brought by a private person into a civil enforcement action by the attorney general . . . ."[3] (Id., § 190 [2] [c] [i].) In such event, the State "ha[s] the primary responsibility for prosecuting the action." (Id., § 190 [5] [a].) The NYFCA further provides that, although the relator "ha[s] the right to continue as a party to the action" subject to certain limitations, "[u]nder no circumstances shall the state or a local government be bound by an act of the person bringing the original action." (Id.) The State may, subject to the right of the relator to be heard, move to dismiss the action notwithstanding the objections of the relator. (Id., § 190 [5] [b] [i].) The State may also move to limit the relator's "unrestricted participation" in the action. (Id., § 190 [5] [b] [iii].) Most critical to this motion, the State may also "settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after an opportunity to be heard, that the proposed settlement is fair, adequate, and reasonable with respect to all parties under all the circumstances." (Id., § 190 [5] [b] [ii].) Section 190 (6) (a) of

[3] The Attorney General must also notify the Court if it "intends to intervene in such action, as of right, so as to aid and assist the plaintiff in the action" (id., § 190 [c] [ii]), or if it intends to grant a local government permission to supersede or intervene. (Id., § 190 [c] [iii].)

the NYFCA, entitled "[a]wards to qui tam plaintiff," provides in pertinent part:

> "If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, or to permit a local government to convert the action into a civil enforcement action by such local government, or if the attorney general or a local government elects to intervene in the qui tam civil action, then the person or persons who initiated the qui tam civil action collectively shall be entitled to receive between fifteen and twenty-five percent of the proceeds recovered in the action or in settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. . . ."

If the State "declines to participate in the action or to authorize participation by a local government," then "the qui tam action may proceed," in accordance with law, under the direction of the relator. (See id., § 190 [2] [f].) Whether or not they elect to supersede or intervene in the qui tam action, section 190 (5) (c) also authorizes the Attorney General or a local government to "elect to pursue any remedy available with respect to the criminal or civil prosecution of the presentation of false claims. . . ." To protect the relator's interest, however, that section further provides that "[i]f any such alternate civil remedy is pursued in another proceeding, the person initiating the action [i.e., the relator] shall have the same rights in such proceeding as such person would have had if the action had continued under this section."

Factual Background

The following facts are undisputed on this motion unless otherwise noted: FX, the relator, commenced a qui tam civil action on or about October 20, 2009 on behalf of the State of New York and City of New York. The complaint and amended complaint, each filed by FX, accused BNYM of violating the NYFCA based on foreign exchange conversions undertaken by BNYM pursuant to agreements with the Funds. (Complaint, First Amended Ex Rel. Complaint, Aff. Of Philip Michael [FX's Atty.] In Supp., Exhs. 2, 3 [Michael Aff. In Supp.].) In compliance

with NYFCA § 190 (2) (b), FX served the Attorney General with a written disclosure of substantially all of its evidence of BNYM's alleged scheme. (See Michael Aff. In Supp., Exh. 4.) Between November 2009 and January 2011, FX provided sixteen supplemental disclosures to the Attorney General concerning its claims. (Id., Exhs. 5-20.) The Funds contend that these disclosures were not shared with them during this period. (Aff. Of Melanie Ash [Asst. Corp. Counsel] In Opp., ¶ 7.)

On or about October 4, 2011, after notifying the court of its intent to supersede the action in accordance with NYFCA § 190 (2) (c) (i), the Attorney General filed a new complaint, substituting itself as plaintiff and converting the qui tam action "into a civil enforcement action by the Attorney General." (Complaint & Superseded Complaint, ¶ 14 [Michael Aff. In Supp., Exh. 21].) The Funds also joined the action as plaintiffs. (Id.) The new complaint pleaded both NYFCA claims and non-NYFCA claims, including claims by the Funds for breach of fiduciary duty and breach of contract. (Id., ¶¶ 106-111.) Plaintiffs subsequently filed an Amended Complaint and Superseding Complaint (the Amended Complaint) (NYSCEF Doc. No. 15, Exh. 1), which was the subject of this court's August 5, 2013 decision on BNYM's motion to dismiss. As review of the superseding complaints shows, all of the claims were based in substantial part on the allegations of misconduct pleaded in FX's qui tam complaints. It is undisputed that the Funds do not contest on this motion "that the scheme that they [the relator] uncovered and brought to light is the scheme that was then the subject of each of the [government's] complaints." (Oral Argument Tr., at 21.)

In moving to dismiss the NYFCA claims, BNYM argued, among other things, that the Amended Complaint (1) failed to allege presentment of a false or fraudulent claim to the government for payment or approval; (2) failed to allege statements made or used to get a false

or fraudulent claim paid or approved by the government; and (3) failed to allege that BNYM acted to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government. (BNYM Memo. In Supp. Of Motion To Dismiss, at 22-29 [Ash Aff. In Opp., Exh. A].) Plaintiffs opposed the motion. (Pls.' Memo. In Opp. To Motion To Dismiss, at 27-37 [Ash Aff. In Opp., Exh. B].)

