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

----------X

PHONE ADMINISTRATIVE SERVICES INC., on behalf of the STATE OF NEW YORK,

Plaintiff,

- v -

VERIZON NEW YORK, INC., VERIZON COMMUNICATIONS INC., XO NEW YORK, INC. D/B/A XO COMMUNICATIONS (NEW YORK), XO COMMUNICATIONS SERVICES, LLC, METROPOLITAN TELECOMMUNICATIONS HOLDING COMPANY D/B/A METTEL, LEVEL 3 COMMUNICATIONS, LLC, CENTURYLINK COMMUNICATIONS, LLC, BANDWIDTH.COM CLEC, LLC, ALTICE USA, INC., TC SYSTEMS, INC., YMAX COMMUNICATIONS CORP., AT&T CORP., AT&T COMMUNICATIONS OF NEW YORK, INC., CITIZENS TELECOMMUNICATIONS COMPANY OF NEW YORK, INC., FRONTIER COMMUNICATIONS OF AUSABLE VALLEY, INC., FRONTIER COMMUNICATIONS OF NEW YORK, INC., FRONTIER COMMUNICATIONS OF ROCHESTER, INC., FRONTIER COMMUNICATIONS OF SENECA-GORHAM, INC., FRONTIER COMMUNICATIONS OF SYLVAN LAKE, INC., FRONTIER TELEPHONE OF ROCHESTER, INC., OGDEN TELEPHONE COMPANY, and KPMG, LLP,

Defendants.

----------X

INDEX NO. 100329/2014

MOTION DATE N/A

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

HON. MELISSA CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 195, 196, 197, 198, 199, 201, 202, 203, 204, 205, 206, 207, 208, 210

were read on this motion to DISMISS.

Plaintiff Phone Administrative Services, Inc. ("PAS") brings a qui tam action under the New York False Claims Act (State Finance Law, art. XIII [hereinafter "NYFCA"') alleging defendant telephone carries systematically under-remitted surcharges intended to fund the 911

emergency system. Defendants[1] move, pursuant to CPLR 3211 (a)(3), (5), and (7), and CPLR 3016, to dismiss the fourth amended complaint in its entirety, arguing that plaintiff lacks standing to bring this action, the complaint's allegations are insufficiently pled, and prior public disclosure bars this action. For the reasons set forth below, the motion is denied with a limited exception.

BACKGROUND

New York State funds its 911 emergency telephone service using surcharges on telephone services (Fourth Amended Compl. ¶ 2 [hereinafter "Compl."] [NYSCEF Doc No. 177]). The State legislature enacted Article 6 of the County Law, authorizing municipalities to, among other things, adopt local laws "impos[ing] a surcharge in an amount not to exceed thirty-five cents per access line per month on the customers of every service supplier within such municipality to pay the costs associated with obtaining, operating, and maintaining the telecommunication equipment and telephone services needed to provide an enhanced 911 emergency telephone system to serve such municipality" (County Law § 303 [1]). However, municipalities having a population of one million people or more are "authorized and empowered to adopt local laws . . . to impose a surcharge in an amount not to exceed one dollar

[1] The moving defendants include: Altice USA, Inc. (Altice); AT&T Communications of New York, Inc. and AT&T Corp. (together, AT&T); TC Systems, Inc.; Bandwidth.com CLEC, LLC (Bandwidth); CenturyLink Communications, LLC (CenturyLink) and Level 3 Communications, LLC (Level 3); Citizens Telecommunications Company of New York, Inc., Frontier Communications of Ausable Valley, Inc., Frontier Communications of New York, Inc., Frontier Communications of Rochester, Inc., Frontier Communications of Seneca-Gorham, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Telephone of Rochester, Inc., and Ogden Telephone Company (collectively, Frontier); Metropolitan Telecommunications Holding Company (MetTel); Verizon New York Inc., Verizon Communications Inc. (together, Verizon), XO Communications Services, LLC, and XO New York, Inc. d/b/a XO Communications (New York) (XO Communications); and YMAX Communications Corp. (YMAX) (NYSCEF Doc No. 180).

