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PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (AUGUST 22, 2019)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
EX REL. LAURENCE SCHNEIDER, ET AL,

and

LAURENCE SCHNEIDER,

Appellant,

v.

JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION, ET AL.,

Appellees.

No. 19-7025
September Term, 2018

Lower Court Case No. 1:14-cv-01047-RMC

Before: HENDERSON, SRINIVASAN, and RAO, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, the supplement, the replies, and the notice to join the motion for summary affirmance; and the motion for summary reversal, the responses thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed appellant's *qui tam* action. The False Claims Act "give[s] the government an unfettered right to dismiss [a qui tam] action," *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), and appellant presented no evidence of "fraud on the court or any similar exceptional circumstance to warrant departure from the usual deference we owe the Government's determination whether an action should proceed in the Government's name," *Hoyte v. American National Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008); *see also id.* at 65 n.4 (noting that the court has "declined to adopt the judicial review standard for a *qui tam* action endorsed by the Ninth Circuit, under which the Government must initially show that dismissal is 'rationally related to a valid purpose,' after which the relator bears the burden to show the decision to dismiss is 'fraudulent, illegal, or arbitrary and capricious'") (quoting *Swift*, 318 F.3d at 252)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (MARCH 6, 2019)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, ET AL.,
EX REL. LAURENCE SCHNEIDER,

Plaintiffs,

v.

J.P. MORGAN CHASE BANK, N.A., ET AL.,

Defendants.

Civil Action No. 14-1047 (RMC)

Before: Rosemary M. Collyer,
United States District Judge.

Pursuant to the Federal False Claims Act and similar State and District of Columbia laws, Relator Laurence Schneider sued J.P. Morgan Chase Bank, N.A., J.P. Morgan Chase & Co., and Chase Home Finance LLC (collectively "Chase") and argued Chase submitted false claims relating to the National Mortgage Settlement and false claims relating to the Home Affordable Modification Program (HAMP) to decrease its liability to the Federal Government. After over five years in litigation both in front of this

Court and the D.C. Circuit, the United States has moved to dismiss the case pursuant to 31 U.S.C. § 3730 (c)(2)(A), which permits the United States to dismiss a *qui tam* action "notwithstanding the objections of the person initiating the action." The Court held a hearing on the motion, as required by the statute, and based on the representations made in the briefs and at the hearing will grant the motion.

I. Facts

The general background and facts of this case are set forth in detail in this Court's opinion on Chase's Motion to Dismiss the Second Amended Complaint and will not be repeated here except as necessary to understand the posture of the current motion. *See United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, 224 F. Supp. 3d 48, 50-53 (D.D.C. 2016) (*Schneider I*).

On May 6, 2013, Mr. Schneider filed his initial Complaint as Relator under the False Claims Act, *see* 31 U.S.C. § 3730(b)(1), in the United States District Court for the District of South Carolina. *See* Compl. [Dkt. 1]. The Federal Government declined to intervene on January 13, 2014. *See* Notice [Dkt. 24]. The case was transferred to this Court on June 19, 2014. *See* Transfer Order [Dkt. 58]. Relator filed his First Amended Complaint on November 17, 2014. *See* FAC [Dkt. 80]. On August 31, 2015, the Federal Government again declined to intervene. *See* FAC Notice [Dkt. 96]. Relator filed a Second Amended Complaint on October 2, 2015. *See* SAC [Dkt. 102]. Defendants moved to dismiss on November 12, 2015. *See* Mot. [Dkt. 105]. The Court granted the motion to dismiss and dismissed Mr. Schneider's HAMP claim without prejudice and all other claims with prejudice. *See Schneider I*, 224 F. Supp. 3d 48. The D.C. Circuit affirmed and remanded the case to this Court to allow Mr. Schneider an opportunity to file a motion to amend his complaint to modify the claim that had been dismissed without prejudice. *See United States ex rel. Schneider v. JPMorgan Chase Bank, Nat'l Ass'n*, 878 F.3d 309 (D.C. Cir. 2017) (*Schneider II*).

Mr. Schneider filed a Motion for Leave to File a Third Amended Complaint; Chase opposed; and that Motion is currently ripe for review.[1] On July 2, 2018, after the briefing on Mr. Schneider's Motion was completed, the United States filed a Notice indicating its intent to evaluate the proposed amendments to determine if dismissal is appropriate. *See* Notice of Intent to Evaluate Proposed Am. Compl. and Request to Abstain Ruling on Mot. for Leave to Amend [Dkt. 130]. The Court stayed the Motion and granted three extensions of time to the United States as it considered whether to move to dismiss. *See* 9/18/2018 Minute Order; 10/10/2018 Minute Order; 10/23/2018 Minute Order. On November 13, 2018, the United States moved to dismiss the case pursuant to 31 U.S.C. § 3730(c)(2)(A). *See* United States' Mot. to Dismiss [Dkt. 135]. Mr. Schneider opposed and requested a hearing on the

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1 *See* Relator's Mot. for Leave to File Third Am. Compl. [Dkt. 124]; Defs.' Mem. in Supp. of Their Opp'n to Relator's Mot. for Leave to File Third Am. Compl. [Dkt. 126]; Relator's Reply to Defs.' Opp'n to Relator's Mot. for Leave to File Third Am. Compl. [Dkt. 127]; Defs.' Mot. for Leave to File Surreply in Opp'n to Relator's Mot. for Leave to File Third Am. Compl. [Dkt. 128]; Defs.' Surreply in Opp'n to Relator's Mot. for Leave to File Third Am. Compl. [Dkt. 128-1]; Relator's Opp'n to Defs.' Mot. for Leave to File Surreply in Opp'n to Relator's Mot. for Leave to File Third Am. Compl. [Dkt. 129].

motion. *See* Relator Laurence Schneider's Notice of Request for Hearing Regarding United States' Mot. to Dismiss [Dkt. 136]. The Court conducted that hearing on February 27, 2019.

II. LEGAL STANDARD

The False Claims Act's "chief purpose . . . is to prevent the commission of fraud against the federal government and to provide for the restitution of money that was taken from the federal government by fraudulent means." *United States ex rel. Purcell v. MWI Corp.*, 824 F. Supp. 2d 12, 15 (D.D.C. 2011). The FCA imposes civil penalties for the submission of false claims to the United States government. Private parties, called relators, can sue for violations of the FCA in the name of the United States. *See* 31 U.S.C. § 3730(b)(1). Special procedures apply in such cases, which are called *qui tam* actions—"short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Vt. Agency of Nat'l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000). When a plaintiff-relator files an initial complaint, it is not immediately served on the defendant, but is instead served on the United States along with "written disclosure of substantially all material evidence and information the [plaintiff] possesses." 31 U.S.C. § 3730 (b)(2). Thereafter, the case is stayed for a minimum of sixty days, plus any extensions, while the United States determines whether it will intervene—that is, whether it will "proceed with the action, in which case the action shall be conducted by the Government; or . . . decline[] to take over the action, in which case the person bringing the action shall have the right to conduct the action." *Id.* § 3730(b)(4)(A)-(B). If the government declines to intervene, as happened here, the complaint is unsealed, and the plaintiff-relator may proceed with the case. Even in cases in which the government has declined to intervene, the government retains special rights atypical in traditional civil actions, such as the right to receive all pleadings, intervene at any time for good cause, *see id.* § 3730(c)(3), and petition the Court for a stay of discovery, *see id.* § 3730(c)(4).

Section 3730(c)(2)(A) also permits the government to "dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." *Id.* § 3730(c)(2)(A). The D.C. Circuit has interpreted that provision to provide the government "unfettered right to dismiss" a *qui tam* action. *Swift v. United States*, 318 F.3d 250, 252-53 (D.C. Cir. 2003) ("Nothing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States. The provision neither sets 'substantive priorities' nor circumscribes the government's 'power to discriminate among issues or cases it will pursue.'"); *see also Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008).

III. Analysis[2]

The United States moves this Court to dismiss Relator's action under 31 U.S.C. § 3730(c)(2)(A). Mr. Schneider opposes, arguing that the United States does not have unfettered discretion to dismiss *qui tam* actions because the Department of Justice created internal rules to govern when to dismiss actions under § 3730(c)(2)(B) and in this case none of the necessary conditions applies. Mr. Schneider spends considerable pages to demonstrate the strength of his *qui tam* case against Chase.

Despite DOJ's internal procedures and Mr. Schneider's argument about the strength of his allegations, this Court is bound by Circuit precedent which holds that the United States may, without the consent of the Relator, dismiss actions brought on its behalf. *See Hoyte*, 518 F.3d at 65; *Swift*, 318 F.3d at 252-53.[3] Before dismissing a case on such a motion from the United States, the Court must give the Relator

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[2] This Court's jurisdiction remains as described in the opinion on Defendants' motion to dismiss the second amended complaint. *See Schneider I*, 224 F. Supp. 3d at 56. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3730(a). This Court is the proper venue because the underlying National Mortgage Settlement was approved by this Court and Defendants conduct business in the District of Columbia. *See* 31 U.S.C. § 3732(a).

[3] Both *Swift* and *Hoyte* mention "fraud on the court" as a possible exception to the unfettered deference provided to the government to dismiss *qui tam* suits. *See Swift*, 318 F.3d at 253; *Hoyte*, 518 F.3d at 65. However, as in *Swift* and *Hoyte*, there is no evidence here to suggest any fraud or any other "exceptional circumstance to warrant departure from the usual deference we owe the Government's determination whether an action should proceed in the Government's name." *Hoyte*, 518 F.3d at 65.

an opportunity to be heard and to attempt to convince the United States why it should allow the case to continue. Mr. Schneider made that attempt in writing and through counsel's presentation at the motion hearing on February 27, 2019. Having not been persuaded, the United States reaffirmed its desire to dismiss this action.

The Court finds that, consistent with *Smith* and *Hoyte*, the United States has "unfettered discretion" to dismiss *qui tam* actions, *Hoyte*, 518 F.3d at 65, and having heard from Relator on the issue, the Court will dismiss the case.

IV. Conclusion

For the reasons set forth above, United States' Motion to Dismiss, Dkt. 135, will be granted. The case will be dismissed and Relator's Motion for Leave to File a Third Amended Complaint and Defendants' Motion for Leave to File Surreply will be denied as moot. A memorializing Order accompanies this Memorandum Opinion.

/s/ Rosemary M. Collyer
United States District Judge

Date: March 6, 2019

RELEVANT STATUTORY PROVISIONS

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31 U.S.C. § 3729

(a) Liability for certain acts.—

(1) In general.—Subject to paragraph (2), 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;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(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, 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 1), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(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—

(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.

(c) Exemption from disclosure.—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5 .

(d) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730

(a) Responsibilities of the Attorney General.— The Attorney General diligently shall investigate a violation under section 3729 . If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure .

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.— (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross—examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period

upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government 2 Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for rea-

sonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the

action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A The court shall dismiss an action or claim under this section, unless opposed by the

Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government 2 Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) Government not liable for certain expenses.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions.—

(1) In general.—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, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief.—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on bringing civil action.—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

TRANSCRIPT OF MOTION HEARING (FEBRUARY 27, 2019)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LAURENCE SCHNEIDER,

Plaintiff,

v.

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION ET AL,

Defendants.

Docket No. CA 14-1047
Washington, D.C.
Wednesday, February 27, 2019, 2:05 p.m.

Before: The Hon. Rosemary M. COLLYER, United States District Senior Judge.

[Transcript p. 1 to 28]

THE DEPUTY CLERK: Your Honor, we have civil action 14-1047, Laurence Schneider versus JP Morgan Chase Bank, National Association, et al.

I'll ask that counsel please approach the lectern and identify yourselves for the record starting with this side of the room, please.

MR. BLACK: Joseph Black representing relator Laurence Schneider.

THE COURT: Thank you, sir.

MR. DI MARCO: Good afternoon, Your Honor, Roberto Di Marco for the relator Laurence Schneider.

THE COURT: Thank you, sir.

MR. COHEN: Good afternoon, Your Honor, Daniel Cohen on behalf of the relator.

THE COURT: All right, thank you.

MR. HUDAK: Good afternoon, Your Honor, Brian Hudak from the U.S. Attorneys office on behalf of the United States.

THE COURT: Brian Hudak?

MR. HUDAK: Yes, ma'am.

THE COURT: Well, I certainly know your name, Mr. Hudak, but it's not on my sheet here. Have you just stepped in? So sorry, you are on my sheet.

MR. HUDAK: No worries. Given that we usually appear at the bottom of the Qui Tam docket.

THE COURT: No, yes, that's where I was looking at the bottom. Excuse me, so sorry.

MR. HUDAK: Thank you, Your Honor.

THE COURT: You're right here.

Yes, sir.

MR. WICK: Good afternoon, Your Honor, Robert Wick from Covington & Burling for the Chase defendants, JP Morgan Chase defendants.

THE COURT: Thank you, sir.

This is an interesting procedure because the government has indicated its intention to move to dismiss this long running case and Mr. Schneider and counsel disagree with that plan on behalf of the government.

As I understand the law, in the end the government gets to decide what it wants to litigate on behalf of the United States and so the situation now is that Mr. Schneider's counsel, Mr. Black, Mr. Cohen and Mr. Di Marco need to persuade Mr. Hudak, I presume, over Mr. Wick's objections, not to dismiss the case. So come away and persuade.

MR. BLACK: Thank you, Your Honor. Joseph Black again for Mr. Schneider.

I am going to speak on the legal issues associated with the government's motion and Mr. Di Marco is going to discuss the evidence that we have. That will hopefully convince the government to withdraw its motion.

Failing that we believe that our legal issues and the law is so great, facts are so great that under the Swift decision which says that the government's motion to dismiss must be denied if it can be shown to be arbitrary and capricious.

We believe that we have strong facts that should compel the government to let us go forward. Failing that we believe that you should dismiss their motion because in fact it is arbitrary and capricious and we can show that.

THE COURT: All right.

MR. BLACK: The government has two justifications for dismissal. First, that Mr. Schneider's action is without merit.

And secondly, that the cost to the government is so high relative to the potential recovery that the case should be dismissed. We believe that both of those justifications do not withstand scrutiny.

Schneider's case presents a relatively simple case of false certification where the certification is a condition of payment or all the payments that Chase received under the HAMP. Plaintiff's complaint is based on the proposition that Chase certification of compliance with the HAMP were false and therefore Chase is not entitled to any of the payments under the HAMP.

This is a case of fraudulent inducement; that is, all the fraud flows from the original false certification, the false certification compliance with the underlying servicing requirements.

In discussing the fraudulent inducement notion, the Fifth Circuit in Longhi stated even if the subsequent claims of payment made under the contract were not literally false because they were derived from the original fraudulent representation, they are also actionable false claims. The certification—

THE COURT: I'm sorry, what is the cite for that court?

MR. BLACK: That is Longhi, U.S. ex rel Longhi v. Lithium Power Technologies, 545 F.3d 458.

THE COURT: Thank you.

MR. BLACK: The independent cite is 468, that's Fifth Circuit, 2009.

THE COURT: Thank you, sir.

MR. BLACK: Again, certification of compliance with requirements of the HAMP was a condition precedent to receive any payment under the HAMP. Therefore, the individual claims made for payment were loan modifications with false claims because of the initial certification, the initial certification that was false.

Let me state right now that based on the evidence this data has obtained in his related Seventh District of New York case. You've probably seen references to that case in our various pleadings. Mr. Di Marco is going to discuss some of that evidence. He could file summary judgment on liability under the fraudulent inducement theory without further discovery.

The government gives two not well thought out reasons why Schneider's case lacks merit. It states notably relator does not allege that Chase received HAMP incentive payments on loans mitigated into Recovery One.

And then additionally, relator concedes that Chase released liens on loans in Recovery One which eliminated the chance of Chase foreclosing on defrauding home mortgage—I'm sorry—foreclosing on a defrauding homeowner because the mortgage was no longer secured by the property.

The government does not explain how these factors underlie Schneider's case. Both of them are irrelevant to the underlying issue to whether Chase was in compliance with the HAMP servicing requirements and whether the certification for compliance were false.

Notably, Chase does not make this argument in its motion to dismiss or its opposition to the filing of the third amended complaint.

And moreover, Schneider does have evidence that Chase received over 65 million in HAMP payments after February 2012 through the end of the program for second lien modifications. This was evidence found in the New York discovery.

In private discussions with Schneider's counsel the government has presented several reasons why this case lacks merit. First, they stated that the alleged false certifications in our case represented conditions of payment and not—I'm sorry, conditions of participation and not conditions of payment.

We pointed out that the Service of Participation Agreement, the SPA, contained two specific statements that stated that the certifications were conditions precedent to payment. We also pointed out that the Court in Escobar, the Supreme Court in Escobar eliminated the distinction between conditions of payment and conditions of certification—I'm sorry—conditions of participation and conditions of payment.

And we also demonstrated why those certifications were false based on Chase's internal documents. When we identified the 65 million dollars in HAMP payments Chase received for second liens taken from our CD One the government was still not satisfied.

Apparently, this did not satisfy the government because we did not identify specific loans that did not qualify for payment. But as noted that is not the requirement in a false certification case where the fraud flows from the initial false certification.

As regard to the cost to the government, the cost to the government of moderating this case is really minor compared to the potential return. Payments made to Chase under the HAMP equaled 550 million dollars. Over 80 percent of this payment was paid after February 8th, 2012, the date set out in the National Mortgage settlement agreement to limit Chase's liability under the HAMP.

Therefore, single damages equals over 440 million dollars. Even if the single damages were limited to the 65 million that Chase received under the HAMP, and that we have knowledge of, this is the minimum number that we know of, the amount that would more than justify the government's efforts in monitoring this case.

Mr. Di Marco is going to get up and talk about the evidence. But we really do believe that this is a strong case going forward and the government should not seek to dismiss the case in that based on the facts and evidence it truly is arbitrary and capricious to suggest that we do not have a good case.

THE COURT: I need to go back to the original concept that you were addressing; that is fraud in the inducement and if there's fraud in the inducement, then as I understood you to say then every claim made thereafter is also false or fraudulent.

MR. BLACK: Yes.

THE COURT: Okay, and that was the case out of the Fifth Circuit. Has anybody else followed that case, do you know?

MR. BLACK: Oh, yes, the Rogan case out of Seventh Circuit. There's a case of Hooper v. Lockheed Martin in the Ninth Circuit and I believe we cited another case in one of our pleadings and it escapes me at the moment, but there are a number of Circuits that have followed that.

THE COURT: Okay, I can look it up. It's not that I don't have good help. Even I know how to do that sometimes. I just was asking for the moment.

All right, I think I understand what your argument is. I appreciate it.

MR. BLACK: Okay.

THE COURT: Thank you.

It's Mr. Di Marco, right?

MR. DI MARCO: Yes, ma'am.

THE COURT: All right.

MR. DI MARCO: Your Honor, thank you very much for your time today.

As Mr. Black has pointed out the standards for payment in this matter are contained within the Longhi case that you were just discussing with him. In short as a condition precedent to the payment of the performance of the obligations by Chase, they needed to perform fully.

The SPA goes into great lengths on that particular issue under Sections 2, Sections 3, Sections 4(C), and Section 4(G) of it. The SPA constantly reiterates the issue of condition precedent.

The government is protected for any of the payments if the participant does not participate fully. There is no obligation to pay. This is a voluntary contract. The SPA deals with billions of dollars of taxpayer monies. Monies that were funded from the TARP.

We have demonstrated to the government time and time again that SPA's conditions were not followed by Chase. They filed demonstratively false certifications. Their own internal audits from 2010 to 2015 admit that internal controls were insufficient to comply with bank policies, law and regulations. Their internal emails admit that they never actually checked to see whether these properties were actually occupied.

The HAMP cite by the treasury lays this out that it was meant to protect the homeowners. To help people in need. They don't know whether or not they were helping people who actually occupied homes.

They also released those, never released the debts related to these lien releases. As part of the HAMP handbook, it states that in order to comply with HAMP when you release the lien you must release the debt. They didn't do that. They continued with collection action. All of this has become clear under the New York case.

They have also admitted that they did not engage an application process. Part of the SPA was collecting information from the applicants. Chase didn't do that.

Now under Longhi any of these individual issues would be sufficient to overturn the SPA payments and activate a requirement that Chase return the funds. This is a voluntary contract. It's something that is overlooked several times throughout this process. Chase didn't have to enter into this agreement. These are not obligations by Chase to get involved with HAMP. It was voluntary.

But when they volunteered to do this, when they entered into this contract, they took on a heightened responsibility. They took TARP funds and they stated that they would not only self-regulate an audit but they would also self-report when they violated the agreement.

This created a fiduciary relationship with the American taxpayer. These were our funds. They were entrusted with the safeguarding of our monies and were to use them to help the most damaged of our society, those most in need. The homeowners who were going to lose their homes. They agreed as one of the largest financial institutions in the country to undertake that responsibility.

