IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.* EDMUND ROSNER, Plaintiffs, v. GLENN GARDENS ASSOCIATES, L.P., and THE CITY OF NEW YORK Defendants.	)	Civ. Action No.06-11440 (SAS)

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

1. This is a civil action brought by relator Edmund Rosner ("Rosner" and/or "Relator") on his own behalf and on behalf of the United States of America ("United States") against defendants Glenn Gardens Associates, L.P. ("Glenn Gardens Associates"), and the City of New York under the *qui tam* provisions of the Civil False Claims Act, 31 U.S.C. § 3729, *et seq*. (the "False Claims Act"), to recover damages, civil penalties and other relief owed to the United States and Rosner.

2. This case concerns conduct, transactions and occurrences by, between and among Defendants and the United States Department of Housing and Urban Development ("HUD") involving so-called "Section 8" rental voucher payments: whereby HUD subsidizes some part of a qualified residential tenant's monthly rent to his or her landlord, with the amount of the subsidy being based on the tenant's household income.

3. In connection with the claim for, and receipt of, Section 8 rent voucher payments from HUD during certain time periods, the Defendants: (a)

knowingly presented, and caused to be presented to an officer and employee of the United States Government false and fraudulent claims for payment and approval; (b) knowingly made, used, and caused to be made and used, false records and statements to get false and fraudulent claims paid and approved by the Government; (c) conspired to defraud the Government by getting false and fraudulent claims allowed or paid, and (d) knowingly made, used, and caused to be made and used, a false record or statement to conceal, avoid, and decrease an obligation to pay or transmit money or property to the Government, in violation of 31 U.S.C. §§ 3729(a)(1), (2), (3) and (7) of the False Claims Act (prior to its amendment on May 20, 2009). Likewise in later periods, Defendants: (a) knowingly presented, or caused to be presented, a false and fraudulent claim for payment or approval; (b) knowingly made, used, and caused to be made and used, a false record or statement material to a false or fraudulent claim; (c) conspired to commit a violation of subparagraphs (A), (B),…and (G) of § 3729(a)(1); and (d) knowingly made, used, and caused to be made and used, a false record or statement material to an obligation to pay and transmit money and property to the Government, and knowingly concealed and knowingly and improperly avoided and decreased an obligation to pay and transmit money and property to the Government, in violation of 31 U.S.C. §§ 3729(a)(1)(A), (B), (C) and (G) of the False Claims Act (as amended on May 20, 2009).

4. In brief, this scheme to violate the False Claims Act involves Glenn Gardens Associates, as the owner of a residential apartment building located in New York City's upper Westside known as Glenn Gardens ("Glenn Gardens Apartments"),

unlawfully overcharging HUD for the United State's share of monthly rental payments for the benefit of Glenn Gardens Apartments Section 8 voucher tenants. It also involves Defendants improperly attempting to alter Glenn Gardens Apartments' rent regulated status under New York City's rent stabilization laws. It further involves Glenn Gardens Associates wrongfully retaining HUD Section 8 voucher overpayments, even after it and its agents knew or should have known that Glenn Gardens Associates received the overpayments and was obligated to return them to the United States. More specifically, Glenn Gardens Associates improperly sought, obtained and has continued to retain excessive Section 8 voucher payments by representing, expressly and implicitly, that Glenn Gardens Apartments was not rent-regulated (and therefore its tenants could be charged market rate rents), when in fact, as Defendants well-knew, or should have known, Glenn Gardens Apartments was subject to New York City's rent-stabilization laws and regulations (codified at New York City Administrative Code §§ 26-501 *et seq.*) by virtue of, among other things, its owner having applied for, received and maintained in effect a so-called "J-51" tax abatement from the City of New York.

5. As a result of misrepresenting Glenn Gardens Apartments' status as non-rent regulated Glenn Gardens Associates and its agents were able to obtain and retain millions of dollars from HUD's Section 8 housing assistance voucher program to which defendant Glenn Gardens Associates and its agents knew it was not entitled. Briefly, the United States paid Glenn Gardens Associates the difference between the Glenn Garden Apartments voucher-eligible tenants' share of rent and the fair market rent ("FMR") of their residential units, when, under the Section 8 program's regulations and policies, HUD

should have only paid the difference between the tenants' share of their monthly rents and the much lower rent stabilized rates corresponding to their respective apartments.

6. On average, HUD overpaid Glenn Gardens Associates approximately $2,000 per month on the typical Section 8 voucher-eligible unit. The overpayments concerned an estimated 170 units at Glenn Gardens Apartments. The overpayments have occurred from in or about June 2003 to the filing of this second amended Complaint. In addition, Glenn Gardens Associates and its agents have known, or should have known, since on or before May 20, 2009, that it had wrongfully obtained Section 8 rental voucher overpayments from HUD and improperly retained them despite Glenn Gardens Associates' contractual and regulatory obligations to return the overpayments to the United States.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over the claims alleged in this Complaint under 28 U.S.C. §§ 1331 (Federal question), 1345 (United States as plaintiff) and the jurisdictional provisions of the False Claims Act, 31 U.S.C. § 3739(e).