per access line per month on the customers of every service supplier within such municipality to pay for the costs associated with obtaining, operating and maintaining the telecommunications equipment and telephone services needed to provide an enhanced 911 emergency telephone system to serve such municipality" (*id.*). The County Law further provides that "[t]he appropriate service supplier or suppliers serving a 911 service area shall act as collection agent for the municipality and shall remit the funds collected as the surcharge to the fiscal officer of the county every month" (County Law § 305).

In November 1991, New York City adopted the Enhanced 911 Telephone Surcharge Act, that mandates the surcharge "be imposed on a per access line basis on all current bills rendered for local exchange access service within the 911 service area," and that "[n]o such surcharge shall be imposed upon . . . more than seventy-five exchange access lines per customer per location" (Administrative Code of City of NY § 11-2324 [a], [b] [1]). New York City's surcharge law further provides that "[i]n accordance with the provisions of article six of the county law, as amended, there is hereby established a surcharge of one dollar per telephone access line per month on the customers of every telephone service supplier within the city of New York" (Administrative Code of City of NY § 11-2323 [a]).

PAS, in its complaint, alleges that the telephone company defendants knowingly underbill 911 surcharges in five different ways, and submit false remittance forms to local governments to conceal the underbilling (Compl. ¶¶ 3-4). First, defendants undercount the number of access lines. For instance, when defendants offer service through primary rate interface (PRI) technology,[2] they should bill their customers for twenty-three access lines, but

[2] PAS alleges that PRI is the standard interface that wireline service providers use to transmit calls from a subscriber to the telephone exchange run by the service provider (Compl. ¶ 16).

routinely bill their customers for less (*id.* ¶¶ 16, 55). Second, defendants undercount Voice over Internet (VoIP)[3] access lines (*id.* ¶ 56). Third, defendants treat multiple locations as a single location for purposes of triggering a location-based cap on surcharges (*id.* ¶ 57). Fourth, providers' interactions with resellers frequently result in underpayment of 911 surcharges (*id.* ¶ 58). Fifth, certain defendants did not collect any 911 surcharges from certain customers or, in some instances, from any customers (*id.* ¶ 59).

PAS filed prior versions of the complaint under seal (*id.* ¶¶ 44-48). After the Attorney General declined to intervene in this action, the court issued an order directing that the action be unsealed (*id.* ¶ 47; Order [NYSCEF Doc No. 2]). PAS alleges that defendants violated State Finance Law § 189 (1)(h), by knowingly concealing or knowingly avoiding or decreasing an obligation to transmit money or property to the state or local governments, and State Finance Law § 189 (1)(g), by knowingly and improperly avoiding and decreasing an obligation to pay or transmit money or property to the state or local governments (*id.* ¶¶ 153, 154). PAS seeks, *inter alia*, treble damages that the state and local governments sustained, including consequential damages; an award of civil monetary penalties; an award of thirty percent of the proceeds as PAS's share; and attorney's fees and expenses (*id.* at 53-54).

DISCUSSION

I. Standing

Defendants argue initially that PAS does not have standing to bring this action. Specifically, defendants argue PAS, as the relator, stands in the shoes of the State, and the State lacks standing to bring charges related to the 911 charges imposed and collected by local

[3] According to PAS, VoIP connects calls by transferring audio over a network, such as the internet (Compl. ¶ 18).

governments. Defendants assert that the real parties in interest are local governments, because the 911 charges are remitted to them, not the State. Defendants' argument is unpersuasive.