The HAMP website actually states that this was a balancing act between protecting the taxpayer and helping banks help homeowners. That's the balancing that we need to be engaged in here.

They failed. Then they hid the act of failure. They took our money. They took taxpayer money. Obviously they helped some people but then they really profited from those funds. We have demonstrated that.

We have shown breaches of the trust. Their behavior that were engaged in and are the sort that must be brought to light. How many homeowners has Chase even to this day prosecuted in courts of foreclosure, in courts of bankruptcy stating that a contract is a contract and they must abide by its exact terms. They do it all the time.

Yet here we are arguing about whether or not they should be allowed to avoid the exact terms of what amounts to less than a ten page contract. They didn't do it.

So now the government wishes to stop us and after five years they want to sweep it all away. Our client Mr. Schneider has as we've stated the private right action in New York. He brought a case for breaches and frauds in New York. But before that action he brought this action. He brought this action and he begged the government to follow up.

When he brought his private action, discovery proceeded there first and through that discovery millions of pages, hundreds of thousands of documents have demonstrated that

Mr. Schneider's allegations are correct. They did what they did without regard to the homeowners.

We showed this to the government. We shared it with them. We demonstrated how Chase had acted. We applied the legal standard the Government has for itself in terms of the Longhi case and then they pushed back and insisted upon a different standard. That's what it sounded like to us.

They asked us to show if any money is coming from the loans within the RCV One. So the RCV One was their recovery system, it's a cesspool of corrupted loans. The government said, tell us that money was given to them for loans contained within our RCV One. Loans which Chase doesn't even always know where the borrower is from. They don't know the exact amount owed in principal balance. Tell us whether or not there is money paid there. That's where the 65 million comes from. It's monies directly connected to the RCV One.

This was all without formal discovery in the case you have here before you, Your Honor. When we showed them that, they moved the goal post again. We tried to get them to consider if we could get loan level detail through discovery the exact loans but instead, they responded by wanting to dismiss us.

So now we're in a position that I find to be unfathomable. As a taxpayer, as an attorney I don't understand where we are here. Chase entered into a voluntary agreement to use tax dollars. They breached it and now the government has stated that they don't want to enforce that contract pursuant to the standards set forth.

Why should Chase be allowed to keep these monies? I don't get it personally. But Mr. Schneider has claimed in his New York case, Your Honor, and I'm sure that the government will bring this up, that he's seeking disgorgement because of the breaches, because they used his companies as scape goats to try and get these monies from the government.

We've made the disgorgement claim, but we've also told the government that in order to avoid any type of conflict we would waive that claim so long as they continued to pursue those monies on behalf of the American people, but here we are being dismissed.

So we'll continue if we are dismissed. If the government doesn't change its mind, we'll continue to seek disgorgement because Chase should not be allowed to keep taxpayer dollars when they did not perform according to the specs set forth.

As a voluntary agreement if they didn't want it to be specific, a condition precedent, they should have, as one of the richest companies in this country, they should have negotiated different terms but they wanted the money. So they got the money but didn't perform.

This is really very easy for the government. They should be allowing us to continue. We have invited the government to allow us to continue the case. We have told them that we intend to fight and continue to fight on this case. They have not intervened.

We have a mediation scheduled in two weeks with Chase on a private right action. We've even told the government that they could participate as far as we were concerned. We got no response.

It is beyond me why the government wouldn't seek to get monies back for the American people. All they have been doing is supervising this case. So their expense argument sorry, but it doesn't hold water.

What I believe this Court can do, if the government is not willing to change its mind, is to see that this decision at this time is arbitrary. That it is simply put, a way for them to hit some quotas and get rid of some cases.

What I think this Court can do, what I strongly believe it can do is to state that it's arbitrary and give us six months. That's it, Your Honor. Six months and we will file the motion for summary judgment that my brother has laid out. Six months in this Court can test whether or not we are telling the truth.

The government will stand up and they will deny this is the case. Chase will stand up and say that we are full of it, I'm sure, but at the end of the day this Court can decide that. Your Honor can look at all of the evidence. Your Honor can check out whether or not the Longhi case applies and then Your Honor can issue a decision on the liability.

If at the end of the day we find that it's a zero but they did breach for some reason they were able to prove their monetary damages were zero, then the government has done nothing except spend some review time. We have asked them for nothing.

But we owe the American people the chance to go after this. The law says it. We've proven it. And I believe that it would be highly in-just for us to do anything else at this time.

So what I'd like to see, Your Honor, is a decision that says right now it's arbitrary, let's revisit this in six months when we all have—the discovery is ongoing. We just last week had expert discovery and deposed experts in the other case. We're going through millions of pages and we found what we found already with them. And we've constantly updated the government as we find more information. They just need to give us the time to continue.

Thank you for the Court's time.

THE COURT: Thank you, sir.

Did you wish to respond?

MR. HUDAK: Your Honor, really my response is going to be directed at what standard the Court, what standard is governing here.

The relators are incorrect, this matter of controlling D.C. Circuit precedent, that the standard is arbitrary and capricious, that's the standard of a APA review.

The D.C. Circuit has made clear that in circumstances such as this the test is government has unfettered discretion unless it's one small, the door is barely closed except for one small exceptional circumstance is where they can prove that the government is somehow operating a fraud on the Court. Which is despite the rhetoric and the personal insults lodged at me about fulfilling quotas which, Your Honor, that is not the case here. That is not a showing that they are even trying to make.

Swift was clarified by Hoyte, case in 2008. Judge Henderson writing for the unanimous panel of the D.C. Circuit concluded and characterized Swift as saying in Swift however we flatly rejected the relator's suggestion that we routinely review the government's decision to dismiss the Qui Tam action, instead holding the door only barely ajar for review in an exceptional circumstance in particular where there is fraud on the Court.

It is clear from Swift that any exception to Section 3730 (c)2(a) if there are any must be like fraud on the Court.

Your Honor, that's not arbitrary and capricious review. This is not the standard of the APA in Chevron. This is the government as the prosecutor on behalf of the United States. Under the oaths we took to uphold and defend the constitution and walls of the United States whether we believe it's prudent to allow a lawsuit in the name of the United States to proceed.

And in this case we've considered all of relator's evidence. They have not presented anything new here today. In the duration of this case we have considered all of their arguments. We have weighed their arguments. We in fact allowed them an attempt to convince this Court that their claims were meritorious on their first complaint.

Instead, they created potentially adverse decisions for the United States requiring substantial involvement by the Department of Justice at the D.C. Circuit to weigh in and ensure that the holding is not overly enshrined in controlling precedent in an overly expansive matter such that it will effect meritorious cases moving forward.

Your Honor, they have had their attempts to convince us, had their attempts here today to convince us. Your Honor, I am not persuaded.

I have the authority of the U.S. Attorney to seek the dismissal of this case and we ask that the Court dismiss it.

THE COURT: Thank you, sir.

MR. HUDAK: Thank you.

THE COURT: Did you wish to speak, sir?

MR. WICK: May I briefly?

THE COURT: Please.

MR. WICK: Your Honor, I'm aware of the procedural standard.

First, let me just make two preliminary observations. The first is that it's our view that the use of the documents from the private litigation in this case is a violation of the protective order in that action.

I don't ask for any relief from this Court for what we regard as that protective order of violation. If we are going to seek relief, we'll seek it in the Southern District of New York, the Court that issued the protective order that we think is being violated. I just don't want anyone to be under the mistaken impression that we consent to or waive objection to what we regard as the improper use of evidence in discovery from that action to this action.

Let me also say that I object and am very surprised to hear that opposing counsel is talking about a private mediation and attempt to settle that action in this action in that they went so far as to invite the government to that mediation even though that mediation is not about this case, that's improper.

On the merits of this case, Your Honor, let me just say the Hoyte and Swift cases couldn't be clearer that the standard is not arbitrary and capricious. The Swift case specifically addresses the question of whether the standard of review is arbitrary and capricious and what the D.C. Circuit for Judge Randolph said there was no, we're not going to follow this other California District Court case that used an arbitrary and capricious standard.

The standard of review is that the government has virtually unfettered discretion to dismiss a case if it so chooses. They left open the question of whether if the government were committing a fraud on the Court that might be reviewable.

So for example, if there were an accusation that I had bribed Mr. Hudak or something, that might be a situation in which the Court could intervene. Absent that, the Swift decision is clear that the Court cannot intervene.

Finally, recognizing that Mr. Hudak has already indicated he's not persuaded, I'll be very brief about this. But let me just point out two fundamental misunderstandings in the plaintiff's argument.

In the first place, they are, they are speaking as if the HAMP program which relates to first liens and the 2 MP programs which relates to second liens are one in the same program and that the same standards apply to both. That is fundamentally incorrect.

They're two distinct foreclosure relief programs that were created by the Treasury Department

Make Home Affordable Program. There are more than two but the two at issue are HAMP. HAMP relates to first lien mortgage loans. Now Recovery One didn't do first lien mortgage loans because it's incapable of doing it. Instead of doing first lien mortgage loans ultimately what happened with the Recovery One loans is that the liens were released which meant that the homeowners were not exposed to the risk of foreclosure and there was no risk of frustration of the fundamental program objective of avoiding unnecessary foreclosures.

The release of the first liens also meant that the loans were no longer mortgage loans. At that point they were unsecured loans akin to credit card debt. They're not mortgage loans and hence they are not eligible for participation in HAMP.

There's a different program, 2 MP for second lien mortgage loans. Under 2 MP you don't have to modify the loan which is something Recovery One can't do. Under 2 MP you are also permitted to extinguish, get rid of the loan, get rid of all of the debt, write it off entirely. When you get rid of the lien and the loan entirely in the 2 MP extinguishment there's nothing to service. The loan has gone, the debt is gone.

Recovery One was capable of doing that, did do that and it earned the 2 MP program incentives that it claimed.

Your Honor, on reflection and in the interest of conserving everyone's time, I will stop there unless the Court or Mr. Hudak have any further questions for me.

THE COURT: Well, in the context in which we're now, I'm now sitting, I do not have questions for you. If this goes forward, then I'm going to ask you to come back.

MR. WICK: Understood, Your Honor.

THE COURT: It was actually very helpful to have you here for six and a half minutes, so assure your client that I found it helpful for the six and a half minutes, okay.

MR. WICK: Yes, Your Honor.

THE COURT: Yes, sir, Mr. Di Marco, go ahead.

MR. DI MARCO: Very, very briefly. This is why I stated about the summary judgment issue because we have significant issues of fact.

Very briefly, Mr. Wick has stated that RCV One did not do first liens. It's an interesting statement since the New York case involves quite a bit of first liens that were part of the RCV One.

Next, I have been told that I was improper in bringing up the mediation. There was no confidentiality issue that was brought forward on that. It was in the interest of bringing this thing to a close and there was no improper action that I sought.

And third, any of the documents which have been shared with this Court that were not sought under seal are documents that were not subject to the specifics. Covington and Chase itself has filed enumerable documents which they stated originally were to be kept out of the public view without regard to any seal.

If my brother were to look I'm sure he'd find those documents among other filings that were done by his office. So those are directed at me and so I just wish to respond and I appreciate the Court's time.

As to Mr. Hudak I have all of the respect in the world for the U.S. Attorney and there was no direct attack to him personally that was intended. It is simply that I understand the pressures that he and his office are under.

I appreciate the Court's time, Your Honor. Thank you very much.

MR. HUDAK: Your Honor, may I be heard one second?

THE COURT: Yes.

MR. HUDAK: Your Honor, in just one follow up and I omitted it from my remarks.

If the Court agrees with the United States that the standard of Swift and Hoyte is what we have said it to be, we urge the Court to make no further rulings.

THE COURT: No, no.

MR. HUDAK: On Longhi, the scope of Longhi, because I actually may agree one hundred percent with them on what Longhi stands for, in the theory of the implied, the theory of fraudulent inducement under the False Claims Act, we may be in complete accord on that.

So what I would not want is to have part of the reason that we are moving to dismiss this case is to not have further adverse law through the United States. So we haven't briefed the issue of Longhi how it would apply. We have not briefed the issue of whether or not Chase's conduct would violate the Service Participation Agreement.

We don't condone breaches of agreement that cause harm to the United States. That's not what we're about. So we would ask the Court if it believes our interpretation of Swift and Hoyte is correct that it decided on that limited basis as opposed to addressing the merits of the presentation related here today.

THE COURT: Okay, I understand exactly what you're saying and why I'm not quite sure because I have to give consideration to their argument, but I do understand the emphasis you put on Swift and Hoyte and that's what I would do were I you too; they happen to be here in this Circuit.

MR. HUDAK: Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. HUDAK: Thank you.

THE COURT: Did you want to add anything?

MR. WICK: Two seconds, Your Honor.

Mr. Di Marco he did say that I said Recovery One doesn't do first liens. I hope I didn't say that.

What I meant to say and what I hope I did say and will now clarify is Recovery One does not do loan modification. It doesn't take a performing mortgage loan and modify it into a different performing mortgage loan.

Recovery One does do complete and total extinguishment of loans and liens. It does not do loan modification. I hope that's what I said. If not, I've clarified it now.

THE COURT: Okay. Yes, sir.

MR. BLACK: If I may.

THE COURT: You should be able to get the last word because you got the first word.

MR. BLACK: Thank you very much.

THE COURT: You're welcome.

MR. BLACK: I just want to make one comment on the Swift decision. The Swift decision did consider whether or not the judge's action was arbitrary and capricious and it found that it was not. It found that the relator in that case didn't know everything to suggest that.

What I am saying is that we have presented evidence to say that it is arbitrary and capricious. If you read the decisions carefully you realize that the Court went beyond just mere fraud on the Court, fraudulent action on behalf of the government. We're not suggesting that, but we are suggesting that if you look at the facts and the law in this case, you will see that we have a well founded case and that it should go forward.

The government's explanation as to why it should not go forward is not given to the Court. It just says we are the government, we don't want this case to go forward. And end of story.

THE COURT: Well, what they said was that this case has already made bad law and they don't want any more. I think that's what they really say.

MR. BLACK: Well, the bad law was, it has not made bad law. We think it was correct at the District Court—I mean at the Court of Appeals. So we don't have that problem. I don't believe.

THE COURT: I'm glad you said that the Court of Appeals because that makes me feel slightly better. If I made bad law for you, that's my bad.

MR. HUDAK: There's no bad law, Your Honor, it depends on whose eyes is viewing.

THE COURT: Believe me, I know bad law when I see it or at least when they're my cases and somebody sues them up on appeal and makes bad law and I can tell.

MR. HUDAK: I just want to note that we did state one of the requirements of the statute to just concisely state the reasons for the United States dismissing a case. We did that on page 5 of our notice.

We believe that the claims lack substantial merit, litigation of them would require further unnecessary expenditures of scarce governmental resources including, if this case were to proceed, large amounts of discovery from the Department of the Treasury because materiality would be at play and what treasury knew and when they knew it would be a centralized question in any false claims act case especially under the Supreme Court's test in Escobar.

Again, we do believe that we are enforced to having cases proceed that may produce adverse decisions to the United States that we have to distinguish and further meritorious cases at the axiom of bad cases make bad law and something that we're always concerned about. And when we exercise our discretion to seek the dismissal of a case, we do so, that's one of the considerations among many that go into the process, Your Honor.

THE COURT: All right.

I think everybody has had at least two chances to speak. So I can consider myself blessed to have had such good lawyering.

And I will take this all under advisement and go back and read very carefully and come up with a decision as quickly as I can, okay.

Thank you everybody.

(Proceedings adjourned at 2:46 p.m.)

UNITED STATES' MOTION TO DISMISS (NOVEMBER 13, 2018)

UNITED STATES DISTRICT COURT
FOR DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, ET AL.,
EX REL. LAURENCE SCHNEIDER,

Plaintiffs,

v.

J.P. MORGAN CHASE BANK, N.A., ET AL.,

Defendants.

Civil Action No. 14-1047 (RMC)

Before: Rosemary M. COLLYER,
United States District Judge.

The United States of America ("United States" or "Government"), by and through its undersigned counsel, respectfully moves the Court to dismiss this action pursuant to Section 3730(c)(2)(A) of Title 31 of the False Claims Act ("FCA").

PROCEDURAL HISTORY

On May 6, 2013, Relator Laurence Schneider ("Relator") filed a *qui tam* complaint under the False Claims Act ("FCA") against three members of the JP Morgan Chase corporate family (collectively, "Chase") in the U.S. District Court for the District of South

Carolina ("DSC"). *See* Init. Compl. (ECF No. 1). On January 13, 2014, the United States declined to intervene in Relator's initial complaint. *See* Notice (ECF No. 24). On June 19, 2014, pursuant to Relator's request, the DSC transferred the case to this Court, which presided over the set of cases constituting the National Mortgage Settlement ("NMS"), including an action brought against Chase. *See* Order (ECF No. 58).

On November 17, 2014, Relator filed a first amended complaint adding new claims to this action, which complaint Relator filed under seal pursuant to the FCA. *See* 1st Amd. Compl. (ECF No. 80). Relator's first amended complaint stated FCA claims based on Chase's alleged non-compliance with (i) the NMS (the "NMS Claims") and (ii) authorities governing Chase's participation in the Housing Affordable Modification Program ("HAMP"), a loan modification program offered by the U.S. Department of the Treasury ("Treasury") (the "HAMP Claims"). On August 31, 2015, the United States declined to intervene in Relator's first amended complaint. *See* Notice (ECF No. 96). On October 2, 2015, Relator filed a second amended complaint, which purportedly corrected certain errors and added certain additional information that had come to Relator's attention since he filed his first amended complaint. *See* 2d Am. Compl. (ECF No. 102). Chase moved to dismiss Relator's second amended complaint. *See* Mot. to Dismiss (ECF No. 105).

The Court dismissed Relator's complaint in full on December 22, 2016, with prejudice as to the NMS Claims and without prejudice as to the HAMP Claims. Memo. Op. & Order (ECF Nos. 118-19); *United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, 224 F. Supp. 3d 48, 57, 60 (D.D.C. 2016) (Collyer, J.).

Relator then took an appeal in which the United States participated as amicus curiae. *See* Notice of Appeal (ECF No. 120). On December 22, 2017, the D.C. Circuit affirmed the Court's dismissal with prejudice of the NMS Claims on alternative grounds and affirmed the dismissal without prejudice of the HAMP Claims. *United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, 878 F.3d 309, 314-15 (D.C. Cir. 2017).

On remand, Relator's HAMP Claims are the lone remaining claims. Relator has moved for leave to file a third amended complaint (ECF No. 125-1) ("TAC"), which motion remains pending and fully briefed. *See* ECF Nos. 124-29. In July 2018, the United States informed the Court that it was evaluating whether it should seek to dismiss the remaining claims in this case under Section 3730(c)(2)(A) of the FCA.

SUMMARY OF RELATOR'S HAMP CLAIMS

Under its HAMP program, Treasury encourages mortgage servicers to modify certain first-lien mortgages by reducing delinquent homeowners' monthly payments to affordable levels so as to prevent foreclosure. *See Schneider*, 224 F. Supp. 3d at 50. HAMP servicers, such as Chase, apply a standard loan modification procedure to achieve affordability through reductions of interest rates, extensions of terms, principal forbearance, and principal forgiveness. *Id.* at 50, 5253. Servicers receive a one-time incentive payment from the United States for each completed permanent HAMP modification and an additional incentive payment each year, for up to six years, if the modified loan remains in good standing. *See generally id.* No incentive is paid unless a borrower successfully makes three payments on the modified mortgage and the loan is permanently modified. *Id.*

In his TAC, Relator alleges that Chase violated the FCA by submitting claims for HAMP incentive payments that were false because Chase failed to adhere to HAMP servicing standards. *See generally* TAC ¶ 1. Specifically, Relator alleges that Chase failed to solicit properly borrowers for HAMP modifications and perform other HAMP servicing obligations for loans that Chase charged-off for accounting purposes and placed onto its "Recovery One" loan platform. *See* TAC ¶ 20. Notwithstanding these alleged violations, Relator alleges that Chase submitted annual certifications with the HAMP compliance agent attesting to Chase's compliance with program rules. *See* TAC ¶¶ 195-201. Notably, Relator does not allege that Chase received HAMP incentive payments on loans migrated onto Recovery One. *See generally* TAC. Additionally, Relator concedes that Chase released liens on loans in Recovery One (*id.* ¶ 18), which eliminated any chance of Chase foreclosing on a defaulting homeowner because the mortgage was no longer secured by the property.