8. Venue is proper in the Southern District of New York pursuant to 31 U.S.C. § 3732(a) under 28 U.S.C. §§ 1391(b) and (c), because (a) at least one of the Defendants can be found, resides or transacts business in this District, (b) an act proscribed by 31 U.S.C. § 3729 occurred within this District; and a substantial part of the events or omissions giving rise to the violations of 31 U.S.C. § 3729 alleged in the Complaint occurred in this District. Section 3732(a) further provides for nationwide service of process.

9. Upon information and belief, there are no pending actions that would be deemed to be related to this action, and further, this second amended Complaint is not based on the facts underlying any such pending action, within the meaning of the False Claims Act's first to file rule, 31 U.S.C. § 3730(b)(5).

10. This action is not precluded by any provisions of the False Claims Act's jurisdiction bar, 31 U.S.C. § 3730(e) *et seq*. This action is not brought by a current or former member of the armed services against another member of the armed services arising out of such person's service in the armed forces. § 3730(e)(1). Nor, is it brought against a member of Congress, the judiciary or a senior executive branch official and based upon evidence or information already known to the Government. § 3730(e)(2). Upon information and belief, other than this action, in which the United States has partially intervened, this second amended Complaint is not based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the United States is already a party. § 3730(e)(3). Upon further information and belief, prior to filing the original qui tam complaint in this action there has been no "public disclosure" of the matters alleged herein and this action is not "based upon" any such disclosure, within the meaning of § 3730(e)(4)(A). Notwithstanding the foregoing, through his first-hand dealings with interested persons, Rosner has "direct and independent knowledge" of the instant allegations. Additionally, Rosner has "voluntarily provided," and offered to provide, this information to the Government before filing this second amended Complaint. Therefore, to the extent any of these allegations is deemed to have been based upon a public disclosure, Rosner is an "original source" of this

information as defined by § 3730(e)(4)(B) of the False Claims Act, and as such, he is expressly excepted from its public disclosure bar.

ENTITIES, PERSONS AND PARTIES

11. The United States is the real plaintiff party in interest in this action. HUD, through its Office of Public and Indian Housing (PIH), funds and broadly administers the federal government's Section 8 Voucher Program (referred to in this Complaint as the "Section 8 Program"). HUD contracts with state and local agencies, known as Public Housing Agencies ("PHAs"), to implement and directly administer the Section 8 Program at the local level. Each PHA enters into an agreement with HUD known as Public Housing Agency Plan. HUD not only provides all of the Section 8 housing assistance funds that are distributed to voucher-eligible tenants, it also pays the PHAs a fee for administering the Section 8 Program on its behalf. HUD is located at 451 7th Street, S.W., Washington, D.C. 20410, and its phone number is (202) 708-1112.

12. Glenn Gardens Apartments is a 266-unit residential apartment building located at 567-569 Amsterdam Avenue and 175 W. 87th Street, New York, New York (parcel BBL 1-1218-1). From the time it was erected (circa 1976) until on or about June 27, 2003, Glenn Gardens Apartments participated in, and was regulated by, New York State's and New York City's commonly called "Mitchell Lama Program." HPD was responsible for overseeing Glenn Gardens Apartments' participation in that program. Beginning in or about 1996-97, the owner of Glenn Gardens Apartments applied for and received J-51 tax abatements from New York City. On or about June 27, 2003, Glenn Gardens Apartment's then-owner, Glenn Gardens Housing Co., Inc., withdrew it from the Mitchell-Lama Program, but left its J-51 tax abatements in effect. On or about the day it

exited from the Mitchell-Lama Program the owner of Glenn Gardens Apartments began participating in the Section 8 enhanced voucher program. Approximately 170 Glenn Gardens Apartments units are Section 8 voucher eligible and participate in the voucher program; the vouchers received on those units are special Section 8 "enhanced" (also known as, "sticky") vouchers: meaning, among other things, that HUD pays the difference between the amount the tenant is required to pay and the actual amount the landlord charges him or her, provided that the rental amount is reasonable in light of market rates.

13. Relator Edmund Rosner resides in one of the Independence Plaza North apartment towers located in downtown Manhattan and is a vice president of the Independence Plaza North Tenants Association, Inc., a New York not-for-profit organization formed in 1980. Relator is familiar with certain facts alleged herein through his dealings with tenant representatives from Glenn Gardens Apartments.

14. Upon information and belief, on or about July 12, 2000, Defendant Glenn Gardens Associates was formed as a domestic limited liability company in the State of New York. Defendant Glenn Gardens Associates maintains an office at 567 Amsterdam Avenue, New York, New York 10024-2806 and currently uses Grenadier Realty Corp., whose offices are located at that same address, to manage Glenn Gardens Apartments. Upon further information and belief, Defendant Glenn Gardens Associates is the current owner of Glenn Gardens Apartments and has: (1) submitted to New York City's Department of Housing Preservation and Development ("HPD") Requests for Tenancy Approval Housing Choice Voucher Program (form HUD-52517) for each Glenn Gardens Apartments tenant seeking eligibility for the Section 8 Program; (2) entered into Housing Assistance Payment ("HAP") Contracts (form HUD-52641) with HPD for each Glenn

Gardens Apartment tenant participating in the Section 8 Program, which HAP contract consisted of Part A Contract Information, Part B Body of Contract and Part C Tenancy Addendum; (3) entered into separate tenant lease agreements with each such tenant, which tenant leases included a Tenancy Addendum (form HUD-52641-A); (4) submitted monthly vouchers to HPD for its claimed Section 8 payment; and (5) received regular payments from HPD in connection with all Glenn Gardens Apartment tenants participating in HUD's Section 8 Program.