In its August 5, 2013 decision, the court dismissed the NYFCA claims. With respect to plaintiffs' claims under sections 189 (1) (a) and (b), the court held, in accordance with the weight of judicial authority addressing substantially similar claims against BNYM, that "because BNYM's trade confirmations and account statements did not contain a request or demand for payment or approval, they d[id] not constitute 'claims'" within the meaning of the NYFCA. (August 5, 2013 Decision, 2013 WL 4516209, at * 26 [collecting authorities].) The court also dismissed plaintiffs' "reverse false claims" under section 189 (1) (g), which applies to "any person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government." In response to plaintiffs' argument that BNYM's contractual obligations to the Funds could satisfy the "obligation" requirement, the court held that "[n]ot only is the amount of the breach of contract claim unfixed, but plaintiffs' very claim as to the existence of a breach is the subject of a bona fide dispute. Under these circumstances, the breach of contract claim is not an adequate premise for the reverse false claim . . . . To hold otherwise would be to impermissibly transform the FCA into an all-purpose antifraud statute." (Id., at * 29 [internal quotation marks and citations omitted].)

The Attorney General and the Funds each filed a notice of appeal of the August 5, 2013 decision. There is evidence in the record that FX provided the Attorney General with a

confidential memorandum regarding the merits of, and strategy concerning, the appeal, as well as a proposed amended complaint. (Memo. From Mike Thornton, dated Aug. 25, 2014 [Ash Aff. In Opp., Exh. G].) The Funds contend that they were not aware of those documents during the time in which they could have perfected their appeal or at any time prior to the settlement of the action. (Ash Aff. In Opp., ¶ 19; Funds Memo. In Opp., at 5.) Although the Attorney General and the Funds each sought and received several extensions of the time to perfect their appeals (Ash Aff. In Opp., Exh. F), neither the Attorney General nor the Funds ultimately chose to proceed with those appeals. Nor did the Attorney General, the Funds, or FX ever seek leave to further amend the superseding complaint to replead the NYFCA causes of action.

During plaintiffs' time to perfect their appeals, litigation of the non-NYFCA claims continued before this court. After the court ordered that discovery in the instant action be coordinated with a federal enforcement action against BNYM brought by the U.S. Department of Justice (the DOJ action) and a federal, nation-wide class action of BNYM custody customers (the Customer Class action), a mediation was conducted in January 2015.[4] (Ash Aff. In Opp., ¶ 21; Funds Memo. In Opp., at 6.) This mediation resulted, on or about March 19, 2015, in a global settlement between BNYM, the Attorney General, the U.S. Attorney's Office, and counsel in the class action. (Ash Aff. In Opp., ¶ 22.) FX contends that it received from the Attorney General a share of this settlement consistent with the 15%-25% share provided for in section 190 (6) of the NYFCA. (Oral Arg. Tr., at 11-12.)[5]

[4] BNYM, the Attorney General, the U.S. attorney's office, and counsel in the class action participated in the mediation. The Funds were not invited to participate in the mediation. They assert that "[b]ecause [their] demand was greater, on a percentage basis, than the demands in those actions, reflecting the City Funds' uniquely strong contractual claims, BNYM refused to even negotiate with the City Funds at that time." (Funds Memo. In Opp., at 6; Ash Aff. In Opp., ¶ 21.)

[5] During this time, however, the Attorney General's time to perfect the appeal of the August 5, 2013 decision had not yet expired.

The Funds, which had not participated in the mediation, continued to litigate this action, completing fact discovery, preparing expert reports, and drafting a summary judgment motion. (Ash Aff. In Opp., ¶¶ 35-36.) On December 30, 2016, the Funds reached an agreement with BNYM to settle the outstanding claims for a payment of $30,000,000.[6] (Id., ¶ 37.) Although it appears that the Funds offered FX a share of this settlement, the Funds do not dispute that the percentage they offered was less than the 15% minimum share referenced in NYFCA § 190 (6).

CONTENTIONS

FX contends that the Funds' settlement is not "fair, adequate, and reasonable with respect to all parties under all the circumstances" (NYFCA § 190 [5] [b] [ii]) because the settlement does not award FX between 15-25% of "the proceeds recovered . . . in settlement of the action," in accordance with NYFCA § 190 (6). (FX Memo. In Supp., at 5-6.) According to FX, the plain language of NYFCA mandates that it be awarded a 15-25% share of the "settlement of the action," regardless of the type or number of claims added by the plaintiffs or those parties' decisions not to defend or replead NYFCA claims after the August 5, 2013 decision. (See id., at 6-11, 23-24; FX Reply Memo., at 7-10.) FX further contends that an award of 15-25% is supported by its substantial assistance in this litigation and the fact that all of the remaining claims in this action—including the Funds' claims for breach of contract and breach of fiduciary duty—were based on the scheme FX uncovered, and significantly overlap with the dismissed NYFCA claims. (Id., at 12-23.) Denial of the statutory award, FX warns, would discourage

[6] According to the Funds, this $30,000,000 settlement amount "represented a gross recovery for the City Funds of approximately 100% of the City Funds' damages according to BNYM, and almost 60% of the losses calculated by the City Funds' experts to have been suffered by the City Funds as a result of BNYM's overcharges for FX transactions." (Funds Memo. In Opp., at 7.) The Funds further contend that "[t]his was a significantly higher recovery than that achieved by the Customer Class, reflecting the stronger contractual language benefitting the City Funds." (Id.; Ash Aff. In Opp., ¶ 37.) They assert that Law Department attorneys spent more than 6400 hours litigating this case over six years, and that the Department spent $1,023,825.02 for experts, contract attorneys, database vendors, and other out-of-pocket costs necessary to pursue this case. (Ash Aff. In Opp., ¶¶ 38, 39.)

relators from bringing qui tam actions. (Id., at 24.)