DISCUSSION

The FCA is the Government's primary tool for recovering money lost from the United States Treasury due to fraud. *See generally* 31 U.S.C § 3729. Its *qui tam* provisions permit a private person, "a relator," to file an action on behalf of the United States to recover the United States' damages in exchange for a payment of up to 30% of any eventual recovery. *See* 31 U.S.C. § 3730(b)-(d). The United States may elect to intervene in the action and assume primary responsibility for the litigation, or it may decline to intervene, which allows the relator to pursue the action on the United States' behalf. *See* 31 U.S.C. §§ 3730(b)(2), (c). The United States also retains the authority to dismiss an action when dismissal is in the interests of the United States. *See* 31 U.S.C. § 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.").

The D.C. Circuit has recognized that 31 U.S.C. § 3730(c)(2)(A) gives the United States "virtually 'unfettered' discretion" to dismiss a *qui tam* suit. *See United States ex rel. Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008); *Swift v. United States*, 318 F.3d 250, 251-54 (D.C. Cir. 2003). By affording *qui tam* relators an opportunity for a hearing if they request one, Section 3730(c)(2)(A) gives relators a chance to convince the United States to change its mind but gives the Court no role in second-guessing the United States' exercise of its prosecutorial discretion to dismiss an action. *See Hoyte*, 518 F.3d at 65; *Swift*, 318 F.3d at 253 ("the function of a hearing when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case"). The D.C. Circuit has explained: "Nothing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Swift*, 318 F. 3d at 253.

In the exercise of its discretion, the United States has determined that the specific claims remaining in this action should not proceed. Among other case-specific reasons guiding the sound exercise of its unreviewable discretion, the United States believes that Relator's specific HAMP Claims lack substantial merit, litigation of them would require further unnecessary expenditures of scarce Government resources, and the United States believes it is prudent to exercise control of this litigation, including in light of its current procedural posture.[1]

* * *

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Relator be afforded an opportunity for a hearing and, thereafter, that the remaining claims in this action be dismissed with prejudice to Relator and without prejudice to the United States should Relator fail to change the views of the United States.

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[1] The United States, acting through the Department of Justice, has made its decision to seek the dismissal of this action based on Relator's specific allegations, its current understanding of the particular facts underlying them, the particular procedural posture of this action, and its assessment of the resources that would be required of the United States to permit this specific action to proceed. Accordingly, the United States' decision to seek dismissal of the specific HAMP Claims in this action should not be viewed as any evidence whatsoever of its views as to (a) the importance or significance of violations of HAMP servicing requirements in the mine run of cases or (b) other factors used in evaluating the materiality of any other alleged violations of HAMP requirements. *See Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002-03 (2016).

Respectfully submitted,

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Attorneys for the
United States of America

Dated: November 13, 2018
Washington, DC

THIRD AMENDED COMPLAINT (MARCH 27, 2018)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiffs,

EX REL. LAURENCE SCHNEIDER,

Plaintiff-Relator,

v.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, J.P. AND MORGAN CHASE & COMPANY,

Defendants.

No. 1:14-cv-01047-RMC

Before: Rosemary M. COLLYER, Judge.

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1. This action seeks to recover damages and civil penalties on behalf of the United States and Plaintiff/Relator Laurence Schneider ("Relator"), based on violations of the "Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement" ("Commitment" or "SPA")

entered into between the United States and Defendants, J.P. Morgan Chase Bank, National Association, and J.P. Morgan Chase & Company (collectively "Chase" or "Defendant" or "Company"). Under the Commitment, Chase was required to meet servicing standards specified in the Home Affordable Modification Program ("HAMP") and provide loan modifications to its borrowers. Chase was paid various amounts for each loan modification by the Government. Chase also received additional incentive payments based on the performance of the borrowers who received loan modifications. Payments were conditioned upon Chase certifying that it was in compliance with the HAMP servicing standards. Chase falsely certified that it was in compliance with those standards and created false records to support each certification. These false certifications and records were material to the government's decision to pay and are actionable under 31 U.S.C. § 3729(a)(1)(A) & (B), which prohibit knowingly submitting "a false or fraudulent claim for payment or approval" or the use of "a false record or statement material to a false or fraudulent claim."

I. Introduction

2. In 2008, Congress enacted the Emergency Economic Stabilization Act (EESA) in response to the Great Recession. The EESA included the Troubled Asset Relief Program (TARP) which charged the Secretary of the Treasury with developing a program to provide relief to struggling homeowners while offering incentives to both the investors of these mortgages such as residential mortgage backed securities and most importantly, the servicers like the Defendant, who are the intermediaries between the investors and the mortgagors.

3. In February 2009, the Government introduced the Making Homes Affordable ("MHA") program, a plan to stabilize the housing market and help struggling homeowners get relief and avoid foreclosure.

4. The U.S. Department of the Treasury ("Treasury") established the HAMP pursuant to section 101 and 109 of the EESA.

5. In March 2009, Treasury issued uniform guidance for loan modifications across the mortgage industry and subsequently updated and expanded that guidance in a series of policy announcements and Treasury Directives.

6. The MHA program was a critical part of the Government's broad strategy to help homeowners avoid foreclosure, stabilize the country's housing market, and improve the nation's economy by setting uniform and industry wide default servicing protocols, policies and procedures for the distribution of federal and proprietary loan modification programs.

7. As part of the MHA program, Treasury established the HAMP program to encourage investors, servicers and borrowers to modify first liens secured by home mortgages. Under the HAMP, servicers such as Chase received incentive payments from the Government to modify loans.

8. Also, under the MHA program, Treasury established the second Lien Modification Program ("2MP"), which was designed to work in tandem with HAMP. In this Complaint, any allegations of violations related to second liens will be treated as violations of the HAMP.

9. In March 2009, Treasury issued uniform guidance for loan modifications across the mortgage industry and subsequently updated and expanded that guidance in a series of policy announcements. Subsequently, Treasury, incorporated this guidance into the Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages ("MHA Handbook")[1], which was intended to provide a consolidated resource for programmatic guidance related to the MHA Program for mortgage loans that are not owned or guaranteed by Fannie Mae or Freddie Mac (Non-GSE Mortgages).

10. The MHA Handbook was incorporated by reference into Chase's SPA as the guidance document for servicing and modifying non-GSE mortgages.

11. In March 2012, the Federal Government and the States filed a complaint against Chase and the other banks responsible for the fraudulent and unfair mortgage practices that cost consumers, the Federal Government, and the States tens of billions of dollars. Specifically, the Government alleged that Chase, as well as other financial institutions, engaged in improper practices related to mortgage origination, mortgage servicing, and foreclosures, including, but not limited to, irresponsible and inadequate oversight of the banks' quality control standards.

12. These improper practices had previously been the focus of several administrative enforcement actions by various government agencies, including but not

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[1] The MHA Handbook has been updated many times. The version cited in this Complaint is v4.0, which can be found at: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf

limited to, the Office of the Controller of the Currency, the Federal Reserve Bank and others. Those enforcement actions resulted in various other Consent Orders that are still in full force and effect.

13. In April 2012, the United States District Court for the District of Columbia approved a settlement between the Federal Government, the States, the Defendant and four other banks, which resulted in the National Mortgage Settlement Agreement ("NMSA"). The operative document of the NMSA was the Consent Judgment ("Consent Judgment" or "Agreement"). The Consent Judgment contains, among other things, Consumer Relief provisions. The Consumer Relief provisions required Chase to provide over $4 billion in consumer relief to their borrowers. This relief was to be in the form of, among other things, loan forgiveness and refinancing. Under the Consent Judgment, Chase received "credits" towards its Consumer Relief obligations by forgiving or modifying loans it maintained as a result of complying with the procedures and requirements contained in Exhibits D and D-1 of the Consent Judgment.[2]

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[2] The NMSA contains a release from liability under the False Claims Act for "Covered Servicing Conduct [including violations of the HAMP] that has taken place as of 11:59 p.m., Eastern Standard Time, on February 8, 2012." Consent Judgment, Exhibit F, Terms and Conditions, ¶ (2)(a) at F12-13, *United States v. Bank of Am.* 12-cv-361, ECF 10 (D.D.C. April 4, 2012). Chase waived this release as a defense when it failed to raise it in its first motion to dismiss filed on November 12, 2015, ECF 105. Moreover, even if Chase were released from its violations of the HAMP occurring before February 8, 2012, it still would be liable for its continuing violations occurring after that date as alleged in this Complaint.

A. Chase Violated the HAMP Requirements Since the HAMP's Inception in 2009

14. Before the Consent Judgment was entered into, Chase sold a significant amount of its mortgage obligations to individual investors. Between 2006 and 2010, the Relator bought the rights to thousands of mortgages owned and serviced by Chase. Unbeknownst to the Relator, these mortgages were saturated with violations of past and present regulations, statutes and other governmental requirements for first and second federally related home mortgage loans.

15. After both the MHA program was in effect and the Consent Judgment was signed, numerous borrowers, whose 2nd lien mortgages had been sold by Chase to the Relator, received debt-forgiveness letters from Chase that were purportedly sent pursuant to the Consent Judgment.

16. Relator, through his contacts at Chase, was made aware that 33,456 letters were sent by Chase on September 13, 2012 to second-lien borrowers. On December 13, 2012 another approximately 10,000 letters were sent, and on January 31, 2013 another approximately 8,000 letters were sent, for a total of over 50,000 debt-forgiveness letters. These letters represented to the recipient borrowers that, pursuant to the terms of the NMSA, the borrowers were discharged from their obligations to make further payments on their mortgages, which Chase stated, it had forgiven as a "result of a recent mortgage servicing settlement reached with the states and federal government." None of these borrowers made an application for a loan modification as required by the MHA program or the Consent Judgment. These letters were not individually reviewed by Chase to ensure

that Chase actually owned the mortgages or to ensure the accuracy and integrity of the borrower's information but instead were "robo-signed"; each of the letters sent out was signed by "Patrick Boyle" who identified himself as a Vice President at Chase.

17. Relator's experience with Chase's baseless debt-forgiveness letters was not unique. Several other investors were also affected by Chase choosing to mass mail the "robo-signed" debt-forgiveness letters to thousands of consumers from its system of records in order to earn credits under the terms of the Consent Judgment and to avoid detection of its illegal and discriminatory loan servicing policies and procedures.

18. In addition to the debt forgiveness letters sent, after both the MHA program was in effect and the Consent Judgment was signed, Chase quietly released the 1st mortgages, which it previously charged off. For most of these lien releases, Chase did not inform the borrower of the release and did not release the borrower from the debt on the loan. Relator learned of this practice because it occurred on almost all of the loans that Chase had sold to him.

19. Relator, through his third-party servicer, which was handling normal and customary default mortgage servicing activities, was made aware that several lien releases were filed in the public records on mortgage loans that were owned by Relator in the fall of 2013. Through Relator's subsequent investigation of the property records for 1st mortgage loans that Chase had previously sold to Relator scores of additional lien releases were also discovered.

20. During the course of Relator's investigation of Chase's servicing practices, he discovered that Chase

maintains a large set of loans outside of its primary System of Records ("SOR"), which is known as the Recovery One population ("RCV1" or "RCV1 SOR".) Once loans had been charged off by Chase, Chase stopped servicing the loans according to the requirements of Federal law, the MHA programs, the Consent Judgment, or any of the other consent orders or settlements reached by Chase with any government agency. As a result the accuracy and integrity of the information pertaining to the borrowers' accounts whose loans became part of the RCV1 population was and is fatally and irreparably flawed.

21. Chase's practice of sending unsolicited debt-forgiveness letters to intentionally pre-selected borrowers of valueless loans did not meet the requirements for obtaining incentives under the HAMP. This practice enabled Chase to reduce its cost of complying with the MHA program and the Consent Judgment, while at the same time enhancing its own profits through MHA incentives and unearned Consumer Relief credits. Chase sought to take credit for valueless charged-off and third-party owned loans instead of applying the Consumer Relief under the NMSA and MHA loan modification programs to properly vetted borrowers who could have applied for and benefitted from the relief and modification programs, those borrowers that were originally intended by the Government to receive the benefit of the Government's bargain with Chase.

22. Relator conducted his own investigations and found that the Defendant sent loan forgiveness letters to consumers for mortgages that Chase no longer owned. Further, Chase failed to meet its obligations to service loans and to prevent blight as required by

SPA. Chase's intentional failure to monitor report and/or service these loans, and its issuance of invalid loan forgiveness letters and lien releases, evidence an attempt to thwart the goal of the MHA program. The purpose of this scheme was to quickly satisfy the Defendant's Consumer Relief obligations as cheaply as possible, without actually providing the relief that Chase promised in exchange for the settlement that Chase reached with the Federal Government and the States. In addition, Chase applied for and received MHA incentive payments without complying with the MHA mandatory requirements. In short, Chase decreased its liabilities, increased its revenues, avoided its obligations, and provided little to no relief to consumers.

23. On September 29, 2010, Chase submitted an initial certification of compliance with the SPA and MHA program. Annually thereafter, Chase submitted subsequent certifications of compliance. The initial and subsequent certifications were largely identical. The subsequent certifications contained the following statements:

> 2. In connection with the Programs, Servicer is in material compliance with, and certifies that all Services have been materially performed in compliance with, all applicable Federal, state and local laws, regulations, regulatory guidance, statutes, ordinances, codes and requirements, including, but not limited to, the Truth in Lending Act, 15 USC 1601 § et seq., the Home Ownership and Equity Protection Act, 15 USC § 1639, the Federal Trade Commission Act, 15 USC § 41 et seq., the Equal Credit Opportunity

Act, 15 USC § 701 et seq., the Fair Credit Reporting Act, 15 USC § 1681 et seq., the Fair Housing Act and other Federal and state laws designed to prevent unfair, discriminatory or predatory lending practices and all applicable laws governing tenant rights, bankruptcy, mediation and foreclosure. . . .

3. Servicer has materially complied with the following: (i) performed its obligations in accordance with the Agreement and in accordance with accepted servicing practices, and has promptly provided such performance reporting on the Programs as Fannie Mae and Federal Home Loan Mortgage Corporation, a federally chartered corporation, acting as compliance agent of the United States ("Freddie Mac") have reasonably required; (ii) all Services relating to benefits under the Programs available to eligible borrowers have been offered by Servicer to such borrowers, fully documented and administered by Servicer in accordance with the applicable Program Documentation then in effect; and (iii) all data, collection information and other information reported by Servicer to Fannie Mae and Freddie Mac under the Agreement, including, but not limited to, information that was relied upon by Fannie Mae and Freddie Mac in calculating the Purchase Price and in performing any compliance review, was true, complete and accurate in all material respects, and consistent with all relevant business records of

the Servicer, as and when provided or, if such information was provided from third parties, including borrowers or prior servicers, Servicer has no knowledge that such information is incorrect or incomplete at the time it was provided to Fannie Mae or Freddie Mac. Notwithstanding the above, Servicer may have inadvertently violated any of the above, but has taken or will take all necessary actions to rectify any such violation or lack of compliance.

4. Servicer has materially complied with the following: (i) performed the Services required under the Program Documentation and the Agreement in accordance with the practices, professional standards of care, and degree of attention used in a well-managed operation, and no less than that which the Servicer exercises for itself under similar circumstances; and (ii) used qualified individuals with suitable training, education, experience and skills to perform the Services. Servicer acknowledges that participation in the Programs required changes to, or the augmentation of, its systems, staffing and procedures. Servicer took all reasonable actions necessary to ensure that it had the capacity to implement the Programs in which it is participating in accordance with the Agreement.

5. Servicer acknowledges that the provision of false or misleading information to Fannie Mae or Freddie Mac in connection with the Programs or pursuant to the Agreement

> may constitute a violation of: (a) Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or (b) the civil False Claims Act (31 U.S.C. §§ 3729-3733). Servicer has disclosed to Fannie Mae and Freddie Mac any credible evidence known to Servicer, in connection with the Services, that a management official, employee, or contractor of Servicer has committed, or may have committed, a violation of the referenced statutes.

24. The mere existence of RCV1 and the fact that all of the mortgages contained therein were not serviced make all claims by Chase that it complied with the SPA of the MHA program false.

25. Borrowers whose 1st lien mortgage loans were hidden in RCV1 were denied the opportunity to apply for the various 1st lien modification options under the HAMP.

26. Since the failure to service mortgages in RCV1 represents a long standing and known practice, dating back to the year 2000, Chase cannot claim that its violations of the HAMP were "inadvertent."

27. As noted in the MHA Handbook, the "evaluation of materiality may or may not be quantifiable in monetary terms and should include, but is not limited to, consideration of the nature and frequency of noncompliance as well as qualitative considerations, <u>including the impact on MHA program goals and objectives</u>." MHA Handbook v.4.0 at 45 (emphasis added).

28. The principal focus of the HAMP were mortgages in which "[d]efault on the payment of such mortgage has occurred, is imminent, or is reasonably foreseeable," MHA Handbook v. 4.0 at 21. He emphasis on mortgages in default describes all of the mortgages in RCV1. Chase internal documents describe the RCV1 population as varying between 359,000 and 420,000. Therefore, since the systematic violation of the HAMP requirements related to the very mortgages that the HAMP was designed to protect had a material "impact on MHA program goals and objectives," any false certifications of compliance related to those mortgages were necessarily material to the government's decisions to make payments to Chase under the HAMP.

B. Damages to the Government Related to the HAMP

29. The Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement between the United States Government and Chase provided for the implementation of loan modification and foreclosure prevention services ("HAMP Services") and the payment of incentives to Chase to make those loan modifications.

30. The value of Chase's SPA was limited to $4,532,750,000 ("Program Participation Cap").

31. The value of EMC Mortgage Corporation's ("EMC") SPA (Chase's successor in interest) was limited to $1,237,510,000.

32. Through February 2018, the total incentive payments paid by the government under Chase's SPA was $ 2,935,614,067.69. Of this amount $844,994, 007.79 went to borrowers; $1,540,570,199.39 went to

Lenders/Investors; and $550,049,860.51 when to Chase. Similarly, through February 2018, the total incentive payments paid by the government under the EMC SPA was $35,441,779.30. Of this amount $7,569,459 .20 went to borrowers; $11,592,937.05 went to Lenders /Investors; and $16,279,383.05 when to EMC. U.S. Treasury, Monthly Report to Congress, February 2018 at 152-53._https://www.treasury.gov/initiatives/financial -stability/reports/Documents/2018.02%20February% 20Monthly%20Report%20to%20Congress%20vfinal. pdf.[3]

33. Chase was required to certify annually that it was in compliance with the SPA and the MHA program and must strictly adhere to the guidelines and procedures issued by the Treasury with respect to the programs outlined in the Service Schedules ("Program Guidelines"). The Program Guidelines pursuant to the Treasury Directives are cataloged in the MHA Handbook. None of the loans that Chase and EMC identified and submitted for payment against their respective Participation Caps were eligible for the incentive payment, because neither Chase nor EMC complied with the SPA and Handbook guidelines. Specifically, all loan modification programs must be made available to all borrowers, who must then apply to determine eligibility. Hundreds of thousands of

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[3] Approximately 12 percent of the payments under Chase's SPA were paid through January 2012. The remainder was paid after that date. All of the EMC SPA payments were made by the end of January 2012._https://www.treasury.gov/initiatives/financial-stability/reports/Documents/February%202012%20105(a)% 20(2).pdf. Thus, if Chase's liability was limited to violations of the HAMP occurring after February 8, 2012, the damages to the government would still be over 80 percent of the total payments to Chase.

borrowers' mortgage loan accounts in the RCV1 system of records were not offered and thereby unable to be considered for all eligible loss mitigation options (even though they likely could have qualified). Due to the omission of the RCV1 population for any loss mitigation options, none of the modifications that Chase provided qualified for HAMP incentives. Thus, Chase does not qualify for any of the HAMP incentives for which it applied and received funds.

34. Relator found hundreds of loans that were lien released, continued to be subject to collection and then later had "vacations" placed on record in an attempt to reinstall the released liens. These vacations professed to be reversals of HAMP modifications but were in fact loans owned by Relator and that were not the subject of HAMP modifications. The lien releases were filed by Chase's third-party contractor Nationwide Title Clearing ("NTC") with instructions that NTC not send the recorded documents to the borrowers.

35. Therefore, Chase's certifications of compliance and its creation of records to support those certifications represent both the knowing presentation of false or fraudulent claims for a payment and the knowing use of false records material to false or fraudulent claims.

36. Under the FCA, a person is liable for penalties and damages who:

> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

31 U.S.C. § 3729(a)(1)(A)

and

> (B) 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)(G).

37. Each of Chase's false certifications is actionable under either 31 U.S.C. § 3729(a)(1)(A) and (B), because they represent a false or fraudulent claim for payment or approval of a false record or statement material to a false or fraudulent claim.

38. Under HAMP, the Federal Government entered into the Commitment with Chase, with the understanding that Chase would meet its obligations under the SPA and related Treasury directives. The Federal Government is now harmed because it is not receiving the benefit of the bargain for which it negotiated with Chase due to the false claims for payment that have been made by the Defendant.

II. Jurisdiction and Venue

39. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3730(a).

40. Venue is proper in this District pursuant to 31 U.S.C. § 3732(a) because

Defendant transacts business in the District of Columbia.

III. Parties

A. Relator

41. Relator, Laurence Schneider, submits this Complaint on behalf of the Federal Government and

himself pursuant to 31 U.S.C. §§ 3729-3733. Relator is an experienced real estate and mortgage investor who works and resides in Boca Raton, Florida. Because of his ownership of thousands of mortgage loans and hundreds of rental housing units, Relator has acquired extensive knowledge of banking practices, laws and regulations. Relator has direct and personal knowledge of the fraudulent scheme described herein. Relator, as President of S&A Capital Partners, Inc., 1st Fidelity Loan Servicing, LLC, and Mortgage Resolution Servicing, LLC, has purchased mortgage notes from Chase since 2005. Relator has over 20 years of experience in mortgage loan origination and servicing. In that time, he has built relationships and purchased mortgage loans from over 40 different loss mitigation representatives in three different loan servicing centers operated by Chase in Wisconsin, Arizona and Texas. In the process, he has learned intimate details of Chase's loss mitigation activities and gained an understanding of Chase's overall loan servicing policies and procedures.

42. S&A Capital Partners, Inc. ("S&A") is a Florida corporation located at 6810 N. State Road 7, Coconut Creek, Florida. Relator is the President and shareholder of S&A. From 2005 to 2010, S&A purchased First Lien and Second Lien mortgages owned by Defendant Chase.

43. 1st Fidelity Loan Servicing, LLC ("1st Fidelity") is a Florida Limited Liability Company located at 6810 N. State Road 7, Coconut Creek, Florida. Relator is the President and managing member of 1st Fidelity. From 2007 to 2010, 1st Fidelity purchased First Lien and Second Lien mortgages owned by Defendant Chase.

44. Mortgage Resolution Servicing, LLC ("Mortgage Resolution") is a Florida Limited Liability Company located 6810 N. State Rd. 7, Coconut Creek, Florida. Relator is the President and managing member of Mortgage Resolution. Mortgage Resolution purchased a pool of what were purported and represented to be 3,529 First Lien mortgages from Defendant Chase on February 25, 2009.

45. By letter dated March 28, 2013, the Relator voluntarily provided information on which this action is based prior to the filing of his original Complaint on May 6, 2013. The Relator served his statement of material information regarding this action on the Government together with the Complaint in accordance with 31 U.S.C. § 3730(b)(2).

B. Defendants

46. Defendants JP Morgan Chase Bank, National Association is a subsidiary of Defendant JP Morgan Chase & Co. Chase's headquarters is located at 270 Park Avenue, New York, New York. Defendant JP Morgan Chase & Co. is a Delaware corporation. On September 25, 2008, Washington Mutual Bank., F.S.B., a federal savings bank headquartered in Henderson, Nevada, failed, and J.P. Morgan Chase Bank, N.A., purchased substantially all of the assets and assumed all deposit and substantially all other liabilities of Washington Mutual Bank., F.S.B., pursuant to a Purchase and Assumption Agreement with the Federal Deposit Insurance Corporation ("FDIC") and the FDIC as Receiver for Washington Mutual Bank, F.S.B. On March 16, 2008, Chase acquired EMC Mortgage Corporation as part of its acquisition of Bear Stearns Companies, Inc. The business of Defendant J.P. Morgan

and its subsidiaries and affiliates includes the origination and servicing of mortgage loans.

IV. Background

A. The HAMP Program

47. To implement and help facilitate the uniform servicing guidelines and provide various government sponsored loan modification programs, Treasury incentivized participating servicers under a Commitment to Purchase Financial Instrument and Servicer Participation Agreement ("SPA"), by and between Federal National Mortgage Association, a federally chartered corporation, as financial agent of the United States ("Fannie Mae").

48. The Treasury established a variety of loan modification programs under the Act to further stabilize the housing market by facilitating first and second lien mortgage loan modifications and extinguishments, providing home price decline protection incentives, encouraging foreclosure alternatives, such as short sales and deeds in lieu of foreclosure, and making other foreclosure prevention services available to the marketplace (collectively, together with the HAMP Services, the "Services"). These programs included:

- The Home Price Decline Protection Incentives (HPDP) initiative.
- The Principal Reduction Alternative (PRA).
- The Home Affordable Unemployment Program (UP).
- The Home Affordable Foreclosure Alternatives Program (HAFA).

- The Second Lien Modification Program (2MP).
- The FHA-HAMP Program.
- The Treasury/FHA Second-Lien Program (FHA2LP).
- Housing Finance Agency Hardest Hit Fund (HHF).
- The SPA provides various types of Servicer Incentive Payments depending on the various governments loan modification programs. These incentives include:
- Completed one-time Modification Incentives.
- Pay-for-Success Incentives.
- Full Extinguishment Incentives.
- Borrower Incentive Compensation.

49. To participate in HAMP a Servicer was required to register using the HAMP registration form and HAMP Reporting Tool.

50. Fannie Mae was designated by the Treasury as the financial agent of the United States in connection with the implementation of the Programs. Its responsibilities were general administration and record keeping for the Programs, standardization of certain mortgage modification and foreclosure prevention practices and procedures as they relate to the Programs, consistent with the Act and in accordance with the directives of, and guidance provided by, the Treasury.

51. In addition to the Commitment, Chase simultaneously executed and delivered to Fannie Mae numerous schedules describing the various loan modification initiatives ("Services") to be performed

by the Servicer pursuant to the Agreement ("Service Schedule"), which are numbered sequentially as Exhibit A of the Commitment.

52. On March 24, 2010, Henry John Beans, SVP of Default Servicing for Chase, registered and executed a SPA with the Program Administrator. The SPA governs servicer participation in MHA.

53. On March 25, 2010, Michael R. Zarro, Jr., SVP of Default Servicing for EMC Mortgage Servicing, registered and executed a SPA with the Program Administrator.

1. Servicing Guidelines

54. Servicers participation in the MHA program included strictly adhering to the guidelines and procedures issued by the Treasury with respect to the Programs outlined in the Service Schedules ("Program Guidelines"); and any supplemental documentation, instructions, directives, or other communications, including, but not limited to, business continuity requirements, compliance requirements, performance requirements and related remedies and duties of the Participating Servicers in connection with the Programs outlined in the Service Schedules ("Supplemental Directives" and, together with the Program Guidelines, the "Program Documentation").

55. Chase was required to perform the Services described in the Financial Instrument ("Financial Instrument"); referenced as Exhibit B of Commitment. Servicer represented, warranted, and acknowledged its agreement to fulfill its duties and obligations, with respect to its participation in the Programs and

under the Agreement, and such representations were set forth in the Financial Instrument.

56. Fannie Mae, in its capacity as the financial agent of the United States, remitted payments described in the Program Documentation to Chase for its successful compliance with the Treasury Directives and subsequent successful modifications of distressed mortgages.

57. In April 2012, the Department of the Treasury issued guidelines regarding which Consumer Redress Activities may be considered "qualified loss mitigation plan[s]" for purposes of Section 201 of the Helping Families Save Their Homes Act of 2009 ("HFSTHA"). As part of HSFTHA, Congress amended the Truth in Lending Act such that each residential loan modification, deed-in-lieu of foreclosure transaction, short sale, refinancing, or principal reduction transaction identified in the Settlements, including those specific to individual servicer settlements, is a "qualified loss mitigation plan."

58. In addition to entering into the qualified loss mitigation plans, mortgage servicers were required to satisfy other requirements of HFSTHA, including the following:

- The mortgage must have been originated before May 20, 2009;
- Default on the payment of such mortgage has occurred, is imminent, or is reasonably foreseeable;
- The mortgagor occupies the property securing the mortgage as his or her principal residence; and

- The servicer reasonably determines, consistent with these guidelines, that the application of the qualified loss mitigation plan will likely provide an anticipated recovery on the outstanding principal mortgage debt that will exceed the anticipated recovery through foreclosure.

59. On June 26, 2014, the Government extended the application deadline for MHA programs to December 31, 2016.

2. Implementation of Servicing Guidelines

60. Servicers were required to maintain complete and accurate records of, and supporting documentation for, all Services provided in connection with the Programs including, but not limited to, data relating to borrower payments (*e.g.*, principal, interest, taxes, homeowner's insurance), loan modification and extinguishment agreements. The documentation was relied upon by Fannie Mae when calculating the Purchase Price to be paid by the Treasury for each certified modification.

61. The Servicers certification as to its continuing compliance with, and the truth and accuracy of, the representations and warranties set forth in the Financial Instrument were provided annually in the form of a certification (the "Certifications"), beginning on June 1, 2010 and again on June 1 of each year thereafter during the term of the SPA.

62. The requirements of the SPA applied to all mortgage loans Chase serviced, whether it serviced such mortgage loans for its own account or for the account of another party, including any holders of mortgage-backed securities.

63. Servicers were required to report periodic loan-level data for all transactions related to HAMP using the HAMP Reporting Tool. Servicers upload data tapes of borrowers loan level data including the type of modification performed.

64. The HAMP Compensation Matrix provides details on the incentive amount, frequency, timing and conditions required for incentive payments in the form of the official monthly report ("OMR").

3. Compliance with Servicing Guidelines

65. The Federal Home Loan Mortgage Corporation ("Freddie Mac") was designated by the Treasury as a financial agent of the United States in its capacity as compliance agent of the Programs and oversight of Servicers' performance of the Services and implementation of the Programs.

66. As Compliance Agent for the elements of HAMP that are addressed in the Handbook, Freddie Mac created an independent division, Making Home Affordable-Compliance (MHA-C) for this purpose. MHA-C conducts independent compliance assessments and servicer reviews to evaluate servicer compliance with the requirements of MHA. During the course of conducting compliance assessments, it requests such documentation, policies, procedures, loan files, and other materials necessary to conduct the review.

67. Servicers were required to maintain appropriate documentary evidence of their HAMP-related activities, and to provide that documentary evidence upon request to MHA-C. Servicers must maintain required documentation in well-documented servicer system notes or in loan files for all HAMP activities,

for a period of seven years from the date of the document collection. Required general documentation applicable to all MHA Programs.

68. The Handbook set forth the requirements for documentation required. It stated that:

- Servicers are required to maintain appropriate documentary evidence of their MHA-related activities, and to provide that documentary evidence upon request to MHA-C. Servicers must maintain required documentation in well-documented servicer system notes or in loan files for all MHA activities, for a period of seven years from the date of the document collection. Required general documentation applicable to all MHA Programs includes but is not limited to:

[* * *]

- The servicer's process for pre-screening non-performing loans against the basic program requirements prior to referring any loan to foreclosure or conducting scheduled foreclosure sales.

- For charged off mortgage loans not considered for HAMP, evidence that the servicer has released the borrower from liability for the debt and provided a copy of the release to the borrower.

- For loans not considered for HAMP or UP due to property condition, evidence that the property securing the mortgage loan is in such poor physical condition that it is uninhabitable or condemned.

[* * *]

- Information relating to the borrower's payment history.

[* * *]

- All policies and procedures related to clearing Dodd-Frank Certification, Borrower Identity and Owner-Occupancy Alerts and for addressing any potential irregularities that may be identified independently by the servicer, including the process the servicer will take to notify the borrower, methods for borrower communication, and the process to verify the accuracy of information disputed by a borrower.

69. In short, servicers were required to establish and maintain internal controls that provide reasonable assurance that they are in compliance with MHA Program requirements. Further, servicers are required to certify that they have developed and implemented an internal controls program to monitor compliance with applicable consumer protection and fair lending laws, among other things, as described in the SPA.

70. Servicers review the effectiveness of the internal controls program on a quarterly basis throughout the period covered by the related Certification. Servicers are also required to develop and execute a quality assurance program to assess documented evidence of loan evaluation, loan modification and accounting processes and to confirm adherence to MHA Program requirements. The quality assurance program includes of internal control processes, and should be assessed to ensure that it: (i) includes loans from all potentially relevant categories (ii) is independent from the business lines; (iii) applies appropriate sampling methodology; (iv) reaches appropriate conclu-

sions; (v) distributes reports to appropriate members of management.

71. Each servicer must develop, document and execute an effective quality assurance ("QA") program that includes independent reviews of each MHA program in which the servicer is participating pursuant to an executed SPA to ensure that the servicer's implementation and execution of such program(s) conforms to the requirements of the SPA and this Handbook.

72. The QA function must establish an internal QA function that:

- Is independent of the servicer's mortgage related divisions (a/k/a an "Internal Review Group");
- Is comprised of personnel skilled at evaluating and validating the processes, decisions and documentation utilized throughout the implementation of each program;
- Has the appropriate authority, privileges, and knowledge to effectively conduct internal QA reviews;
- Coordinates activities and validates results with other risk and control units within the servicer's organization including, but not limited to, internal audit, compliance, and operational risk;
- Evaluates whether management, at varying levels, is receiving appropriate information on a timely basis which would allow for the identification of process failures, backlogs, or unexpected results or impacts; and

- Evaluates the completeness, accuracy and timeliness of the servicer's response to MHA-C servicer-level review reports.

73. The established QA function evaluated all components of the servicer's participation in applicable MHA programs, including, but not limited to:

- Availability and responsiveness of servicing personnel to borrower inquiries, questions, and complaints, including Escalated Cases;
- Solicitation and outreach to potentially eligible borrowers;
- Determination of borrower eligibility for any MHA program;
- Pre-screening practices exclusion from solicitation due to known eligibility failures or automated programs used to target and identify potentially eligible or qualified individuals for MHA programs;
- Tracking and retention of documentation submitted by borrowers;
- Compliance with the requirements concerning Borrower Notices;
- Reporting of Government Monitoring Data;
- Adherence to prohibitions on referral of loans to foreclosure and conducting of scheduled foreclosure;
- Underwriting, including assessment of imminent default and hardship circumstances, calculation of borrower income, debts and escrow analysis; valuation of property; application of

each applicable standard modification waterfall and, if required, the applicable alternative modification waterfall(s);

- Documentation of a request for and approval of a modification (or other loss mitigation option) by the mortgage insurer, investor and/or other interested party in a loss position;
- Timely consideration of alternative loss mitigation options, as well as other foreclosure alternatives when a permanent modification is not appropriate;
- Reconciliation and distribution of incentives payments;
- Maintenance of documentation appropriate to support MHA requirements and decisions; and
- Reporting of MHA data timely and accurately for recording in the HAMP Reporting Tool, including data related to incentive payments, and the process used to map program data from the servicer's loss mitigation system to the HAMP Reporting Tool.

74. QA reviews must occur at least quarterly and the report must be distributed to the appropriate executives or board-level committees, including senior management independent of the area under review. (a/k/a Monitor Reports).

75. Results of QA activities required support by adequate work papers and other documentation that is well organized and sufficiently detailed to allow a knowledgeable third party who did not participate in the review to assess the documentation and understand

how the conclusions reached in the associated report are substantiated (a/k/a Professional Firms).

4. Relationship Manager A/K/A SPOC

76. Servicers with a Program Participation Cap of $75,000,000 or more as of May 18, 2011, were required to establish and implement a process through which borrowers who potentially are eligible for HAMP are assigned a relationship manager to serve as the borrower's single point of contact.

77. Each servicer was required to have clear and comprehensive internal written policies for identification and solicitation of borrowers who are potentially eligible based on information in the servicer's possession.

78. The same relationship manager was responsible for managing the borrower relationship throughout the entire delinquency or imminent default resolution process, including any home retention and non-foreclosure liquidation options, and, if the loan was subsequently referred to foreclosure, had to be available to respond to borrower inquiries regarding the status of the foreclosure.

79. Each such servicer must assign a relationship manager to a delinquent borrower or a borrower who requests consideration under a designation of imminent default immediately upon the successful establishment of Right Party Contact with the borrower and (i) the determination by the servicer of a borrower's potential eligibility for HAMP based on information disclosed during the initial telephone interview or other oral communication, or (ii) upon receipt from the borrower of any completed or partially completed Initial Package

(as defined in Section 4 of Chapter II of the Handbook) signed by the borrower.

80. The relationship manager's responsibilities included, without limitation:

- Communicating the options available to the borrower for resolving the delinquency or imminent default, the actions the borrower must take to be considered for those options, the timing requirements for completion of actions by the borrower and the servicer, and the status of the servicer's evaluation of the borrower for those options;
- Coordinating maintenance and tracking of documents provided by the borrower and that the borrower is notified promptly of the need for additional information;
- Being knowledgeable about the borrower's situation and current status in the entire delinquency or imminent default resolution process, including any home retention or non-foreclosure liquidation options; and
- Coordinating with other personnel responsible for ensuring that a borrower who was not eligible for MHA programs be considered for other available proprietary loss mitigation options.

81. The relationship manager had primary responsibility for coordinating the servicer's actions to resolve the borrower's delinquency or imminent default until all available home retention and non-foreclosure liquidation options had been exhausted and for communicating those actions to the borrower.

82. A servicer evaluated a borrowers loan modification options after its relationship manager receives the borrowers Initial Package.

The Initial Package included:

- Request for Modification Assistance ("RMA") Form;
- Either (i) IRS Form 4506-T or 4506T-EZ or (ii) a signed copy of the borrower's tax return for the most recent tax year;
- Evidence of income; and
- Dodd-Frank Certification

83. Servicers could require use of the RMA by all borrowers requesting consideration for HAMP or may use other proprietary financial information forms that are substantially similar in content to the RMA.

84. Included in the RMA was a Hardship Affidavit. Every borrower seeking a modification, regardless of delinquency status was required to sign a Hardship Affidavit that attests that the borrower is unable to continue making full mortgage payments and describes the type of hardship.

85. Servicers were required to use HAMP as the first loss mitigation option for each borrower.

86. Each servicer was required to have written standards for determining imminent default that are consistent with applicable contractual agreements and accounting standards and must apply the standards equally to all borrowers. The mortgage file and/or servicing system had to contain evidence of this determination.

87. A servicer had to document in its servicing system and/or mortgage file the basis for its determination that a payment default is imminent and retain all documentation used to reach this conclusion.

88. Servicers were required to include in their internal quality assurance plan appropriate assessments of relationship manager activities. These assessments included, but were not limited to, coverage of the following areas:

1. Timing of communications to borrowers about relationship manager assignment and changes;
2. Relationship manager access to information, including the borrower's current status in the delinquency or imminent default resolution process, and appropriate training to understand the information;
3. Relationship manager coordination of document and information flow to and from borrowers;
4. Relationship manager's access to individuals with the ability to stop foreclosure proceedings;
5. Organizational structure and staffing levels such that relationship managers can properly carry out responsibilities; and
6. Relationship manager input on the certification prior to foreclosure sale.

89. Servicers were required to maintain evidence of the control testing activities conducted in order to assess compliance and submit the annual certification.

90. In testimony delivered on May 15, 2012, before the California Legislative Conference Committee Hearing on Foreclosure Crises—SB 900 and AB 278, Stephanie Mudick, Executive Vice President, Head of Consumer and Regulatory Affairs, Mortgage Banking J.P. Morgan Chase acknowledged the very strict rules for modifying loans under the HAMP. She stated:

> So first I might mention to do a modification under the rules of HAMP and they're very, very clear and specific rules about what you need when you do a modification, we need to have documentation from a borrower. We need to have certain forms filled in. We need to have income documentation so that we can do a calculation as to what an affordable payment would be and so if we don't have the ability to engage and have conversations with the borrower, we literally are not able to be in a position where we can do a mod. So it's kinda its basic and simple as that.

http://calchannel.granicus.com/MediaPlayer.php?view id=7&clip id=375 [at 02:06:14]

91. The SPA required a servicer to submit an annual certification (Annual Certification) as to its continued compliance with, and the truth and accuracy of, the representations and warranties set forth in the SPA on June 1, 2010. On June 1 of each year thereafter during the term of the SPA, servicers are required to submit Subsequent Certification. The Form of Certification is attached to the original SPA as an exhibit.

92. If a servicer became aware of any information that would cause them to be unable to certify to the truth and accuracy of the representations and warranties included in the applicable, the servicer was required to notify MHA-C promptly and amend its Certification to include that information.

93. This included any representations and warranties, or covenants that ceased to be true and correct or any deficiencies in the design or operating effectiveness of the internal controls, including the servicer's quality assurance program.

5. Incentive Payments

94. Under the HAMP Chase received incentive compensation for each eligible loan modification. This compensation varied based on the delinquency period of the loan and the continued success of the loan modification effort. The specific conditions for these incentive payments are set out in Chapter 1, Section 13 of the HAMP Handbook.

95. Under the HAMP servicer Compensation Matrix, the servicer receives a servicer one-time payment from the Government for each completed permanent HAMP modification of a first lien. The amount of the payment depends on a number of factors and has varied over time from $400 to $2000.

96. In addition to the initial modification completion incentive payment, servicers are paid "Pay for Success" incentives of up to $83.33 per month, which are accrued monthly and paid annually on the anniversary date of the permanent HAMP loan modification for a period of thirty six (36) months for modified loans that remain in good standing.

97. Servicers may also receive compensation for modifying second liens. The amount of the payments varies depending on whether the modification is a full or partial extinguishment and the combined loan-to-value (CLTV) ratio.

B. The U.S. Bankruptcy Trustee Program and the Office of the Comptroller of the Currency Identified Servicing Practices by Chase Which Violated the HAMP Loan Servicing and Modification Requirements

98. On March 3, 2015 the Department of Justice announced that the U.S. Trustee Program ("USTP") had entered into a $50 million settlement agreement with JP Morgan Chase. As part of the settlement, Chase acknowledged that it filed over 50,000 false payment change notices ("PCN") in bankruptcy courts around the country. The admissions contained in this settlement agreement demonstrate that Chase violated many of the requirements of NMSA and the HAMP and that any certifications that Chase was in compliance with those requirements represented material false claims.

99. On June 16, 2015, the Office of the Comptroller of the Currency ("OCC") filed a document in bankruptcy court titled "CONSENT ORDER AMENDING THE 2011 CONSENT ORDER and 2013 AMENDMENT TO THE 2011 CONSENT ORDER" regarding Chase. http://www.occ.gov/static/enforcement-actions/ea2015-064.pdf. The original consent order was issued after the OCC "identified certain deficiencies and unsafe or unsound practices in residential mortgage servicing and in the Bank's initiation and handling of foreclosure proceedings." http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47e.pdf. As

part of the original OCC consent order, Chase agreed to take specific actions to correct its servicing deficiencies. The OCC's amended consent order details the many ways in which Chase violated these commitments.

100. Specifically, the 2015 amended consent order stated that Chase violated the following commitments:

> (a) the Bank shall implement its Revised Action Plan and ensure effective coordination of communications with borrowers, both oral and written, related to Loss Mitigation or loan modification and foreclosure activities, including, at a minimum:
>
> (i) appropriate deadlines for responses to borrower communications and requests for consideration of Loss Mitigation, including deadlines for decision-making on Loss Mitigation Activities, with the metrics established not being less responsive than the timelines in the Home Affordable Modification Program (commonly referred to as "HAMP");
>
> (ii) a requirement that written communications with the borrower identify a single point of contact along with one or more direct means of communication with the contact; and
>
> (iii) procedures and controls to ensure that a final decision regarding a borrower's loan modification request (whether on a trial or permanent basis) is made and communicated to the borrower in writing, including the reason(s) why the borrower did not qualify for the trial or permanent modification (including the net present value calculations utilized by the Bank, if applicable) by the single point

> of contact within a reasonable period of time before any foreclosure sale occurs.

OCC Amended Consent Order at 8-9.

101. These requirements are similar, if not identical, to requirements in the HAMP and ¶¶ 54-89. Thus, the OCC consent order represents a finding that Chase violated those requirements and that those violations were material. Thus, any certifications by Chase that it was in compliance with those requirements represented material false claims.

V. Chase Falsely Claimed Compliance with Servicing Requirements of Hamp

A. The Secondary System of Loans: Recovery One

102. As indicated, Chase maintains a secondary set of loans stored outside of its primary SOR. The secondary set of loans is known as Recovery One ("RCV1") or RCV1-SOR. RCV1 is essentially a collection of various federally related mortgage loans that have been charged off by Chase and whose documentation has been corrupted, ignored or allowed to fall into disarray. It includes various levels of defaulted and charged off loans in both first and second lien positions. It also includes mortgages that are subject to bankruptcies and post-foreclosure deficiencies.

103. In short, the RCV1-SOR is a loose collection of loans that Chase has relegated to the No Man's Land of the bank where these mortgage loans and the associated borrowers are ignored to the point where compliance with any regulatory body is impossible.

104. The RCV1 population of loans is comprised of loans that Chase has removed from its primary SOR

upon a determination that the loans were valueless based on General Acceptable Accounting Principles (GAAP) and other internal methods of bookkeeping.

105. Upon the determination that a loan is valueless, Chase removes the loan from its balance sheet and adjusts its accounting entry, thus charging off the loan as a bad debt expense.

106. This "charge off," as it is commonly known, is generally defined as a creditor having little expectation of collection of the debt. However, the loan's "charge off" status does not relieve a servicer of its servicing responsibilities for its "federally related mortgage loans."

107. As set out in 12 U.S.C. § 2602(1):

> (1) [T]he term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which—
>
> (A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and
>
> (B)
>
> (i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender

> which is regulated by any agency of the Federal Government. . . . [4]

108. There is no exception from the servicing requirements in 12 U.S.C. § 2602(1) for loans that have been charged off by the servicer.

109. An exemption for charged-off loans was created in the HAMP under the following conditions:

> Servicers are not required to consider for HAMP a mortgage loan that has been charged off if the servicer has released the borrower from liability for the debt and provided a copy of such release to the borrower. The servicer must retain in the mortgage file and/or servicing system all evidence related to the charge off including the release of liability.

MHA Handbook v.4.0 at 60.

110. Thus, in order to be exempted from the requirements of the HAMP for charged-off loans, the servicer had to not only release to lien, but in addition, forgive the debt and notify the borrower.

111. Chase's policies and procedures regarding loan charge-offs included both first and second lien mortgages.

112. These charge-offs included proprietary bank owned mortgage loans and loans which are serviced on behalf of others, including Residential Mortgage Backed Securities (RMBS) and loans serviced on behalf of Government Sponsored Entities (GSE) such as

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[4] The current version of 12 U.S.C. § 2602(1) became effective on January 2, 1976.

FNMA, Freddie Mac and the Federal Housing Authority (FHA).

113. The motivating factors for moving charged-off mortgages from the primary SOR to the RCV1-SOR includes the high cost—in terms of financial, reputational and human resources—of properly servicing these federally related mortgages that require a single point of contact, timely and accurate information, adequate and knowledgeable staffing, communications with law firms, code enforcement, compliance with all Federal and State laws and other associated activities.

114. Other motivating factors included servicing contracts between the Servicer and third party investors that did not provide for reimbursement of third party expenses such as those for property preservation, insurance, payment of taxes, costs of foreclosure and disposition fees.

115. Loans in RCV1 are not serviced as required by RESPA, Treasury Directives, or the HAMP.

116. These loans remain subject to collection actions by collection agencies and the liabilities were not released.

117. For many loans in the RCV1 population, Chase did release lien to reduce the liability to Chase. However, the loans remained in collection and the borrowers were not informed of the release and Chase continued active collection activities on these loans.

118. Continuing these collection activities in RCV1 was an important revenue source for Chase. According to a 2015 internal Audit Group Report, "[t]he busi-

ness recovered approximately $213 million in deficiency balances during 2014, with the majority of the recovery amount tied to charged off home equity liens."

118. The failure to service the loans in the RCV1 population is a violation of the applicable Servicing Guidelines of the MHA.

120. The existence of RCV1 and the fact that its universe of loans was not serviced in accordance with existing law and regulations made it impossible for Chase to be in compliance with the Treasury Directives of the HAMP. Thus, any assertion by Chase that Chase met those directives represents a material false claim.

121. The practice of porting loans out of the primary SOR and into the RCV1-SOR began as early as 2000 when JP Morgan & Company merged with Chase Manhattan Corporation.

122. Thus, the violations of federal banking law and regulations regarding the charged-off mortgages in RCV1 began before the introduction of the HAMP in 2009 and continue to the present time.

123. Chase's policy of porting charged off home loans into the RCV1-SOR damaged its ability to properly document the loans due to the complete lack of any servicing, and thus a complete corruption of the accuracy and integrity of the records for these mortgage loans.

124. The HAMP servicing guidelines required that Servicer's systems to record account information be periodically independently verified for accuracy and completeness by an independent reviewer.

125. Internal documents of Chase demonstrate that the RCV1 contains mortgage loans whose borrowers

have had no contact with Chase since as far back as 2000.

126. The entire population of loans sold to the Relator's entity Mortgage Resolution came directly from the RCV1-SOR, a small portion of the hundreds of thousands of loans contained within it.

127. After the transfer to Mortgage Resolution of 3,529 loans from the RCV1-SOR, Chase failed to send transfer letters to the borrowers as required by RESPA. Chase did not possess the records necessary to determine whose loans had been transferred. Chase did not provide any complete or accurate servicing information for these loans. As recently as March 2014, over 5 years after the completion of the sale, Chase admitted in writing that it was unable to determine which loans it had included in the sale to Mortgage Resolution.

128. Since the loans contained in the RCV1 population are not maintained or serviced according to any Servicing Standards, they fail to meet any of the requirements set forth in the MHA Commitment and its accompanying MHA Handbook, the past standards under prior laws and regulations or the standards set forth in the Dodd-Frank legislation.

129. Due to Chase's total disregard of the MHA Handbook and servicing requirements under RESPA, none of the borrowers in the RCV1-SOR were considered for eligibility by Chase for any proprietary or government loan modification programs offered to borrowers in the primary system of records. In contrast, none of the borrowers in the primary SOR's were considered for eligibility for Chase's 2nd Lien Extinguishment Program.

130. Pursuant to the SPA, all loan modification programs must be made available to all eligible borrowers. Since Chase did not make its proprietary or government loan modification programs available to all eligible borrowers, none of the incentive payments paid in under the HAMP are eligible for such payments.

131. During October 2013, the Monitor of the Consent Judgment became aware that Chase had not included the loans in RCV1 in the population of loans for metrics testing of the servicing requirements of Exhibit A of the Consent Judgment. When Chase was told that it would have to include RCV1 loans in metric testing population, Chase sought a compromise. The Monitor then permitted Chase to avoid placing those loans in the metric testing population if it would certify that all the liens on property securing the loans in RCV1 were released.

132. The Monitor later testified that he did not know that the loans in RCV1 were not being serviced. Thus, the Monitor reached this agreement without the full knowledge of Chase's servicing practices regarding RCV1.

133. Chase agreed to the Monitor's condition and began the process of releasing the liens on the property securing the charged-off loans in RCV1. However, Chase did not release the underlying debt for those loans and continued collection efforts on that debt. Chase also did not inform the borrower that the lien on the property securing the loan had been released. Chase did not inform the Monitor that it was still continuing to collect on the underlying debt from the borrowers even though it had released the liens on the on the property securing the loans.

134. Chase instructed its third party contractor, Nationwide Title Clearing, to file releases on the liens on the property securing the loans and to NOT inform the borrowers of the filed release nor provide them with a copy of the filed release.

135. Since Chase did not release the underlying debt at the same time it released the lien on the property securing the loans in RCV1, those loans were still subject to the requirements of the HAMP.

136. Chase did not inform the MHA-C of its failure to service charged-off loans in RCV1. Chase also did not inform the MHA-C that when it released liens of charged off mortgages that it did not forgive the borrowers debt or inform the borrowers or the municipalities were the homes were located that the liens had been released.

B. The "2nd Lien Extinguishment Program"

137. Instead of following the requirements of the HAMP or the Consent Judgment, Chase set out—in an internal document ("DOJ July 2012")—its own standards used to grant relief for second liens:

- Loans were primary selected based on aging collectability performance. "Arguably, those with the smallest likelihood to pay also represent the populations that need relief the most."
- Loans were rank ordered using a variety of factors that included aging, balance size and probability of payment.
- Loans were then segmented and binned into 5 distinct groups, each offering its own benefits and opportunity cost collections.

- Each bin contains an estimated lifetime recoveries sum that was used to determine the impacts to the line of business and 2012 recovery budget.

138. Using these criteria, Chase tasked its Mortgage Banking Recovery with identifying second mortgage home loans for Consent Judgment credit in the amount of Three Hundred, Ninety-Seven Million Dollars ($397,000,000.00).

139. Instead of applying the specific criteria set forth in the MHA Handbook, Chase substituted its own self-serving algorithm, referencing criteria such as the number of months since charge-off, last payment date and age of loan to determine the least valuable loans in its portfolio.

140. In several Chase internal documents, Chase specifically references excluding from the loans considered for Consumer Relief those loans that could provide a larger monetary benefit to Chase than the value of the Consumer Relief credit would have. Examples of loans not included are:

- Those loans whose properties were MLS listed;
- Those loans that had been charged off in the last six months; and
- Those loans whose borrowers were making payments in the last year.

141. In short, Chase specifically excluded those homeowners for whom loan modifications under the HAMP would have been most effective.

142. The loans chosen for release and crediting were selected based solely on internal queries of the

RCV1-SOR. In other words, they were loans with the least possibility of collection, no servicing history and not in compliance with the objectives of the HAMP or Consent Judgment.

143. Among these loans were loans sold to the Relator's entities.

144. The letters were the result of efforts by Chase to minimize the cost of the Consent Judgment credits and to maximize its own profitability from the implementation of the Consumer Relief by circumventing the application process and ignoring the MHA Servicing Guidelines and the NMSA Servicing Standards.

145. In an internal document entitled "DOJ: Default: Recovery 2nd Lien Credit Initiative, Financial Impact Overview, November 14, 2012" ("DOJ November 2012"), Chase began by admitting to itself that the data from the RCV1 pool was "challenged."

146. The November 2012 DOJ document is broken down between identifying issues from the first Chase mailer and identifying loans to be included in the second mailer.

147. Chase went on to state that the mailing that it had sent out on September 13, 2012 had encountered issues, including "confusion over letters sent (bankruptcy and unsecured customers)" and that "[r]emediation efforts are still in progress." Those remediation efforts primarily addressed the issues caused by mailing borrowers of non-Chase owned loans.

148. Among the non-Chase owned loans were several loans owned by the Relator's entities.

149. The DOJ November 2012 document also set forth the series of admissions as to the failings:

Data issues resulted in four high level gaps:

- Lien status issues exist within the population;
- Inactive loans included in the pool did not include updated bankruptcy information;
- Loans previously sold to investors lacked proper coding in Recovery One system, causing these loans to be included in the pool in error; and
- Loans previously settled as part of the "repurchase/make whole" process were not identified in Recovery One system, causing these loans to be included in the pool in error.

150. The document acknowledged that 108 loans were owned by 21 different investors, with 83 out of 108 loans (78 percent) purchased by 8 investors. Relator owns 3 of the eight identified companies.

151. The Chase DOJ November 2012 document also stated that the "[m]ethodology would be to tier older, never paid loans as first into the 2nd mailer pools."

152. In evaluating the loans, Chase designed the searches to focus on various criteria that would rid Chase of loans that had no possibility of future payments and that had low lifetime collectability, thus increasing Chase's profitability and focusing on borrowers who were more likely not to need the benefit because their debt was uncollectable.

153. Chase had had no contact with these borrowers in over ten years and had no knowledge of the status of the loans. Due to the corruption of the data in the RCV1 population, Chase had no information about these loans and could not have applied the re-

quired criteria under the HAMP or Consent Judgment.

154. Chase, in complete disregard for the requirements of the MHA Commitment and the NMSA Consent Judgment, made no effort to apply the criteria to any of the borrowers to whom they sent debt forgiveness letters.

C. The RCV1-SOR Collection Agencies

155. Chase established policies and procedures for those mortgage loans in the RCV1-SOR that included the rapid transfer of these borrowers' accounts through several levels of third party collections activity, from primary agencies through quinary agencies, based on their collection success.

156. Through the use of these serial collection agencies, Chase increased the profitability of these defaulted home loans and lowered costs on the funds collected because these agencies were compensated based on a percentage collected.

157. Because the collection agencies did not service the federally related mortgage loans, the RCV1 loan portfolio was not capable of being serviced as required by the MHA Program.

158. The use of collection agencies was reserved for the worst portion of the RCV1-SOR.

159. These collection agencies are unlicensed, unregulated and do not possess the servicing platforms to provide any mortgage servicing functions. This institutional unwillingness to service loans properly placed Chase in violation of its legal obligations

regarding the servicing of hundreds of thousands of mortgage loans.

160. Six months after the deadline for full implementation of the Servicing Standards of the Consent Judgment, and years after Chase certified continued compliance with the Commitment, an internal Chase document from April 2013 entitled "Chase Home Loan Servicing and Default: Daily Agency Recovery Summary" stated Chase had 160,309 loans with a total aggregate outstanding balance of $12,296,131,671.00 assigned to collection agencies for servicing.

161. These loans included 130,204 bank-owned loans.

162. These loans also included 30,105 service-only loans that were under contractual servicing agreements, such as mortgage backed security loans.

163. This pool of 160,309 loans is but a portion of the total population included in the RCV1. Based on information and belief the total number of such loans has exceeded 500,000.

164. This serial use of collection agencies added to the data corruption already inherent in the design of the RCV1. The data was incomplete, inconsistent and, in many places, irreparably corrupted by the collection agencies' involvement in the management of the data

D. Examples of Loans Where Chase Released the Lien but Failed to Forgive the Debt and Notify the Borrower

165. The following are examples of loans, which had previously been sold to Schneider, and on which

Chase released the lien on securing the property without forgiving the underlying debt on the loan and still made efforts to collect on the debt even though the debt was no longer secured. The total number of such loans sold to Schneider was over 400. This 400 was representative of Chase's practice of releasing liens without notifying the borrower and forgiving the debt. As of May 2015 Chase had released of 400,000 loans in RCV1

Borrower	Address of property	Origination Date	Date of Lien Release
Myers, Stephanie	371 Hilton Avenue Youngstown, OH 44507	4/18/2007	10/23/2013
Bell, Raymond	6826 Georgeland Saint Louis, MO 63134	9/28/2007	10/24/2013
Fontenot, Patrick	240 Nimitz Street Eunice, LA 70535	12/27/2006	11/12/2013
Lockett, Shawn	864 Inez Street Memphis, TN 38111	12/18/2007	11/18/2013
McKernan, Shawn	6332 Stanwin Drive Apopka, FL 32712	9/28/2007	11/20/2013

Dent, Mary	380 Hudson Street Rossville, GA 30741	6/21/2004	12/3/2013
Smith, Scott	16650 Mark Twain Street Detroit, MI 48235	8/2/2007	12/13/2013
Damstra, Mark	719 Adams Street Apt. 4R Hoboken NJ 07030	9/12/2007	9/18/2014
Smith, Ali	1013 Juneau Avenue Akron, OH 44320	10/17/2005	10/3/2014
Harris, Dorothy	8505 Greenview Detroit, MI	3/17/2004	10/14/2014
Thompson, Kirk	499 Shepherd Avenue Brooklyn, NY 11208	10/11/2005	11/7/2014
Slate, Donald	7532 Perilla Court Indianapolis, IN 46237	2/4/2005	3/2/2015

166. As of May 2015, Chase had released over 400,000 liens on loans in RCV1. Following Chase's stated practices, most of these liens would have been

released without forgiving the underlying debt and notifying the borrower.

E. Chase's "Alternative Foreclosure Program" Violates the Requirements of the Servicing Standards

167. Chase maintains a policy of not foreclosing on first lien loans that are secured by properties located in blighted neighborhoods and where the underlying property has little or no value. These loans are least likely to be repaid, represent the highest reputational risk and the highest servicing costs to Chase. Instead, Chase seeks another path aimed at circumventing the issues related to these properties. This internal Chase policy is known as the "Alternative Foreclosure Program" ("AFP").

168. The AFP process is an ongoing effort to conceal legal violations, relieve Chase of liabilities, mitigate losses and circumvent the objectives and requirements of the Consent Judgment to prevent community blight.

169. Under Chase's AFP, thousands of mortgage loans have been, and continue to be, quietly released, with no notice to any interested parties, no documentation or correspondence with homeowners or others, and no outside indication of any type to alert interested parties of this action.

170. Chase simply files releases of liens on the properties securing the underlying loan to appear as if the borrower had paid off the loan. However, without notification to the borrower of the release, the loan remains subject to the HAMP and all of the servicing requirements thereof.

171. These lien releases are not individually reviewed by Chase to ensure that Chase actually owned or serviced the mortgages or to ensure the accuracy and integrity of the borrower's information but instead were "robo-signed"; many of which signed by Amy Knight, who identified herself as a Vice President at J.P. Morgan Chase Bank and others signed by Ingrid Whitty and Arocla Whitty who identified themselves as Vice President and Asst. Secretary respectively of JPMorgan Chase Bank N.A, Successor In Interest By Purchase From The FDIC As Receiver of Washington Mutual Bank, FA F/K/A Washington Mutual Home Loans, Inc, Successor By Merger to Homeside Lending, Inc. All of the lien releases indicated that "the instrument was signed on behalf of its corporation, by authority from its board of directors."