15. [Intentionally left blank to conform paragraph numbering here to that in the original complaint.]

16. Upon information and belief, HPD is an agency of the City of New York and is a PHA under the Section 8 Program, having filed a Public Housing Agency Plan with HUD. Upon further information and belief, HPD participates in the Section 8 Program through HPD's Office of Housing Operations, Division of Tenant Resources, which is located at 100 Gold Street, New York, New York 10038. Upon further information and belief, at all relevant times, HPD: (1) received and approved Requests for Tenancy Approval Housing Choice Voucher Program (form HUD-52517) for each Glenn Gardens Apartment tenant seeking eligibility for the Section 8 Program; (2) entered into separate HAP Contracts with the owner of Glenn Gardens Apartments for each apartment unit participating in the Section 8 Program; (3) received and approved monthly vouchers from Glenn Gardens Apartments' owner requesting payments under the Section 8 Program; and (4) caused HUD Section 8 Program payments to be remitted to Glenn Gardens Apartments' owner for each Glenn Gardens Apartment tenant participating in the Section 8 Program. HPD also supervises the J-51 Program in New York City.

THE FALSE CLAIMS ACT

17. [Paragraph 17 is divided into two sub-paragraphs, 17A and 17B, to conform paragraph numbering here to that in the original complaint.]

A. Section 3729 of the False Claims Act (prior to its amendment on May 20, 2009) provided, in pertinent part, that:

> (a) Any person who
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; [or]
>
> ***
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
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> ***
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person….[1]
>
> (b) For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information…(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

[1] The minimum and maximum penalties were increased in September 1999 to $5,500 and $11,000, respectively, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410, 104 State. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, 110 Stat. 1321).

B. Section 3729 of the False Claims Act (as amended May 20, 2009) provides, in pertinent part, that:

> (a) Liability for certain acts.
>
> (1) In general….any person who—
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; [2]
>
> (C) conspires to commit a violation of subparagraph (A), (B),…or (G); [or]
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> ***
> (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,
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> is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.
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> ***
>
> (b) Definitions. For purposes of this section—
>
> (1) the terms "knowing" and "knowingly"—
> (A) mean that a person, with respect to information—
> (i) has actual knowledge of the information;
> (ii) acts in deliberate ignorance of the truth or falsity of the information; or
> (iii) acts in reckless disregard of the truth or falsity of the information; and
> (B) require no proof of specific intent to defraud;
>
> (2) the term "claim"—
> (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

[2] Sub-section (a)(1)(B) was made effective as of June 7, 2008.

(i) is presented to an officer, employee, or agent of the United States; or
(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—
(I) provides or has provided any portion of the money or property requested or demanded; or
(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and
(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

31 U.S.C. § 3729.

STATUTORY AND REGULATORY FRAMEWORK

(a) HUD's Voucher Program

18. In 1937, the United States Housing Act (42 U.S.C. § 1437 *et seq.*) was enacted to provide eligible low-income people with private housing by making payments directly to local housing authorities. In 1974, Section 8 (§ 1437f) was added to this Act to authorize the making of "assistance payments" to encourage private property owners to provide housing. According to the HUD handbook, the program created financial incentives for private investors to participate in the construction and operation of housing for low-income families. Over the years, many different programs and subprograms have been authorized and funded under Section 8. All of the Section 8 Programs subsidize the rent of low- and very low-income tenants. Each program is designed to provide "decent,

safe and sanitary" housing. This action involves the Section 8 Program known as the HUD Housing Choice Voucher Program (sometimes referred to as the "Voucher Program").

19. Enhanced (or "Sticky") vouchers are special Section 8 vouchers provided by HUD to protect the residents of rent-regulated apartments with federal assistance, when owners pre-pay federal loans to opt out of such programs. They differ from standard vouchers in several ways. They are specifically allocated for residents of the affected units; the income eligibility standards are 95% of the area median income, as opposed to the 80% limit for standard vouchers; the rents for Enhanced Vouchers are not limited to the HPD payment standard, but can be up to reasonable market rents for the units affected; and, Enhanced Vouchers are designed to protect residents, not confer a benefit, so the minimum rent that an Enhanced Voucher participant pays is the tenant's payment prior to conversion (although it could be lower if the person becomes unemployed or otherwise suffers a significant drop in income and it is the United States, not the owner that pays for any further drop in the tenant's payment obligation). The differences for Enhanced Vouchers apply only while the participant household resides in the housing development that has been converted, otherwise the value of an Enhanced Voucher drops to the standard level for the community once the resident moves out of the original development. The vouchers are "sticky" because they stick with those specific residents.

20. The regulations governing the Voucher Program are set forth in Title 24 C.F.R. Part 982. HUD has also issued guides (see e.g., Housing Choice Voucher Program Guidebook) and instructions for completing and submitting HUD forms, which guides and instructions contain and reflect Voucher Program rules and policies.