The Funds contend that FX has no statutory right to share in its settlement with BNYM because FX failed to state a valid claim under the NYFCA, and because FX had no standing to assert any of the contract or common-law causes of action based on which plaintiffs recovered.[7] (Funds Memo. In Opp., at 7, 8-15.) According to the Funds, federal courts, in analogous cases interpreting the False Claims Act (FCA), have consistently held that a valid FCA claim is a prerequisite to a relator's entitlement to share in a settlement. (Id., at 11-15.) They contend that the structure and language of the NYFCA support their position that this prerequisite also applies under that statute. (Id., at 8-11.) The Funds further contend that "[t]he Relator's failure to make any attempt to protect the [NY]FCA causes of action bars him from arguing now that maybe those causes of action would have somehow survived." (Id., at 15.) Finally, the Funds contend that, if there is any award to FX, such award should be limited to the statutory minimum based on net proceeds—i.e., a 15% award calculated after the Funds' attorney's fees and costs have been deducted from the settlement amount. (Id., at 16-20.)

DISCUSSION

For the reasons set forth below, the court holds that a relator's recovery under NYFCA § 190 (6) is conditioned on the relator having commenced a valid qui tam action for violation of the NYFCA. FX is not entitled to share in the Funds' settlement with BNYM because FX's action failed to state a claim under the NYFCA. (See August 5, 2013 Decision, 2013 WL 4516209, at * 25-29.) As the NYFCA does not require an award to FX, FX's objection to the

[7] The parties do not dispute that the Funds lacked standing to assert breach of contract or common law causes of action for breach of fiduciary duty on behalf of the Attorney General or the Funds. (See United States ex rel. Rockefeller v Westinghouse Elec. Co., 274 F Supp 2d 10, 14 [D DC 2003], summary affirm granted 2004 WL 180264 [DC Cir 2004] cert denied 543 US 820 ["A relator in a qui tam FCA action does not have standing to assert common law claims based upon injury sustained by the United States" (there, claims for fraud, payment by mistake, and unjust enrichment)].)

settlement is without merit.

The court takes note that the Funds do not deny that the scheme uncovered and brought to light by FX formed the basis of all of the claims in the action, including the Funds' contract and common-law claims. (See Oral Arg. Tr., at 21.) They therefore do not dispute that FX's qui tam action was a significant catalyst for the Funds' $30 million recovery in this action. The fairness of the Funds' refusal to offer FX a share consistent with NYFCA § 190 (6) may accordingly be perceived as questionable under these circumstances. (See Donald v Univ. of Cal. Bd. of Regents, 329 F3d 1040, 1044 & n 6 [9th Cir 2003].) Nevertheless, "the narrow question before [the court] is whether the relator[] [is] entitled to redress" under the NYFCA, not the fairness of the government's position on the relator's entitlement to a share. (See id.) As discussed further below, courts interpreting the analogous FCA have overwhelmingly held that a relator must have a valid qui tam action in order to recover a statutory share of a settlement. This court holds that this interpretation is the only viable interpretation of the NYFCA. In adopting this interpretation, it is the court's expectation that the consistency of the courts, in holding that a valid qui tam action is a condition of a relator's recovery of a share, at least fosters consistency in the treatment of relators and predictability in their expectations regarding their rights of recovery.

Authority Addressing a Relator's Right to Share in a Settlement

There does not appear to be any authority in this State that addresses the precise question at issue: whether NYFCA § 190 (6) entitles a relator to share in the settlement of a converted qui tam action after all of the relator's NYFCA claims have been dismissed for failure to state a claim, the time to appeal has expired, and the only claims remaining are those the relator had no standing to assert on behalf of the government.

As "NYFCA follows the federal FCA, . . . it is appropriate to look toward federal law

when interpreting the New York act." (State of N.Y. ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 71 [1st Dept 2012], lv denied 19 NY3d 810; see also United States of Am. ex rel. Lee v Northern Adult Daily Health Care Ctr., 174 F Supp 3d 696, 703 [ED NY 2016] [citing the Seiden holding, after noting the "similarity" between the NYFCA and the FCA].) The reasoning of the federal decisions applying analogous FCA provisions concerning relator awards, together with this court's analysis of the language and structure of the pertinent NYFCA provisions, persuade this court that FX's interpretation of NYFCA § 190 (6) is not sustainable.