Standing is a threshold issue, requiring "an actual legal stake in the outcome of the . . . action or, in other words, an injury in fact and capable of judicial resolution" (*Matter of La Barbera v Town of Woodstock*, 29 AD3d 1054, 1055 [3d Dept 2006], *lv dismissed* 7 NY3d 844 [2006] [citations omitted]). As the Court of Appeals has explained,

> "Whether derived from the Federal Constitution or the common law, the core requirement that a court can act only when the rights of the party requesting relief are affected, has been variously refashioned over the years… '[I]njury in fact' has become the touchstone during recent decades. The existence of an injury in fact – an actual legal stake in the matter being adjudicated – ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.' The requirement of injury in fact for standing purposes is closely aligned with our policy not to render advisory opinions.
>
> Injury in fact thus serves to define the proper role of the judiciary, and is based on 'sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments'"

(*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991] [citations omitted]).

"On a pre-answer motion to dismiss for lack of standing, the burden lies with the defendant to establish prima facie that plaintiff has no standing to sue" (*Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510 [1st Dept 2016]; *accord Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016]).

It is appropriate to look toward the federal False Claims Act because NYFCA follows the federal False Claims Act (31 USC § 3729 *et seq.*) (*State of New York ex rel. Seiden v Utica First Ins. Co.*, 96 AD3d 67, 71 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]). Here, NYFCA

provides that "[a]ny person may bring a qui tam civil action for violation of [NYFCA] on behalf of the person and the people of the state of New York or a local government" (State Finance Law § 190 [2]). The relator plaintiff "stands in the shoes of the government, which is the real party in interest" (*United States ex rel. Kreindler & Kreindler v United Techs. Corp.*, 985 F2d 1148, 1154 [2d Cir 1993], *cert denied* 508 US 973 [1993]). Thus, "relators have standing to sue not as agents of the [government], but as partial-assignees of the [government's] claim to recovery" (*United States ex rel. Eisenstein v City of New York*, 540 F3d 94, 101 [2d Cir 2008], citing *Vermont Agency of Nat. Res. v U.S. ex rel Stevens*, 529 US 765, 883-774 [2000]).

NYFCA's language makes clear that the State has an actual legal stake in the outcome of a false claims action. NYFCA provides, with respect to civil enforcement actions, that "[i]f the attorney general believes that a person has violated or is violating . . . section one eighty-nine, then the attorney general may bring a civil action on behalf of the people of the state of New York or on behalf of a local government against such person" (State Finance Law § 190 [1]). "The state may elect to supersede or intervene or proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene . . . ." (State Finance Law § 190 [2] [b]).[4] Where the State declines to intervene, "[t]he qui tam action may proceed subject to judicial review under this section, the civil practice law and rules, and other applicable law," and "[t]he qui tam plaintiff shall provide the state or any applicable local government with a copy of any document filed with the court on or about the date it is filed" (State Finance Law § 190 [2] [f]). In addition, "[a] copy of any complaint which alleges that damages were sustained

[4] A "local government" is defined as "any New York county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state, or of such local government" (State Finance Law § 188 [7]).

by a local government shall also be served on such local government" (State Finance Law § 190 [3]). There is no requirement that the State suffer damages before the attorney general may bring an enforcement action. Nor is the attorney general required to sue on behalf of a local government that sustained damages.

NYFCA also provides for the rights of the parties of qui tam actions. Under NYFCA, "[i]f neither the attorney general nor a local government intervenes in the qui tam action then the qui tam plaintiff shall have the responsibility for prosecuting the action, subject to the attorney general's right to intervene at a later date upon a showing of good cause" (State Finance Law § 190 [5] [a]), subject to the limitations found in section 190 (5) (b) (i). That section states that "if the action involves damages sustained by a local government but not the state, then the local government may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the motion" (State Finance Law § 190 [5] [b] [i]). Even if this case involves damages sustained only by local governments, the local governments are not precluded from seeking to intervene or moving to dismiss.

