Docket #0011 Date Filed: 12/15/2016

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: GMAC Mortgage, LLC, Debtor(s).	Chapter 11 Case No. 12-12032-mg Jointly Administered Case No. 12-12020-mg
Beverlie Roseberry, 3900 Oldfield Crossing Drive, Apt. 215, Jacksonville, FL 32223, Plaintiff, v. GMAC Mortgage, LLC; Ocwen Loan Servicing, LLC; Aldridge Pite, LLP a/k/a Aldridge Connors, LLP; and Deutsche Bank National Trust Company, Defendants.	Adversary Proceeding Case No. 16-01202-mg

NOTICE OF DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S ADVERSARY COMPLAINT

TO: Plaintiff Beverlie Roseberry
3900 Oldfield Crossing Drive, Apt. 215
Jacksonville, FL 32223

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United States Trustee
U.S. Federal Office Building
201 Varick Street, Room 1006
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PLEASE TAKE NOTICE that on **January 26, 2017 at 10:00 a.m.,** or as soon thereafter as counsel may be heard, Defendants, Deutsche Bank Trust Company, as Trustee for Harbor View Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2004 and Ocwen Loan Servicing, LLC ("***Defendants***") will move before the Honorable Judge Martin Glenn at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, NY 10004-1408, for an order dismissing Beverlie A. Roseberry's complaint to determine liens and note validity and to discharge debt.

PLEASE TAKE FURTHER NOTICE that Defendants will rely upon the Memorandum of Law and the proposed order, in support of this motion at the hearing.

PLEASE TAKE FURTHER NOTICE that, pursuant to Southern District of New York Local Bankruptcy Local Rule 9006-1, any papers in opposition to this Motion must be filed with the Bankruptcy Court and served upon Creditors no later than fourteen (14) days in advance of the hearing date. A hearing is requested if any opposition is timely filed.

PLEASE TAKE FURTHER NOTICE that on January 19, 2017 at 12:00 noon, the undersigned will present the Order on Defendants' Motion to Dismiss Plaintiff's Adversary Complaint, submitted herewith, to the Honorable Martin Glenn, United States Bankruptcy Judge

for signature if there is no objection, and the Order maybe entered without a hearing unless a timely objection is made.

Philadelphia, PA
Dated: December 15, 2016

DUANE MORRIS LLP

By: /s/ Brett L. Messinger

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re: GMAC Mortgage, LLC, Debtor(s).	Chapter 11 Case No. 12-12032-mg Jointly Administered Case No. 12-12020-mg
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MEMORANDUM OF LAW SUPPORTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, AND FOR JUDGMENT ON THE PLEADINGS ON COUNT NO 2 – FEDERAL FALSE CLAIMS ACT

Defendants, Deutsche Bank Trust Company, as Trustee for Harbor View Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2004 ("***Deutsche Bank***"), and Ocwen Loan Servicing, LLC ("***Ocwen***", and collectively with Deutsche Bank, "***Defendants***"), by and through the undersigned attorneys, submit this Memorandum of Law Supporting Defendants' Motion to Dismiss the Complaint filed by Plaintiff Beverlie A. Roseberry ("***Plaintiff***") and for judgment on the pleadings on Count 2 for failure to state a claim. In support of thereof, Defendants respectfully state as follows.

I. INTRODUCTION

The Complaint should be dismissed for two reasons:

First, this Court does not have subject matter jurisdiction over Plaintiff's two claims against Defendants because they are neither core bankruptcy claims, nor are they related to the captioned bankruptcy; and

Second**,** even if this Court had jurisdiction, which it does not, then Plaintiff cannot file a Federal Fair Claims Act ("***FCA***") because she is not bringing a *qui tam* action on behalf of the United States.

II. RELEVANT FACTUAL BACKGROUND

Plaintiff has a mortgage originated by GMAC Mortgage, LLC. Compl., ¶ 14. Plaintiff avers that this mortgage is void, *id.,* and has allegedly requested that Defendants and GMAC "validate the debt." Compl., ¶ 13.

Plaintiff's mortgage was transferred to Ocwen for loan servicing. Compl., ¶ 12. Plaintiff purportedly applied for a loan modification, but was denied. Compl., ¶ 12. Defendants filed an action to foreclose on Plaintiff's mortgage. Compl., ¶16. Plaintiff asserts that this foreclosure was invalid because Defendants had "false and fabricated documents particularly mortgage assignments." Compl., ¶16. As a result of these allegedly false assignments, Plaintiff asserts that Defendants were not entitled to initiate foreclosure. Compl., ¶¶ 18-20

Plaintiff filed her Complaint to Determine Liens and Dischargeability of Debt and Request for Stay of Foreclosure Until the Validity of the Note Can Be Determined and to Determine Nature, Extent and Validity of Lien and Debt as Void Pending Outcome of Litigation ("***Complaint***") on September 1, 2016. ECF No. 1. The Complaint asserts two Claims: (i) "violation of the Fair Debt Collection Act and Statute of Limitation Expired to Collect Debt", Compl, at 4-6; and (ii) that "Defenants' [sic] Acts Violate the False Claims Act." Compl. at 6-7.

Defendants filed an Answer on September 28, 2016. ECF No. 3.

III. ARGUMENT

A. Applicable Law

Federal Rule of Civil Procedure 12, made applicable here by Federal Rule of Bankruptcy Procedure 7012, governs motions to dismiss for lack of subject matter jurisdiction and for judgment on the pleadings for failure to state a claim.

It states, in pertinent part:

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; … (6) failure to state a claim upon which relief can be granted; …
>
> (c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings….
>
> (h) Waiving and Preserving Certain Defenses.
>
> (2) … Failure to state a claim upon which relief can be granted, … may be raised:... (B) by a motion under Rule 12(c)….
>
> (3) … If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
>
> (i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Fed. R. Bankr. P. 7012.

B. The Complaint Must Be Dismissed for Lack of Subject Matter Jurisdiction

1. *A Federal Court Must Dismiss Any Case Over Which it Lacks Subject Matter Jurisdiction*

"Article III of the Constitution limits the jurisdiction of federal courts to the resolution of 'cases' and 'controversies.'" *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP,* 549 F.3d 100, 106 (2d Cir. 2008) (citing U.S. Const. art. III, § 2). "In order to ensure that this 'bedrock' case-or-controversy requirement is met, courts require that plaintiffs establish their

'standing' as 'the proper part[ies] to bring' suit." *In re Residential Capital, LLC*, 524 B.R. 563, 577–78 (Bankr. S.D.N.Y. 2015). "[S]tanding is an aspect of subject matter jurisdiction". *Breeden v. Kirkpatrick & Lockhart LLP (In re Bennett Funding Group, Inc.)*, 336 F.3d 94 (2d Cir. N.Y. 2003) (citing *Lujan v Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

"Federal Rule 12(b)(1) provides for dismissal of a case for lack of subject matter jurisdiction 'when the district court lacks the statutory or constitutional power to adjudicate it.'" *Residential Capital, LLC*, 524 B.R. at 577–78. (quoting *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1))). Even "a facially sufficient complaint may be dismissed for lack of subject matter jurisdiction if the asserted basis for jurisdiction is not sufficient." *Frisone v. Pepsico, Inc.*, 369 F. Supp. 2d 464, 469 (S.D.N.Y. 2005) (quoting *Augienello v. Fed. Deposit Ins. Corp.*, 310 F. Supp. 2d 582, 587 (S.D.N.Y. 2004)). When resolving issues of subject matter jurisdiction, a court is not confined to the complaint and may refer to evidence outside the pleadings, such as affidavits. *Makarova v. United States*, 201 F. 3d 110, 113 (citing *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986)). Plaintiff "bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005).

"[F]ailure of subject matter jurisdiction is not waivable and may be raised at any time by a party or by the court *sua sponte*." *Lyndonville Savings Bank & Trust Co. v. Lussier & Applied Research and Dev., Inc.*, 211 F.3d 697, 700-01 (2d Cir. 2000); *accord Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000). Hence, this motion is timely.

2. *The Court Lacks Subject Matter Jurisdiction Over Roseberry's Claims Because They Are Unrelated to the Bankruptcy Estate.*

The Motion should be granted and the Complaint should be dismissed because the Court lacks subject matter jurisdiction over the claims against Defendants.

> The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307, 115 S. Ct. 1493, 131 L. Ed. 2d 403 (1995); *see* 28 U.S.C. § 1334. Bankruptcy courts may exercise jurisdiction, through referral from the district court, over three broad categories of proceedings: those "arising under title 11" of the Code, those "arising in . . . a case under title 11," and those "related to a case under title 11." 28 U.S.C. § 157(a). Proceedings "arising under title 11, or arising in a case under title 11," are deemed "core proceedings." *Stern v. Marshall*, 564 U.S. 462, 476, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011) (quoting 28 U.S.C. § 157(b)). In those proceedings, bankruptcy courts retain comprehensive power to resolve claims and enter orders or judgments. *See In re Millenium Seacarriers, Inc.*, 419 F.3d 83, 96 (2d Cir. 2005).

Elliott v. GM LLC (In re Motors Liquidation Co.), 829 F.3d 135, 152-153 (2d Cir. N.Y. 2016).

This limitation may not be bypassed "simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern v. Marshall*, 564 U.S. 462, 499 (2011). "[B]ankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Celotex*, 514 U.S. at 308 n.6.

a. The Claims in the Complaint Are Not Within the Court's Core Jurisdiction.

Claims that are within the core jurisdiction of the Court are claims that arise under Title 11, or can only arise in a bankruptcy case. The Complaint asserts claims under the Fair Debt Collection Practices Act ("***FDCPA***") and under the FCA. Neither of these claims arise under Title 11.

"T]he meaning of the statutory language 'arising in' may not be entirely clear." *Baker v. Simpson*, 613 F.3d 346, 351 (2d Cir. 2010). At a minimum, a bankruptcy court's "arising in"

jurisdiction includes claims that "are not based on any right expressly created by [T]itle 11, but nevertheless, would have no existence outside of the bankruptcy." *Id*. Such claims also only have an existence outside of a bankruptcy case; they must be brought in a civil action or adversary proceeding (such as this one). Plaintiff's FDCPA and FCA claims can exist outside of a bankruptcy case.

Hence, the claims in the Complaint are not within the Court's core jurisdiction.

b. The Claims in the Complaint Are also Not Within the Court's Related-to Jurisdiction.

Non-core proceedings, or claims that do not arise under the bankruptcy code, must be "related to" a bankruptcy case for this Court to have jurisdiction over them. *See* 28 U.S.C. § 157(c)(1). The Second Circuit has set out the following standard:

> [T]he test for determining whether a civil proceeding is related to bankruptcy is whether ***the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy***. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

In re Ames Dep't Stores, Inc., 542 B.R. 121, 136–37 (Bankr. S.D.N.Y. 2015) (emphasis in original). The existence or absence of subject matter jurisdiction is determined as of the time of the filing of the complaint. *Id.* at 137.

Where a plaintiff "seek[s] damages ***for themselves, not their estates***. . . the proceedings will not affect the bankruptcy estates, [and] they do not fall within the parameters of "related to" jurisdiction." *In re Torres*, 367 B.R. 478, 481 (Bankr. S.D.N.Y. 2007) (dismissing FCRA and defamation claims in adversary complaint based on lack of subject matter jurisdiction). Moreover, the Court's related-to jurisdiction for claims between third parties is, as here, limited:

> Those cases in which courts have upheld "related to" jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the

> estate, or because the dispute over the asset would have an effect on the estate. Conversely, courts have held that a third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy. . . . [T]he district court's desire to "foster and encourage and then preserve settlement in federal court" does not in and of itself confer jurisdiction.

Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52, 65 (2d Cir. N.Y. 2008) (*quoting Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 753-54 (5th Cir. 1995)) (*reversed on other grounds by Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009)).

Here, the subject of the dispute is not property of the estate. Furthermore, claims by Plaintiff against Defendants would have no effect on the property of the estate. If the Plaintiff were to be successful against Defendants, the estate would not be augmented and claims would not be administered. The estate would not be affected in any way.

Plaintiff labels her first count as an "FDCPA" claim.[1] Bankruptcy courts routinely dismiss FDCPA claims in adversary proceedings where the claims can have no effect on the bankruptcy estate's property or administration. *See e.g.*, *In re Csondor*, 309 B.R. 124, 129 (Bankr. E.D. Pa. 2004) ("Win, lose, or draw, the outcome of [debtor's] F.D.C.P.A. and tort claims cannot conceivably have any effect on the estate being administered in bankruptcy") (quoting *In re Goldstein,* 201 B.R. 1, 5 (Bankr. D. Me. 1996) (listing bankruptcy court cases dismissing FDCPA claims because they did not "relate to" the estate)).

Additionally, Plaintiff's allegations supporting her FDCPA and FCA claims do not relate to the administration of the bankruptcy estate – Plaintiff alleges solely that there was a fraudulent assignment of her mortgage to Deutsche Bank. Compl., ¶¶ 17-19. Plaintiff further claims that

[1] Roseberry cites to the FCA in her allegations. Defendants presume that Roseberry intended to cite to the Fair Debt Collection Act, 15 U.S.C. § 1692 *et seq*.

Deutsche Bank does not have proper ownership of her assets due to this allegedly fraudulent assignment, and speculates that the Defendants used false documents to pursue a foreclosure action against her. Compl., ¶¶ 15, 18. Whether or not the Plaintiff's claims are successful, the Debtor's estate would not be affected in any way. [2]

Plaintiff only seeks monetary damages for herself for these allegedly "illegal actions;" she does not seek any right or remedy in the handling and administration of the bankrupt estate. Compl., ¶¶ 20. Because the relief sought would only inure to her own personal benefit, not to the Debtor's estate, none of the claims in the Complaint "relate to" the bankruptcy proceeding. *In re Csondor*, 309 B.R. at 129. Therefore, the Complaint should be dismissed.

C. Alternatively, The Court Should Enter Judgment in Favor of Defendants on Plaintiff's FCA Claim.

Unless the Court disagrees with the above discussion, there is no need to read any further. However, should the Court believe that *some* jurisdiction exists over Plaintiff's claims, then it must enter judgment against Plaintiff on her FCA claim pursuant to Rule 12(c), on the grounds that it fails to state a claim upon which relief can be granted.

In general, "the standard for addressing a Rule 12(c) motion for judgment on the pleadings is the same as that for a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Cleveland v. Caplaw Enters*., 448 F.3d 518, 521 (2d Cir. 2006).

Under the now well-established *Twombly* standard, a complaint should be dismissed if it does not contain enough allegations of fact to state a claim for relief that is "plausible on its

[2] If Plaintiff seeks to stay the scheduled sheriff's sale in the foreclosure, or to challenge the foreclosure statute of limitations, then Roseberry must file these defenses or counterclaims, in the underlying foreclosure action in state court. *See* N.J. Ct. R. 4:64-5 ("A defendant who chooses to contest the validity, priority or amount of any alleged prior encumbrance shall do so by filing a cross-claim against that encumbrancer" in the foreclosure action).

face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Second Circuit has explained that, after *Twombly*, the Court's inquiry under Rule 12(b)(6) is guided by two principles.

> First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id*. at 72 (quoting *Iqbal*, 556 U.S. at 678). "'Second, only a complaint that states a plausible claim for relief survives a motion to dismiss' and '[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id*. (quoting *Iqbal*, 556 U.S. at 663-64).

Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, (2009)),

Here, there is no factual scenario where Plaintiff's allegations could give rise to an entitlement to relief under the FCA. "*Qui tam* standing is a creature of statute. The FCA's *qui tam* provision provides: "A person may bring a civil action for a violation of section 3729 for the person and for the United States Government." *U.S. ex rel. Kester v. Novartis Pharm. Corp.*, 43 F. Supp. 3d 332, 358 (S.D.N.Y. 2014). "The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). The plaintiff therefore "stands in the shoes of the government, which is the real party in interest." *Kester*, 43 F. Supp. 3d at 358. "[A]lthough the relator has standing to prosecute a *qui tam* claim under the FCA, his standing does not change the nature of the underlying debt. ***The debt is owed to the Government and not to the relator***." *In re Hawker Beechcraft, Inc.*, 493 B.R. 696, 712 (Bankr. S.D.N.Y. 2013), *rev'd in part,* 515 B.R. 416 (S.D.N.Y. 2014) (emphasis added) (reversing due to District Court's finding that "there is no basis in law to preclude relators from asserting a non-dischargeability complaint as to their FCA claims based on injuries to the government").

Despite Plaintiff's conclusory reference to a "*qui tam* action," this action is not action to recover money or property for the United States, and Plaintiff has not brought this action in the name of the United States. Plaintiff does not even allege a debt owed to the United States. The

complaint is simply devoid of any factual basis to plausibly support that this lawsuit is based on recovery of funds fraudulently paid by the United States, or that must be recovered by the United States.

Thus, should the Court find that it has jurisdiction, the Court must enter judgment in favor of Defendants on Plaintiff's FCA Claim.

IV. CONCLUSION

Based on the foregoing, Plaintiff has no cause of action that can be pursued in this Court against Defendants. Accordingly, Defendants' motion to dismiss should be granted and the Complaint should be dismissed. In the alternative, should the Court find jurisdiction over Plaintiff's claims against Defendants, the Court must enter judgment against Plaintiff on Count 2 of the Complaint.

Philadelphia, PA
Dated: December 15, 2016

DUANE MORRIS LLP

By: /s/ Brett L. Messinger

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Presentment Date and Time:
January 19, 2017, Noon
Objection Deadline:
January 12, 2017

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CERTIFICATE OF SERVICE FOR MOTION TO DISMISS PLAINTIFF'S ADVERSARY COMPLAINT

I, Brett L. Messinger, hereby declare that I served the above-referenced document on December 15, 2016 as follows:

By Mail:

Plaintiff Beverlie Roseberry
3900 Oldfield Crossing Drive, Apt. 215
Jacksonville, FL 32223

Debtor GMAC Mortgage, LLC
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201 Varick Street, Room 1006
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Place: Philadelphia, PA
Dated: December 15, 2016

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