Of the numerous federal authorities cited by the parties, Donald v University of California Board of Regents (329 F3d 1040, supra) and United States ex rel. Merena v SmithKline Beecham Corp. (205 F3d 97 [3d Cir 2000, Alito, J.]) are particularly instructive. In each case, the government intervened in federal False Claims Act (FCA) qui tam actions, entered into multi-million dollar settlements with the defendants encompassing the relators' claims, and then contested the relators' attempts to recover a statutory share of the settlement proceeds pursuant to FCA § 3730 (d) (1)—the federal analogue to NYFCA § 190 (6). Both Circuit Courts held that the relators were only entitled to share in the settlements to the extent that they had asserted valid FCA claims in their qui tam actions.

More particularly, in Donald, relators filed two qui tam suits under the FCA against the Regents of the University of California.[8] The government conducted a two-year audit of the Regents based on the allegations of the relators. The government also intervened in both qui tam suits. (329 F3d at 1041.) Shortly after the interventions, the government and the Regents reached a settlement of both actions "in which the Regents agreed to pay the government $22.5

[8] The relators alleged that teaching hospitals affiliated with the university were fraudulently billing federal and state health insurance programs for services rendered by interns and residents as if they had been provided by faculty physicians. (329 F3d at 1041.)

million in exchange for a release from liability for certain fraudulent practices, both under the FCA and under the common law." (Id.) The government and the relators began to engage in talks about the amount owed to the latter from the settlement proceeds. Soon, however, the government terminated negotiations with the relators. The government took the position that the relators were not entitled to any share of the settlement based on the U.S. Supreme Court's then-recent decision in Vermont Agency of Natural Resources v United States ex rel. Stevens (529 US 765 [2000] [Stevens]), which held that a state or state agency (like the Regents) is not a "person" that can be named as a defendant in a qui tam action brought under the FCA. (Donald, 329 F3d at 1041-1042.)

On appeal of the district court's denial of their motion for a statutory share of the settlement, the relators argued that the federal government's intervention in their action and use of their FCA claims to negotiate and secure the settlement of the action, without asserting the defense that the Regents was not a proper qui tam defendant, entitled the relators to a share of the proceeds of the settlement. (Id., at 1042-1043.) The Ninth Circuit disagreed, holding that, "[r]egrettably for the relators, the plain language of the FCA precludes their statutory claim for relief." (Id., at 1043.) First, the Court held that, in light of Stevens, the relators could "claim no statutory basis [under the FCA] on which to bring suit against the Regents." (Id., at 1044.) Second, the Court held that, under FCA § 3730 (d) (1), "the government is required to share settlement proceeds '[i]f [it] proceeds with an action brought by a person under subsection [b]"—i.e., if it proceeds with a qui tam action. (Donald, 329 F3d at 1044 [brackets in original].) As the government in Donald had intervened in and "proceed[ed]" with the relators' qui tam actions, the Court effectively interpreted the language "an action brought by a person under subsection [b]" in FCA § 3730 (d) (1) to mean an action alleging a "valid cause of action" under

the FCA. (See id. [concluding that "[a] private party . . . has a legal right to recovery only from a qui tam action brought pursuant to § 3730(b)(1), which is in turn dependent on the private party having a valid cause of action under § 3729(a)"].)

In sum, the Donald Court denied the relators a share of the government's settlement with the qui tam defendant because the relators could not establish that they had a valid cause of action under the FCA. The Court reached this conclusion despite the existence of a number of circumstances arguably weighing in favor of affording the relators a share of the settlement: (1) the relators' claim had not been formally dismissed prior to the government's settlement; (2) the relators had brought their qui tam action before the Supreme Court's decision in Stevens; (3) the relators apparently had provided the government with the foundational evidence for its multi-million dollar settlement; and (4) the settlement had encompassed, among other claims and liabilities, outstanding FCA claims. (Id., at 1042-1043.)

Similarly, in Merena, three groups of relators commenced qui tam actions against SmithKline Beecham Clinical Laboratories (SKB) after it was publicly alleged that SKB and several other medical laboratories had adopted a scheme that allowed them to bill the government for unauthorized and unnecessary laboratory tests (the "automated chemistry" scheme). (205 F3d at 98-99.) The three qui tam actions alleged a variety of FCA violations, including but not limited to claims based on the automated chemistry scheme. In early 1996, SKB and the government tentatively agreed to settle both the automated chemistry claims and the "additional claims in the qui tam actions." (Id., at 99.) The government thereafter intervened in the relators' actions. (Id.) The district court approved a settlement between the government and SKB for $325 million and dismissed the three qui tam actions with prejudice, but retained jurisdiction over the determination of the relators' shares of the settlement. (Id., at 99-100.) The

government offered the relators a share of the proceeds attributable to the settlement of certain of their FCA claims. (Id., at 100.) It argued, however, that the relators were not entitled to any share of the proceeds attributable to settlement of the automated chemistry claims because the Court was "jurisdictionally barred" from considering such claims by the public disclosure provision of FCA § 3730 (e) (4).[9] (Id.) The relators took the position that they were entitled to a share of the "total proceeds" that the government obtained in the settlement. (Id.)