In sum, PAS has standing to bring this action, and is responsible for prosecuting this action pursuant to the statute. Accordingly, defendants' motion to dismiss for lack of standing is denied.[5]

[5] Defendants argue that PAS is barred under the res judicata doctrine from bringing claims on behalf of six counties, contending that these counties lost a case based on similar misconduct. In that action, the court held that the plaintiff counties did not have the authority to enforce 911 surcharges against telephone companies (*County of Fulton v Verizon N.Y., Inc.*, Sup Ct, Nassau County, Nov. 26, 2019, Murphy, J., Index No. 605952/2019 [NYSCEF Doc No. 185]). This argument is without merit. The State was not a party to that action (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]).

II. Failure to State a Claim and the Particularity of the Allegations

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carlson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). At the same time, however, "'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration'" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

"To state a claim under [NYFCA] . . . the relator in this qui tam action must allege facts showing that defendants knowingly made, used, or caused 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 local government" (*State of New York ex rel. Edelweiss Fund, LLC v JP Morgan Chase & Co.*, 189 AD3d 723, 723 [1st Dept 2020], citing State Finance Law § 189 [1] [g]) or "knowingly conceal[ed] or knowingly and improperly avoid[ed] or decrease[d] an obligation to pay or transmit money or property to the state or local government, or conspire[d] to do the same" (State Finance Law § 189 [1] [h]). Under NYFCA, the word "knowingly" includes actual knowledge, deliberate indifference, and recklessness (State Finance Law § 188 [3]). The word "material" is defined as "having a natural tendency to influence, or be capable of influencing the payment or receipt of money or property" (State Finance Law § 188 [5]).

CPLR 3016 provides that, in fraud cases, "the circumstances constituting the wrong shall be stated in detail." NYFCA provides that, for purposes of applying CPLR 3016,

> "the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit a state or local government effectively to investigate and defendants fairly to defend the allegations made"

(State Finance Law § 192 [1-a]).

Defendants contend that PAS fails to allege the local laws that defendants allegedly violated. According to defendants, this is significant because at least one county, Hamilton, has elected not to impose 911 surcharges at all,[6] while other counties only impose 911 charges on traditional telephone service, but not VoIP service. Defendants further maintain, with respect to certain defendants, that PAS impermissibly relies on out-of-state conduct.

Contrary to defendants' contention, PAS has alleged facts that, if proven true, "would provide a reasonable indication" that the NYFCA was violated (*id.*). Plaintiff adequately alleges, based on its review of telephone bills and remittance forms, that each defendant knowingly made, used, or caused to be made or used, false records or statements material to an obligation to pay or transmit money to local governments (*see State ex rel. Edelweiss Fund, LLC*, 189 AD3d at 723 [relator adequately alleged violation of NYFCA in fraudulent scheme in connection with resetting interest rates]; *cf. Total Asset Recovery Servs. LLC v Metlife, Inc.*, 189 AD3d 519, 523 [1st Dept 2020] [complaint failed to plead claim under NYFCA where it alleged, "in general terms, that all defendants engaged in all of the alleged conduct"]).

---

[6] PAS conceded at oral argument that its allegations as to Hamilton County could be dismissed (Oral Argument Tr. at 35 [NYSCEF Doc No. 210]).

For instance, with respect to Verizon, PAS alleges that Verizon charged five 911 surcharges for each PRI, instead of 23; undercounted the number of access lines for VoIP services; treated entire boroughs of New York City as a single location for the surcharge cap; and in some cases, omitted surcharges altogether (Compl. ¶¶ 70-89). PAS's review of a bill to an XO Communications customer in New York City showed that it did not bill for 911 surcharges, and counted each PRI as five access lines instead of twenty-three (*id.* ¶¶ 84-86). PAS also alleges that Verizon and XO Communications submitted false remittance forms to local governments certifying the accuracy of the data (*id.* ¶ 87). According to PAS's review of telephone bills, MetTel underbilled for 911 services, including VoIP services, and submitted false remittance forms which underreported the number of access lines (*id.* ¶¶ 90-93). PAS alleges, after reviewing CenturyLink's bills in Alabama, that CenturyLink has a nationwide practice of assessing its customers only one 911 surcharge per PRI, when it should assess twenty-three (*id.* ¶¶ 96, 97). PAS further alleges, based upon its review of bills in Minnesota, that CenturyLink underbills for VoIP service, and, upon information and belief, that CenturyLink has a nationwide practice of underbilling 911 charges for VoIP service (*id.* ¶¶ 98, 99). According to PAS's review of bills from across the country, Level 3 underbills 911 charges for VoIP service and when it does business through resellers (*id.* ¶¶ 100-101). PAS also alleges, upon information and belief, that CenturyLink and Level 3 submit false remittance forms that inaccurately report the number of access lines, "including in New York" (*id.* ¶ 102).

Based on PAS's review of bills in Pennsylvania and North Carolina, Frontier allegedly has a nationwide practice of underbilling 911 surcharges per PRI product and on its Centrex service, and, upon information and belief, Frontier follows these practices "in New York," and falsely reports the number of access lines (*id.* ¶¶ 103-107). With respect to AT&T, PAS alleges,

based upon bills for customers in Georgia and North Carolina, that AT&T underbills 911 surcharges per PRI, underbills 911 surcharges for 911 VoIP service, underbills the number of VoIP access line equivalents, systematically charges only five 911 surcharges per PRI, underbills 911 surcharges "in New York" on information and belief, and falsely reports access lines on its remittance forms, concealing the underbilling (*id.* ¶¶ 108-112). PAS alleges, based upon its review of a bill for a company in New Jersey, that Altice, including the Lightpath brand, allegedly underbills 911 surcharges per PRI, and assesses 911 surcharges on VoIP services as if the service were traditional channelized service (*id.* ¶¶ 113-115). PAS alleges, upon information and belief, that Altice follows these practices "in New York," and falsely reports the number of access lines (*id.* ¶ 116). According to PAS, based upon its review of a North Carolina bill, Bandwidth allegedly underbills for VoIP service, does most business through resellers who do not assess surcharges at all, and, on information and belief, follows the same billing practices "in New York," and falsely underrepresents the number of access lines (*id.* ¶¶ 117-121). Further, PAS alleges, based upon emails to clients, that YMAX allows customers, at their option, to visit its website and prepay 911 service for an entire year (*id.* ¶¶ 122-129). On information and belief, YMAX submits false remittance forms, that show only the amount collected, and not the amount exempt or uncollected (*id.* ¶ 130).

Significantly, defendants do not argue that the complaint is not pled with particularity as to conduct in New York City, or as to Verizon, MetTel, YMax, or KPMG. The complaint specifically references New York City's Enhanced 911 Telephone Surcharge Act (Compl. ¶¶ 35-40). Accepting the allegations as true, and giving PAS the benefit of reasonable inferences, PAS has sufficiently alleged that these defendants violated New York City law. As for the remaining local laws, PAS has detailed the material terms of the relevant laws, and has provided a list of

citations to local laws allegedly violated in response to the motion (NYSCEF Doc No. 197). Although defendants contend that some counties only impose charges on 911 calls, but not VoIP service, PAS sufficiently alleges that each defendant engaged in at least one of the five fraudulent schemes relating to 911 charges, and submitted false remittance forms to the local governments certifying their accuracy.

Although defendants argue that PAS relies on out-of-state conduct as to Altice, AT&T, Bandwidth, CenturyLink, and Frontier, it also alleges that defendants engage in nationwide billing practices (Compl. ¶¶ 94-102, 103-107, 108-112, 113-116, 117-121), and, upon information and belief, follow these practices in New York (*id.* ¶¶ 102, 103, 107, 108-112, 113-116, 117-121). PAS alleges that it has firsthand knowledge, through its principals, about defendants' billing practices, taken from investigations in multiple jurisdictions (*id.* ¶¶ 8-9). Under these circumstances, PAS's allegations made on information and belief are adequate to support its fraud claim (*see U.S. Tsubaki Holdings, Inc. v Estes*, 194 AD3d 590, 591 [1st Dept 2021]; *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]).

Moreover, the court rejects defendants' contention that PAS's damages are speculative. Damages are not an element of an NYFCA claim (*see* State Finance Law § 189 [1]; *see also United States ex rel. Grubbs v Kanneganti*, 565 F3d 180, 189 [5th Cir 2009] [stating that the federal "False Claims act . . . lacks the elements of reliance and damages"]). Thus, even if only local governments sustained damages, this would not be a basis for dismissal.

III. Public Disclosure Bar

Pursuant to NYFCA, "the court shall dismiss a qui tam action under this article . . . if substantially the same allegations or transactions as alleged in the action were publicly disclosed" in, as relevant here, "the news media" or a "federal, New York state or New York

local government report, hearing, audit or investigation that is made on the public record or disseminated broadly to the general public," "unless the qui tam plaintiff is an original source of the information" (State Finance Law § 190 [b] [ii], [iii]). NYFCA defines an "original source" as the following:

> "a person who (a) prior to a public disclosure under paragraph (b) of subdivision ninety of this article has voluntarily disclosed to the state or local government the information on which allegations or transactions in a cause of action are based, or (b) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state or a local government before or simultaneous with filing an action under this action"

(State Finance Law § 188 [7]).

The public disclosure bar applies "where the relevant disclosures exposed 'all the essential elements of the fraud' alleged and made public the 'crux of the alleged fraud'" (*United States ex rel. Chen v EMSL Analytical, Inc.*, 966 F Supp 2d 282, 297 [SD NY 2013] [citations omitted]; *see also United States ex rel. Kirk v Schindler El. Corp.*, 437 Fed Appx 13, 17 [2d Cir 2011]).

Defendants contend the central allegation in the complaint—that defendants failed to charge, remit, and report the required 911 charges in New York to gain a competitive advantage—has been the subject of extensive reporting in the news media and governmental reports for over a decade. Defendants cite the following evidence:

(1) a New York State Public Service Commission advisory report issued on November 6, 2006, recommending that telecommunications carriers "review their billing practices and be certain that taxes and surcharges are labeled correctly," and determining "some companies are improperly billing certain taxes and surcharges" and recommending that "each carrier carefully evaluate the propriety of their individual billing charges based on this notice," including E911 surcharges (NYSCEF Doc No. 190, H-60-61);

(2) a newspaper article indicating that a federal lawsuit alleged that "AT&T was not charging enough of the fees that are used to support Nashville's 911 system in an effort to bundle

services to businesses at competitive rates," and "undercollecting the 911 fee" (*id.*, H-22-24);[7]

(3) (i) a newspaper article reporting on audits in Suffolk County indicating that Verizon had taken a three percent "incollectible adjustment" beyond the two percent administrative fee permitted by law,[8] (ii) a newspaper article reporting on an audit in Nassau County indicating that Verizon "failed to consistently provide Nassau its required share of the e911 fees the company collected from residents' monthly bills," Verizon improperly kept a three percent administrative fee, and "the police department failed to properly account for surcharge revenue from eight telecommunications carriers, and that most of the providers failed to provide the county with annual accounts of the surcharge amounts billed,"[9] and (iii) a New York State Comptroller report from April 2018 indicating that "officials cannot be sure that their county received all the surcharges to which it was entitled and amounts suppliers remitted were accurate and appropriate" (*id.*, H-01-02, 03-04, 68-85); and

(4) a newspaper article reporting that "phone companies have been undercutting one another by lowering those 911 fees for big businesses, resulting in less money for local authorities," and includes denials of culpability by Verizon and AT&T (*id.*, H-37-41).[10]

According to defendants, these public disclosures were sufficient to alert the government as to the alleged fraud and decide whether to pursue an investigation into their 911 charge remittance procedures. Defendants point out that these public disclosures led six New York counties to file an action to recover for the allegedly unpaid 911 charges, that was dismissed for failure to state a cause of action (NYSCEF Doc No. 185, *County of Fulton v Verizon N.Y., Inc.*, Sup Ct, Nassau County, Nov. 26, 2019, Murphy, J., index no. 605952/19).

Defendants contend that the public disclosure bar applies to defendants who were not named within the public disclosures. Where fraud consists of industry-wide misconduct, courts have required "allegations specific to a particular defendant be publicly disclosed" before finding

---

[7] Brandon Gee, *Tennessee 911 Districts Suing AT&T over Fees*, Knoxville News-Sentinel, Nov. 26, 2011.
[8] Rick Brand, *County Auditor: Verizon owes Suffolk money from E-911 surcharges*, Newsday, Jan. 20, 2014.
[9] Nicole Fuller, *Lax accounting led to revenue loss for Nassau county, audit says*, Newsday, Dec. 8, 2015.
[10] Ryan Knutson, *Some 911 Fees Go Unpaid by Phone Companies, Lawsuit Says*, The Wall Street Journal, Aug. 8, 2016.

the action barred, because "[t]he government often knows on a general level that fraud is taking place," but "has difficulty identifying all of the individual actors engaged in the fraudulent activity" (*Cooper v Blue Cross and Blue Shield of Florida, Inc.*, 19 F3d 562, 566 [11th Cir 1994]). On the other hand, the public disclosure bar may apply to unnamed defendants if the public disclosures "alerted the government to the industry-wide nature of the fraud and enabled the government to readily identify wrongdoers through an investigation" (*In re Natural Gas Royalties*, 562 F3d 1032, 1039 [10th Cir 2009], *cert denied* 558 US 880 [2009]; *accord United States ex rel. Jamison v McKesson Corp.*, 649 F3d 322, 329 [5th Cir 2011] [noting that "the public disclosures need not name particular defendants so long as they 'alerted the government to the industry-wide nature of the fraud and enabled the government to readily identify wrongdoers through an investigation'"] [citation omitted]). In such cases, "the public disclosures provided specific details about the fraudulent scheme and the types of actors involved in it, removing this from a situation where the government would need to comb through myriad transactions performed by various types of entities in search of potential fraud" (*In re Natural Gas Royalties*, 562 F3d at 1042).

In *United States ex rel. Fine v Sandia Corp.* (70 F3d 568 [10th Cir 1995]), prior public disclosure barred a qui tam action. The relator alleged that a laboratory under the control of the Department of Energy (DOE) misappropriated nuclear waste funds (*id.* at 569). The Tenth Circuit held that a GAO report and congressional report were sufficient to set the government on the trail of the alleged fraud where "these disclosures detailed the mechanics of the practice, revealed that at least two of Sandia's eight sister laboratories were engaged in it, and indicated the DOE's acquiescence" (*id.* at 571).

Similarly, in *United States v ex rel. Gear v Emergency Med. Assoc. of Il., Inc.* (436 F3d 726 [7th Cir 2006]), public disclosures that practices had been taking place nationwide barred a relator's claim about fraudulent billing practices at the hospital where he worked. According to the Seventh Circuit,

> "We are unpersuaded by an argument that for there to be public disclosure, the specific defendants named in the lawsuit must have been identified in the public records. The disclosures at issue here were of industry-wide abuses and investigations. Defendants were implicated. Industry-wide public disclosures bar *qui tam* actions against any defendant who is directly identifiable from the public disclosures"

(*id.* at 729).

In this case, the news articles and reports defendants rely upon did not specifically name any telephone companies other than AT&T and Verizon (NYSCEF Doc No. 190, H-01-02, 04-05, 22-23, 37-38). They do not provide sufficient information about the fraudulent schemes or participants in the schemes to identify other defendants. Thus, the public disclosure bar does not apply to the unnamed defendants.