21. To receive assistance payments, a property owner must enter into a HAP contract with its local PHA. Such payments are made directly from the PHA to the private property owners in the form of a subsidy. The PHA is responsible for determining the amount of the assistance payment to the owner in accordance with HUD requirements. The basic HUD formula for calculating Voucher Program payments is to subtract the so-called TTP (Tenant Total Payment) from the so-called Standard Payment and to remit the difference to the owner. The TTP is generally determined by what the tenant can afford to pay, which, usually, may be no less than 30% of the tenant's household income, and no more than 40%. The Standard Payment is determined by the PHA in most instances by reference to a schedule showing a certain average price for comparable rental units in the same geographic location. It is intended to approximate what the private property owner could otherwise expect to receive as a rental payment under the prevailing market rates. It is in short, a PHA-determined "reasonable rent." When the Standard Payment is determined in the aforesaid manner it is sometimes called the unit's fair market rent (or "FMR"). Ordinarily, under the Voucher Program the United States pays the difference between the TTP and the FMR. 24 C.F.R. §§ 982.521 *et seq.* If, however, a building is rent stabilized and the rent-stabilized rate is less than the PHA-determined reasonable rate, the owner is entitled to receive only the difference between the TTP and the rent regulated amount (unless the units at issue are exempt from local rent regulation under the rent regulation ordinance). See *Housing Choice Voucher Program Guidebook*, Chapter 9, § 9.2. Each HAP between a Section 8 owner and the PHA incorporates by reference HUD regulation 24 C.F.R. Part 982. Sub-section 451 of that regulation obligates any owner

who receives an excess Section 8 payment to refund the excess amount to the PHA for the benefit of the United States.

(b) NYC's Applicable Rent Regulation Schema

22. In or about 1955, New York State and New York City implemented an initiative to increase affordable housing for moderate and middle income households that is known at the Mitchell-Lama Program. The rules regarding the Mitchell-Lama Program are set forth in the Private Housing Finance Law ("PHFL"), 9 N.Y.C.R.R. part 1727. According to Article 2 of PHFL, the Mitchell-Lama housing program was designed to provide affordable rental and cooperative housing to only moderate- and middle-income families. The program sought to meet this goal by providing certain financial incentives to property developers, such as subsidized loans and tax breaks. At its inception, in exchange for low-interest mortgage loans and real property tax exemptions, the Mitchell-Lama Law required limitation on profits, income limits on tenants and supervision by either Division of Housing and Community Renewal ("DHCR") or HPD. Rents were set by HPD and/or DHCR, and HPD regulated the rental of vacant units, the setting of rents, the maintenance of the premises as middle-income housing, and the eviction of tenants.

23. Under the Mitchell-Lama Program owners are permitted to withdraw their properties, that is, "buy them out," after 20 years upon prepayment of the subsidized mortgage. When developers buy out Mitchell-Lama properties, they are no longer subject to Mitchell-Lama regulations as administered by DHCR or HPD, whichever was the designated supervisory agency, and apartments need not be kept affordable for moderate or middle income families. Because an increasing number of Mitchell-Lama developments were becoming eligible for buyout in the early l990's, in 1991 DHCR and

HPD issued regulations to clarify the buyout process and ensure a smooth transition to non-Mitchell-Lama status. The regulations stipulated that in areas subject to the Rent Stabilization Law or the Emergency Tenant Protection Act, developments that buy out are covered by rent control or stabilization, programs which prevent landlords from increasing rents beyond a certain percentage per lease term based on the previous term's cost.

24. New York City's Administrative Code creates a mechanism for receiving a tax abatement on rental properties; it is known as "J-51" tax abatement. See New York City Administrative Code §§ 11-243 and 11-244.

25. When a Mitchell-Lama property has a J-51 tax abatement in effect at the time it is withdrawn from the Mitchell-Lama Program that property is immediately subject to New York City's rent stabilization rules. See Real Property Tax Law § 489(7), New York City Administrative Code §§ 26-504(c), 11-243(d)(2), 11-243(i) and 11-244(d), and RCNY § 5-03(f).

26. Under New York City's rent stabilization laws, the initial rent that a Mitchell-Lama property owner can charge on a building that is withdrawn from the Mitchell-Lama Program and made immediately subject to rent stabilization is the last Mitchell-Lama rent for that unit. New York City Administrative Code § 26-512(b)(3) and 9 N.Y.C.R.R. 2521.1(j). An owner is not permitted to collect a rent in excess of the legal regulated rent. New York City Administrative Code §§ 26-516(a) and (b).

27. In order to remove former Mitchell-Lama properties from New York City's rent stabilization rules, an owner must effectuate certain notices to its tenants, including notices relating to J-51 tax abatements. If the owner does not so notify the tenants, then New York City's rent regulations apply to each tenant as long as they continuously

occupy their apartment. See New York City Administrative Code Sections 26-504(c) and 26-517(e) and 9 N.Y.C.R.R. 2528.4.

FALSE CLAIMS RELATED FACTS

28. In or about 1976, Glenn Gardens Apartments became Mitchell-Lama housing.

29. In or about 1996-97, Glenn Gardens Apartments' owner obtained a J-51 tax abatement.

30. On or about June 27, 2003 (the "Exit Date"), Glenn Gardens Apartments' owner withdrew the premises from the Mitchell-Lama Program.

31. By operation of the above-described New York City rent regulations, upon Glenn Gardens Apartments' withdrawal from the Mitchell-Lama program on or about June 27, 2003, Glenn Gardens Apartments' units were required to remain rent stabilized until either 2011 or as long as the tenants in occupancy at the Exit Date continued to occupy their apartments, which ever is greater in duration.

32. Glenn Gardens Apartments' owner failed to give the requisite tenant notices or to otherwise effectuate the dissolution of Glenn Gardens Apartments' J-51 tax abatement. This meant that upon Glenn Gardens Apartments' exit from the Mitchell-Lama Program the initial rent stabilized rate for each Section 8 apartment at Glenn Gardens Apartments (and thus in most cases the Standard Payment for determining voucher amounts) was supposed to be the last Mitchell-Lama rent as of the Exit Date.

33. From at least as early as the Exit Date, and continuing through the date of this second amended Complaint, Glenn Gardens Apartments' owner applied for and

received Section 8 Program Enhanced (Sticky) voucher payments through HPD, in the manner described above in this Complaint.

34. Upon information and belief, since on or about the Exit Date, at any given time, tenants in approximately 170 of the approximately 266 residential units at Glenn Gardens Apartments have been Section 8 eligible and have participated in the Voucher Program.

35. Upon information and belief, as of the Exit Date, the last Mitchell-Lama rents for units at Glenn Gardens Apartments (and therefore the amounts that should have been used for setting the Standard Payment) were significantly lower than the current market rate rents for such apartment units.

36. Upon information and belief, based on the facts alleged in this second amended Complaint, the owner of Glenn Gardens Apartments has been receiving Enhanced (Sticky) Voucher payments based upon the higher FMR (as determined by HPD) and not the substantially lower rent stabilized rate.

37. Upon information and belief, based on the facts alleged in this second amended Complaint, Glenn Gardens Apartments' owners represented expressly and implicitly on the HUD mandated documentation and leases corresponding to units participating in the Section 8 Program that Glenn Gardens Apartments was not subject to rent regulation, when, in fact, Glenn Gardens was subject to New York City's rent stabilization rules.

38. Upon information and belief, based on the facts alleged in this second amended Complaint, Glenn Gardens Apartments' owner, as well as its agents, knew, or should have known at the time Glenn Gardens Apartments and its agents created and

submitted documents in support of Section 8 Program vouchers to HUD (via HPD) and received Section 8 Program payments from HUD (via HPD), that Glenn Gardens Apartments was in fact subject to New York City's rent stabilization laws. Therefore, Glenn Gardens Associates' representations to HUD that Glenn Gardens was not subject to rent regulation were false and fraudulent.

39. Upon information and belief, HPD knew or should have known at the time it received, reviewed and created documents relating to Glenn Gardens owner's application for and receipt of Section 8 Voucher Program payments, as well as when it certified compliance with the Public Housing Agency Plans it filed with HUD and received its fee from HUD for administering the Section 8 Program in New York City, that Glenn Gardens was subject to New York City's rent stabilization laws. Thus, HPD knew or should have known that HUD was overpaying Glenn Gardens Apartments' owner as a result of HPD using FMR rates rather than rent stabilization rates to determine Glenn Gardens Apartments' voucher payment amounts.

40. Specific examples of Section 8 tenants (whose identities are redacted here to protect their privacy, but which can be provided at a later date pursuant to court order) at Glenn Gardens Apartments whose units are illustrative of the overcharging scheme alleged in this second amended Complaint are:

(a) Mr. CK, a resident of Glenn Gardens Apartments, was notified by letter dated April 7, 2004 that effective February 1, 2004, his total rent was to be $2,567.00, of which his share was $619.00, and of which HUD's share was $1,948.00.

(b) Mr. PG, a resident of Glenn Gardens Apartments, was notified by letter dated October 26, 2004 that effective December 1, 2004, his total rent was to be $3,054.54, of which his share was $1,154.00, and of which HUD's share was $1,900.54.

(c) Mr. and Mrs. OM, received a letter dated December 13, 2005, which refers and relates to their status as participants in the Section 8 Enhanced Voucher Program.

(d) Ms. RP, a resident of Glenn Gardens Apartments, entered into a lease dated June 3, 2003, which provided that effective September 9, 2003, her total rent would be $2,162.00, of which her share was to be $650.00 and HUD's share was to be $1,512,00.

41. On or about February 15, 1996, the Supreme Court of New York, Appellate Division, First Department, affirmed the lower court's decision upholding a declaratory ruling of the HPD that prohibited a landlord from attempting to unilaterally terminating its tenants' rent stabilization status by trying to waive its J-51 real property tax benefits and exemptions. State v. Fashion Place Assocs., 224 A.D.2d 280 (N.Y. App. Div. 1st Dep't), rehearing denied, 1996 N.Y. App. Div. LEXIS 9566 (N.Y. App. Div. 1st Dep't) (1996).

42. In or about April 2004, HPD published a revised "J-51 Guidebook" to provide a general overview of the J-51 program. Section 4 of the guidebook is entitled, "Conditions Imposed for the Benefits." Within that section is sub-section B, which is captioned, "Rent Regulation." Sub-section B states simply and unequivocally that::

> A rental unit which receives J-51 exemption and/or abatement benefits must be registered with the Division of Housing and Community Renewal *(DHCR)* and subjected to rent stabilization for the full term of the J-51

> benefits, regardless of whether the rental unit would otherwise have been subject to the Rent Stabilization Law. (Emphasis added.)