Although the District Court accepted the relators' position (id., at 100-101), the Third Circuit reversed. In deciding whether the relators were entitled to a share of settlement proceeds attributable to the automated chemistry claims, the Court considered whether the relators would have been entitled to such a share had their complaints asserted only those claims. (Id., at 101-102.) There was no dispute that, under the relevant provisions of the FCA, the government's intervention had provided the district court with subject matter jurisdiction over—i.e., eliminated any jurisdictional bar or cured any jurisdictional defect as to—both the automated chemistry claims and the relators' other FCA claims. (Id., at 103.) The Court held, however, that the relators' right to a share of the automated chemistry proceeds did not turn on the question of subject matter jurisdiction. (Id.) Rather, the Court identified the pertinent legal question as "whether the qui tam statute authorizes an award when a relator asserts a claim that is subject to dismissal under § 3730 (e) (4) [the public disclosure bar] but the government intervenes before the claim is dismissed." (Id.) The Court held that the government's position—that the statute does not authorize such an award—was "much more persuasive." (Id., at 105.) The relators' position, the Court noted, would provide a "potentially huge windfall—15-25% of the total

[9] Section 3730 (e) (4) requires courts to dismiss an action or claim, "unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed [among other sources] . . . (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

recovery—for most relators whose claims would have been dismissed under [the public disclosure bar] if the government had not intervened." (Id.) The Court reasoned that "[i]t is hard to see why Congress might have wanted the fortuity of government intervention to make such a difference—or why Congress might have wanted to provide such a large reward to such a relator, who provides little if any public service." (Id.) Moreover, the relators' position would have afforded the relators a percentage recovery identical to that of relators who brought claims not based on publicly disclosed information, although "[i]t seem[ed] unlikely that Congress wanted these two vastly different types of relators to be treated the same." (Id.) According to the Court, the legislative history also supported the government's position. (Id., at 106.) Finally, the Court held that the government had not "waived its right to argue that the relators were barred from recovering proceeds attributable to the automated chemistry claims" when it agreed to settle the lawsuits. (Id.) The Court concluded: "[A] relator whose claim is subject to dismissal under section 3730(e)(4) may not receive any share of the proceeds attributable to that claim." (Id.)

Although Donald and Merena involved government intervention in the relators' qui tam actions, they are fully consistent with a long line of federal decisions referred to by the parties as "alternate remedy" decisions. The latter decisions address a separate award provision of the federal FCA, section 3730 (c) (5), which applies when the government declines to intervene in a relator's qui tam suit and instead "elects to pursue its claim through any alternate remedy . . ."—i.e., recovers from the defendant by means of some remedy other than the qui tam action. Both the FCA and the NYFCA permit the government to pursue remedies, alternative to the qui tam suit, for the misconduct pleaded by the relator. Both Acts, in virtually identical language, provide, in pertinent part, that '[i]f any such alternate remedy is pursued in another proceeding, the person initiating the action [i.e., the relator] shall have the same rights in such proceeding as

such person would have had if the action had continued under this section [i.e., as a qui tam action]." (FCA § 3730 [c] [5]; NYFCA § 190 [5] [c].) Thus, "even if the government does not intervene, under both the FCA and the NYFCA, a relator may still potentially share in a recovery that the State or federal government has obtained as an 'alternate remedy' to the qui tam action." (Lee, 174 F Supp 3d at 700.)

Where the government does not elect to intervene in a qui tam action, settlements negotiated by the government with a qui tam defendant outside the relator's FCA action, but encompassing or overlapping with the relator's claims, may constitute an "alternate remedy" in which the relator is entitled to share. (See United States ex rel. Bledsoe v Community Health Sys., Inc., 342 F3d 634, 647, 650-651 [6th Cir 2003] [Bledsoe I].) The overwhelming weight of federal appellate authority holds, however, that a relator is not entitled to a statutory share of such a settlement unless the relator has pleaded "a valid qui tam action that overlaps . . . with the conduct covered by the Settlement Agreement." (See e.g. United States ex rel. Bledsoe v Community Health Sys., Inc., 501 F3d 493, 522 [6th Cir 2007] [Bledsoe II] [holding that the relator was not entitled to a share of a settlement, where the relator's qui tam complaint failed to plead a violation of the FCA with particularity]; United States ex rel. Adrian v Regents of Univ. of Cal., 337 Fed Appx 379, 380-381 [5th Cir 2009] [holding that the relator was not entitled to a share of a settlement, where the relator's action against the state agency had previously been dismissed as invalid under Stevens]; see also United States ex rel. Newell v City of St. Paul, Minn., 728 F3d 791, 798-800 [8th Cir 2013], cert denied 134 S Ct 1284 [2014] [denying the relator a share of a secret global settlement in which his qui tam action was allegedly "used as a bargaining chip to induce the City not to take an action" in an unrelated litigation, on the ground, among others, that even if the settlement constituted an "alternate remedy," relator's "FCA

claims were subject to dismissal under the public disclosure bar"].)[10]

At least two federal alternate remedy cases have held that the same rule applies under the NYFCA. (Lee, 174 F Supp 3d at 704 [holding that the relevant FCA and NYFCA statutory provisions are "nearly identical, and that the relator's motion for a share of a settlement was premature because a motion to dismiss was pending, the Court reasoning: "Because Relators may ultimately fail to state a valid qui tam action, it would be premature to determine Relators' entitlement to an alternative remedy"]; State of N.Y. ex rel. Khurana v Spherion Corp., 246 F Supp 3d 995, 1001 [SD NY 2017] [holding that the relator was not entitled to a share of a settlement, where his qui tam claims had been dismissed under the public disclosure bar or otherwise held defective, the Court reasoning: "Because [relator's] qui tam claims have been dismissed he has no right to recover any proceeds . . . under the NYS FCA's 'alternate civil remedy' provision"].)