172. Prior to the implementation of the AFP, the underlying loans remained in collection as unsecured debts despite their status as federally related loans with all related attributes.

173. Chase applied the AFP to valueless RCV1 first mortgage loans, which it had not serviced in accordance with law, thus creating and enhancing community blight.

174. The use of the RCV1-SOR population in the application of the AFP meant that, once again, Chase's malfeasance affected loans that it neither owned nor serviced.

175. In addition to the violation of the HAMP, Relator's investigation revealed that Chase's practices under AFP violated the terms of the anti-blight requirements of the Consent Judgment. As a result, Chase has rapidly enhanced blight, rather than limited

it, in many of the country's hardest hit areas, including areas within Detroit, Michigan, St. Louis, and St. Louis County, Missouri. This directly violated government policies and publications, such as Fannie Mae's Property Preservation Matrix and Reference Guide, which mandated that throughout the default process, servicers are responsible for performing all property maintenance functions to ensure that the condition and appearance of properties are maintained.

176. Because of Chase's policies and procedure in implementing the AFP, Chase merely released liens in many of the hardest hit areas rather than foreclosing. Despite electing not to pursue foreclosure, Chase continues to pursue the underlying debt for those loans in the AFP which require them to be accounted for through HAMP in the primary SOR.

F. Chase's Internal Documents and Deposition Testimony Demonstrate That Chase's Servicing Practices Regarding Charged-Off Loans in RCV1 Violate HAMP Requirements

177. On August 1, 2011 Chase's Audit Department issued an internal audit report entitled "Home Lending —Recovery Operations and Recovery One (RVC) Application." The period covered by the Audit included year 2010. The "Key Findings of the report stated:

> The current operational and technology controls over Recovery operations are not sufficient to ensure compliance with bank policies, laws and regulations, therefore, an <u>Inadequate</u> rating is assigned. Issues were identified that could cause legal and reputational risk in particular relating to the execution of sworn documents and the need

> for personal knowledge prior to signing assertions. Issues were also identified relating to data integrity, risk management and access administration.

178. Under Chase's audit rating system "<u>Inadequate</u>" means: "Internal control processes are generally ineffective. Risk management processes are ineffective, as several issues were noted."

179. Among the findings of the August 2011 audit report was that sworn documents were signed without personal knowledge as required by the HAMP. Also, the audit report found that RCV1 lacked data integrity as required by the HAMP. *See* ¶ 68 above.

180. Chase's August 1, 2011, internal audit report confirms that Chase's 2010 and 2011 Certifications of Compliance with the SPA represented material false claims.

181. A Chase document titled "RCV1 Audit Jan 1, 2013" contained the following statements which acknowledged violations of the HAMP.

> Operational processes that are not compliant with existing policy subject the firm to financial, regulator, and reputational risk.

182. Regarding Quality Assurance the document stated:

> Ineffectively designed key controls increase the risk of operational issues that may result in financial loss or regulatory action taken against the firm.

183. In a section titled "Bankruptcy/Foreclosure Activities performed by Recovery Operations," the document stated:

> Recover Operations performs bankruptcy and foreclosure activities for charged off loans with processes that are not consistent with similar, more stringent processes in place with Mortgage Banking teams who service pre-charge off loans (MB Bankruptcy and MB Foreclosure Operations teams). Specifically, chain-of-title reviews are not being performed to verify and document ownership of Notes prior to a POC or surplus funds foreclosure filing, which are both sworn documents.

184. Chase's document "RCV1 Audit Jan 1, 2013" confirms that Chase's 2012 Certification of Compliance with the SPA represented a material false claim.

185. An internal Chase document entitled "Lien Release on 1st Lien Walk/Charge-offs" detailed the determinations made in a teleconference conducted with Chase staff members on February 14, 2013. Those determination included:

- No letters will be sent to borrowers or municipalities
- Debt will not be forgiven as part of this process, we will just release the lien
- Will continue through standard Recovery Process. . . .

186. A document titled "Mortgage Business Banking Requirements," completed in the Spring of 2013 stated regarding Chase's lien release project:

> No letters will be sent to borrowers or municipalities to alert that Chase is releasing the lien on the loans in scope for this project.
>
> No debt will be forgiven of borrowers associated with the properties which have received a lien release as part of this project, with the exception of states where an amended release is not possible. In such cases the release will state that all obligations have been satisfied.

187. Similarly, an internal documentation entitled "Chase Home Loan Servicing and Default: Daily Agency Recovery Summary" demonstrated, that borrowers, whose loans were in the RCV1 population, were not released of the "liability for the debt" but instead were still the subject of collections efforts by various collection agencies who did not service these federally related mortgages. These mortgage loans were therefore subject to all HAMP servicing requirements.

188. The foregoing documents represent clear admissions that Chase was not meeting the requirements of the HAMP to exempt lien released loans from the HAMP's provisions. *See* ¶ 109 above.

189. In an email dated June 21, 2013, to Robert K. Admovic, Patrick M. Boyle, Ormar Kassem, and Panickos Palettas, Krista R. Hensley, VP Recovery Operations, Mortgage Banking, Chase, stated "We have not taken into account whether or not the property is occupied in the past (for DOJ or current 1st lien releases to meet DOJ requirements), so I am not sure why we would need to start using that as a determining factor." This email represents a clear admission that Chase failed to determine whether the borrower met

one of the prime criteria to determine if the loan was eligible for a HAMP modification. *See* ¶ 58 above.

190. An internal Chase document written in January 2014 states:

> Given systemic constraints within Recovery One, charged-off loans cannot currently be serviced in the manner prescribed by Reg-X. As a result, decision has been made to release liens on Reg-X eligible [closed-ended, purchase money] loans, rendering them to an unsecured position, before returning them for recovery collection activity.

191. Regulation-X includes a restatement of the definition of a "federally related mortgage loan" contained RESPA. *See* 12 CFR § 1024.2(b). Regulation X, effective January 10, 2014, did not change the requirement of the HAMP to continue servicing charged-off loans where the debt has not been forgiven and the borrower notified. Therefore, this statement admits that Chase was not able to service loans in RCV1 according to the HAMP requirements. Further, it demonstrates that Chase sought to continue to profit from loans that it charged off and lien released in direct contravention of the HAMP. *See* ¶ 58 above. This document confirms that Chase's 2013 Certification of Compliance with the SPA represented a material false claim.

192. Schneider has deposition testimony from a third party that further confirms Chase's practice of not notifying borrowers when Chase released liens. This deposition is currently subject to an agreement to treat it as confidential. It will be available to

Schneider, if necessary, at summary judgment or at trial.

193. This practice of filing lien releases without basic due diligence and with lack of care for the truth of the recording led to hundreds of the Relator's loans being lien released. When Chase was informed, it filed "vacations" to attempt to reinstall the liens without borrower permission or knowledge. These vacations are of two varieties. One variation indicates that "[t]hrough inadvertence and mistake the undersigned executed a Release of Mortgage," or equivalent document of recording. The other variation states that "[t]hrough inadvertence and mistake the undersigned executed a Home Affordable Modification." The indication that Chase had executed Home Affordable Modifications, or HAMP modifications, inadvertently was in fact false. Chase Has had never contacted any of the borrowers whose liens had been released to determine if those loans were eligible for modification under the HAMP.

194. The documentary evidence and deposition testimony set out above confirm the allegations in this complaint that Chase could not and did not service and provide loan modifications to charged-off mortgages it had relegated to RCV1 as required by the HAMP. Therefore, since mortgages in RCV1 where the very loans that HAMP was designed to address, any certifications of compliance with the HAMP were material false claims.

VI.
Documentation Containing False Claims

195. On September 29, 2010, Chase filed its Initial Certification of compliance with its "Commitment to

Purchase Financial Instrument and Servicer Participation Agreement." This Certification contained material false claims.

196. On September 29, 2010, Chase's subsidiary, EMC, filed a Certification of compliance with its "Commitment to Purchase Financial Instrument and Servicer Participation Agreement." This Certification contained material false claims.

197. On or about September 29, 2011, Chase filed a Subsequent Certification of compliance with its "Commitment to Purchase Financial Instrument and Servicer Participation Agreement." This Certification contained material false claims.

198. On or about September 29, 2012, Chase filed a Subsequent Certification of compliance with its "Commitment to Purchase Financial Instrument and Servicer Participation Agreement." This Certification contained material false claims.

199. On or about September 29, 2013, Chase filed a Subsequent Certification of compliance with its "Commitment to Purchase Financial Instrument and Servicer Participation Agreement." This Certification contained material false claims.

200. On or about September 29, 2014, Chase filed a Subsequent Certification of compliance with its "Commitment to Purchase Financial Instrument and Servicer Participation Agreement." This Certification contained material false claims.

201. On or about September 29, 2015, Chase filed a Subsequent Certification of compliance with its "Commitment to Purchase Financial Instrument and

Servicer Participation Agreement." This Certification contained material false claims.

VII.
Causes of Action Count I

Federal False Claims Act, 31 U.S.C. § 3729(a)(1)(A) & (B) Against All Defendants

202. Relator realleges and incorporates herein by reference all the allegations set forth in paragraphs 1 through 201 of this Complaint.

203. The Relator seeks relief against Chase under Section 3729(a)(1)(A) & (B) of the FCA, 31 U.S.C. § 3729 (a)(1)(A) & (B).

204. As set forth above, Chase knowingly presented, or causes to be presented, a false or fraudulent claim for payment or approval and knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim. These false claims and false records were made in the form of certifications of compliance with its "Commitment to Purchase Financial Instrument and Servicer Participation Agreement" and records and documents used to support those certifications.

205. Chase's use of false reports and certifications enabled it to obtain payments from the Government for which it was not entitled.

206. By reason of the forgoing, the United States has been damaged in a substantial amount to be determined at trial, and is entitled to treble damages and a civil penalty as required by law for each violation.

PRAYER FOR RELIEF

WHEREFORE, Relator Laurence Schneider requests that judgment be entered against Defendants, ordering that:

1. Defendants pay an amount equal to three times the amount of damages the United States has sustained because of Defendants' actions, plus a civil penalty against Defendants of not less than $5,000, and not more than $10,000 for each violation of 31 U.S.C. § 3729;

2. Relator be awarded the maximum amount allowed pursuant to 31 U.S.C. § 3730(d);

3. Relator be awarded all costs of this action, including attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d); and

4. The United States and Relator be granted all such other relief afforded by law as the Court deems appropriate;

REQUEST FOR A TRIAL BY JURY

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

/s/ Joseph A. Black
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Admitted Pro Hac Vice

Dated: March 27, 2018

MEMORANDUM BY MICHAEL D. GRANSTON (JANUARY 10, 2018)

U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION

To: Attorneys
Commercial Litigation Branch,
Fraud Section

Assistant U.S. Attorneys Handling False Claims Act Cases Offices of the U.S. Attorneys

From: Michael D. Granston
Director
Commercial Litigation Branch, Fraud Section

Subject: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A)

Introduction

Over the last several years, the Department has seen record increases in *qui tam* actions filed under the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., with annual totals approaching or exceeding 600 new matters. Although the number of filings has increased substantially over time, the rate of intervention has remained relatively static. Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. If the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. Thus, when evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A).

Historically, the Department has utilized section 3730(c)(2)(A) sparingly, in large part because the statutory text makes clear that relators can proceed with certain *qui tam* actions following the government's declination. Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources. Accordingly, we have been circumspect with the use of this tool to avoid precluding relators from pursuing potentially worthwhile matters, and to ensure that dismissal is utilized only where truly warranted.

While it is important to be judicious in utilizing section 3730(c)(2)(A), it remains an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent. The Department plays an important gatekeeper role in protecting the False Claims Act, because in *qui tam* cases where we decline to intervene, the relators largely stand in the shoes of the Attorney General. That is why the FCA provides us with the authority to dismiss cases. This memo is intended to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A) and to ensure a consistent approach to this issue across the Department. We reviewed those cases in which the government moved to dismiss relators pursuant to this statutory provision since 1986, when this provision was added to the FCA. As discussed below, we identified approximately seven factors that the government has relied upon in seeking to dismiss a *qui tam* action pursuant to section 3730 (c)(2)(A). To ensure consistency across the Department, these factors should serve as a basis for evaluating whether to seek to dismiss future matters, though they are not intended to constitute an exhaustive list, and there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam* action.[1]

Finally, as noted below, when the Department is considering dismissal, relators should be advised of this possibility since it will inform their judgment regarding whether to voluntarily dismiss their actions.

Discussion

The False Claims Act authorizes the Attorney General to dismiss a *qui tam* action over the relator's objection:

> The Government may dismiss the action notwithstanding the objections of the person

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[1] In jointly handled and monitored cases, the prior approval of the Assistant Attorney General is required for a motion to dismiss a qui tam action, including under section 3730(c)(2)(A). In delegated cases, the authority for dismissing a *qui tam* complaint will generally be vested in the U.S. Attorney unless dismissal would present a novel issue of law or policy, or for any other reason raises issues that should receive the personal attention of the Assistant Attorney General. *See* Civil Division Directive 1-15, Subpart 1(c). In order to maintain consistency and evaluate the appropriateness of Assistant Attorney General approval, U.S. Attorneys' Offices should provide notice to the assigned Fraud Section attorney at least 10 days prior to filing any motion to dismiss in a delegated matter. In addition, for reporting purposes, the Department will collect information on an annual basis regarding the number of *qui tam* complaints dismissed upon motion by the United States. The Fraud Section will work with the Executive Office of United States Attorneys to formulate a reporting mechanism.

> initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

31 U.S.C. § 3730(c)(2)(A).[2] The FCA does not, however, provide a standard of review for evaluating such a request for dismissal. As a result, courts have developed two differing standards. *Compare United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1145 (9th Cir. 1998) (holding that the United States must identify a "valid government purpose" that is rationally related to dismissal) *with Swift v. United States,* 318 F.3d 250, 252 (D.C. Cir. 2003) (holding that the United States has an "unfettered right" to dismiss a *qui tarn* action).

Moreover, the FCA does not set forth specific grounds for dismissal under section 3730(c)(2)(A). However, below is a non-exhaustive list of factors that the Department can use as a basis for dismissal, along with citations to cases where the government has previously sought dismissal based on these factors.

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[2] This is just one of several mechanisms contained in the FCA to ensure that the United States retains substantial control over lawsuits brought on its behalf. *See also* 31 U.S.C. § 3730(c)(1) (providing government with "the primary responsibility for prosecuting the action" when it intervenes); 31 U.S.C. § 3730(c)(2)(B) (allowing government to settle actions over relator's objections); 31 U.S.C. § 3730(c)(2)(C) (providing government with mechanism to restrict relator's participation in the case); 31 U.S.C. § 3730(b)(1) (requiring relator to obtain government consent prior to any dismissal of the action).

1. Curbing Meritless Qui Tams

The Department should consider moving to dismiss where a *qui tam* complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous. Examples of inherent legal defects include *qui tarn* actions where the relator failed to allege an actionable obligation to support a reverse false claim violation, *see, e.g., United States ex rel. Hoyte v. American National Red Cross,* 518 F.3d 61 (D.C. Cir. 2008); *United States ex rel. Wright,* No. 5:03-264 (ED. Tex. Feb. 3, 2005), or to allege a non-federal defendant that is not covered by sovereign immunity. *See, e.g., United States ex rel. Carter v. Board of Governors of the Federal Reserve, et al.,* No. 12-0129-cv-W-HFS (W.D. Mo. May 1, 2013); *United States ex rel. Casey v. Blevins,* No. 4:02-CV-60 (E.D. Ark. July 5, 2002); *Braswell v. Unger,* No. 4:14-cv-02574-JAB (D. Az. August 11, 2015). Factually frivolous cases can take a number of forms. *See, e.g., United States ex rel. Roach v. Obama,* No. 14-0470 (D.D.C. December 18, 2014); *United States ex rel. May v. City of Dallas,* 2014 WL 5454819, at *5 (N.D. Tex. Oct. 27, 2014); *United States ex rel. Berg v. Obama,* 383 F. App'x 7 (D.C. Cir. 2010) (per curiam); *United Slates ex rel. Lachkovich v. Ashcroft, et al.,* No. 08-cv-00066-WYD-BNB (D. Colo. March 13, 2008).

In certain cases, even if the relator's allegations are not facially deficient, the government may conclude after completing its investigation of the relator's allegations that the case lacks merit. In such a case, the Department should consider dismissing the matter. *See United States ex rel. Nasuti v. Savage Farms, Inc.,* 2014 WL 1327015, at *11 (D. Mass. Mar. 27, 2014), aff'd, 2015 WL 9598315 (1st Cir. 2015) (dismissing *qui tam* claims that government concluded were "factually incorrect and without foundation."); *United States ex rel. Dreyfuse v. Farrell, et al.,* 3:16-cv-5273 (S.D. W.Va. March 28, 2017) (granting government's motion to dismiss claims that were submitted to state agency and which did not implicate any federal programs or funds); *United States ex rel. Stierli v. Shasta Services, Inc.,* 440 F. Supp. 2d 1108, 1113 (E.D. Cal. 2006) (granting government's motion to dismiss because, among other things, there was not any false or fraudulent claim paid or approved by the federal government); *United States v. Fiske,* 968 F. Supp. 1347, 1353 (E.D. Ark. 1997) (holding that relator's allegations, even if true, do not involve the submission of any false or fraudulent claim to the federal government). These cases may be rare, in part, because to maximize its resources the government typically will investigate a *qui tam* action only to the point where it concludes that a declination is warranted. This may not equate to a conclusion that no fraud occurred. If the Department is concerned that a case lacks any merit, but elects to afford the relator an opportunity to further develop the case, the Department attorney may consider advising the relator that dismissal will be considered if the relator is unable to obtain additional support for the relator's claims by a specified date.

2. Preventing Parasitic or Opportunistic Qui Tam Actions

The Department should consider moving to dismiss a *qui tam* action that duplicates a preexisting government investigation and adds no useful information to the investigation. In these cases, the government should consider whether the relator would receive an unwarranted windfall at the expense of the public fisc because Congress intended for the relator share to incentivize and award the provision of meaningful information and assistance instead of merely providing duplicative information already known to the government. *See* 132 Cong. Rec. 29, 322 (1986) (citing S. Rep. No. 99-345, at 28 (1986), *reprinted in* 1986 U.S.C.C. A.N. 5266, 5293) (discussing factors relevant to awarding a relator share, including "the significance of the information provided" and whether the government was already aware of the information prior to relator providing it). For example, in *United States ex rel. Amico, et al. v. Citi Group, Inc., et al.,* No. 14-cv-4370 (CS) (S.D.N.Y. August 7, 2015), relators filed a *qui tam* action against Citi Group and its subsidiaries alleging fraud in connection with the marketing and sale of residential mortgage backed securities; however, the Department of Justice had been investigating the same conduct for several years prior to the filing and had engaged in extensive settlement negotiations before relators filed their complaint. The government successfully moved to dismiss the action under section 3730(c)(2)(A) because, among other factors, relators' belated complaint provided no assistance to the government in its pre-existing investigation. *See also United States ex rel. Piacentile v. Amgen Inc.,* No. 04-cv-3983-SJ-RML, 2013 WL 5460640, at *4 (E.D.N.Y. Sept. 30, 2013) (granting government's motion to dismiss *qui tam* complaint filed by serial relator who filed one of ten *qui tams* alleging similar wrongdoing by the same defendant),

3. Preventing Interference with Agency Policies and Programs

Dismissal should be considered where an agency has determined that a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs and has recommended dismissal to avoid these effects. For example, in *United States ex rel. Ridenour v. Kaiser-Hill Co., LLC,* 397 F.3d 925 (10th Cir. 2005), relator alleged that a security contractor submitted false claims to the Department of Energy for deficient security services at Rocky Flats, a radiologically-contaminated nuclear weapons manufacturing facility that was slated to undergo decontamination and closure. The government successfully moved to dismiss the action because, among other things, litigation would delay the clean-up and closure of the facility by diverting agency personnel and resources away from the project. 397 F.3d at 937; *see also United States ex rel. Sequoia Orange Co.,* 151 F.3d at 1146 (concluding that valid government interests supporting dismissal included the Department of Agriculture's desire to "end the divisiveness in the citrus industry" by promulgating new citrus marketing regulations to replace invalidated regulations upon which the relator based its claims); *United States ex rel. Toomer v. TerraPower,* No. 4:16-cv-00226-BLW (D. Idaho) (Under Seal) (seeking dismissal of allegation that defendant's invention constituted government property, based in part on the concern that this allegation would hinder the Energy Department's ability to collaborate with private sector partners). Finally, there may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry. *Cf. United States ex rel. Harmon v. Trinity Indus., Inc.,* 872 F.3d 645 (5th Cir. 2017) (reversing $680 million judgment against highway guardrail manufacturer based on alleged manufacturing defects that agency concluded did not affect eligibility of defendant's claims).

4. Controlling Litigation Brought on Behalf of the United States

Relatedly, the Department should consider dismissing cases when necessary to protect the Department's litigation prerogatives. For example, in *In Re Natural Gas Royalties Qui Tam Litigation,* MDL Docket No. 1293 (D. Wyo. October 9, 2002), relator filed separate *qui tam* actions in various districts against more than 300 defendants accused of underpaying royalties owed to the United States in connection with natural gas produced from federal lands. After intervening as to a limited number of defendants, the government sought to dismiss certain declined claims to, among other things, avoid interference with the government's ability to litigate the intervened claims. The court agreed, finding that the interest in avoiding interference with ongoing litigation warranted dismissal of the declined claims. *See also Lion Raisins v. Kagawa, et al.,* No. CV-F-02-5665-REC-LJO (E.D. Cal. Nov. 3, 2003) (granting government's motion to dismiss, concluding that government's desire to avoid interference with pending Federal Torts Claims Act action involving the same parties was a valid government purpose that was rationally related to dismissal). In addition, in *United States ex rel. Wright v. Agip Petroleum Co.,* No. 5:03-264 (E.D. Tex. Feb. 3, 2005), the government moved to dismiss, in part, to avoid the risk of unfavorable precedent. *See id.* Finally, in

United States ex rel. Piacentile, 2013 WL 5460640, the government moved to dismiss a declined claim that was serving as an obstacle to the settlement of the government's intervened claims. *But cf. United States ex rel. Schweizer v. Oce,* 677 F.3d 1228 (D.C. Cir. 2012) (once the government reaches a settlement with defendant of relator's claims, the dismissal of those claims is governed by section 3730(c)(2)(B), requiring a showing that the settlement is fair, adequate, and reasonable, rather than by section 3730(c)(2)(A)).[3]

5. Safeguarding Classified Information and National Security Interests

In certain cases, particularly those involving intelligence agencies or military procurement contracts, we should seek dismissal to safeguard classified information. For example, in *United States ex rel. Fay v. Northrup Grumman Corp.,* No. 06-cv-00581-EWN-MJW, 2008 WL 877180 (D. Colo. Mar. 27, 2008), the relator alleged that a defense contractor defrauded the United States in connection with work performed on a classified contract. After declining to intervene, the Department moved to dismiss the action under section 3730(c)(2)(A), asserting that continued litigation would pose "an unacceptable risk to national security" due to the potential for disclosure of classified information. Applying the *Sequoia Orange* standard, the Court agreed, concluding that the claims and defenses were inextricably tied to classified informa-

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[3] In each of the foregoing cases, in addition to determining that the dismissed claims were interfering with the government's litigation prerogatives, the government's briefs make clear that the government had determined that the claims lacked substantial merit.

tion and dismissal was rationally related to the valid government interest of preventing the disclosure of such information. *Id.* at * 6-7. *See also United States ex rel. Matseki v. Raytheon Co.,* 634 F. App'x 192 (9th Cir. 2015) (per curiam) (holding that government interest in avoiding disclosure of classified information was sufficient basis for dismissal); *United States ex rel. Schwartz v. Raytheon Co.,* 150 F. App'x 627 (9th Cir. 2005) (holding that "federal interest in protecting military and state secrets" was valid basis for dismissal); *United States ex rel. Ridenour,* 397 F.3d at 936-37 ("The Government demonstrated that classified documents required in the litigation would present a risk of inadvertent disclosure, implicating national security."). Finally, it should be noted that the government need not demonstrate that continued litigation <u>will</u> result in the disclosure of classified information. In jurisdictions that apply the "rational basis" basis test, the government has a strong argument that the <u>risk of disclosure</u>, alone, justifies dismissal. *See United States ex rel. Ridenour,* 397 F.3d at 937 (finding risk of inadvertent disclosure of classified information, "even if theoretically minimal," sufficed to justify dismissal). (In jurisdictions that apply the "unfettered right" standard, no showing by the government is required.)

6. Preserving Government Resources

The Department should also consider dismissal under section 3730(c)(2)(A) when the government's expected costs are likely to exceed any expected gain.[4]

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[4] Cost to the government includes the opportunity cost of expending resources on other matters with a higher and/or more certain recovery.

See, e.g., Swift v. United States, 318 F.3d 250, 251 (D.C. Cir. 2003) (the government moved to dismiss the complaint, arguing that the amount of money involved did not justify the expense of litigation even if the allegations could be proven); *United States ex rel. Nicholson v. Spigelman, et al.,* No. 1:10-cv-03361, 2011 WL 2683161, at *2 (N.D. 111. July 8, 2011) (explaining that the estimated government losses, even with statutory penalties and damages multiplier, were less than the costs of monitoring the litigation and responding to discovery requests) Examples of potential costs may include, among other things, the need to monitor or participate in ongoing litigation, including responding to discovery requests. *See, e.g., United States ex rel. Sequoia Orange Co.,* 151 F.3d at 1146 (holding that district court "properly noted that the government can legitimately consider the burden imposed on taxpayers by its litigation, and that, even if the relators were to litigate the FCA claims, the government would continue to incur enormous internal staff costs"); *United States ex rel. Levine v. Avnet, Inc.,* No. 2:14-cv-17-WOB-CJS, 2015 WL 42359 (E.D. Ky. Apr. 1, 2015) (holding that dismissal of *qui tam* complaint "will further [the government's] interest in preserving scare resources" that would otherwise be spent "monitoring [relator's] action"). In some cases, the government may also be liable for the defendant's litigation costs if the defendant prevails in the action. *See, e.g.,* FAR § 31.205-47(c).

7. Addressing Egregious Procedural Errors

The Department may also seek dismissal of a *qui tam* action pursuant to section 3730(c)(2)(A) based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation.

For example, in *United States ex rel. Surdovel v. Digirad Imaging Solutions,* No. 07—cv-0458, 2013 WL 6178987 (E.D. Pa. Nov. 25, 2013), the relator ignored repeated requests from the Office of the U.S. Attorney to serve the *qui tam* complaint and disclose material facts as required by 31 U.S.C. § 3730(b). The Court granted the government's motion to dismiss the action because the "egregious procedural errors completely frustrated the government's ability to investigate the relator's claims." *Id.* at *4. *But cf. State Farm Fire and Cas. Co. v. United States ex rel. Rigsby,* ___U.S.___, 137 S. Ct. 436, 440 (2016) (holding that relators' violation of FCA's seal requirement did not mandate automatic dismissal of relators' complaint).

[* * *]

Several additional points are in order with respect to the use of the government's dismissal authority under section 3730(c)(2)(A). First, while the Department's position has been that the appropriate standard for dismissal under section 3730(c)(2)(A) is the "unfettered" discretion standard adopted by the D.C. Circuit rather than the "rational basis" test adopted by the 9th and 10th Circuits, we should argue that even the latter standard was intended to be a highly deferential one. Moreover, in those jurisdictions where the standard remains unresolved, in many cases the prudent course may be to identify the government's basis for dismissal and to argue that it satisfies any potential standard for dismissal under section 3730 (c)(2)(A).

Second, the factors identified above are not mutually-exclusive, and the Department has often relied on multiple grounds for dismissal (for example, lack of merit and need to safeguard classified information). Nor, as noted above, are the factors identified in this memorandum intended to constitute an exhaustive list—there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam* action.

Third, in some cases there may be alternative grounds for seeking dismissal other than section 3730(c)(2)(A), such as the first to file bar, the public disclosure bar, the tax bar, the bar on *pro se* relators, or Federal Rule of Civil Procedure 9(b). Although the Department has sometimes moved to dismiss on these grounds under section 3730(c)(2)(A), we believe the better approach is to assert these grounds separately since they can provide alternative, independent legal bases for dismissal. It may sometimes be appropriate, however, to move for dismissal under section 3730 (c)(2)(A) in the alternative based on one or more for the factors listed above.

Fourth, section 3730(c)(2)(A) does not require the government "to proceed in an all or nothing manner." *See Juliano v. Fed. Asset Disposition Ass 'n,* 736 F. Supp. 348, 351-53 (D.D.C.1990) ("The [FCA] nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the qui tam plaintiffs charges wholesale."). In certain situations, it may be appropriate to seek only partial dismissal of some defendants or claims. *See id.* (granting motion for partial dismissal under 3730(c)(2)(A)); *United States ex rel. Grober v. Summit Medical Group, Inc.,* No. 02-177-C (W.D. Ky. July 9, 2004) (same).

Fifth, where a *qui tam* case is a potential candidate for dismissal, Department attorneys should consult closely with the affected agency as to whether dismissal is warranted under any of the factors set forth in this guidance. The agency's recommendation should be obtained in advance of the filing of any request to dismiss. In cases where dismissal under section 3730(c)(2)(A) is opposed by the agency (because, for example, it would require the government to disclose sensitive information or could result in other collateral consequences), there may be alternative ways to address the deficiencies while accommodating the agency's desire to forego seeking dismissal. For example, if the agency views the alleged falsity as immaterial, the United States can provide an agency declaration to that effect. *See Trinity,* 872 F.3d at 664 (holding that district court erred in concluding alleged falsity was material to agency despite agency memorandum stating that there was "an unbroken chain of eligibility for Federal reimbursement" for the allegedly defective product at issue).

Sixth, although a motion to dismiss under section 3730(c)(2)(A) will often be filed at or near the time of declination, there may he cases where dismissal is warranted at a later stage, particularly when there has been a significant intervening change in the law or evidentiary record. However, if one waits until the close of discovery or trial, there is a risk that the court may be less receptive to the request given the expenditure of resources by the court and parties. The court may also be less receptive to a motion filed at a later stage when doing so undercuts a claimed desire to avoid or reduce costs associated with discovery or safeguard information in discovery. Attorneys considering dismissal should therefore allow for sufficient time to consult with the affected agency and, in delegated cases, to provide appropriate notice to the Fraud Section

Finally, attorneys planning to recommend declination or dismissal should, to the extent possible, consider advising relators of perceived deficiencies in their cases as well as the prospect of dismissal so that relators may make an informed decision regarding whether to proceed with the action. In many cases, relators may choose to voluntarily dismiss their actions, particularly if the government has advised the relator that it is considering seeking dismissal under section 3730(c)(2)(A).[5]

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[5] Since January 1, 2012, more than 700 *qui tam* actions have been dismissed by relators after the government elected not to intervene. The frequency with which relators voluntarily dismiss declined *qui tam* actions has significantly reduced the number of cases where the government might otherwise have considered seeking dismissal pursuant to section 3730(c)(2)(A).

SERVICER PARTICIPATION AGREEMENT (NOVEMBER 29, 2018)

AMENDED AND RESTATED

COMMITMENT TO PURCHASE FINANCIAL INSTRUMENT AND SERVICER PARTICIPATION AGREEMENT

This Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement (the "Commitment") is entered into as of the Effective Date, by and between Federal National Mortgage Association, a federally chartered corporation, as financial agent of the United States ("Fannie Mae"), and the undersigned party ("Servicer"). Capitalized terms used, but not defined contextually, shall have the meanings ascribed to them in Section 12 below.

Recitals

WHEREAS, the U.S. Department of the Treasury (the "Treasury") has established a Horne Affordable Modification Program (the "HAMP") pursuant to section 101 and 109 of the Emergency Economic Stabilization Act of 2008 (the "Act"), as section 109 of the Act has been amended by section 7002 of the American Recovery and Reinvestment Act of 2009;

WHEREAS, Fannie Mae, as financial agent of the United States, and Servicer entered into a Commitment to Purchase Financial Instrument and Servicer Participation Agreement for the Home Affordable Modification Program under the Emergency Economic Stabilization Act (the "Prior Agreement") in connection with the implementation of HAMP, the primary purpose of which was the modification of first lien mortgage loan obligations and the provision of loan modification and foreclosure prevention services relating thereto (the "HAMP Services");

WHEREAS, the Treasury has established a variety of new programs (together with the HAMP, the "Programs") under the Act to further stabilize the housing market by facilitating second lien mortgage loan modifications and extinguishments, providing home price decline protection incentives, encouraging foreclosure alternatives, such as short sales and deeds in lieu of foreclosure, and making other foreclosure prevention services available to the marketplace (collectively, together with the HAMP Services, the "Services");

WHEREAS, the Programs may include Services relating to FHA, VA and USDA loans;

WHEREAS, Fannie Mae has been designated by the Treasury as a financial agent of the United States in connection with the implementation of the Programs; all references to Fannie Mae in the Agreement shall be in its capacity as financial agent of the United States;

WHEREAS, Fannie Mae will fulfill the roles of administrator and record keeper for the Programs, and in conjunction therewith must standardize certain mortgage modification and foreclosure prevention practices and procedures as they relate to the Programs, consistent with the Act and in accordance with the directives of, and guidance provided by, the Treasury;

WHEREAS, Federal Home Loan Mortgage Corporation ("Freddie Mac") has been designated by the Treasury as a financial agent of the United States and will fulfill a compliance role in connection with the Programs; all references to Freddie Mac in the Agreement shall be in its capacity as compliance agent of the Programs;

WHEREAS, Fannie Mae and Servicer desire to amend and restate the Prior Agreement in its entirety as set forth herein;

WHEREAS, all Fannie Mae and Freddie Mac approved servicers are being directed through their respective servicing guides and bulletins to implement the Programs with respect to mortgage loans owned, securitized, or guaranteed by Fannie Mae or Freddie Mac (the "G SE Loans"); accordingly, this Agreement does not apply to the GSE Loans;

WHEREAS, all other servicers, as well as Fannie Mae and Freddie Mac approved servicers, that wish to participate in the Programs with respect to loans that are not GSE Loans (collectively, "Participating Servicers") must agree to certain terms and conditions relating to the respective roles and responsibilities of participants and other financial agents of the government; and

WHEREAS, Servicer wishes to participate in the Programs as a Participating Servicer on the terms and subject to the conditions set forth herein.

Accordingly, in consideration of the representations, warranties, and mutual agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Fannie Mae and Servicer agree to amend and restate the Prior Agreement in its entirety, as follows.

Agreement

1. Services

A. Contemporaneously with the execution and delivery of this Commitment and the Financial Instrument, Servicer will execute and deliver to Fannie Mae one or more schedules describing the Services to be performed by Servicer pursuant to this Agreement, effective as of the Effective Date of the Agreement (each, a "Service Schedule" or an "Initial Service Schedule" and, collectively, the "Initial Service Schedules"), After the Effective Date of the Agreement, Servicer may opt-in to any additional initiatives offered by Treasury in connection with the Programs by executing and delivering to Fannie Mae one or more additional Service Schedules describing the Services relating to such initiatives (each, a "Service Schedule" or an "Additional Service Schedule" and, collectively, the "Additional Service Schedules") (the Initial Service Schedules and the Additional Service Schedules, collectively, the "Service Schedules"). All Service Schedules that are executed and delivered to Fannie Mae by Servicer from time to time will be numbered sequentially (*e.g.* Service Schedule A-1; Service Schedule A-2; Service Schedule A-3; et seq.) and are referenced herein, collectively, as Exhibit A; Exhibit A is hereby incorporated into the Commitment by this reference.

B. Subject to Section 10.C., Servicer shall perform the Services described in (i) the Financial Instrument attached hereto as Exhibit B (the "Financial Instrument"); (ii) the Service Schedules attached hereto, collectively, as Exhibit A; (iii) the guidelines and procedures issued by the Treasury with respect to the Programs outlined in the Service Schedules (the "Program Guidelines"); and (iv) any supplemental documentation, instructions, bulletins, frequently asked questions, letters, directives, or other communications, including, but not limited to, business continuity requirements, compliance requirements, performance requirements and related remedies, issued by the Treasury, Fannie Mae, or Freddie Mac in order to change, or further describe or clarify the scope of, the rights and duties of the Participating Servicers in connection with the Programs outlined in the Service Schedules (the "Supplemental Directives" and, together with the Program Guidelines, the "Program Documentation"). The Program Documentation will be available to all Participating Servicers at www.HMPadmin.com; for the avoidance of doubt, the term "Program Documentation" includes all of the Program Guidelines and Supplemental Directives issued by Treasury and made available to Participating Servicers at www.HMPadmin.com prior to the Effective Date of the Agreement. The Program Documentation, as the same may be modified or amended from time to time in accordance with Section 10 below, is hereby incorporated into the Commitment by this reference,

C. Servicer's representations and warranties, and acknowledgement of an agreement to fulfill or satisfy certain duties and obligations, with respect to its participation in the Programs and under the Agreement are set forth in the Financial Instrument. Servicer's certification as to its continuing compliance with, and the truth and accuracy of, the representations and warranties set forth in the Financial Instrument will be provided annually in the form attached hereto as Exhibit C (the "Certification"), beginning on June 1, 2010 and again on June 1 of each year thereafter during the Term (as defined below) and upon the execution and delivery by Servicer of any Additional Service Schedule during the Term.

D. The recitals set forth above are hereby incorporated herein by this reference.

2. Authority and Agreement to Participate in Programs

A. Servicer shall perform the Services for all mortgage loans it services, whether it services such mortgage loans for its own account or for the account of another party, including any holders of mortgage-backed securities (each such other party, an "Investor").

B. Fannie Mae acknowledges that Servicer may service mortgage loans for its own account or for the account of one or more Investors and may be subject to restrictions set forth in pooling and servicing agreements or other servicing contracts governing Servicer's servicing of a mortgage loan; Servicer shall use reasonable efforts to remove all prohibitions or impediments to its authority, and use reasonable efforts to obtain all third party consents, waivers and delegations that are required, by contract or law, in order to perform the Services.

C. Notwithstanding subsection B., if (x) Servicer is unable to obtain all necessary consents, waivers and delegations for performing any Services under the Programs, or (y) the pooling and servicing agreement or other servicing contract governing Servicer's servicing of a mortgage loan prohibits Servicer from performing such Services for that mortgage loan, Servicer shall not be required to perform such Services with respect to that mortgage loan and shall not receive all or any portion of the Purchase Price (defined below) otherwise payable for such Services with respect to such loan.

D. Notwithstanding anything to the contrary contained herein, the Agreement does not apply to GSE Loans. Servicers are directed to the servicing guides and bulletins issued by Fannie Mae and Freddie Mac, respectively, concerning the Programs as applied to GSE Loans.

E. Servicer's performance of the Services and implementation of the Programs shall be subject to review by Freddie Mac and its agents and designees as more fully set forth in the Agreement.

3. Set Up; Prerequisite to Payment

Servicer will provide to Fannie Mae: (a) the set up information required by the Program Documentation and any ancillary or administrative information requested by Fannie Mae in order to process Servicer's participation in the Programs as a Participating Servicer on or before the Effective Date of the Agreement as to the Initial Service Schedules that are executed and delivered contemporaneously herewith, and on or before the effective date of the Additional Service Schedules (if any) executed and delivered after the Effective Date of the Agreement; and (b) the data elements for each mortgage obligation, property, or borrower eligible for the Programs as and when described in the Program Documentation and the Financial Instrument. Purchase Price payments will not be remitted pursuant to Section 4 with respect to Services for which the required data elements have not been provided.

4. Agreement to Purchase Financial Instrument; Payment of Purchase Price

A. Fannie Mae, in its capacity as a financial agent of the United States, agrees to purchase, and Servicer agrees to sell to Fannie Mae, in such capacity, the Financial Instrument that is executed and delivered by Servicer to Fannie Mae in the form attached hereto as Exhibit B, in consideration for the payment by Fannie Mae, as agent, of the Purchase Price.

B. The conditions precedent to the payment by Fannie Mae of the Purchase Price with respect to the Services described on the Initial Service Schedules are: (a) the execution and delivery of the Commitment, the Initial Service Schedules, and the Financial Instrument by Servicer to Fannie Mae; (b) the execution and delivery of the Commitment and the Initial Service Schedules by Fannie Mae to Servicer; (c) the delivery of copies of the fully executed Commitment, Initial Service Schedules and Financial Instrument to Treasury on the Effective Date of the Agreement; (d) the performance by Servicer of the Services described in the Agreement, in accordance with the terms and conditions thereof, to the reasonable satisfaction of Fannie Mae and Freddie Mac; and (e) the satisfaction by Servicer of such other obligations as are set forth in the Agreement.

C. The conditions precedent to the payment by Fannie Mae of the Purchase Price with respect to the Services described on the Additional Service Schedules (if any) are: (a) the execution and delivery of the Additional Service Schedules and the Certification by Servicer to Fannie Mae; (b) the execution and delivery of the Additional Service Schedules by Fannie Mae to Servicer; (c) the delivery of copies of the fully executed

Additional Service Schedules to Treasury; (d) the performance by Servicer of the Services described in the Agreement, in accordance with the terms and conditions thereof, to the reasonable satisfaction of Fannie Mae and Freddie Mac; and (e) the satisfaction by Servicer of such other obligations as are set forth in the Agreement.

