IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLINE HERRON, **Plaintiff,** **- versus -** **FANNIE MAE, *et al.*,** **Defendants.**	**No.: 1:10-CV-00943-RMC**

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR RENEWED RULE 12(b)(6) MOTION TO DISMISS THE COMPLAINT

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Defendants Fannie Mae (f/k/a Federal National Mortgage Association), Eric Schuppenhauer ("Schuppenhauer"), Nancy Jardini ("Jardini"), and Alanna Scott Brown ("Brown"), by undersigned counsel, respectfully submit this Memorandum in Support of Their Renewed Rule 12(b)(6) Motion to Dismiss the Complaint ("Renewed Motion") filed by Plaintiff Caroline Herron ("Herron").

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

At a status conference on February 22, 2011, this Court invited Defendants to file a renewed Motion to Dismiss addressing issues that were not discussed in the Court's February 10, 2011 Order. *See* Feb. 22, 2011 Transcript of Status Conference ("Transcript"), attached hereto as Exh. 1, at 12-13. More specifically, Defendants' Reply to Plaintiff's Opposition to Their Rule 12(b)(6) Motion to Dismiss the Complaint ("Reply") (Doc. # 23) raised two arguments which were neither addressed by Herron in her Surreply Brief ("Surreply") (Doc. # 31) nor by this Court in its February 10, 2011 Order denying Defendant's 12(b)(6) Motion to Dismiss the Complaint ("Order") (Doc. # 30) (reattached hereto as Exh. 2). These arguments, which Defendants ask the Court to consider at this time, are: (1) Herron's wrongful discharge claim should be dismissed for failure to state a claim because her allegations regarding Defendants' purported fraud and misrepresentations to the government state a claim under the False Claims Act ("FCA"), and thus cannot fall within the public policy exception to an at-will employee wrongful discharge claim; and (2) Herron's *Bivens* action against the individual Defendants should also be dismissed for failure to state a claim because such an action is inappropriate where another remedy (*i.e.*, an FCA claim) is available. *See* Reply at 5-9; 17-19.

Moreover, there are other arguments set forth in Defendants' initial briefs which the Order did not reach, but for which Defendants ask the Court's renewed consideration. These include: (1) Herron's tortious interference claim fails as a matter of law because (i) neither Fannie Mae nor its

executives can interfere with themselves, and (ii) Herron failed to allege that any of the Defendants acted with malice; and (2) Herron's civil conspiracy claim fails as a matter of law because she has failed to adequately plead any other underlying tort. *See* Memorandum in Support of Defendants' Rule 12(b)(6) Motion to Dismiss the Complaint ("Memorandum" or "Mem.") (Doc. # 6-2) at 29-32, 43-45; Reply at 16-17, 24-25.

Accordingly, as explained more fully below, Defendants respectfully request the Court to grant their Renewed Motion.

II. BACKGROUND

Herron's wrongful discharge (Count I) and *Bivens* (Count IV) claims are based on her allegations that she was retaliated against and fired for disclosing that Defendants engaged in "illegal" acts. Compl. ¶¶ 92, 98. More specifically, she claims that she was wrongfully discharged because she opposed Fannie Mae's alleged violations of it legal duties to the government. *Id.* ¶ 90. She premises her *Bivens* claim on the allegation that Defendants retaliated against her due to her protected First Amendment protestations. *Id.* ¶¶ 121-22.

Moreover, Herron alleges that that her wrongful discharge claim is based, in part, on "a violation of the public policy underlying the False Claims Act, which prohibits individuals and entities from fraudulently or dishonestly obtaining or using government funds." Herron's Opposition to the Motion to Dismiss ("Opposition" or "Opp.") (Doc. # 18-1) at 24. She argues:

> [she was fired] because she disclosed to [Treasury] and protested within Fannie Mae, that Fannie Mae was engaging in a gross waste of public funds and violating its statutory obligations *by making false and misleading statements to Treasury . . . . Fannie Mae took these illegal actions so that it could get paid incentives* for work done that was not in the best interests of Treasury and the taxpayers . . ..