Both policy considerations and the plain language of the FCA support this rule that a relator who fails to state a valid FCA claim has no right to share in the recovery achieved by the government by alternate means. With respect to policy, as the Sixth Circuit explained in Bledsoe II, the determination that a settlement agreement may constitute an alternate remedy in which a relator may be entitled to share is based on the premise that the government could otherwise "decline to intervene in a qui tam suit, then settle that suit's claims separately and deny the relator his or her share of the settlement proceeds simply because the government had not

[10] The same rule has been applied in alternate remedy cases that do not appear to involve consummated settlements. (United States ex rel. Godfrey v KBR, Inc., 360 Fed Appx 407, 410, 413 [4th Cir 2010] [per curiam] [holding that there was no evidence that the government was in fact pursuing an alternate remedy, but that the relator would not in any event be entitled to a share of the recovery, as the relator's qui tam complaint had been dismissed for pleading defects]; United States ex rel. Hefner v Hackensack Univ. Med. Ctr., 495 F3d 103, 108, 111-112 [3d Cir 2007] [holding that the relator was not entitled to a share of money repaid by defendant to the government where the relator failed, on a summary judgment motion, to present sufficient evidence that defendant knowingly submitted false claims].)

formally intervened in the qui tam action." (501 F3d at 522 [internal quotation marks and citation omitted].) The Court reasoned that "[t]his course of action would undermine relators' incentives to bring qui tam actions, and would thereby frustrate Congress's intent that the government and private citizens collaborate in battling fraudulent claims." (Id. [internal quotation marks and citations omitted].) As further explained by the Court, however:

> ". . . This reasoning . . . does not extend to qui tam actions that fail to adequately state a claim upon which relief can be granted. Since there is no prospect for relators to recover on their claims under any circumstances, holding that a relator is not entitled to settlement proceeds that potentially overlap with his inadequately-pled claims does not decrease relators' incentives to bring qui tam actions in the first instance.
>
> Moreover, allowing a relator who failed to plead fraud with particularity to recover proceeds from an alternate remedy pursued by the government with respect to those fraudulent allegations would make little sense. Qui tam proceeds are available not to persons who inform the government of wrongdoing, but are only available when the government proceeds 'with an action.' 31 U.S.C § 3730(d)(1). Absent a valid complaint which affords a relator the possibility of ultimately recovering damages, there is no compelling reason for allowing a relator to recover for information provided to the government."

(Id., at 522.)

The requirement of a valid FCA claim in alternate remedy cases is also based on the unambiguous terms of FCA § 3730 (c) (5) and NYFCA § 190 (5) (c), the federal and state alternate remedy provisions. (See e.g. Newell, 728 F3d at 799; Lee, 174 F Supp 3d at 703.) As previously noted, these sections, in virtually identical language, afford a relator the "same rights in [the alternate remedy] proceeding as such person would have had if the [qui tam] action had continued . . . ." "Where a relator lacks a valid qui tam claim on which the government or the relator could proceed, the relator lacks any rights to a recovery in that action. In turn, because the relator lacks any right to recovery in the original action, the relator has no right to recovery that would also apply to an alternate remedy." (Lee, 174 F Supp 3d at 703.) By requiring that a relator have a valid FCA claim before it is awarded a share of a government's settlement, the

court ensures that the relator is afforded no greater or different rights than it would have had if the relator's action had proceeded. "The statute evinces no intent to compensate relators who bring unfounded [FCA] claims, whether the claims are legally or factually unfounded." (Hefner, 495 F3d at 112.)

FX's Attempts to Distinguish This Precedent Are Unpersuasive

The court is unpersuaded by FX's attempts to distinguish the above cases. FX argues, for example, that the federal alternate remedy cases are not applicable here because the alternate remedy provisions of the FCA "can only be invoked when a government has declined to intervene." (FX Reply Memo., at 3 [emphasis in original].) FX states that "[h]ad the City declined [to supersede FX's qui tam action] and brought its own action for breach of contract or breach of fiduciary duty, the outcome may have altered." (Id., at 1.) It argues, however, that conversion "irrevocably changed the nature of the action 'in all respects'" (id.), and that "the concepts of an 'invalid,' or 'unfounded,' claim are meaningless to the relator's share analysis once a government chooses to intervene in, or, in this case, supersedes, a relator's qui tam action." (Id., at 6.)

FX thus appears to concede that if the Funds had declined to take over this proceeding and had instead brought their own action for breach of contract and breach of fiduciary duty, and if FX's qui tam action had thereafter been dismissed for failure to state a claim, FX would not now be entitled to share in the Funds' settlement. (See id., at 1.) It contends, however, that the government's conversion of the action bound the Funds to share their recovery with FX on claims that FX had no standing to assert, and notwithstanding that the Attorney General and the Funds inherited no viable claims from FX in the conversion. FX cites no authority supporting, or policy rationale for, this position, which would create an unfair and illogical distinction between

converted and declined qui tam actions, and attach a potentially multi-million dollar penalty to the government's decision to supersede or intervene in a weak qui tam action and then to supplement with overlapping, and better fitting, contract or tort claims.