D. Solely in its capacity as the financial agent of the United States, and subject to subsection E. below, Fannie Mae shall remit all payments described in the Program Documentation to Servicer for the account or credit of Servicer, Investors and borrowers, in each case in accordance with the Program Documentation (all such payments, collectively, the "Purchase Price"); all payments remitted to Servicer for the credit or account of third parties under the Program Documentation shall be applied by Servicer as required by the Program Documentation. Fannie Mae shall have no liability to Servicer with respect to the payment of the-Purchase Price, unless and until: (a) Servicer and all other interested parties have satisfied all prerequisites set forth herein and in the Program Documentation relating to the applicable Program payment structure, including, but not limited to, the delivery of all data elements required by Section 3 of this Commitment; and (b) the Treasury has provided funds to Fannie Mae for remittance to Servicer, together with written direction to remit the funds to Servicer in accordance with the Program Documentation.

E. The Purchase Price will be paid to Servicer by Fannie Mae as the financial agent of the United States as and when described herein and in the Program Documentation in consideration for the execution and delivery of the Financial Instrument by Servicer on or before the Effective Date of the Agreement, upon the satisfaction of the conditions precedent to payment described in this Section 4.

F. The value of the Agreement is limited to $4,532,750,000.00 (the "Program Participation Cap"). Accordingly, the aggregate Purchase Price payable to Servicer under the Agreement with respect to all Services described on all of the Service Schedules that are executed and delivered in connection with the Agreement may not exceed the amount of the Program Participation Cap. For each Service to be performed by Servicer, the aggregate remaining Purchase Price available to be paid to Servicer under the Agreement will be reduced by the maximum Purchase Price potentially payable with respect to that Service. In the event the Purchase Price actually paid with respect to that Service is less than the maximum Purchase Price potentially payable, the aggregate remaining Purchase Price available to be paid to Servicer under the Agreement will be increased by the difference between such amounts. Notwithstanding the foregoing, no agreements with any party that may result in a new payment obligation under the Programs will be effected under the Agreement, and no payments will be made with respect to any new Services, from and after the date on which the aggregate Purchase Price paid or payable to Servicer under the Agreement equals the Program Participation Cap. Treasury may, from time to time in its sole discretion, adjust the amount of the Program Participation Cap. Servicer will be notified of all adjustments to the Program Participation Cap in writing by Fannie Mae.

G. Servicer shall maintain complete and accurate records of, and supporting documentation for, all Services provided in connection with the Programs including, but not limited to, data relating to borrower payments (*e.g.*, principal, interest, taxes, homeowner's insurance, hazard insurance, flood insurance and homeowner's association and/or condo fees), delinquencies and the terms of each agreement executed under the Programs (*e.g.*, trial modification agreements, loan modification agreements and extinguishment agreements), which will be relied upon by Fannie Mae when calculating, as financial agent for the United States, the Purchase Price to be paid by the Treasury through Fannie Mae or any other financial agent. Servicer agrees to provide Fannie Mae and Freddie Mac with documentation (including copies of executed borrower agreements) and other information with respect to any amounts paid by the Treasury as may be reasonably requested by such parties. In the event of a discrepancy or error in the amount of the Purchase Price paid hereunder, at Fannie Mae's election, (x) Servicer shall remit to Fannie Mae the amount of any overpayment within thirty (30) days of receiving a refund request from Fannie Mae, or (y) Fannie Mae may immediately offset the amount of the overpayment against other amounts due and payable to Servicer by Fannie Mae, as financial agent of the United States, upon written notice to Servicer. Servicer shall still be obligated to credit

Financial Instrument

This Financial Instrument is delivered as provided in Section 1 of the Amended and Restated Commitment to Purchase Financial Instrument and Servicer

Participation Agreement (the "Commitment"), entered into as of the Effective Date, by and between Federal National Mortgage Association ("Fannie Mae"), a federally chartered corporation, acting as financial agent of the United States, and the undersigned party ("Servicer"). This Financial Instrument is effective as of the Effective Date. All of the capitalized terms that are used but not defined herein shall have the meanings ascribed to them in the Commitment.

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Servicer agrees as follows:

1. Purchase Price Consideration; Services. This Financial Instrument is being purchased by Fannie Mae pursuant to Section 4 of the Commitment in consideration for the payment by Fannie Mae, in its capacity as a financial agent of the United States, of various payments detailed in the Program Documentation and referred to collectively in the Commitment as the "Purchase Price."

   (a) The conditions precedent to the payment by Fannie Mae of the Purchase Price with respect to the Services described on the Initial Service Schedules are: (i) the execution and delivery of this Financial Instrument, the Commitment and the Initial Service Schedules by Servicer to Fannie Mae; (ii) the execution and delivery of the Commitment and the Initial Service Schedules by Fannie Mae to Servicer; (iii) the delivery of copies of the fully executed Commitment, Initial Service Schedules and Financial Instrument to Treasury on the Effective Date of the Agreement; (iv) the performance by Servicer of the Services described in the Agreement; and (v) the satisfaction by Servicer of such other obligations as are set forth in the Agreement. Servicer shall perform all Services in consideration for the Purchase Price in accordance with the terms and conditions of the Agreement, to the reasonable satisfaction of Fannie Mae and Freddie Mac.

(b) The conditions precedent to the payment by Fannie Mae of the Purchase Price with respect to the Services described on the Additional Service Schedules (if any) are: (i) the execution and delivery of the Additional Service Schedules and the Certification by Servicer to Fannie Mae; (ii) the execution and delivery of the Additional Service Schedules by Fannie Mae to Servicer; (iii) the delivery of copies of the fully executed Additional Service Schedules to Treasury; (iv) the performance by Servicer of the Services described in the Agreement, in accordance with the terms and conditions thereof, to the reasonable satisfaction of Fannie Mae and Freddie Mac; and (v) the satisfaction by Servicer of such other obligations as are set forth in the Agreement.

2. <u>Authority and Agreement to Participate in Program</u>. Subject to the limitations set forth in Section 2 of the Agreement, Servicer shall

use reasonable efforts to remove all prohibitions or impediments to its authority and to obtain all third party consents, waivers and delegations that are required, by contract or law, in order to perform the Services.

3. Audits, Reporting and Data Retention.

   (a) Freddie Mac, the Federal Housing Finance Agency and other parties designated by the Treasury or applicable law shall have the right during normal business hours to conduct unannounced, informal onsite visits and to conduct formal onsite and offsite physical, personnel and information technology testing, security reviews, and audits of Servicer and to examine all books, records and data related to the Services provided and Purchase Price received in connection with each of the Programs in which Servicer participates on thirty (30) days' prior written notice.

MAKING HOME AFFORDABLE HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES, RELEVANT EXCERPTS (AUGUST 17, 2012)

MAKING HOME AFFORDABLE

MAKING HOME AFFORDABLE® PROGRAM

HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES

Version 4.0
As of August 17, 2012

1. Servicer Participation in MHA

1.1 Servicer Participation Agreement

To participate in MHA for Non-GSE Mortgages, the servicer must register and execute a Servicer Participation Agreement, related documents, and, if applicable, one or more Service Schedules (SPA) with the Program Administrator on or before October 3, 2010. The SPA governs servicer participation in MHA for all Non-GSE Mortgages.

The entity that has the direct contractual obligation to the investor to perform the servicing functions is the entity that will formally elect to participate in MHA by signing the SPA. This entity will sign the SPA regardless of whether (i) it has engaged one or more subservicers to perform some or all of the servicing functions on its behalf or (ii) it is subject to oversight by a master servicer that does not have a direct contractual obligation to the investor to perform the servicing functions. If the entity that signed the SPA sub-contracts out any portion of its responsibilities as a servicer to another party, the entity that signed the SPA will be liable for the acts and omissions of the sub-contracted party under the SPA.

MHA reflects usual and customary industry standards for mortgage loan modifications, short sales and DILs contained in typical servicing agreements, including pooling and servicing agreements (PSAs) governing private label securitizations. Participating servicers are required to consider all eligible mortgage loans for Services (as defined in the SPA) unless prohibited by the rules of the applicable PSA and/or other investor servicing agreements. As further described in Section 1.3, participating servicers are required to use reasonable efforts to remove any prohibitions and obtain waivers or approvals from all necessary parties in order to carry out the requirements of the SPA.

Section 9 of the SPA identifies for each party one or more points of contact for receipt of legal notices under the SPA. Section 9 also permits each party to designate a different point of contact in writing. If the Program Administrator is informed by a representative of a servicer that the individual identified in Section 9 of a SPA as the servicer's point of contact is no longer available to receive legal notices on behalf of that servicer (for example, because he or she has left the servicer organization), then unless and until the servicer designates a different point of contact for purposes of Section 9 to the Program Administrator in writing, legal notices under Section 9 from the Program Administrator to the servicer may also be sent to the person(s) designated as the "Primary Contact' and/or "Secondary Contact" in the then-current HAMP Registration Form on file with the Program Administrator for such servicer.

1.2 Servicer Safe Harbor

As part of Helping Families Save Their Homes Act of 2009 (HFSTHA), Congress established the Servicer Safe Harbor by amending the Truth in Lending Act for the purpose of providing a safe harbor to enable such servicers to modify and refinance mortgage loans and engage in other loss mitigation activities under a "qualified loss mitigation plan." Treasury has determined that each residential loan modification under HAMP (Tier 1 and Tier 2) (including Principal Reduction Alternative (PRA) modifications) and 2MP, each modification and refinance under FHA Refinance and FHA2LP, as well as each short sale and deed-in-lieu of foreclosure under HAFA and each forbearance plan under UP, is a "qualified loss mitigation plan" as defined in the Servicer Safe Harbor. However, this guidance does not mean that each such qualified loss mitigation plan automatically qualifies for safe harbor protection under HFSTHA. Servicers are reminded to refer to Section 201 of HFSTHA, which sets forth the specific requirements that must be satisfied. For example, these requirements include, among other items, that:

- The servicer must implement the qualified loss mitigation plan prior to December 31, 2012;
- Default on the payment of the related mortgage must have occurred, be imminent, or be reasonably foreseeable;
- The mortgagor must occupy the property securing the mortgage as his or her principal residence; and
- The servicer must reasonably determine that the qualified loss mitigation plan will likely provide an anticipated recovery on the outstanding principal mortgage debt in excess of the anticipated recovery through foreclosure.

1.3 Investor Solicitation

Within 90 days of executing a SPA, the servicer must review all servicing agreements to determine investor participation in HAMP. Within 30 days of identifying an investor as a nonparticipant, or as unwilling to extend its participation in MHA to include any extension or expansion of an MHA program, or identifying a servicing agreement that limits or prohibits a servicer from offering any assistance available under MHA, including HAMP Tier 2 modifications (i.e., prohibition against modification of non-owner occupied mortgages or limits on multiple modification of the same mortgage), the servicer must contact the investor in writing at least once, encouraging the investor to permit modifications and other assistance available under the extended and expanded MHA programs.

Servicers, within 120 days of signing the SPA, must create and maintain in their records an Investor Participation List containing the following information: (1) the number of investors for whom it services loans; (2) a list of those investors who do not participate in HAMP; (3) the number of loans serviced for each investor that does not participate in HAMP; and (4) pool-level identification data, such as pool name and pool number, for loans serviced for each investor that does not participate in HAMP or whose participation is subject to any limitations or restrictions. In addition, servicers must provide a copy of the servicing agreement or other pool documentation to Treasury or its agents upon request.

All servicers must update their Investor Participation Lists within 30 days of any change and maintain both the old and revised versions of the lists, which should clearly identify the time period during which each list was applicable, on a system that MHA-C may access upon request.

1.4 Transfers of Servicing

1.4.1 Transfer of Eligible Loans

When a participating servicer transfers or assigns mortgage loans, or servicing rights relating to mortgage loans, that constitute Eligible Loans pursuant to the SPA, the transferee servicer must assume the transferor's obligations under the SPA with respect to the transferred Eligible Loans. A transferring servicer may not use a transfer to circumvent its existing obligations under the SPA. If the transferee servicer has signed its own SPA, the Eligible Loans involved in the transfer become subject to the transferee servicer's SPA. If a transferee servicer has not signed its own SPA, it will be required to execute an assignment and assumption agreement, the form of which is attached as Exhibit D to the SPA (AAA).

The transferee servicer is not required to execute an assignment and assumption agreement for the transfer of loans that are not or no longer Eligible Loans. The transferor servicer must document the basis for this determination in the mortgage file and/or servicing system. Servicers are reminded to take into consideration the expanded criteria of MHA when determining whether a loan is an "Eligible Loan".

1 Eligibility

1.1 HAMP Eligibility Criteria

1.1.1 Basic HAMP Eligibility Criteria

First lien	The mortgage loan is a first lien mortgage loan originated on or before January 1, 2009. This includes mortgages secured by: • Cooperative shares, • Condominium units, and • Manufactured housing (the first lien mortgage loan must be secured by the manufactured home and the land, both of which must be classified as real property under applicable state law). The reference to "originated on or before" refers to the date on which the loan was first originated (i.e., not the date a loan may have been modified previously).
Not condemned	The property securing the mortgage loan has not been condemned or is not in such poor physical condition that it is not habitable even if not condemned. Servicers must retain in the mortgage file

	and/or servicing system all evidence related to the basis for the determination of an uninhabitable condition.
Financial hardship	A borrower has documented a financial hardship and represented that he or she does not have sufficient liquid assets to make the monthly mortgage payments.
Escrow account established	The borrower agrees to set up an escrow account for taxes and hazard and flood insurance prior to the beginning of the trial period if one does not currently exist.
Unpaid principal balance limits	The current unpaid principal balance (UPB) of the mortgage loan prior to • 1 Unit $729,750 • 2 Units $934,200 • Units $1,129,250 • Units $1,403,400
Single family Property	The mortgage loan is secured by a one- to four-unit property.
Program cut-off date	The borrower has submitted an Initial Package (as defined in Section 4) on or before December 31, 2013 and the Modification Effective Date is on or before September 30, 2014

1.1.2 HAMP Tier 1 Eligibility Criteria

A loan is eligible for Home Affordable Modification Program (HAMP) Tier 1[2] if the servicer verifies that, in addition to satisfaction of the basic eligibility criteria for HAMP described in Section 1.1.1, all of the following criteria are met:

Not previously HAMP modified	The mortgage loan has not been previously modified under HAMP. For more information, refer to the Continued Eligibility due to Change in Circumstances guidance in Section 1.2.
Delinquent or in imminent default	The mortgage loan is delinquent or default is reasonably foreseeable. Loans currently in foreclosure are eligible.
Owner-occupied	The mortgage loan is secured by a single family property that is occupied by the borrower as his or her principal residence. Additionally, a loan may be considered for HAMP Tier 1 if: • The property was originally non-owner occupied, but the servicer can verify that it is

[2] For clarity, a HAMP modification in existence prior to June 1, 2012, is referred to as "HAMP Tier 1" and references to "HAMP Tier 1" refers both to HAMP modifications completed under guidance in effect prior to June 1, 2012 and HAMP Tier 1 modifications completed after June 1, 2012.

	currently the borrower's principal residence. • The borrower is displaced (e.g., military deployment, permanent change of station orders, out of area job transfer or foreign service assignment) but was occupying the property as his or her principal residence immediately prior to his or her displacement, intends to occupy the property as his or her principal residence in the future and the borrower does not own any other single family real estate (evidence may include but is not limited to: a credit report, property title search, military change of station orders or employer letter).
Minimum monthly Mortgage payment ratio	The borrower's monthly mortgage payment (including principal, interest, taxes, insurance, and when applicable, association fees, existing escrow shortages) prior to the modification is greater than 31 percent of the borrower's verified monthly gross income.

1.1.3 HAMP Tier 2 Eligibility

A mortgage loan may be eligible for HAMP Tier 2 if (i) the borrower satisfies the basic eligibility criteria for HAMP set forth in Section 1.1.1; (ii) the loan did not satisfy the criteria in Section 1.1.2 for HAMP Tier 1 or, upon evaluation for a HAMP Tier 1 modification, failed to receive a modification under HAMP Tier 1; and (iii) the following criteria are met, if applicable:

Owner occupied or rental property	The mortgage loan is secured by a single family property that is either • Owner-occupied as set forth in 1.1.2; or • A rental property (defined below). A "rental property" is a property that is used by the borrower for rental purposes only and not occupied by the borrower, whether as a principal residence, second home, vacation home or otherwise. A mortgage loan secured by a rental property may be considered for a HAMP Tier 2 modification if the rental property is (i) occupied by a tenant as their principal residence; (ii) occupied by the borrower's legal dependent, parent or grandparent as his or her principal residence

	without rent being charged or collected; or (iii) vacant and available for rent. A property that is or will be offered for rent on a seasonal basis and is available for use by the borrower when it is not rented is not eligible for a HAMP modification. If the mortgage loan is secured by a rental property, the borrower must make the certifications described in Section 4.1.1.2.
Previous HAMP Tier 2 TPP or permanent modification	A mortgage loan has not received a permanent modification or TPP under HAMP Tier 2.
Previous HAMP Tier 1 Permanent Modification	A mortgage loan on which the borrower lost good standing under a HAMP Tier 1 permanent modification, and, at the time of evaluation for HAMP Tier 2, at least 12 months have passed since the HAMP Tier 1 Modification Effective Date or the borrower has experienced a change in circumstances.
Previous HAMP Tier 1 TPP	A mortgage loan that received a HAMP Tier 1 TPP but on which the borrower defaulted.

Previous consideration for HAMP	A mortgage loan was evaluated for HAMP prior to June 1, 2012 and was not offered a HAMP Tier 1 TPP as long as the non-approval was not due to borrower fraud or non-compliance with section 1481 of Dodd-Frank Act (as defined in Section 1.7 of Chapter I).
Delinquent or imminent default	A mortgage loan is delinquent (which, in the case of a mortgage loan secured by a rental property, means two or more payments are due and unpaid) or default is reasonably foreseeable; provided, however, that a mortgage loan secured by a rental property that is not in default even if default is reasonably foreseeable is not eligible for HAMP Tier 2. Loans currently in foreclosure are eligible.

1.2 Additional Factors Impacting HAMP Eligibility

Certain factors impacting HAMP eligibility are described below:

No waiver of legal rights	The servicer may not require a borrower to waive legal rights as a condition of HAMP.
No up-front Contribution	The servicer may not require a borrower to make any "good faith" payment or contribution up-front cash contribution to be considered for HAMP.

Active litigation	A borrower in active litigation regarding the mortgage loan is eligible for HAMP.
Redemption rights following foreclosure	Whether a borrower can qualify for HAMP if the mortgage loan is currently in the redemption period after a foreclosure sale is dependent on the amount of time remaining in the redemption period and other legal requirements of the state in which the property is located. When permissible under state law, the servicer should, on a case-by-case basis, seek investor approval prior to evaluating a borrower for HAMP during a redemption period.
Balloon loans	Balloon loans that have matured or that mature during the HAMP trial period are eligible for HAMP subject to investor guidelines.
Borrower is a natural person	The borrower must be a natural person. Mortgage loans made to, or secured by properties owned by, corporations, partnerships, limited liability companies or other business entities) are not eligible for assistance under HAMP.

Inter vivos Revocable Trust	A loan secured by a property owned by an inter vivos revocable trust is eligible for HAMP as long as the borrower: • Is a trustee of the trust and • Is a primary beneficiary of the trust, In the case of such a property where the borrower, as trustee, occupies the property as his or her principal residence—, the loan must first be considered for HAMP Tier 1 and, if the loan is determined to not qualify for HAMP Tier 1, must then be considered for HAMP Tier 2. Where the borrower, as trustee, does not occupy the property as his or her principal residence, the loan may only be considered for HAMP Tier 2. The borrower must sign all HAMP-related documents in both an individual capacity and as trustee of the inter vivos revocable trust.
Subordinate Liens	HAMP does not require extinguishment of subordinate lien instruments as a condition of modification. However, servicers must follow investor guidance to ensure first lien priority.

HUD Counseling	Borrowers with back-end ratios of 55 percent or more must agree in writing to obtain HUD-approved counseling as a condition of receiving a permanent modification, even if they recently completed counseling. *See* Section 6.7 for more information.
Charged off loans	Servicers are not required to consider for HAMP a mortgage loan that has been charged off if the servicer has released the borrower from liability for the debt and provided a copy of such release to the borrower. The servicer must retain in the mortgage file and/or servicing system all evidence related to the charge off including the release of liability.