The court must next consider whether PAS's claims against AT&T and Verizon are subject to the public disclosure bar. "[C]ourts have cautioned against conducting the substantial similarity inquiry at too high a level of generality" (*Sturgeon v Pharmerica Corp.*, 438 F Supp 3d 246, 264 [ED Pa 2020]; *see United States ex rel. Goldberg v Rush Univ. Med. Ctr.*, 680 F3d 933, 936 [7th Cir 2012] ["[B]oosting the level of generality in order to wipe out qui tam suits that rest on genuinely new and material information is not sound"]; *accord United States ex rel. Mateski v Raytheon Co.*, 816 F3d 565, 577 [9th Cir 2016] [noting that this approach strikes a "balance between encouraging private persons to root out fraud and stifling parasitic lawsuits"] [citation omitted]; *see also United States ex rel. Heath v Wisconsin Bell, Inc.*, 760 F3d 688, 691 [7th Cir

2014] [holding that allegations were not substantially similar because they "required independent investigation and analysis to reveal any fraudulent behavior"]).

Here, the news articles and government reports disclosed, on a general level, that service providers failed to pay the appropriate amount of 911 surcharges (NYSCEF Doc No. 190, H-01-02, 03-04, 22-24). However, these articles and reports do not discuss the precise mechanism by which the telephone companies allegedly committed fraud (*see Goldberg*, 680 F3d at 936 ["Unless we understand the 'unsupervised services' conclusion of the GAO report and the HHS audits at the highest level of generality—as covering all ways that supervision could be missing or inadequate—the allegations of these relators are not 'substantially similar'"]; *Phone Recovery Servs., LLC v Verizon Washington, DC, Inc.*, 191 A3d 309, 320-321 [DC Ct App 2018] [concluding that public disclosure bar did not apply where relator's "description of the precise mechanism by which the phone companies allegedly committed fraud differs markedly from the publicly disclosed misconduct for purposes of the public disclosure bar"]; *Phone Recovery Servs. of Il., LLC v Ameritech Il. Metro, Inc.*, 2018 IL App (1st) 170968-U, 2018 WL 4603902, *4-*7 [Il Ct App 2018], *appeal denied* 426 Ill Dec 608, 116 NE3d 908 [Ill 2019] [public disclosure bar did not apply where disclosures were too different from relator's allegations]). The disclosures do not indicate that the providers undercounted access lines, or treated multiple locations as a single location for purposes of location-based caps on surcharges. These disclosures do not state that telephone companies failed to collect surcharges from customers purchasing services from resellers, or failed to collect surcharges altogether. Nothing in these public disclosures was "sufficient to set the government squarely upon the trail of the alleged fraud" (*In re Natural Gas Royalties*, 562 F3d at 1041). Additionally, the complaint alleges that PAS discovered the fraud by studying non-public information, including telephone bills and remittance forms (Compl. ¶¶

75-86, 91-92, 97-101, 105-106, 109-111, 114, 118-119, 133-136). Accordingly, the public disclosures relied upon by defendants are not "substantially the same allegations or transactions" as alleged in this action.

Because the court concludes that the news articles and reports do not report on "substantially the same allegations or transactions" that this action alleges, the public disclosure bar does not preclude plaintiff's claim. As a result, the court need not reach whether PAS is an "original source" of the information (State Finance Law § 188 [7]).

For the foregoing reasons, defendants' motion to dismiss is granted only to the extent that the allegations as to Hamilton County are dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 014) of defendants to dismiss the fourth amended complaint is granted only to the extent that the allegations as to Hamilton County are dismissed, and is otherwise denied; and it is further

ORDERED that defendants shall answer the fourth amended complaint within 20 days after service of a copy of this decision and order with notice of entry.

3/10/2022
DATE

MELISSA CRANE, J.S.C.

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