Although the cited alternate remedy cases involve recoveries after the government declined to intervene in qui tam actions, FX points to no conceivable reason why a relator who fails to plead a valid NYFCA claim should receive a windfall from the government's decision, generally very early in the litigation,[11] to convert the qui tam action and add non-NYFCA causes of action. A relator whose invalid action is not converted receives nothing, regardless of whether the government is able to use the information disclosed to recover from the defendant by alternate means. As observed by the Court in Merena, "[i]t is hard to see why Congress might have wanted the fortuity of government intervention to make such a difference—or why Congress might have wanted to provide such a large reward to such a relator . . . ." (205 F3d at 105.) As further explained by the Sixth Circuit in Bledsoe II, "[q]ui tam proceeds are available not to persons who inform the government of wrongdoing, but are only available when the government proceeds 'with an action.' 31 U.S.C. § 3730(d)(1). Absent a valid complaint which affords a relator the possibility of ultimately recovering damages, there is no compelling reason for allowing a relator to recover for information provided to the government." (501 F3d at 522.) Here, FX did not commence a valid NYFCA action, and thus has no legal right to share in the recovery achieved after the Attorney General and the Funds converted the action and asserted viable contract and common-law claims against BNYM.

[11] FX appears to assume that the government's decision to intervene is, in effect, "a validation of a relator's allegations." (FX Reply Memo., at 6, n 4 [emphasis in original].) FX, however, makes no showing that the assumption is well-founded. It must be noted that the decision by the government to intervene or supersede generally must be made within sixty days of receiving the relator's complaint, before the relator's claims have been judicially tested. (See FCA § 3730 [b] [2]- [4]; NYFCA § 190 [2] [b].)

In any event, as discussed above, the alternative remedy cases are consistent with Donald and Merena, in which the Courts denied relators shares of settlements entered after the government intervened in those relators' actions. FX attempts to distinguish Donald and Merena on the ground that the relators' claims there were found to be "jurisdictionally barred," whereas FX's claims here were dismissed for failure to state a claim. (See FX Reply Memo., at 7.) There is nothing on the face, or implicit in the reasoning, of those decisions to suggest that the jurisdictional bar finding was determinative. On the contrary, in Merena the Court expressly reasoned that the relators' right to a share in the proceeds did not "turn[] on a question of subject matter jurisdiction." (205 F3d at 103.) Instead, the Court held that the issue was one requiring statutory construction and, in particular, determination as to whether the FCA authorized an award where a relator asserted a claim that was subject to dismissal but the government intervened before the claim was dismissed. (See id.) In short, whether a relator pleads a claim subject to the public disclosure bar (id.), fails to plead a claim against a proper defendant (see Donald, 329 F3d 1040, supra), or fails to plead facts bringing its claim within the categories of fraudulent conduct prohibited by the NYFCA (as here), an invalid qui tam complaint provides no basis on which the relator may subsequently seek to share in a settlement by the government.

The NYFCA Does Not Provide Broader Rights than the FCA for a Relator that Brings an Invalid NYFCA Qui Tam Action

The court also rejects FX's contention that the language of NYFCA § 190 (6), as compared to that of the federal analogue, renders the federal authorities discussed above inapplicable. The relevant provisions of the two Acts are set forth side by side below:

NYFCA § 190 (6) (a):	FCA § 3730 (d) (1):
"If the attorney general elects to convert the qui tam civil action into an attorney general enforcement	"If the Government proceeds with an action brought by a person under subsection (b), such person shall,

> action, or to permit a local government to convert the action into a civil enforcement action by such local government, or if the Attorney General or a local government elects to intervene in the qui tam civil action, then the person or persons who initiated the qui tam civil action collectively shall be entitled to receive between fifteen and twenty-five percent of the proceeds recovered in the action or in settlement of the action. . . ." (emphasis supplied)
>
> subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. . . ." (emphasis supplied)

FX contends that the language of section 190 (6) (a), entitling a relator to a 15-25% percentage of the "proceeds recovered . . . in settlement of the action," means the "action" at the time of settlement, regardless of whether any NYFCA claims exist at that time. (See FX Memo. In Supp., at 6-11, 23-24.) In support of this contention, FX emphasizes the distinction between the phrase "settlement of the action" in NYFCA § 190 (6) (a) and "settlement of the claim" in FCA § 3730 (d) (1). It argues that, by broadening the word "claim" to the word "action," the New York Legislature unambiguously signaled its intent to depart from the FCA and to award relators in superseded qui tam actions a share of any recovery in the total converted action, regardless of the validity of the relators' NYFCA claims or the addition of contract and tort claims by the government. (See FX Memo. In Supp., at 9-11.)