Opp. at 2 (emphasis added). *See also id.* at 39 ("defendants . . . misrepresent[ed] to Treasury the progress that Fannie Mae was making on the loan modifications, so that Fannie Mae could get paid under its Contract [*i.e.,* the Financial Agency Agreement ("FAA")] with Treasury"); *id.* at 25 ("Fannie

Mae fired [Herron] after she disclosed that Fannie Mae made false or fraudulent representations to Treasury; " "Fannie Mae fired her after she disclosed to Treasury that Fannie Mae was deliberately concealing information from Treasury about Fannie Mae's operations at the expense of the government"). Herron's Surreply repeats her allegations that Defendants made "misrepresentations to the federal government" contrary to the public policy embodied in the FCA and other statutes, and further that "defendants terminated her in retaliation for her disclosures of this conduct." Surreply at 7-8.

In ruling on Defendants' Motion to Dismiss, this Court held that at this stage of the litigation it "accepted as true" all the factual matter contained in the Complaint, as well as "accept[ed] all of the facts and arguments that are brought pursuant to the Surreply Brief . . ." Order at 2. By accepting all of Herron's allegations, including her allegations of fraud and misrepresentations, the Court should have found that Herron has pled herself out of her wrongful discharge and *Bivens* claims.

III. ARGUMENT

A. Herron's Wrongful Discharge Claim Fails As A Matter Of Law Because The Public Policy Exception Does Not Apply Here On the Facts Alleged

Herron brings her claim for wrongful discharge under the "very narrow" public policy exception to the rule that an employer may terminate an at-will employee – which Herron alleges she is (*see* Compl. ¶ 26, referencing her "open-ended" contract) – for any reason or no reason at all. *See Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991). *See also Mills v. D.C. Dep't of Mental Health St. Elizabeths Hosp. Managers*, No. 10-0648, 2010 WL 5168887, *3 (D.D.C. Dec. 21, 2010). Herron argues that the FCA, 31 U.S.C. § 3729(a), among other statutes, provides the public policy to support her wrongful discharge claim. *See* Opp. at 22. *See also* Surreply at 7-8. While Defendants strenuously deny Herron's allegations underlying this claim, Herron's allegations show that, as a matter of law, she has no wrongful discharge claim because the FCA may provide an express and

specific remedy for her. Stated otherwise, under D.C. law, because she may have an FCA claim, Herron "is not facing a situation in which the *only* possibility for compensation for her claimed injury is the recognition by this court of a public policy tort expansive enough to cover her situation." *Nolting v. Nat'l Capital Group, Inc.,* 621 A.2d 1387, 1389 (D.C. 1993) (emphasis added) (refusing to apply the "very narrow" exception where plaintiff had a statutory remedy).

1. The Public Policy Exception Does Not Apply to Wrongful Discharge Claims Where the Plaintiff Has FCA Claims

Under D.C. law, "'where the very statute creating the relied-upon public policy already contains a specific and significant remedy for the party aggrieved by its violation,' the plaintiff may *not* invoke the [public policy] exception to the at-will employment doctrine [as a matter of law]." *Elemary v. Philipp Holzmann A.G.*, 533 F. Supp. 2d 116, 136 (D.D.C. 2008) (*quoting Nolting,* 621 A.2d at 1390). *See also Kassem v. Washington Hosp. Ctr.*, 513 F.3d 251, 254-55 (D.C. Cir. 2008). Stated differently, a claim under the public policy exception fails as a matter of law if a plaintiff *"might"* have a remedy under a statute that she relies upon to provide the public policy. *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 645 (D.C. 2005) (emphasis added) (no wrongful termination claim where "the policy in question . . . was 'explicit and [might] apply directly' through a statute expressly addressing the matter") (*quoting Freas v. Archer Servs., Inc.*, 716 A.2d 998, 1002 (D.C. 1998); *citing McManus v. MCI Comms. Corp.*, 748 A.2d 949, 957 (D.C. 2000)) (brackets in original). This standard requires only that the plaintiff allege facts, which, if proven to be true, would demonstrate a discharge in violation of a statute that expressly provides a remedy for the violation. *See Freas*, 716 A.2d at 1002. This is so even when the plaintiff does not actually plead a violation of the statute. *See Carter v. District of Columbia,* 980 A.2d 1217, 1225-26 & n.27 (D.C. 2009) (affirming denial of wrongful termination claim because the plaintiff's allegations "fell squarely" under the D.C. Whistleblower's Act, even though no claim under that Act had been made and would have been time-barred in any event).

This Court has held that the FCA is a statute which contains a "specific and significant remedy for the party aggrieved by its violation[.]" *Elemary*, 533 F. Supp. 2d at 136 (citation omitted). Its retaliation provision entitles a prevailing plaintiff to, *inter alia*, reinstatement with the same seniority status that the employee would have had but for the discrimination, twice the amount of back pay and compensation for any special damages resulting from the retaliation, including litigation costs and reasonable attorneys' fees. *See* 31 U.S.C. § 3730(h)(2). Simply put, where an action under the FCA "lies open to her, [Herron] *may not* invoke the public policy exception to the at-will employment doctrine." *Elemary*, 533 F. Supp. 2d at 136 (emphasis added).

2. Herron Can Allege FCA and FCA Retaliation Claims

The FCA permits an action and grants remedies against a defendant that "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." *United States v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1254 (D.C. Cir. 2004) (*quoting* 31 U.S.C. § 3729(a)[(1)(B)]). In addition, the FCA allows a claim for retaliation in connection with an FCA claim. To state an FCA retaliation claim the plaintiff must (1) be an employee, contractor, or agent; (2) have engaged in "protected activity," *i.e.*, taken a lawful act in furtherance of an effort to stop a violation of the FCA; and (3) have been retaliated against (4) because of the protected activity. *See United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998); Claire M. Sylvia, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT, §§ 5:2, 5:3, at 259-60 (West 2010). As set out below, Herron can allege both an FCA and an FCA retaliation claim.

a. Herron's FCA claim

An FCA claim is present where a person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). A Section 3729(a)(1)(A) violation requires that: "'(1) the defendant submitted a claim to the government, (2)

the claim was false [or fraudulent], and (3) the defendant knew the claim was false [or fraudulent].'" *United States ex rel. Westrick v. Second Chance Body Armor, Inc.,* 685 F. Supp. 2d 129, 134 (D.D.C. 2010) (citation omitted); Sylvia, § 4:2, at 116. The FCA is also violated by, *inter alia*, one who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B).

While the paradigmatic false "claim" under the FCA involves submission for payment of an invoice overcharging the government for a good or service, "claims" under the FCA are not limited to just those circumstances. Sylvia, § 4:2, at 117. A scheme, practice, or course of conduct to fraudulently dupe the government to pay out money can constitute a "claim" under the FCA, even if ultimately it (*i.e.*, the claim) is unsuccessful: "As the Supreme Court put it, 'the [FCA] was intended to reach *all types of fraud, without qualification, that might result* in financial loss to the Government.'" *United States ex rel. Totten v. Bombardier Corp.,* 380 F.3d 488, 509 (D.C. Cir. 2004) (*quoting United States v. Neifert-White Co.,* 390 U.S. 228, 231-32 (1968)) (emphasis added). *See also Alsco-Harvard Fraud Litig.,* 523 F. Supp. 790, 811 (D.D.C. 1981) ("'claim' should … be broadly construed to include 'all fraudulent attempts to cause the Government to pay out sums of money'") (citation omitted).

Moreover, a false "claim" under the FCA does *not* have to be made through a "big document" (or for that matter in any writing whatsoever) as Herron's counsel argued at the status conference. *See* Transcript at 10-11. Rather, a "claim" under the FCA can be an oral representation or even silence. *See Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (claim under the FCA can arise from misrepresentations or omissions in "documents *or oral representations*") (emphasis added) (*quoting United States ex rel. Clausen v. Lab. Corp. of America, Inc.,* 290 F.3d 1301, 1310 (11th Cir. 2002) (other citation omitted)); *United States ex rel. Siewick v. Jamieson Science & Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000) (courts will infer a false claim from silence "where certification was a prerequisite to the government action sought").

Applying the above here, Herron clearly can state an FCA claim. Herron alleges that Fannie Mae could have received incentive payments under its contract with Treasury based upon, among other things, the number of mortgage servicers it enrolled and the number of trial modifications that it processed. *See, e.g.*, Compl. ¶¶ 47-50; Opp. at 9, 27. She alleges (albeit, and significantly, without the requisite specificity required by FRCP 9(b)) that Fannie Mae "was . . . violating its statutory obligations by making false and misleading statements to Treasury" by knowingly making "false and misleading statements to Treasury" "so that it could get paid incentives [under the FAA] for work done[,]" and, similarly, that "[D]efendants . . . misrepresent[ed] to Treasury the progress that Fannie Mae was making on the loan modifications, so that Fannie Mae could get paid under its Contract [the FAA] with Treasury[.]" Opp. at 2, 39; *see also id.* at 25 ("Fannie Mae made false or fraudulent representations to Treasury about its work on the TARP contract . . . [Herron] disclosed to Treasury that Fannie Mae was deliberately concealing information from Treasury about Fannie Mae's operations, at the expense of the government"). These statements clearly allege "fraudulent attempts to cause the Government to pay out sums of money," *Alsco-Harvard Fraud Litig.,* 523 F. Supp. at 811, and therefore (provided they are properly pled) can state an FCA claim.

b. Herron's FCA retaliation claim

The FCA's retaliation provision provides, in relevant part:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged . . . or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, . . . in furtherance of other efforts to stop 1 or more [FCA] violations[.]

31 U.S.C. § 3730(h)(1). Herron expressly alleges every legal element of an FCA retaliation claim, to wit: that Herron was a Fannie Mae employee, Compl. ¶ 89; that she engaged in protected activity, *see* Compl. ¶¶ 121-25; Opp. at 25-32; that she was retaliated against, Compl. ¶¶ 121-25, Opp. at 33, Surreply at 7-8; and that the retaliation was in response to her protected activity. Compl. ¶¶ 121;

Opp. at 21 ("Fannie Mae's purported reasons for terminating her are pretext for retaliatory animus motivated by her protected disclosures and her protests").

Notwithstanding her allegations, Herron now attempts to undermine and defeat her obvious potential to state FCA claims, by arguing that she cannot plead an FCA claim because she has not alleged "specific protected activity" about a "specific misrepresentation" in a "particular document." Transcript at 11, 13. These arguments, which were conspicuously absent from Herron's briefs and were only first advanced by counsel at the status conference, have no merit, and are especially disingenuous in light of the fact that Herron spent *seven* pages of her Opposition arguing that she was engaged in protected activity. *See* Opp. at 25-32. *See also* Compl. ¶¶ 121-25.

The element of "protected activity" under an FCA retaliation claim has two parts: (1) that the plaintiff took a legal act in furtherance of an effort to stop (2) a violation of the FCA. *See* 31 U.S.C. § 3730(h)(1).

Above, we have already demonstrated the second part, namely that Herron has alleged a violation of the FCA. The first part may be satisfied where the plaintiff alleges that he or she engaged in internal reporting of false claims, *see Yesudian*, 153 F.3d at 741, 743-44 & n. 9, or that he or she disclosed fraud and corruption. *See Kakeh v. United Planning Org., Inc.,* 655 F. Supp. 2d 107, 117 (D.D.C. 2009) ("an employee engages in protected activity when he discloses fraud and corruption, as opposed to making a 'complaint about mere regulatory compliance'") (*quoting Yesudian*, 153 F.3d at 744-45).

Here, Herron's allegations (which Defendants deny) that she reported to Fannie Mae and disclosed to Treasury Fannie Mae's alleged false and misleading statements allegedly made to obtain incentive payments from Treasury satisfy the requirement that Herron took a "legal act in furtherance of an effort to stop" an FCA violation. *See, e.g., Yesudian*, 153 F.3d at 741, 743-44 & n. 9; *Kakeh,* 655 F. Supp. 2d at 117.

Further, for Herron to satisfy the element that she took protected action to stop an FCA violation, she does not have to show an *actual* FCA violation by the Defendants. *See Yesudian*, 153 F.3d at 739-40 ("the protected activity element does not require the plaintiff to have developed a winning *qui tam* action before he is retaliated against"); Sylvia, § 5:15, at 283. Rather, a plaintiff only need allege that she was fired because "the employee [was] 'investigating matters that '*reasonably could lead*' to a viable False Claims Act case.'" *Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 7 (D.D.C. 2010) (*quoting Yesudian*, 153 F.3d at 739-40) (emphasis added). *Yesudian* and *Boone* thus answer in the affirmative the Court's inquiry at the status conference – namely, whether Herron's claims "*could* or *could not* be" a claim under the FCA. *See* Transcript at 12 (emphasis added). They certainly "could be" an FCA claim.

Herron's Surreply mischaracterized Defendants' argument regarding Herron's ability to bring FCA claims in contending that "Defendants' extensive argument on the merits of Ms. Herron's wrongful termination claim is largely based on their theory that because Ms. Herron cannot *prove* an actual violation of the [FCA] . . . that she *cannot* state a common-law wrongful termination claim." *See* Surreply at 7 (*citing* Reply at 5-11) (emphasis added). Defendants, however, made no such argument. To the contrary, Defendants' argument is exactly the opposite – it is precisely because Herron has pled facts which *might* give rise to a valid FCA claim that she has pled herself out of a valid wrongful termination claim. *See*, *e.g.*, Reply at 6.

Finally, and most tellingly, counsel for Herron has *admitted* that Herron may have a valid FCA claim. *See* Transcript at 12-13 (stating, "[i]f [Herron] had full access to all of the documents perhaps she could make out a false claim.").[1]

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[1] Herron cannot, of course, obtain discovery in an attempt to make out a valid FCA claim. *See United States ex rel. Joshi v. St. Luke's Hosp., Inc.,* 441 F.3d 552, (8th Cir. 2006) (refusing to let plaintiff to "fill in the blanks" on his FCA claim by obtaining discovery); *see also Sanderson.*, 447 F.3d at 876 (the FCA "has been repeatedly amended, representing 'a long history of repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior'") (citation omitted).

3. Herron's FCA Claims Preclude Her Wrongful Discharge Claim

Because Herron has alleged all the elements of an FCA claim and an FCA retaliation claim, her wrongful discharge claim must fail. Contrary to Herron's counsel's averment at the status conference, it is immaterial whether Herron believes she has brought an FCA claim or whether she could successfully bring an FCA claim. *See* Transcript at 10. It matters only that her allegations "fall squarely" within the FCA, which "may" provide a statutory remedy for her claims. *See Carter,* 980 A.2d 1217, 1225-26 & n.27; *Freas*, 716 A.2d at 1002. Here, not only do Herron's allegations fall squarely within the FCA, as already noted counsel for Herron admitted at the status hearing that Herron may have a valid FCA claim. *See* Transcript at 12-13. Thus, Herron can bring her FCA claims against Defendants if she wants the Court to address her alleged injuries.

This is not, as Herron argues, Defendants' attempt to "decide what claims [Herron] should bring or shouldn't bring." *See* Transcript at 10. Rather, Herron's own allegations can state claims under the FCA, and so she may not "instead obtain recovery against [Defendants] on a tort theory of wrongful discharge under the narrow 'public policy' exception to the employment-at-will doctrine." *Kassem*, 513 F.3d at 255. As the Court noted at the status conference, "[y]ou can't have a wrongful discharge claim if you have a statutory claim." Transcript at 9. Because Herron has alleged the elements of FCA claims (albeit without the necessary particularity), a statutory claim "lies open" to her, and therefore her claim for wrongful discharge in violation of public policy must fail. *Elemary*, 533 F. Supp. 2d at 136; *Nolting,* 621 A..2d at 1389-90 (refusing to apply the narrow public policy exception where plaintiff had a statutory remedy).

B. Herron's *Bivens* Claim Fails As A Matter Of Law

As this Court recently noted, "a *Bivens* remedy is only appropriate where the petitioner has no other means of obtaining redress and there are no other 'factors counseling hesitation.'" *Wilson v. U.S. Dep't of Transp.*, No. 10-490, 2011 WL 11500, *4 (D.D.C. Jan. 4, 2011) (*quoting Osahar v.*

Postmaster Gen., No. 06-15613, 2008 WL 123959, *10 (11th Cir. Jan.15, 2008) and *citing Bush v. Lucas,* 462 U.S. 367, 373 (1983)) (dismissing *Bivens*-type claim based on employment discrimination because remedies for such a claim were available under Title VII and the Age Discrimination in Employment Act). *See also* Transcript at 9 (Court: "You can't have a *Bivens* claim if you have a statutory claim.").

A *Bivens* remedy is inappropriate here per the "special factors" consideration because Herron has alternative relief available for the alleged wrong – retaliatory discharge (*see, e.g.,* Compl. ¶¶ 121-22) – she has suffered. *See generally* Reply at 18-19. Since the time that *Bivens* was decided, the Supreme Court has explained that the "special factors" consideration forbids courts from implying a *Bivens* remedy if Congress has established an alternative remedial scheme that "provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies," "even though [such] remedies do not provide complete relief," *Bush*, 462 U.S. at 386, 388, or even if the scheme forecloses the recovery of damages altogether. *Schweiker v. Chilicky,* 487 U.S. 412, 423-25 (1988). Thus, "[s]o long as the plaintiff has an avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001) (citation omitted). *See also Spagnola v. Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) ("[a]s we read *Chilicky* and *Bush* together, . . . courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies").

Because Herron has made her fraud and misrepresentation allegations, and the Court at this stage has accepted those allegations, a *Bivens* remedy is clearly inappropriate as a matter of law in light of the "special factors" consideration. *See Wilson v. Libby*, 498 F. Supp. 2d 74, 87-93 (D.D.C. 2007) and D.C. decisions cited therein (rejecting *Bivens* claim because the Privacy Act created a comprehensive scheme covering the conduct at issue and potentially provided a damages remedy).

As discussed above, Herron can state all the elements of an FCA and FCA retaliation claim. The FCA provides a comprehensive scheme to redress the making of false or fraudulent claims to the federal government for payment, or the use of a false statement in support of such a claim, and, more importantly, protects an employee against retaliation. *E.g.*, *Neifert-White Co.*, *supra.* Further, the FCA's legislative history nowhere indicates that Congress intended to preserve a *Bivens* remedy when an FCA claim is possible.

Accordingly, this Court must dismiss the *Bivens* count because Herron has a statutory remedy which she may pursue to obtain relief for her claim that she was discharged because she engaged in her alleged protected First Amendment activity. *See, e.g.*, Transcript at 9; *Wilson*, 2011 WL 11500 at *4.

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In denying Defendants' Motion to Dismiss, the Court relied primarily on its conclusion that there are "multiple questions of fact" that made dismissal at this point inappropriate. *See* Order at 2. However, much like the above legal arguments regarding the wrongful discharge and *Bivens* counts, the Order did not address several other legal arguments that Defendants had raised to have the tortious interference and conspiracy counts also dismissed as a matter of law. Accordingly, Defendants respectfully request that the Court reconsider the legal sufficiency of these remaining claims to which we briefly turn now.[2]

[2] At the status conference, Herron's counsel made the remarkable admission that some of Herron's allegations regarding alleged misrepresentations are "not factual." Transcript at 13. This admission highlights the inherent contradictions and inconsistencies in Herron's filings to date that should give this Court renewed concern and pause about the legal sufficiency and plausibility of Herron's claims, as Defendants previously argued, but which the Court did not directly address in the Order. *E.g.*, Reply at 3 (citing, as an example, Herron's conflicting allegations in support of her *Bivens* claim that "[h]er job duties did not include reporting Fannie Mae's wasteful and illegal conduct to Treasury officials," with the allegation in support of her civil conspiracy claim that Defendants conspired to "specifically injure her for complying with her *legal obligations*"). *Compare also* Herron's admissions in her contract and in her email – *see* Mem. Exh. A at 2, reattached hereto as Exhibit 3 (Herron's admission in contract with ICon that she had no expectancy to be employed by Fannie *(footnote continued)*…

C. Herron's Tortious Interference Claim Fails As a Matter of Law

As Defendants previously argued, Herron's tortious interference claim fails because Fannie Mae cannot have tortiously interfered with itself, and because Herron has not alleged how Fannie Mae, or its employees, intentionally interfered with her employment opportunities with malice or intent to harm her. *See* Mem. at 29-32; Reply at 16-17. As for Fannie Mae, it cannot be liable for tortiously interfering with a contractual relation to which it is a party. *See* Mem. at 29 (*citing Press v. Howard Univ.*, 540 A.2d 733, 736 (D.C. 1988)). As for all Defendants, Herron must allege facts suggesting malice or other improper or egregious behavior, such as libel, slander, or physical coercion. *See id.* at 29-32. Here, Herron has failed to allege any conduct that could suggest Defendants acted with the malicious intent to harm her or advance an improper purpose. *Id.*

In these regards, Judge Bates' recent decision in *Hopkins v. Blue Cross and Blue Shield Ass'n*, No. 10-900, 2010 WL 5300536 (D.D.C. Dec. 21, 2010), is instructive. Therein, Judge Bates dismissed a tortious interference claim with prospective economic advantage against a corporate employer because: "[P]laintiff complains only of interference by her employer with her future employment with that same employer. Hence, plaintiff's claims against her employer BCBSA for its alleged interference with her future employment at BCBSA must fail." *Id.* at * 8. Judge Bates also found that the plaintiff did not satisfy the requisite "intentional" standard to make out a claim for tortious interference because plaintiff's allegations concerning the actions of the individual who

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Mae) (relevant portions highlighted) and Mem. Exh. C, reattached hereto as Exhibit 4 (Herron's email admission that she was conflicted and barred from working at Treasury because of her contractor work for Fannie Mae) (relevant portions highlighted) – with her assertion that she had a valid business expectancy in her employment with Fannie Mae or at Treasury. *See also* Reply at 12.

It is not our intention to tax the Court with renewed argument about the legal deficiencies in Herron's pleadings as a result of these and other contradictions and inconsistencies. However, if the Court grants Defendants' request for oral argument, *see* page 15, *infra,* we would be happy to address these points at that time, should the Court desire.

acted as an agent for the employer (*i.e.,* plaintiff's supervisor) in purportedly interfering with plaintiff's job expectations do "not rise to the required level of libel, slander, misrepresentation, or disparagement" to sustain the claim. *Id.* at 7.

In its Order, the Court did not address the legal argument that Fannie Mae cannot tortiously interfere with itself; nor did it address Herron's failure to plead *any* facts to support her allegation of intentional or malicious conduct on the part of the Defendants; nor the further legal arguments that Herron's expectancy for a job at Fannie Mae or Treasury could not be "valid" expectancies or ones of which Defendants could have knowledge to interfere with. *See* Mem. at 25-28; *see also* note 2, *supra*. *Compare* Order at 2. Accordingly, Defendants respectfully ask the Court to consider anew the arguments in Defendants' pleadings addressing these arguments, *see* Mem. at 25-32; Reply at 12-17, and further request the Court to dismiss this count in Herron's Complaint for failure to state a claim.

D. Herron's Civil Conspiracy Claim Fails As a Matter of Law Because There Is No Underlying Tort

Herron does not dispute that civil conspiracy is not a stand-alone tort and, when properly pled, may establish vicarious liability only for a valid underlying tort. *See* Opp. at 40. In light of Defendants' renewed motion to dismiss all other counts of Herron's Complaint, Defendants also renew their motion to dismiss Herron's civil conspiracy claim based on her failure to adequately plead any other underlying tort, as discussed in this brief. *See* Mem. at 43-44; Reply at 24.

IV. CONCLUSION

As set forth above, Herron's Complaint should be dismissed with prejudice in its entirety for failure to state a claim.

REQUEST FOR ORAL ARGUMENT – Defendants respectfully request the opportunity to present oral argument on this Renewed Motion.[3]

Respectfully submitted,

/s/ Ira T. Kasdan

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Dated: March 11, 2011

[3] Should this Court grant oral argument, Defendants' lead counsel respectfully notes his unavailability for the period April 18-27.

CERTIFICATE OF SERVICE

I hereby certify that, on the 11th day of March, 2011, I caused the foregoing to be electronically filed using the Court's CM/ECF system, which will then send a notification of such filing (NEF), to the following counsel for the Plaintiff:

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