43. Upon information and belief, on or about the dates indicated, if not earlier, Defendants knew or should have known of the events alleged in paragraphs 41 to 42, above.

44. On or about October 27, 2006, Relator filed the original complaint in this action under seal, which complaint charged generally that defendants had violated the False Claims Act by filing Section 8 housing voucher claims and related documents with HUD that falsely represented Glenn Gardens Apartments' status as non-rent regulated, when it was subject to rent regulation because of its J-51 tax abatement.

45. On or about March 26, 2008, HPD purported to retroactively terminate Glenn Gardens Apartments' J-51 tax abatement effective June 27, 2003, that is, on its Exit Date from the Mitchell-Lama Program. Upon information and belief, given the nature and effect of this transaction, it was done at the request, and for the benefit, of Glenn Gardens Associates. Upon similar information and belief, both Glenn Gardens Associates and HPD understood sometime prior to on or about March 26, 2008, that as long as its J-51 tax abatement was in effect Glenn Gardens Apartments was restricted to charging rent stabilized rates to all of its tenants, and the sole purpose of HPD's attempted retroactive termination of the J-51 tax abatement was to improperly circumvent this rent stabilization restriction. Thus, one of the Defendants' intended effects underlying HPD's action on March 26, 2008, was to permit Glenn Gardens Associates to obtain and retain Section 8 voucher payments from HUD based on higher fair market rent rates, rather than lower rent stabilized rates.

46. Glenn Gardens Associates' request, and HPD's purported decision, to retroactively terminate Glenn Gardens Apartments' J-51 tax abatement was contrary to, in conflict with, and an unlawful attempt to circumvent,:

a. HPD's fiduciary obligations to the United States as a PHA in HUD's Section 8 Voucher Program, whereby HPD is responsible for determining the correct amount that landlords can charge Section 8 tenants and hence the amount of the United States' subsidy.

b. HPD's declaratory ruling that was affirmed by the lower and appellate courts' opinions in the Fashion Place, which precluded a landlord from waiving J-51 tax benefits in order to collect higher rents.

c. HUD's clearly stated rule in its *Housing Choice Voucher Program Guidebook*, Chapter 9, § 9.2, which provides that a rent regulated Section 8 landlord cannot charge a Standard Rate higher than the established regulated rent. And,

d. Various state and city laws and regulations governing the J-51 Program, New York City's rent stabilization laws, and their interplay, including, Real Property Tax Law § 489(7), New York City Administrative Code §§ 26-504(c), 26-512(b)(3), 26-516(a) and (b), 11-243(d)(2), 11-243(i) and 11-244(d), RCNY § 5-03(f) and 9 N.Y.C.R.R. 2521.1(j) and 2528.4.

47. Communications between and among agents and representatives of Glenn Gardens Associates and HPD led to HPD's decision to retroactively terminate Glenn Gardens Apartments' J-51 tax abatement. These persons included Martin Siroka, Esq., on

behalf of Glenn Gardens Apartments and Julie Walpert, Deputy Commissioner, on behalf of HPD. Upon information and belief, Attorney Siroka knew or should have known at the time of these communications and his attempt to cause HPD to retroactively terminate Glenn Gardens Apartments' J-51 tax abatement to its June 27, 2003 Exit Date from the Mitchell-Lama Program that New York City landlords participating in the J-51 Program were required to charge rent stabilized rates because, among other things, (a) he was a former deputy general counsel to HPD, and (b) he was counsel to defendants in a rent overcharge case commenced in 2005, where the same J-51/rent stabilization issues were raised. Denza v. Independence Plaza Associates, LLC, Index No. 11763/05, New York Supreme Court, New York County. During his representation of Independence Plaza Associates, LLC, attorney Siroka had multiple communications with senior HPD attorney Matthew Shafit, Esq., including through email exchanges in August and September of 2005 and March 2006, in which the attorneys addressed the Fashion Place opinion as precluding HPD's retroactive termination of J-51 benefits in order to permit a landlord to avoid rent regulation and retain excess Section 8 payments.

48. Upon information and belief, the United States was unaware of the communications between representatives and agents of Glenn Gardens Associates and HPD that resulted in HPD's attempt to retroactively terminate Glenn Gardens Apartments' J-51 benefits (thereby increasing the amount of HUD's Section 8 subsidies beyond what they would otherwise have been) and therefore such communications were effectively "ex parte."

49. The United States obtained a partial lifting of the seal and revealed the substance of the original complaint to Defendants on or about July 23, 2009.

50. Arising in the context of a tenant's rent overcharge action, on or about October 22, 2009, the New York Court of Appeals, affirmed a unanimous decision of the Supreme Court of New York, Appellate Division, First Department, 62 AD3d 71, 83 (1st Dep't) (Mar. 5, 2009), when it held that the current and former owners of Peter Cooper Village and Stuyvesant Town, two adjoining Manhattan apartment complexes comprising 110 buildings and occupying roughly 80 acres between 14th and 23rd Streets along the East River in New York City, were not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law (RSL) while simultaneously receiving tax incentive benefits under the City of New York's J-51 program and thus could not lawfully charge rents at rates greater than those set by the RSL. Roberts v. Tishman Speyer Properties, L.P., 2009 NY Slip Op 7480; 13 N.Y.3d 270; 918 N.E.2d 900; 2009 N.Y. LEXIS 3953 (2009). The Roberts court concluded that:

> Rental units in buildings receiving these [J-51] exemptions and/or abatements must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (see 28 RCNY at 5-03 [f]). (Citation in original; emphasis added.)

51. Upon information and belief, given the high news profile of the Roberts case and its obvious relevance to the instant matter, Defendants have known, or should have known, of both the Court of Appeals' and Appellate Division's rulings since on or about the time they were issued.

52. In light of the United State's decision to partially intervene in this mater, Relator believes Glenn Gardens Associates has yet to refund to the United States the unlawfully obtained and retained Section 8 voucher overpayments Glenn Gardens Associates had received since on or about June 27, 2003. As a result, the United States

has suffered, and continues to suffer, substantial economic loss and damages in an amount to be determined at trial.

53. Upon information and belief, as reflected in HUD's *Housing Choice Voucher Program Guidebook*, Chapter 9, § 9.2, whether or not a Section 8 landlord in New York City, such as Glenn Gardens Associates, is legally subject to the city's rent stabilization laws would have a natural tendency to influence HUD's decision to remit Section 8 voucher payments to that landlord and, if so, in what amount, as well as HUD's determination to pay an PHA, such as HPD's, Section 8 administrative fees. Additionally, a Section 8 landlord's retention of excess payments is important to HUD and that agency regularly commences legal actions to recover such overpayments when landlords attempt to wrongfully retain them.

54. Upon information and belief, in light of the fact that it published the J-51 Guidebook, HPD knew that a landlord receiving J-51 benefits was subject to the New York City's rent stabilization laws and could charge its tenants at only the rent stabilized rates. Upon further information and belief, given that it supervises the J-51 Program in New York City, HPD was aware that Glenn Gardens Apartments was receiving J-51 benefits between at least as early as 1997, when its former own applied for and first obtained J-51 benefits, through at least as late as March 26, 2008, when HPD purported to retroactively terminate Glenn Gardens Apartments' J-51 tax abatement. As a result of the foregoing, HPD knew or should have known that Glenn Gardens Associates was overcharging HUD for Section 8 vouchers during at least the period June 27, 2003, the date Glenn Gardens Apartments exited the Mitchell-Lama Program, through March 26, 2008, and therefore Glenn Gardens Associates had a legal obligation under its HAPs and

HUD regulation 24 C.R.R. § 982.451 to return the excess amounts to HPD for the benefit of the United States.

55. Upon information and belief, at all times relevant hereto, as a large real estate developer in New York City, Glenn Gardens Associates, itself and through its agents and representatives, knew that: (a) an owner of a New York City residential apartment building receiving J-51 benefits was required to charge its tenants no more than rent stabilized rates; (b) a rent-regulated landlord participating in HUD's section 8 Enhanced Voucher Program could not charge a Standard Rate greater than the rent stabilized rate; (c) a landlord who has received J-51 tax benefits cannot return and terminate such benefits retroactively; (d) Glenn Gardens Apartments received a J-51 tax abatement beginning in or about 1997 to at least as late as March 26, 2008; (e) Glenn Gardens Apartments tenants have participated in HUD's Section 8 Voucher Program since on or about June 27, 2003, when it exited the Mitchell-Lama Program; (f) on a monthly basis since that time, Glenn Gardens Associates has been charging Standard Rates to its Section 8 tenants at rates greater than the corresponding rent stabilized rates and was thus receiving excess payments; and (g) Glenn Gardens Associates had a contractual and regulatory obligation to return such excess payments to HPD for the benefit of the United States.

.FIRST CAUSE OF ACTION

FALSE CLAIMS ACT VIOLATIONS PRIOR TO MAY 20, 2009
31 U.S.C. §§ 3729(a)(1), (3) and (7)

56. The allegations contained in paragraphs 1 through 55 above, are realleged as if fully set forth below.

57. Since at least as early as on or about June 27, 2003, and continuing through May 19, 2009, in New York City and elsewhere, in connection with the claim for, and receipt of, Section 8 rent voucher payments from HUD, the Defendants and others:

(a) knowingly presented, and caused to be presented to an officer and employee of the United States Government, namely HUD and its agent HPD, false and fraudulent claims for payment and approval, namely monthly Enhanced Vouchers for Glenn Gardens Apartments' Section 8 tenants, which implicitly and explicitly represented falsely that Glenn Gardens Apartments was not subject to rent regulation, when, in fact as Defendants knew and should have known, Glenn Gardens Apartments was subject to New York City's RSL by virtue of having received J-51 tax benefits since in or about 1997; such false claims also include the ensuing Section 8 Enhanced Voucher payments that Glenn Gardens Associates received and negotiated on a monthly basis;

(b) conspired to defraud the Government by getting the above-described false and fraudulent claims allowed or paid, by billing HUD at an improperly high Standard Rate for each Glenn Gardens Apartments tenant participating in the Section 8 Voucher Program, and by attempting to circumvent the laws and regulations limiting Glenn Gardens Associates from charging more than rent stabilized rates through an unlawful attempt on or about March 26, 2008 to permit Glenn Gardens Apartments to wrongfully retain excess Section 8 payments by disavowing the J-51 tax abatements it had received annually since in or about 1997 and to terminate them retroactive to June 23, 2003; and

(c) knowingly made, used, and caused to be made and used, a false record or statement to conceal, avoid, and decrease an obligation to pay and transmit money and property to the Government, namely, the records and statements Defendants created and used in or about March 26, 2008, which purported to terminate Glenn Gardens Apartments' J-51 tax abatement retroactively in order to avoid refunding the Section 8 Enhanced Voucher overpayments Glenn Gardens Associates had received from HUD since on or about June 23, 2003.

in violation of 31 U.S.C. §§ 3729(a)(1), (3) and (7), respectively, of the False Claims Act (prior to its amendment on May 20, 2009).

SECOND CAUSE OF ACTION

FALSE CLAIMS ACT VIOLATIONS ON OR AFTER MAY 20, 2009 31 U.S.C. §§ 3729(a)(1)(A), (C) and (G)

58. The allegations contained in paragraphs 1 through 57 above, are realleged as if fully set forth below.

59. From on or about May 20, 2009 through the date of this second amended Complaint, in New York City and elsewhere, the Defendants and others:

(a) knowingly presented, or caused to be presented, a false and fraudulent claim for payment or approval;

(b) conspired to commit a violation of subparagraphs (A), (B),and (G) of § 3729(a)(1); and

(c) knowingly made, used, and caused to be made and used, a false record or statement material to an obligation to pay and transmit money and property to the Government, and knowingly concealed and knowingly and improperly avoided and decreased an obligation to pay and transmit money and property to the

Government, including Glenn Gardens Associates' contractual obligations under its HAPs and legal duties under 24 C.F.R. § 982.451 to refund excess Section 8 payments,

in violation of 31 U.S.C. §§ 3729(a)(1)(A), (C) and (G) of the False Claims Act (as amended on May 20, 2009).

THIRD CAUSE OF ACTION

FALSE CLAIMS ACT VIOLATIONS PRIOR TO JUNE 7, 2008
31 U.S.C. §§ 3729(a)(2)

60. The allegations contained in paragraphs 1 through 59 above, are realleged as if fully set forth below.

61. Since at least as early as on or about June 27, 2003, and continuing through June 6, 2008, in New York City and elsewhere, in connection with the claim for, and receipt of, Section 8 rent voucher payments from HUD, the Defendants and others knowingly made, used, and caused to be made and used, false records and statements to get false and fraudulent claims paid and approved by the Government, including, but not limited to, Requests for Tenancy Approvals, HAP Contracts, Tenancy Leases together with Tenancy Addenda and HPD's Public Housing Agency Plans (HAPs), certifications to get false and fraudulent Section 8 rent subsidies for such tenants approved and paid; and the records Defendants created and used in the attempt to retroactively terminate Glenn Gardens Apartments' J-51 tax abatement on or about March 26, 2008, in violation of 31 U.S.C. §§ 3729(a)(2) of the False Claims Act (prior to its amendment on May 20, 2009).

FOURTH CAUSE OF ACTION

FALSE CLAIMS ACT VIOLATIONS PRIOR ON OR AFTER JUNE 7, 2008
31 U.S.C. §§ 3729(a)(1)(B)

62. The allegations contained in paragraphs 1 through 61 above, are realleged as if fully set forth below.

63. From on or about June 7, 2008, through the date of this second amended Complaint, in New York City and elsewhere, the Defendants and others knowingly made, used, and caused to be made and used, a false record or statement material to a false or fraudulent claim, in violation of 31 U.S.C. §3729(a)(1)(B) of the False Claims Act (as amended on May 20, 2009).

PRAYER FOR RELIEF

WHEREFORE, Relator Rosner, on behalf of himself individually, and acting on behalf, and in the name, of the Government of the United States, respectively, demands and prays that judgment be entered against the Defendants as follows:

1. That the Defendants be ordered to cease and desist from violating the False Claims Act, 31 U.S.C. § 3729 *et. seq*.

2. On the all Causes of Action under the False Claims Act, judgment against Defendants in the amount of three times the amount of damages the United States has sustained because of Defendants' actions, plus a civil penalty of between $5,500 and $11,000.00 for each act in violation of the False Claims Act, as provided by Section 3729(a), with interest.

3. That Relator Rosner be awarded an amount available under Section 3730(d) of the False Claims Act for bringing this action, namely, between 15 and 25 percent of the proceeds of the action or settlement of the claim if the Government

intervenes in the matter (or pursues its claim through any alternate remedy available to the Government, Section 3730(c)(5)), or, alternatively, between 25 and 30 percent of the proceeds of the action or settlement of the claim, if the Government declines to intervene.

4. That Relator Rosner be awarded all reasonable expenses that were necessarily incurred in the prosecution this action, plus all reasonable attorneys' fees and costs, as provided by Section 3730(d).

5. That Relator Rosner be awarded prejudgment interest.

6. And, such other relief for the United States and Relator Rosner, in law or equity, as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Relator Rosner hereby demands trial by jury.

Respectfully submitted,

/S Timothy J. McInnis

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