FX does not submit any case law or legislative history supportive of this position, and the court finds no basis on which to attribute such significance to the use of the word "action" in NYFCA § 190 (6) (a). Indeed, there is persuasive authority to the contrary construing the word "action" in determining a relator's claim to a share of a settlement in an intervened FCA qui tam action. In Rille v PricewaterhouseCoopers LLP (803 F3d 368 [8th Cir 2015]), the Court held that the phrase "proceeds of the action" in FCA § 3730 (d) (1) applies to a relator's share in a

litigation, not a settlement. Even assuming that the phrase applied in the case of a settlement, the Court rejected as "unnatural" the relators' contention that the phrase "means proceeds not of the action as brought by the relators, but of the action as developed after intervention by the government." (Id., at 373 [emphasis in original].) As the Court explained, "[i]t would be inconsistent with the purposes of the [FCA] to permit a relator automatically to receive a share of the proceeds when the relator might have had nothing to do with the government's recovery on a particular claim that was added after the government's intervention." (Id.)

The court concludes that the word "action" in NYFCA §190 (6) (a) must be construed as referring back to "the qui tam civil action"—that is, the action as initially brought by the relator, not the action as converted and developed by the government. For the reasons discussed above, the court further holds that the phrase "proceeds recovered . . . in settlement of the action" in NYFCA §190 (6) (a) must be read to mean the proceeds of the settlement of a valid action commenced by the relator.[12] Here, FX did not commence a valid NYFCA action against BNYM because its pleadings failed to state a claim for violation of that statute. This defect was never cured. For purposes of the NYFCA, all that remained following the court's August 5, 2013 decision was a non-NYFCA action by the Attorney General and the Funds. There is

[12] The court need not, and does not, decide on this motion whether a relator who commences a valid NYFCA action is entitled to share in the settlement of non-NYFCA claims, which are added by the government to that action after conversion, and which overlap factually with the claims brought by the relator. In Rille v PricewaterhouseCoopers LLP (803 F3d 368, supra), the Eighth Circuit held, based on the phrase "settlement of the claim" in FCA § 3730 (d) (1), that when the government proceeds with a valid action brought by a relator under the FCA, and then settles both the claim brought by the relator and a different claim that does not overlap factually with the claim brought by the relator, "the relator may recover only from the proceeds of the settlement of the claim that he brought." (Id., at 370.) The Court also held, however, that "proceeds of 'the claim' must extend to proceeds of a settlement in which 'the conduct contemplated in the settlement agreement . . . overlaps with the conduct alleged in the Relator's complaint.' Otherwise the government could deprive the relator of his right to recover simply by recasting the same or similar factual allegations in a new claim or by pursuing the substance of the relator's claim in an alternate proceeding. But there must be a factual overlap for the relators to recover." (Id., at 373-374 [quoting Bledsoe, 342 F3d at 651].) There was no dispute in Rille that the relators had stated valid causes of action under the FCA.

consequently no "action" within the meaning of section 190 (6) (a), the proceeds of which FX is entitled to share.

The Possibility of a Valid NYFCA Claim

Finally, to the extent FX contends that it should be awarded a share of the Funds' settlement because plaintiffs could have successfully defended the NYFCA claims on appeal or sought leave to replead valid NYFCA claims, that contention is also rejected. FX argues that the Attorney General and the Funds assumed "primary responsibility" for this litigation when they converted the qui tam action. (See FX Reply Memo., at 7-10.) Although FX does not fault the Attorney General or the Funds for prioritizing their non-NYFCA claims, it contends that its own rights should not be prejudiced because those parties declined to pursue NYFCA theories after the court's decision. (Id., at 10.) The Funds argue that "[t]he Relator's failure to make any attempt to protect the FCA causes of action bars him from arguing now that maybe those causes of action would have somehow survived." (Funds Memo. In Opp., at 15-16.)

The parties dispute whether FX itself had the ability to appeal this court's dismissal of the NYFCA claims or to replead those claims. The court does not, and need not, reach this issue, as the parties' respective responsibilities for defending the NYFCA claims are, in any event, irrelevant to this motion. In determining whether a relator is entitled to a share of a government settlement, a court is not, and should not be, called upon to decide the fundamentally speculative issues of whether an appeal of the trial court's dismissal of the relator's NYFCA claims would have been successful; whether the complaint could have been amended to assert potentially novel and never-pleaded claims; and whether such claims would have been successful had the parties litigated the action differently.

Remaining Claims

As the court holds that FX is not entitled to a share of the Funds' settlement under NYFCA §190 (6) (a), the court need not address the parties' arguments with respect to the calculation of the share.

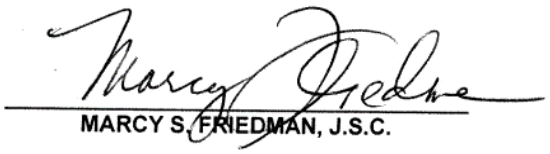
ORDER

It is accordingly hereby ORDERED that the motion of qui tam plaintiff FX Analytics "for an order on [its] Objection and a determination of the statutory award of 15% to 25% of the value of the settlement . . . ." is granted solely to the extent that it is

ORDERED, ADJUDGED, and DECLARED that FX's objection to the settlement of this action is without merit; and it is further

ORDERED that FX Analytics, as qui tam plaintiff, is denied a statutory award in the settlement of the above-captioned action by plaintiff Comptroller of the City of New York and plaintiff City Funds.

This constitutes the decision and order of the court.



9/14/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE